

Superior Court of the State of Washington
For Thurston County

Paula Casey, Judge
Department No. 1
Richard A. Strophy, Judge
Department No. 2
Wm. Thomas McPhee, Judge
Department No. 3
Richard D. Hicks, Judge
Department No. 4
Christine A. Pomeroy, Judge
Department No. 5
Gary R. Tabor, Judge
Department No. 6
Chris Wickham, Judge
Department No. 7
Anne Hirsch, Judge
Department No. 8



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SUPERIOR COURT
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THURSTON COUNTY, WASHINGTON

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November 26, 2008

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Re: *State Department of Ecology v Northwest Aquatic Ecosystems, et al*
Thurston County Superior Court No. 07-2-01447-8

Dear Counsel:

A hearing was held on the Petition for Judicial Review of Agency Action on November 21, 2008. The decision of the Court follows.

Petitioner Department of Ecology ("Ecology") has challenged two provisions of the decision of the Pollution Control Hearings Board ("the Board"): (1) the requirement that Ecology amend the permit to allow associations of shoreline owners to apply pesticide to an area greater than the 20 foot (or 10 feet on each side of a dock) general provision; and (2) the elimination of the section in the permit that would allow denial of a permit to an applicant with outstanding penalties.

(1) *Inclusion of "a provision allowing local governments or associations of contiguous property owners seeking to address noxious weed infestations in Lake Washington, Lake Sammamish, or Portage Bay/Lake Union to obtain coverage to treat more than 10 feet on either side of a dock or 20 feet on each individual lot."*
(FF/CL, Order p.26, lines 15-18.)

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ATTORNEY GENERAL'S OFFICE
Ecology Division



Ecology argues that this provision is not supported by substantial evidence and fails to reflect suitable deference to Ecology's scientific expertise. *Port of Seattle v Pollution Control Hearings Board*, 151 Wn.2d 568, 595 (2004). Respondent Northwest Aquatic Ecosystems contends that there is substantial evidence to support the findings underlying the order and the order itself and that the provision proposed by Ecology was not based on scientific expertise.

Respondent refers to the testimony of Kathy Hamel (Tr. At 110, 4-5) as demonstrating the lack of scientific basis for the 20 foot restriction. Ecology cites the education and experience of the permit-drafting team in developing this requirement. Admittedly, Ms. Hamel's testimony taken alone does not seem to demonstrate a scientific basis for the provision. However, the greater context for the remarks and the permit provision include the inability to effectively control invasive plants in the three large lakes in question, the concern about introducing toxic chemicals into a body of water with no long-term benefit to the lakes, and the obligation of Ecology to balance competing interests. In this regard, it does appear that Ecology's knowledge of and experience with these issues is helpful in determining where to set the balance between competing uses. This expertise is entitled to deference. The failure of the Board to defer to Ecology in this regard is reversible error.

As to the scientific evidence supporting Ecology's proposed 20 foot limit, the parties referred the Court to Exhibit N5, Exhibit N3, and Exhibit N4. Exhibit N5 is a string of e-mails culminating in a long statement from Gayle Kreitman of Washington Department of Fish and Wildlife. In that statement she urges site-specific permits over generic standards. This position was essentially adopted by Ecology. Any property owner dissatisfied with the 20 foot limitation was entitled to obtain a site-specific individual permit.

Exhibit N3 is a declaration of Kelly McLain of Ecology submitted in opposition to a stay of the current permit requested by the Washington Toxics Coalition. Ms. McLain documents the dangers to swimmers and boaters posed by invasive plants. She also explains the harm to fish and invertebrates these plants present. In Exhibit N4, the assistant attorney general author recites concerns raised by Ms. McLain regarding the negative impacts of invasive plants. These exhibits were submitted to explain the need for permitted herbicide use on certain vegetation. They do not reach the more complicated issue raised by Ms. Kreitman: how to balance the removal of invasive plants with protection of native plants in an ecosystem where there is not lake-wide weed control.

The permit language proposed by Ecology appears to be based upon this recognition of competing concerns. Ecology's expertise is helpful in analysis and resolution of the problem. Failure to defer to that expertise is error and this provision of the Board will be reversed.

(2) The provision at Condition S(2)(E)(1)(d) allowing Ecology to deny permit coverage if an applicant has an unpaid penalty should be deleted. (FF/CL, Order p.2, lines 3-4).

This ruling by the Board is challenged as an erroneous interpretation or application of the law under RCW 34.05.570(3)(d). The Board noted and Ecology apparently does not disagree that Ecology lacks specific statutory authority to deny a permit to an applicant with outstanding penalties. The Board concluded that this provision resulted in an additional form of punishment beyond the regular enforcement regime. Ecology argues other authority already in statute or WAC allows Ecology to terminate a permit for cause. Ecology contends that this provision is within that broader authority. The Board concluded that this was more of a collection provision and less of an enforcement provision. Because it could result in a severe penalty that could affect a permittee's ability to engage in commercial activity, it should be adopted after a general rule-making proceeding, not as part of a specific permit process.

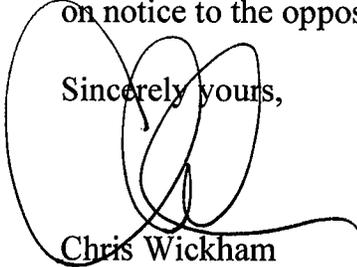
The Administrative Procedures Act defines "rule" as

Any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; [or]... (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law"

The provision in question would satisfy one or both of these sections of the definition: it would apply to all penalties of any kind for anyone who applies for a permit; it could provide a sanction for applicants owing penalties; and it would establish a requirement relating to the enjoyment of benefits or privileges (the right to seek a permit and conduct one's business.) Although it might arguably be within the broad authority given to Ecology in existing WAC, the fact that it is not explicitly covered in WAC or statute supports the Board's decision that a rule-making procedure on this provision is required. This Court cannot find that the Board erroneously interpreted or applied the law and so the appeal of this provision will be denied.

Counsel may present an agreed order consistent with this decision *ex parte* or may note for hearing on a civil motion calendar an order consistent with this decision on notice to the opposing party.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Chris Wickham". The signature is written in a cursive style with a large, looping initial "C" and a long horizontal flourish extending to the right.

Chris Wickham
Superior Court Judge

c Clerk, for filing