WASHINGTON COURT OF APPEALS UPHOLDS PRELIMINARY PERMIT FOR GROUNDWATER TESTING

Public Utility District No. 1 of Clark County v. Pollution Control Hearings Board,
137 Wn. App. 150, 151 P.3d 1067 (2007)

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In a decision published February 6, 2007, Division Two of the Washington State Court of Appeals upheld a preliminary permit issued by the Department of Ecology (Ecology) for aquifer testing. The court ruled that environmental review of a proposed municipal wellfield project is not required before authorizing test wells and groundwater pumping to gather information on the impacts of the project. Utility managers and agency regulators have welcomed this judicial clarification of the applicability of Washington's State Environmental Policy Act (SEPA) to a key aspect of water right decision-making.

Background

Public Utility District No. 1 of Clark County (known as "Clark Public Utilities" or "CPU") is a customer-owned public utility district providing electrical power and water supply service in southwest Washington. CPU serves one of the fastest-growing areas in Washington, and is projected to have approximately 140,000 water customers by the year 2020. As part of its ongoing planning efforts to ensure water supplies to meet the anticipated water demand of its customers, CPU identified the need for a major new water supply source within its service area. In 2001, CPU issued an updated Water Supply Plan, as required under State law, to include a new wellfield near Vancouver Lake with an anticipated water supply of 36 million gallons per day, and applied for a water right.

Unfortunately, past industrial activities within the Vancouver Lake lowlands area had resulted in significant groundwater contamination. Ecology was concerned that operation of a municipal wellfield would cause spreading of a trichloroethylene (TCE) plume in the shallow aquifer underlying CPU's wellfield site, and disrupt efforts by the Port of Vancouver and other industrial property owners to investigate and clean up the groundwater contamination. CPU decided to explore a deeper, uncontaminated aquifer as a potential alternative source of water, and to undertake a sophisticated groundwater modeling effort to predict impacts on the affected aquifers.

Washington's Water Code authorizes Ecology to issue preliminary permits in order to obtain information necessary to evaluate a water right application. RCW 90.03.290(2)(a) provides:

> If the application does not contain, and the applicant does not promptly furnish sufficient information on which to base such findings [under the four-part test of water availability, beneficial use, no impairment to other rights, and no detriment to the public interest], the department may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary.

CPU asked Ecology to issue a preliminary permit authorizing it to drill large-diameter wells and conduct large-scale pumping tests in two aquifers: the shallow aquifer identified in its water right application, and the deeper uncontaminated aquifer. The identified purpose of the groundwater testing was to analyze water quality, water availability, and the environmental impacts of operating a new municipal wellfield near Vancouver Lake. In particular, data from the aquifer pump tests was proposed to be incorporated into groundwater models to predict the impacts of the proposed wellfield on the contamination plume.

Ecology issued the preliminary permit, stating that it did not anticipate that the aquifer testing itself would have a significant impact on the groundwater contamination. Ecology emphasized that "[n]o beneficial use of the water is allowed and issuance of a preliminary permit is not a guarantee of approval of the underlying application."

The Port of Vancouver and another industrial property owner appealed the preliminary permit to the Pollution Control Hearings Board, alleging among other things that Ecology had violated the State Environmental Policy Act (SEPA). (*Port of Vancouver, et al. v. Ecology, et al.,* PCHB Nos. 03-149 & 03-151.)

SEPA requires that government agencies conduct environmental review of proposed actions, and prepare a detailed environmental impact statement for any action likely to have a significant adverse environmental impact. *See* RCW 43.21C.031. However, under state SEPA regulations certain categories of actions are exempt from environmental review, including "basic data collection, research, resource evaluation, requests for proposals, and the conceptual planning" of proposals:

> These may be strictly for information-gathering, or as part of a study leading to a proposal that has not yet been approved, adopted or funded; this exemption does not include any agency action that commits the agency to proceed with such a proposal.

WAC 197-11-800(17). For a categorically exempt action that is part of a larger proposal including a series of related actions, some of which are exempt and some of which are not, an agency may proceed with the categorically exempt action prior to conducting environmental review, as long as it would not (a) have an adverse environmental impact or (b) limit the choice of reasonable alternatives. WAC 197-11-305(1); WAC 197-11-070(1).

All parties agreed that the activities allowed under Ecology's preliminary permit would not have an adverse environmental impact. Ecology and CPU asserted that the permit was categorically exempt under the SEPA Rules; the Port of Vancouver argued that the categorical exemption for information-gathering did not extend to test well drilling and pumping.

