

**WASHINGTON POLLUTION CONTROL HEARINGS BOARD AFFIRMS
DEPARTMENT OF ECOLOGY'S AUTHORITY TO ISSUE NEW
GROUNDWATER RIGHTS WITH MITIGATION**

Squaxin Island Tribe v. Ecology and Miller Land and Timber LLC, PCHB No. 05-137 (Order on Motions, May 19, 2006 and Modified Findings of Fact, Conclusions of Law, and Order, November 20, 2006)

By Sarah E. Mack
mack@tmw-law.com

Published in *Western Water Law & Policy Reporter*
Volume 11, No. 3
January 2007
www.argentco.com

The Washington Pollution Control Hearings Board has upheld the Department of Ecology's authority to issue water rights relying upon mitigation through streamflow augmentation. Although the PCHB reversed two groundwater permits because it found that Ecology had erred in predicting surface water impacts, the Board entered key legal rulings that will likely encourage the use of streamflow augmentation as mitigation for new groundwater rights.

Background

Miller Land and Timber LLC, a property owner and developer, applied for groundwater permits to serve two proposed residential subdivisions located near the City of Lacey within the Deschutes River Basin. The project wells would be located near Woodland Creek, which has been closed to further consumptive surface water appropriations under Ecology's Deschutes River Basin regulations, WAC chapter 173-513-040.

All groundwater in the basin is considered to be in hydraulic continuity with the surface water. However, the basin regulations provide: "Future ground water withdrawal proposals will not be affected by this chapter unless it is verified that such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter." WAC 173-513-050.

Ecology issued two groundwater rights to Miller Land and Timber for domestic supply and direct streamflow augmentation to Woodland Creek. Ecology required streamflow augmentation at a combined rate of 32 gallons per minute during the six-month low flow period from June 1 to November 30 of each year for both projects. Ecology relied upon a USGS numerical groundwater flow model to estimate that this rate of streamflow augmentation would more than offset impacts to Woodland Creek from the entire authorized appropriation. (This factual determination was subsequently rejected by the PCHB after a hearing on the merits.)

The Squaxin Island Tribe appealed Ecology's decisions, arguing that, where a groundwater permit would otherwise be denied because of its adverse impact on a closed surface water source, Ecology lacked authority to grant a water right based on mitigation. The Tribe also argued that Ecology should bear the burden of proof to justify its decision, because Ecology lacks "uniform standards" governing the adequacy of mitigation plans.

The PCHB Decision

The PCHB ruled against the Tribe and granted summary judgment in favor of Ecology on the issue of Ecology's authority to issue new water rights in reliance upon mitigation for surface water impacts in a closed basin.

The Tribe argued that Ecology lacks authority to approve a water right with mitigation because the agency does not have "uniform standards" to evaluate the adequacy of a mitigation plan. Relying upon Washington's "nondelegation" doctrine, the Tribe contended that "adequate safeguards do not exist to control arbitrary administrative action."

Rejecting this argument, the PCHB first pointed out that Washington's Water Code explicitly directs Ecology to take into account any "resource management technique" – i.e., mitigation – included as part of a water right application. 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.

The PCHB noted also that in *Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), the Washington Supreme Court expressly upheld Ecology's authority to impose conditions on a groundwater right permit.

Finally, the PCHB cited the four-part test for issuance of a new water right, which requires Ecology to determine whether (1) the water will be applied to a beneficial use, (2) the water is available for appropriation, (3) the proposed use of water will not impair existing rights, and (4) the proposed use will not be detrimental to the public welfare. See RCW 90.03.290; RCW 90.44.060 (making the Water Code four-part test applicable to groundwater right applications).

The PCHB stated: "The Board agrees with the Respondents that the statutory four-part test for Ecology to issue a water right provides sufficient guidance and places adequate limits on Ecology's discretion when evaluating a water mitigation plan. . . . If the mitigation plan fails to address a deficiency in any portion of the four-part test, the mitigation plan is inadequate and no water right permit may issue."

Turning to the Tribe's request to shift the burden of proof to Ecology, the PCHB ruled:

The Tribe contends that since there are no uniform standards regarding the adequacy of mitigation plans, it is "appropriate for the decision-making body to have the burden to justify its decision." . . . The Board has already concluded that sufficient guidance exists for Ecology to review and determine the adequacy of mitigation plans. Board rules also place the burden of proof on the appealing party, unless the case involves a penalty or regulatory order. In addition, the Board's rule is consistent with the State Administrative Procedures Act, which places the burden of demonstrating the invalidity of an agency action on the party who asserts the invalidity. . . . Nothing presented by the Appellant's argument convinces the Board that it is appropriate to shift the burden of proof to Ecology in this proceeding.

The PCHB reaffirmed its ruling after the hearing on the merits, when the Tribe renewed its request to shift the burden of proof to Ecology to justify its water right decisions.

However, after the hearing on the merits, the PCHB found that the Tribe had satisfied its burden of demonstrating that Ecology erred in concluding that Miller Land and Timber's proposed groundwater withdrawals would satisfy the four-part test. The PCHB vacated Ecology's decisions and encouraged Ecology to issue a preliminary permit for aquifer testing and streamflow monitoring, "to allow Miller to further assess the actual [effect] of groundwater withdrawals on the Woodland Creek basin."

Conclusion and Implications

The Board's legal rulings in this case provide important support for Ecology's efforts to encourage innovative mitigation and resource management in conjunction with applications for water rights. If required on a consistent basis for new development, streamflow augmentation using groundwater withdrawn from deep wells could do more than offset impacts to surface water; it could eventually increase stream flows and enhance habitat and fisheries resources in the affected surface water systems.

Editor's Note: Sarah Mack, who covers Washington State water law for the *Western Water Law & Policy Reporter*, serves as co-counsel for Miller Land and Timber LLC in this case.