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Port of Seattle v. Pollution Control Hearings Bd., 90 P.3d 659 (Wash. 2004).

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cially use, nor could he claim for himself water beneficially used by others. Finally, when filing for WUC 57-8492, Meyer selected PWUA c/o LeRoy Meyer as the petitioner for the water right. Meyer claimed this was his personal d/b/a, however, the court determined this was blatantly incompatible with PPOC's records where the property owners association referred to itself as the PWUA.

With respect to the cross-appeal, PPOC claimed the trial court erred by: (1) finding BCWDC actively used water for irrigation during the alleged forfeiture period, (2) giving weight to the State Engineer's proposed determination identifying BCWDC as owner of WUC 57-3442, and (3) determining BCWDC beneficially used the water. The court confirmed that watering indigenous vegetation was generally not a beneficial use and may be wasteful, but stated the determination relied on individual facts and circumstances. Here, however, because BCWDC cultivated plants, harvested berries, and gifted trees, the irrigation of natural vegetation constituted a beneficial use. Additionally, since the trial judge personally inspected BCWDC's property and found sufficient evidence of irrigation, the court concluded the trial court did not give undue weight to the State Engineer's proposed determination, and affirmed the trial court's ruling that BCWDC did not forfeit rights to WUC 57-3442.

In conclusion, the Utah Supreme Court affirmed the trial court's summary judgment regarding ownership of WUC 57-8492, because Meyer's failed to file a timely objection; Meyer could not claim more water than he could beneficially use; and as an individual user, he could not claim for himself water beneficially used by others. The court also affirmed the trial court's ruling that BCWDC did not forfeit its water rights under WUC 57-3442, because PPOC failed to establish forfeiture of water for a continuous five-year period.

Charles P. Kersch, Jr.

WASHINGTON

Port of Seattle v. Pollution Control Hearings Bd., 90 P.3d 659 (Wash. 2004) (holding: (1) the Pollution Control Hearings Board ("PCHB") was within its authority to impose conditions on the section 401 certification when those conditions are necessary to reach reasonable assurance that water quality standards will be met; (2) PCHB should review all relevant information when evaluating section 401 certification regardless of whether that information was submitted prior or subsequent to the original grant of the certification; (3) PCHB reliance on future information is not only permitted, but necessary in light of the predictive nature of section 401 certification; (4) mitigation is only required to the level at which the environment is affected; (5) mitigation plans that use stormwater to maintain existing flow levels are considered "stormwater management" and does not require a water right; (6) Chapter 210 is not unconstitutional special legislation, and was

intended to be retroactively enforced; (7) the Synthetic Precipitation Leaching Procedure does not conflict with the Clean Water Act; (8) Water Effects Ratio studies may be used to tighten or relax water quality standards; (9) a degraded wetland can be restored; (10) in-basin mitigation options need not be exhausted before considering out-of-basin alternatives; (11) PCHB is within its rights to exclude irrelevant testimony; and (12) PCHB must only include evidence if its exclusion would prejudice the PCHB's opinion).

The Port of Seattle's ("Port") plan for the construction of a third runway at Seattle-Tacoma International Airport ("SeaTac") included placing fill in adjacent wetlands. In October 2000 the Port submitted a joint aquatic resource permit application ("JARPA") to the Army Corps of Engineers ("Corps") and to the Washington State Department of Ecology ("Ecology"), pursuant to section 404 of the Clean Water Act. The Port's JARPA also constituted an application to Ecology for certification that the Port's plan complies with applicable water quality laws, as required by section 401 of the Clean Water Act. Ecology granted section 401 certification in September 2001, and the Airport Communities Coalition, with intervener Coalition Against SeaTac Expansion (collectively "Citizens Groups"), appealed this decision to the Pollution Control Hearings Board ("PCHB"). PCHB affirmed the section 401 certification and added 16 new conditions it deemed necessary to meet the reasonable assurance standard of the certification. Ecology, the Port, and the Citizens Groups all filed petitions for judicial review of the ruling. At the urging of the parties, their requests were consolidated and the case appeared before the Washington Supreme Court.