Although it found that the purpose of the preliminary permit was to obtain information on the affected aquifers and the likely impacts of the proposed wellfield, the PCHB concluded that the preliminary permit was not categorically exempt under SEPA. Observing that "the well specifications are calculated to accommodate full production if the wellfield project is approved," the PCHB characterized the test well as "a full-scale component of the ultimate working project," and concluded that the aquifer testing is "at best a subsidiary function of the well."

The PCHB went on to conclude that even if the test well drilling and pumping were categorically exempt, such activity would still be prohibited prior to completion of SEPA review because it would limit the choice of reasonable alternatives. In reaching this conclusion, the PCHB stated flatly that "[t]he coercive effect of the well construction and testing is evident."

The PCHB's ruling placed CPU squarely in a "Catch-22" situation: unable to complete environmental review of its wellfield project without the aquifer test data, but unable to test the aquifer before completing environmental review of its project. More generally, utility managers were alarmed by the notion that aquifer testing would not be categorically

exempt if the test well might potentially be used as a production well. CPU appealed the PCHB decision.

The Court of Appeals' Decision

The Court of Appeals began its analysis by addressing the issuance of deference to agency interpretations of applicable law and regulations. Under Washington law, if interpretation of a statute falls within an agency's expertise, the agency's interpretation of the statute is accorded deference, so long as that interpretation does not conflict with the plain language of the statute. *Port of Seattle v. Pollution Control Hrgs. Bd.*, 151 Wn.2d 568, 612, 90 P.3d 659 (2004). The court explained:

> The Legislature designated Ecology to regulate Washington's water code, and we give Ecology's interpretation of statutes and regulations dealing with water resources great weight. Ecology is also charged with the rule-making powers to implement and interpret SEPA and to determine which categories of governmental actions are not "potential major actions significantly affecting the quality of the environment." We therefore give deference to Ecology's interpretation which actions are categorically exempt from SEPA, and we give deference to the PCHB's findings of fact.

(Citations omitted.) The court disagreed with the PCHB's conclusion regarding the applicability of the categorical exemption for data collection. The court relied upon CPU's purposes for requesting permission for aquifer testing:

> It is undisputed that the information obtained would be helpful to CPU in determining aquifer transmissivity, which is a critical component CPU used to develop models to predict the impact of a new wellfield project at Fruit Valley on the contaminated groundwater. The PCHB found that one of CPU's primary goals in analyzing groundwater movement in the Vancouver Lowlands area is to determine what steps might be necessary to effectively contain the contaminated groundwater.

The court also took careful note of Ecology's intentions in issuing the preliminary permit:

> Ecology expressly stated that the overall objective of authorizing the tests was to obtain hydrogeologic data to assist Ecology in deciding whether to issue water rights to CPU . . . . A year after Ecology first approved the preliminary permit, it reiterated that it was only authorizing the preliminary permit, not the application for groundwater rights for a new wellfield project.

The court concluded that "the record demonstrates that the main objective of the permit was to authorize testing to be used for research purposes," and held that the PCHB erred in ruling that the preliminary permit was not categorically exempt from SEPA.

The court also rejected the PCHB's conclusion that the preliminary permit for aquifer testing would limit the choice of reasonable alternatives. First, the court pointed out that "[t]here is nothing in the record to suggest that Ecology's approval of the preliminary permit would coerce Ecology to grant groundwater rights at Fruit Valley simply because it issued the permit." The court further rejected the PCHB's suggestion that CPU's financial investment in testing at this site would limit CPU's opportunities to choose alternative sites, pointing out that "CPU's cost for the testing was a small fraction of CPU's overall cost to build the entire wellfield project." Holding that the aquifer testing "will not serve to limit the choice of reasonable alternatives available to Ecology or CPU for the wellfield project," the court reversed the PCHB's decision.

Conclusion and Implications

The Court of Appeals' decision was greeted with relief by utility managers faced with the need to gather information about new water supplies and their impacts. The court recognized that predicting the environmental impacts of a new wellfield requires groundwater testing from a well – and that this testing activity is data gathering that must occur in order to complete environmental review under SEPA. Further, the court recognized that even very expensive environmental testing and analysis – often essential for planning and evaluation of complex projects – is not inherently coercive given the overall cost of major public works projects.

Although Ecology's ultimate decision on CPU's water right application is far from certain, the court's ruling has effectively eliminated the "Catch-22" SEPA obstacle in the way of municipal utilities' efforts to assess the environmental impacts of major new wellfield projects.

Editor's Note: Sarah Mack, Washington Editorial Board member for *Western Water Law & Policy Reporter,* represented Public Utility District No. 1 of Clark County in this case.