

WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD REJECTS VEGETATION REMOVAL AS MITIGATION FOR GROUNDWATER RIGHTS

CPM Development Corp. dba ICON Materials v. Ecology, PCHB No. 03-071 (Order on Summary Judgment, March 12, 2007)

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After a lengthy battle over the Department of Ecology's denial of two groundwater permit applications for a gravel mining operation near Seattle, Washington, the Pollution Control Hearings Board (PCHB) issued a declaratory ruling that vegetation removal does not qualify as a "resource management technique" offsetting the impact of the water withdrawals. The Board's ruling foreclosed the mine operator's reliance on a 1997 statute requiring consideration of water impoundments, aquifer recharge, and similar resource management techniques as mitigation for water rights.

Background

In virtually identical provisions, the surface water and groundwater codes require consideration of any "water impoundment or other resource management technique" included as a component of a water right application, as a means of making water available or mitigating the impacts of a new water withdrawal. RCW 90.03.255 and RCW 90.44.055. For groundwater, RCW 90.44.055 provides:

The department shall, when evaluating an application for a water right or an amendment filed pursuant to RCW 90.44.050 or 90.44.100 that includes provision for any water impoundment or other resource management technique, take into consideration the benefits and costs, including environmental effects, of any water impoundment or other resource management technique that is included as a component of the application. The department's consideration shall extend to any increased water supply that results from the impoundment or other resource management technique, including but not limited to any recharge of ground water that may occur, as a means of making water available or otherwise offsetting the impact of the withdrawal of ground water proposed in the application for the water right or amendment in the same water resource inventory area. Provision for an impoundment or other resource management technique in an application shall be made solely at the discretion of the applicant and shall not be made by the department as a condition for approving an application that does not include such provision.

Since the early 1970's, a succession of gravel mining operators including ICON Materials ("ICON") have operated the Auburn Pit, a 664-acre facility on the Lake Tapps

Plateau within the Puyallup River Basin. In addition to an active surface mine, the Auburn Pit operation includes sand and gravel washing, rock crushing, concrete mixing and asphalt production. Water is used to control dust, wash sand and gravel, and mix concrete. Two groundwater wells, established without any water right permits, supplied the mine with water for years. In 1994, the mine operator filed water right applications to legitimize the groundwater withdrawals.

In 2003, Ecology denied both applications on the grounds that water was not available, issuance of new groundwater rights in the area would impair existing rights, and the groundwater withdrawals were contrary to the public interest. Ecology found that the groundwater sought by ICON was in hydraulic continuity with Bowman Creek and the White River, both of which have been closed by rule to further appropriations. (*See* WAC 173-510-040.) The White River, in turn, is a tributary to the Puyallup River, which at times does not meet the minimum instream flows set by Ecology's regulations. (*Id.*)

ICON appealed the permit denials to the PCHB, and the parties attempted to reach a settlement to resolve the dispute. ICON proposed a plan under which its water withdrawals, coupled with its management of water resources and vegetation at the Auburn Pit, would result in no net impact to surface water flows or senior water rights.

A key part of ICON's plan involved credit for groundwater recharge attributable to vegetation removal from the Auburn Pit site. Vegetation was initially removed from the surface of the ground beginning in the early 1970's; new vegetation continues to be removed to allow access to the sand and gravel resources. The active mining area of over 380 acres is slated to be kept clear of vegetation until mining at the site ceases and the land is reclaimed. ICON also collects and manages stormwater at the site in compliance with an NPDES permit. Surface water runoff is retained onsite in a series of ponds for infiltration into the ground and recharge of the underlying aquifers.

ICON's proposal was predicated on the assumption that its removal of vegetation at the Auburn Pit site creates substantial aquifer recharge, and that the collection, retention, and infiltration of stormwater on the site contributes to surface water flows. ICON described this combination of circumstances as "water budget neutral" and as a "resource management technique" within the meaning of RCW 90.44.055. To provide assurance that groundwater withdrawals would not continue beyond the period when the recharge effects of vegetation removal would be realized, ICON offered to limit the requested groundwater rights to temporary rights, lasting only as long as the gravel mining operation continued.

Ecology refused to consider the vegetation removal and recharge plan as a "resource management technique" under RCW 90.44.055, and additionally determined that two aspects of the proposal were contrary to the public interest: (1) the amount of recharge benefit from vegetation removal is inherently uncertain; and (2) such an approach would create incentives for deforestation as a means of obtaining water rights. Both parties moved for summary judgment on the issue of whether vegetation removal is properly considered a "resource management technique" under the groundwater code.

