

WASHINGTON ATTORNEY GENERAL SUPPORTS ECOLOGY'S DISCRETION TO REVIEW WATER CONSERVANCY BOARD DECISIONS

On September 25, 2006, the Attorney General of Washington issued a formal opinion adopting an expansive view of the Department of Ecology's discretion to review decisions on water right transfers by local water conservancy boards. In a blow to the already-circumscribed authority of the local boards, the opinion endorses Ecology's practice of looking beyond the board record and applying its own administrative "guidelines" to veto board decisions. (AGO 2006 No. 17.)

Water Conservancy Boards: Washington's Experiment

In 1997, the Washington Legislature authorized the creation of water conservancy boards, in response to a substantial backlog of applications for water right changes and transfers within the Department of Ecology. The Legislature found that "[t]he state should expedite the administrative process for water right transfers by authorizing the establishment of water conservancy boards." RCW 90.80.005(3). As noted in a 2004 legislative audit report, "water conservancy boards are one of the 'release valves' the Legislature has created to cope with the building pressure of the backlog of pending water right transfer applications."

Water conservancy boards are three- or five-member boards created by county legislative authorities, subject to approval by the director of Ecology. RCW 90.80.020(1). In general, the boards are empowered to act upon applications for water right transfers, defined as "a transfer, change, amendment, or other alteration of a part or all of a water right authorized under RCW 90.03.380, 90.03.390, or 90.44.100." RCW 90.80.010(7). (Water Conservancy Boards cannot act upon applications for new water appropriations; those applications must still be made to Ecology.) At least one commissioner on each board must be "an individual water right holder who diverts or withdraws water for use within the area served by the board," and each board must have "one person who is not a water right holder." RCW 90.80.050(2).

Ecology was authorized by the Legislature to adopt rules to implement the conservancy board statute, promulgated at WAC chapter 173-153. In addition, individual water conservancy board commissioners are required to undergo training and continuing education, all conducted by Ecology. RCW 90.80.040. Ecology also provides "technical assistance" to boards when requested to do so. The statute and Ecology's implementing regulations specify precise requirements for applications, public notice, meetings, and issuance of decisions by a water conservancy board.

The Legislature's goal of expediting water right transfers through the use of water conservancy boards appears to have been met, at least relative to the Ecology backlog. Between 1998 and the first quarter of 2004, the average Ecology processing time for water right transfer applications was 4 years; the median time was 2 years, 11 months. During the same period, the average water conservancy board processing time was 343 days; the median time was 8 _ months. AGO 2006 No. 17 at 6, n.5.

Whose Authority Is It?

All board decisions are subject to review by Ecology before they become final. This division of authority has made relationships between Ecology and local water conservancy boards complicated and at times uneasy. Most friction has centered around Ecology's so-called "veto authority" over decisions by local boards.

RCW 90.80.080(1) requires a water conservancy board to "submit its record of decision on the transfer application to [Ecology] for review," and to "submit its report of examination to [Ecology] summarizing factual findings on which the board relied in reaching its record of decision and a copy of the files and records upon which the board's record of decision is based." The director of Ecology is required to "review each record of decision made by a board for compliance with applicable state water law." RCW 90.80.080(2).

Any person – whether a party, a water right holder who alleges impairment as a result of a transfer, or any "other person" – may "file a letter of concern or support" and have it considered by Ecology. RCW 90.80.080(3). Ecology has 45 days to affirm, reverse, or modify the board's record of decision; this deadline may be extended for an additional 30 days by Ecology, or at the request of the board or the applicant. If Ecology fails to act within the statutory deadline, the board's Record of Decision ("ROD") becomes final and appealable to the Pollution Control Hearings Board. RCW 90.80.080(4).

The Attorney General's opinion observes that "under some circumstances Ecology has performed additional analyses of its own prior to making a decision on a ROD, such as when Ecology concluded that a ROE did not contain adequate analysis to support approving a proposed transfer. . . . In other such instances, Ecology has reversed the board decision or suggested that the board withdraw it." AGO 2006 No. 17 at 6, n.4. Additional controversies arose over Ecology's insistence that local boards follow Ecology "guidelines" or "policies" that have not undergone rulemaking under Washington's Administrative Procedures Act. This situation led to a request by one State Senator and five State Representatives for a formal Attorney General's opinion as to the proper division of authority and allocation of discretion between local boards and Ecology under the water conservancy board statute.

The Attorney General opined that the governing statute authorizes Ecology to, in effect, start from scratch in reviewing a water right transfer application that has been acted upon by a local water conservancy board, while placing an obvious practical constraint on Ecology's ability to do so via the mechanism of short deadlines (45 to 75 days) for Ecology to reach a decision. The opinion also gave the local boards leeway not to follow Ecology's administrative guidelines and policies that have not been adopted as formal agency rules, but pointed out that Ecology can apply its own informal policies and guidelines when it wields its "veto" authority.

The Attorney General summarized his opinion as follows: “In reviewing a board’s conclusion with respect to an application to transfer a water right, Ecology is not limited to the factual materials developed by the board. Time limits applicable to Ecology’s review of board records of decision (ROD), however, constrain Ecology’s practical ability to conduct independent ‘investigations’ into water right transfer applications. Governing statutes and regulations do not require Ecology to accept board ‘findings of fact’ or to defer to board factual findings or interpretations of law, but Ecology’s review of a board’s decision on a water right transfer application is subject to appeal and *de novo* review before the Pollution Control Hearings Board. A water conservancy board is not required to follow Ecology policies and guidelines that have not been adopted into rules or enacted into statute. However, in reviewing a board decision, Ecology may utilize its guidelines and policies that reflect Ecology’s interpretation of applicable water law and related administrative rules.” AGO 2006 No. 17 at 2.

Conclusion and Implications

Ultimately, the Attorney General appears to rely upon the *de novo* appeal process before the Pollution Control Hearings Board – which has jurisdiction over all appeals of Ecology water right decisions – to imply that the potential for serial factual investigations before a local board and then Ecology is irrelevant, because if there is an appeal to the PCHB there would be yet another *de novo* factual inquiry anyway.

But this does not answer the question of whether the Legislature truly intended this result when it authorized the creation of local water conservancy boards. Are the local boards supposed to function as a meaningful substantive alternative to the Ecology review process? Or are they simply a procedural hurdle to be cleared in order to obtain a final substantive decision from Ecology on a quicker timetable? The Attorney General’s opinion will place these questions squarely in front of the Washington Legislature when it convenes in January 2007.