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Nelson v. Shorewood Hills Homeowners Assoc., No. 53891-8-I, 2005 Wash. App. LEXIS 1573 (Wash. Ct. App. Jul. 5, 2005)

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regulation required a permittee seeking a permit for a water segment that does not already meet water quality standards to show the segment could support additional effluent based on a VDEQ load allocation. Crutchfield argued the regulation required a VDEQ load allocation prior to permit issuance. The court reasoned the permitting process did not trigger this provision merely because the Pamunkey River did not meet water quality standards at the time of permit issuance. Instead, the court found the VDEQ could only trigger this provision if they perform the load allocation first, and the regulations did not require the VDEQ to perform the load allocation. Here, the record did not show any load allocation by the VDEQ. Therefore, the court decided the VDEQ did not trigger the provision.

In conclusion, by deferring to the agency decision-making process, the court affirmed the trial court's findings that the record contained substantial evidence to support the VPDES permit issuance, and regulations governing the permit application process do not require the VDEQ to perform a load allocation prior to permit approval.

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WASHINGTON

Nelson v. Shorewood Hills Homeowners Assoc., No. 53891-8-I, 2005 Wash. App. LEXIS 1573 (Wash. Ct. App. Jul. 5, 2005) (holding adjacent property owners did not violate the surface water common enemy doctrine by paving and grading their property).

Homeowners in Shorewood Hills, a private housing community, sued Shorewood Hills Homeowners Association (the "Association") for damages stemming from a severely eroded ravine adjacent to their property. In turn, the Association sued the City of Shoreline (the "City") and Shoreline Community College (the "College") as third party defendants for contribution. The Superior Court of King County denied the Association's motion for summary judgment and granted the City and College's motion. The Association appealed to the Court of Appeals of Washington, Division One.

The Association first asserted that the City and College were liable because they trespassed by water by overburdening an easement and their actions did not fall under any of the exceptions to the common enemy doctrine. The common enemy doctrine has been the foundation of surface water law in Washington since 1896. This doctrine states that landowners may use any means to protect their land from unwanted surface water without incurring liability to neighboring landowners. The doctrine has three exceptions: (1) landowners may not inhibit the flow of a natural watercourse; (2) landowners may not collect, channel, and thrust water, whether by gutter, culvert, street, or

other mechanism, onto a neighbor's land in a manner or quantity different from its natural flow; and (3) landowners who alter the flow of surface water must act in good faith and avoid unnecessary damage to adjacent property. The Association argued the City and College's actions fell under the second and third exceptions.

To establish the second exception, the Association produced a declaration and three-page report from an expert. The expert opined that paving and grading the property altered the land from its natural forested state in which the water would have percolated into the ground. However, the court held that paving and grading alone are insufficient to establish liability in the absence of specific facts showing that the paving and grading collected, concentrated, and channeled the water in an unnatural manner. The Association made no such showing here.

As to the third exception, also known as the "due care exception," the Association contended that the City and College failed to act in good faith because they were aware that surface water was draining into the ravine causing damage, yet they took no action. The court disagreed, noting the due care exception applies only when the landowner alters the water's natural flow, which the Association failed to establish. The court further noted that the College pre-dated the Shorewood Hills subdivision by fifteen years. Thus, when it was developed, the College had no reason to suspect that its actions would burden a neighboring housing development with excess water.

The court also rejected the Association's claims that the City assumed a statutory duty from King County to maintain the ravine when the City incorporated. The court affirmed the summary judgment motion in favor of the City and College.

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WYOMING

Snider v. Kirchhefer, 115 P.3d 1 (Wyo. 2005) (denying a petition for abandonment of water rights because of failure to show reasonable likelihood that injury would result from reactivation of the water right).

Yvonne Snider had a 1915 water appropriation right on Six Mile Creek. The appropriation permitted the diversion of water from Six Mile Creek at a point on Fred and Donita Kirchhefers' ("Kirchhefers") land. An easement to construct, maintain, and repair the ditch as well as a right of way across the Kirchhefers' land accompanied Snider's appropriation. The Kirchhefers had no surface appropriation rights for Six Mile Creek but possessed a ground water permit from the Kirchhefer Spring No. 1, a well built into the creek bank of Six Mile Creek approximately 100 feet upstream from the point of diversion.