In an attempt to reconcile the conflicting authorities of Ecology and PCHB, the court ruled that PCHB may add conditions to a section 401 certification issued by Ecology only after determining the added conditions are necessary to provide reasonable assurance water quality standards will be met. The court also ruled that due deference should be afforded the technical expertise of Ecology and the decisions made within the scope of its expertise.

The Citizens Groups argued PCHB erred in considering studies, reports and plans not submitted prior to Ecology's grant of the section 401 certification. The court held that PCHB did not err; explaining that PCHB should review all relevant information regardless of submission date and PCHB's decisions need not be based on reasonable assurance at the time of the original certification.

The Citizens Groups also argued that Ecology and PCHB erred in concluding there was reasonable assurance that the third runway project does not violate state water quality standards. Specifically, they objected to the conditions imposed by PCHB, PCHB's reliance on future submissions, future National Pollution Discharge Elimination System ("NPDES") permits, and adaptive management. The court ruled

that PCHB is within its authority to impose conditions it deems necessary to satisfy reasonable assurance and does not have to remand to Ecology any section 401 certification it finds insufficient. Next, the Citizens Groups argued PCHB cannot base its finding of reasonable assurance on plans, studies, and reports unless they have already been received and evaluated. However, the court concluded that Ecology and PCHB did not act in an arbitrary or capricious way in their reliance on future revisions to the Port's plans, studies, and reports to find reasonable assurance. Further, the court ruled that Ecology and PCHB may rely on these sources as long as their information and execution meet the same reasonable assurance standard.

The Citizens Groups further objected to PCHB's reliance on future NPDES permits to guarantee compliance with state water quality standards, arguing that the NPDES permits are less protective than a section 401 certification. The NPDES permits are subject to provisions prohibiting them from creating a lower standard with each subsequent grant and PCHB explicitly stated that conditions of the section 401 certification, if not incorporated into new NPDES permits, will remain effective as a part of the section 401 certification. The court found these protections sufficient to justify reliance on the future NPDES permits to ensure compliance with water quality standards. Next, the Citizens Groups argued that reliance on future monitoring and adaptive management was fundamentally at odds with the reasonable assurance requirement. However, the court found the predictive nature of the section 401 certification must necessarily rely on continued observation and Ecology and PCHB relied correctly on the provisions of adaptive management and monitoring to find reasonable assurance. For all of these reasons, the court held PCHB was justified in finding there was reasonable assurance that the runway expansion project would not violate water quality standards.

Regarding low flow mitigation, the court ruled on the adequacy of the plan, the specific requirement contained in PCHB's condition six, and the water right requirement of PCHB's condition sixteen. The Citizens Groups took issue with the Port's plan to use stormwater to mitigate low flows and with the section 401 certification's failure to require the mitigation to begin before construction impacts flow. However, the Citizens Groups did not introduce adequate evidence to prove either of these arguments, so the court assigned no error to PCHB based on its conclusion that the Port's plan for low flow mitigation was satisfactory.

The Port objected to PCHB's condition six which required the Port to maintain a specified low flow level in Des Moines Creek, rather than merely offset its runway expansion's impact on the stream. The court ruled that PCHB erred in assigning this responsibility to the Port and overturned condition six. Condition sixteen, imposed by PCHB, and required the Port to obtain a water right in order to implement its low

flow mitigation plan. Because the low flow mitigation project did not propose to use or appropriate water, but merely to maintain existing flow levels, the court ruled that it was not a beneficial use project, but a stormwater management project. Since stormwater management does not require a water right, the court overruled the requirement of condition sixteen.

