

STATE HEARINGS BOARD LIMITS “ANTI-ENLARGEMENT” RULE FOR WATER RIGHT CHANGES

Cornelius, et al. v. Ecology and Washington State University, PCHB No. 06-099 (Order on Summary Judgment, January 18, 2008).

The Washington Pollution Control Hearings Board (PCHB) has cut the so-called “anti-enlargement principle” down to size. In an appeal of changes to several groundwater rights held by Washington State University, the PCHB ruled that the prohibition against “enlargement” of a water right applies only to the combined total quantity of water withdrawn from an additional well and an original well authorized under a water right. The PCHB specifically overruled a 1989 decision suggesting a much broader scope for an “anti-enlargement” rule.

Background

Under Washington’s groundwater code, when the Department of Ecology authorizes an additional well for a groundwater right, the combined total quantity withdrawn from the original well and any additional well may not enlarge the right conveyed by the original groundwater permit or certificate. RCW 90.44.100(2). No similar prohibition is set forth in the Water Code for changes to the point of diversion of a surface water right. *See* RCW 90.03.380.

Despite the straightforward language of the groundwater code, a more amorphous notion of “enlargement” – sometimes referred to as “enhancement” -- has been occasionally asserted to preclude any change that would enable the easier exercise of a water right, or that would alter the “original intent” of the water right applicant. (See the July 2007 issue for a discussion of Ecology’s recent effort to articulate the basis for a more far-reaching concept of “enlargement” in a draft policy, since withdrawn.)

The *Cornelius* Appeal

Washington State University sought changes to six groundwater rights to enable water to be pumped from any of seven wells serving its main campus in Pullman, Washington. The University’s goal is to consolidate its pumping from a smaller number of modern wells, and to discontinue use of several older wells drilled between the 1930’s and the 1960’s (several of which were no longer reliable). Ecology approved the changes in points of withdrawal for the six water rights, and a group of appellants brought an appeal before the PCHB. The appellants raised numerous issues, including the claim that the changes in point of withdrawal impermissibly “enlarged” the University’s water rights. The “enlargement” issue was the subject of cross-motions for summary judgment.

The PCHB Decision

Washington State University and Ecology argued that the change authorization did not permit the University to withdraw any quantities of water over and above the quantities

already authorized under its existing water rights. The appellants argued that “enlargement” would occur because the University would increase the quantity of its water withdrawals beyond the amounts presently available from existing wells which are older, unreliable, failing and/or decommissioned.

The PCHB described the appellants’ legal theory as follows:

Appellants seek a ruling from this Board that enlargement of a water right occurs, as a matter of law, whenever a change in the point of withdrawal enables a water right holder to exercise a greater quantity of an existing right than is being exercised at the original point of withdrawal. Appellants argue the approval of WSU’s change applications will allow WSU to pump a greater amount of water than it is physically capable of pumping from its existing well locations and configurations, and that this change therefore amounts to an unlawful “enlargement” of WSU’s water rights.

Agreeing that “it is undisputed that the change/consolidation of WSU’s rights will enable WSU to pump more water than it currently withdraws,” the PCHB rejected the appellants’ theory:

We conclude, as a matter of law, that enlargement of a water right does not occur by virtue of a change in the point of withdrawal merely because it may result in a water right holder exercising more of a previously, and validly, authorized quantity of water. This is in accord with previous Board decisions.

The PCHB cited *Kile v. Ecology*, PCHB No. 96-131 (1997), in which the Board reviewed an amendment to a groundwater certificate to add a second well because the original well had limited production due to drought. In that case, the Board held that because the amendment authorized appropriation of no more water than the original certificate, “there is no enlargement of the right conveyed by the original certificate.”

The PCHB went on to address an earlier Board decision, *Jellison v. Ecology*, PCHB No. 88-124 (1989), and explicitly overruled it:

In so concluding, we specifically overrule this Board’s earlier conclusory statement in *Jellison v. Ecology*, PCHB No. 88-124 (1989) to the contrary (that granting a change in a surface water point of diversion that would allow a water right holder to exercise a greater amount of a previously authorized quantity of water would be to “enlarge” the right).

The PCHB reserved for hearing a separate “enlargement” claim with respect to one groundwater permit, but granted summary judgment for respondents as to the appellants’ general “enlargement” theory.

Conclusion and Implications

In its summary judgment ruling in *Cornelius*, the PCHB squarely rejected an overly-broad concept of “enlargement” and precluded further reliance on the now-overruled language in *Jellison*. In so doing, the PCHB has brought additional clarity to the requirements for changing a water right in Washington. The rule against “enlargement” in RCW 90.44.100 prohibits an increase in the authorized quantity of water under a water right – and nothing more. Changes to a water right to allow it to be fully exercised, or to enable its exercise in a more convenient, cost-effective, or efficient way, cannot henceforth be characterized as “enlargement” of the right.

***UPDATE (December 2008):* On April 17, 2008, the PCHB issued its final decision, ruling in favor of Washington State University and the Department of Ecology on all issues except for petitioners’ claims regarding constitutional violations relating to the 2003 Municipal Water Law, over which the PCHB ruled it did not have jurisdiction. In June 2008, the PCHB denied the petitioners’ motion for reconsideration. The petitioners appealed the PCHB’s decision and sought direct review by Division Three of the Court of Appeals under the Administrative Procedures Act. In October 2008, the Court of Appeals denied direct review. The appeal remains pending in Whitman County Superior Court.**