The PCHB Decision

The PCHB characterized ICON's proposal as follows:

The ICON proposal asks Ecology to recognize that removal of vegetation on this site over thirty years ago freed up water that the vegetation previously intercepted and used to sustain life. Since the same precipitation would fall on bare ground after the de-vegetation, becoming stormwater runoff and a potential source of groundwater recharge, ICON reasons the increase should be credited as an offset against the impacts of its proposed consumptive withdrawal. In addition to removing vegetation, ICON's overall operations include capturing stormwater and infiltrating it to the ground as required by the NPDES permit governing the company's activities. ICON contends that the combination of its historic and on-going clearing of nearly 400 acres and its permitted stormwater management activities is properly considered a resource management technique within the meaning of RCW 90.44.055.

Characterizing the issue before it as "whether a plan to remove all vegetation from a site and retain the area in an un-vegetated state constitutes a 'resource management technique' under RCW 90.44.055, because water previously used by the vegetation may become available for groundwater recharge or surface runoff," the PCHB began its analysis by examining the "plain meaning" of the statutory language.

The Board was persuaded by Ecology's argument that "giving water right applicants a credit against consumptive use for recharge generated by removing vegetation would have broad ranging adverse consequences in violation of the well recognized first in time, first in right principle of water law." The PCHB stated:

A plain reading of the statute, within the context of other statutory provisions regulating water rights, indicates that the purpose of the legislation was limited to require Ecology to consider resource management techniques that would increase the availability of water or offset impacts of ground water withdrawals. The construction of this legislation advanced by ICON is unreasonable because it could result in major impacts to fundamental tenants [sic] of water law.

The PCHB continued that "cutting down all trees and other vegetation in an area and a plan to prevent them from growing back for the duration of a water right cannot reasonably be construed as a resource management technique. Long-term eradication of trees and vegetation certainly cannot be characterized as the management of trees as a resource under the plain meaning of those terms. Nor does giving credit for water no longer needed or used by the removed vegetation constitute water management." Concluding that the "plain language" of the statute cannot be read to include vegetation removal as a "resource management technique" requiring detailed consideration, the Board also noted that the same conclusion would follow even if the statute were considered ambiguous.

The PCHB agreed with Ecology's interpretation, supported by the "general public policy concern that approval of the ICON proposal as a resource management technique will create incentives for water right applicants to remove trees and vegetation in exchange for obtaining water rights."

In several decisions in the mid-1990's, the PCHB had specifically rejected the idea that vegetation removal could serve as a credit to justify the issuance of a water right, reasoning that any water that is not otherwise used by trees would belong to the public, subject to the rights of prior appropriators. *E.g.*, *Port Blakely Tree Farms, Ltd. v. Ecology*, PCHB No. 96-66 (1997); *Manke Lumber v. Ecology*, PCHB No. 96-102 (1996); *Black River Quarry, Inc. v. Ecology*, PCHB No. 96-56 (1996) ("No credit is merited nor authorized under the Water Code for returning to nature, what originally belonged to it"). The Board explained that those PCHB cases, although decided prior to the passage of RCW 90.44.055, were not overturned by enactment of the statute: "Despite its proximity in time, nothing in the language of the legislation indicates any intent to overturn the *Manke* line of cases specifically rejecting vegetation removal as a form of aquifer recharge credit."

ICON argued that its proposal was distinguishable from the water right applications considered in the PCHB's 1990's-era cases. However, the Board was unmoved by the proposed temporary duration of the requested water right, or by the complicated on-site stormwater management and infiltration regime at the Auburn Pit, noting that these features "do not change the basic nature of the proposal, which involves taking credit for an increase in recharge based on removing vegetation." The PCHB concluded that "the language cannot be read to include deforestation as a resource management technique" under RCW 90.44.055, and that Ecology was not required to consider it in this case.

Conclusion and Implications

In rejecting the applicability of RCW 90.44.055 to the Auburn Pit mine operation, the PCHB appears to have been concerned primarily with the dire consequences on the landscape that could potentially result from giving water right applicants an incentive for deforestation. The Board's ruling is narrowly applicable to vegetation removal; it does not exclude from consideration as a "resource management technique" any other approach to water right mitigation.

The PCHB's Order on Summary Judgment has been appealed to the Superior Court (*CPM Development Corp. dba ICON Materials v. Pollution Control Hearings Board*, King County Superior Court No. 07-2-11502-1); oral argument is scheduled for November 2007. In the meantime, the parties are discussing other mitigation options, and may settle the case prior to a final resolution of the issues in the appeal.