

DEFERENCE TO ECOLOGY'S TECHNICAL JUDGMENTS DECLINES AS WASHINGTON COURT OF APPEALS BOOSTS HEARINGS BOARD AUTHORITY

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Rosemere Neighborhood Ass'n, et al. v. Ecology, et al., 2012 WL 4373414, ___ P.3d ___
(Washington Court of Appeals Division II, September 25, 2012)

In a decision that may herald greatly reduced deference to the technical expertise of the Department of Ecology, an intermediate Washington appellate court has affirmed a Pollution Control Hearings Board (PCHB) decision rejecting Ecology's modification to a municipal stormwater general permit. The PCHB, which hears appeals from Ecology decisions, has been required to give deference to Ecology's expertise with respect to technical matters since the Washington Supreme Court's 2004 decision in *Port of Seattle v. PCHB*.

In *Rosemere Neighborhood Ass'n v. Ecology*, while recognizing "that deference is due Ecology because of its technical and scientific expertise," Division II of the Court of Appeals nevertheless affirmed – based on "expert testimony" and concerns expressed by other agencies – the PCHB's disagreement with Ecology's opinions. Erosion of deference to Ecology's technical expertise may have far-reaching implications in litigation over water rights in Washington.

Deference to Ecology in *Port of Seattle*

In *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash. 2d 568, 90 P.3d 659 (2004), the Washington Supreme Court settled the issue of which agency – Ecology or the PCHB – is entitled to deference when they disagree over issues involving statutory interpretation or technical judgments. With respect to technical judgments, the Court held that "due deference" must be given to Ecology's specialized expertise.

Ecology had argued in *Port of Seattle* that it is entitled to deference with regard to its technical judgments, especially when they involve complex scientific issues. The PCHB filed a brief in the Supreme Court contending that it conducts a de novo fact-finding hearing “in which the technical expertise of Ecology is put to the test in an adversary proceeding,” and asserting that the court should not assign more weight to Ecology's technical judgments than to the PCHB's evaluation of those judgments. *Id.* at 594.

The Supreme Court explained that it reviews a PCHB decision by applying the Washington Administrative Procedures Act standards of review to the PCHB's decision and the PCHB's record. The PCHB's findings of fact are reviewed under the “substantial evidence” test. RCW 34.05.570(3)(e). Therefore, the standard of review “inherently assigns deference to the PCHB's factual conclusions. This system respects both the PCHB's statutory role as independent reviewer of Ecology actions and the trial-like nature of the PCHB hearings.” *Id.* at 595. “Even so,” the Court continued, “it is well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency.” *Id.* Thus, the Court “begins by applying the clearly erroneous standard to PCHB's factual determinations. Within the framework of determining whether one of the PCHB's factual findings is clearly erroneous, this court gives due deference to Ecology's expertise.” *Id.*

Deference in *Rosemere*

Rosemere involves Washington's Municipal Stormwater General Permit issued by Ecology in 2007. A major component of the Permit is a storm water flow control condition, which requires a permittee to reduce stormwater runoff from new development to “historical” levels. A permittee can adopt an alternative stormwater flow control program if the alternative program provides “equal or similar” protection to that specified in the Permit.

Clark County, located in southwestern Washington, adopted stormwater control ordinances which Ecology deemed insufficient. Ecology and the County then negotiated an Agreed Order to bring the County into compliance with the Permit. As modified by the Agreed Order, the Clark County alternative program required a developer to mitigate only for the increased flow caused by its development, with the County itself undertaking further mitigation to account for historic runoff levels. The County's further mitigation could occur at comparable locations other than the property being developed. Ecology determined that this alternative flow control program offered protection “equal or similar” to the Permit. The Agreed Order was appealed to the PCHB.

Citing *Port of Seattle*, the PCHB majority acknowledged “that it must give deference to the technical expertise of Ecology.” *Rosemere Neighborhood Ass'n, et al. v. Ecology and Clark County*, PCHB No. 10-013 (Findings of Fact, Conclusions of Law, and Order, January 5, 2011). However, the PCHB concluded that “**Ecology is not entitled to deference** in its characterization and agreement to Clark County's alternative flow control model as

equivalent . . . because Ecology failed to follow the clear and unambiguous terms of the permit, and because Ecology’s approval of the alternative program is unsupported by, and contrary to its own technical or science-based discussions and assessments of the flow control standard.” *Id.* at 52 (emphasis added).

Focusing on an “absence of information” regarding habitat values and mitigation outcomes, the PCHB suggested that Ecology had insufficient data to make a reasoned decision. *Id.* at 52-53. The PCHB reversed the Agreed Order, concluding that it failed to meet the test of “equivalent” protection compared to the Permit.

The Court of Appeals Decision

Clark County appealed the PCHB’s decision to the Court of Appeals, contending that the PCHB had overstepped its authority and failed to accord deference to Ecology as required by *Port of Seattle*. The court agreed that the PCHB “should defer to Ecology on technical and scientific issues,” but explained that affording Ecology such deference “does not preclude the Board from engaging in de novo review of Ecology’s decisions.” Deferring to Ecology does not mean “that the Board must accept Ecology’s experts’ opinions without weighing them against contrary expert testimony.”

The court then reviewed “expert testimony that contradicted Ecology’s experts’ opinions that the Agreed Order was equivalent to the Permit”:

For example, former Ecology employee, Greg Winters, testified that the Agreed Order was not “equal or similar” to the Permit because it did not require any particular level of effort to guarantee the same results as the Permit. Dr. Derek Booth testified that the Agreed Order failed on several levels, including that its alternative program was not supported by scientific analysis. Additionally, letters from the EPA and National Marine Fisheries Service, two agencies with experience in water pollution science, expressed serious concerns with the Agreed Order for its lack of “equal or similar” environmental protection. . . . Thus, several experts disagreed with Ecology’s assessment of “equivalency.”

The court held that the PCHB’s power to conduct de novo review “allowed it to weigh the evidence and decide which experts were more credible.” The court also observed that “nothing in the record suggests that the Board failed to grant some deference to Ecology’s expertise in resolving the conflicting views of the experts.”

The court’s decision on this point raises some interesting questions. First, the court characterizes as “more credible” the opinions of federal agency staff and a “former Ecology employee” but does not explain how exactly Ecology’s determination was accorded any deference in that process. Second, the court’s confidence that “nothing in the record”

suggests the PCHB “failed to grant some deference” appears completely inconsistent with the PCHB’s explicit conclusion that “Ecology is not entitled to deference” in this case. Finally, the court’s opinion leaves unanswered two overarching questions: What exactly is meant by deference to Ecology? And how exactly does it work?

Conclusion and Implications

In *Rosemere*, Ecology’s exercise of its technical expertise fared exceedingly poorly before both the PCHB and the appellate court. It difficult to tell whether this outcome is attributable to a unique factual situation or a more general skepticism toward Ecology’s technical judgments. This case could have far-reaching implications beyond stormwater regulation, inasmuch as Ecology typically makes highly technical determinations in numerous environmental permitting contexts, including water rights cases. The agency’s technical determinations are likely to come under more intense scrutiny if the concept of technical “deference” envisioned in *Port of Seattle* continues to erode.

Clark County has petitioned the Washington Supreme Court for review of the Court of Appeals’ decision. If the Supreme Court grants review, it will have an opportunity to flesh out the rule it announced in *Port of Seattle* and clarify the scope of deference to Ecology’s technical judgments.