Both the Port and the Citizens Groups attacked the fill criteria PCHB imposed in condition seven. Additionally, the Port and Ecology objected to PCHB's condition eight prohibiting the use of Synthetic Precipitation Leaching Procedure ("SPLP") to evaluate fill, while the Citizens Groups attacked the retroactive nature and constitutionality of legislative approval of SPLP. Due to the Citizens Groups' lack of evidence supporting a need for PCHB to set stricter fill criteria based on natural soil background levels, which was unnecessarily stringent in the Port's view, the court overruled the criteria of PCHB's condition seven but required Ecology to recalculate criteria for selenium and silver and to set total petroleum hydrocarbons at zero. Regarding SPLP, the court ruled that the legislature intended the statute governing the use of SPLP to ensure the suitability of the fill and its effects on water quality to apply retroactively. The court further ruled that retroactive application is appropriate in this case, does not violate separation of powers, and the Citizens Groups did not prove the statute amounted to unconstitutional special legislation. The court also found no evidence to suggest that SPLP conflicts with the Clean Water Act. The court overruled condition eight prohibiting the use of SPLP, but required Ecology to compare the SPLP results with both surface and groundwater criteria.

Construction of the third runway will necessarily disturb sediment, causing temporary turbidity within a "mixing zone." The Citizens Groups opposed the mixing zone provision of the section 401 certification and argued that the Port's mere submission of a monitoring plan, as opposed to a complete description of the effects of the mixing zone, is insufficient to provide reasonable assurance. The court held that the Citizens Groups did not show by a preponderance of the evidence that the mixing zone provisions of the section 401 certification would result in violation of water quality standards.

Both Port and Ecology opposed PCHB's condition five to the section 401 certification, which stated Water Effects Ratio ("WER") studies would only be used to adjust for a stricter water quality standard. Both the Environmental Protection Agency ("EPA") and Ecology approved the WER for determining site specific criteria for water quality, and both agencies allowed for adjustments as needed based on the results. The court overturned condition number five and held that WER studies could apply to either tighten or relax water quality standards. Further, the court held that condition five contradicts a former statute and PCHB provided no rational basis for ignoring the rule in this case.

The court also held that since another, uncontested condition requires upstream and downstream sampling, using WER studies only to tighten restrictions is unjustified.

The Port proposed the restoration of Vacca Farm, a wetland used for farming and grazing, to its historic peat wetland condition. Ecology found that Vacca Farm was degraded enough to qualify for restoration. The Citizens Groups contended that PCHB and Ecology wrongly categorized the work at Vacca Farm as restoration instead of enhancement and accordingly granted the Port too much credit for their activities at the Vacca Farm site. Since the Citizens Groups did not show that Ecology's opinion was flawed, the court deferred to Ecology's assessment and held that a site does not have to be entirely functionless to qualify for restoration; a degraded wetland can be restored.

The last sentence of PCHB's condition eleven urged the Port to consider other in-basin mitigation sites to fulfill its obligation. The Port claimed, and the court agreed, there was no evidence of legislative intent to require in-basin mitigation opportunities to be exhausted before the Port turned to out-of-basin possibilities. Based on this evidence, and since the Citizens Groups did not present convincing arguments regarding the prohibition of out-of-basin mitigation, the court overruled the final sentence of condition eleven and found the Port's plan for out-of-basin mitigation adequate.

The court also ruled on two evidentiary issues. First, the court found that PCHB did not abuse its discretion when it redacted testimony regarding the political motivations that allegedly undercut the section 401 certification. PCHB was entirely within its rights to exclude irrelevant evidence. Second, the court held that PCHB did not need to include inadvertently disclosed privileged opinions of the assistant attorney general because the lack of these opinions did not prejudice the decision of PCHB against the Citizens Groups.

The court affirmed the ruling of PCHB regarding the reasonable assurance of the Port's compliance with water quality standards, affirmed PCHB's conditions one through four, nine, ten, the first two sentences of condition eleven, and conditions twelve through fifteen, overturned conditions five through eight, the final sentence of condition eleven, and condition sixteen.

Meredith Ginn

WEST VIRGINIA

McCormick v. Walmart Stores, Inc., 600 S.E.2d 576 (W. Va. 2004) (reversing dismissal of the town as defendant because neither intervening stormwater flow through private property nor statutory immunity prevented town liability for negligent operation of city drainage systems).

The McCormick family ("McCormick") filed suit against the Town of Lewisburg ("Town"), Walmart Stores ("Walmart"), and Walmart's