

## WASHINGTON POLLUTION CONTROL HEARINGS BOARD RULES THAT PUDDLES ARE NOT “WATERS OF THE STATE” UNDER THE WATER POLLUTION CONTROL ACT

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Published in *Western Water Law & Policy Reporter*  
Volume 17, No. 2  
December 2012  
[www.argentco.com](http://www.argentco.com)

*BNSF Railway Company v. Washington State Department of Ecology*, PCHB No. 11-181  
(Order on Motion for Summary Judgment)

In a case testing the limits of the extremely broad coverage of Washington’s water pollution control statutes, the Pollution Control Hearings Board ruled that “waters of the state” do not include puddles, which the Board defined as shallow depressions full of water, especially muddy or dirty water. This appeal arose after Ecology issued a penalty order against BNSF Railway Company based on a chemical spill after a freight train derailment in 2011.

The PCHB’s summary judgment ruling makes clear that even a very large puddle, “unconnected to any other water body, with no outlet to any other water body, and wholly transitory in nature,” is not a “water of the state” for purposes of liability for pollution discharges.

### **Factual Background**

On February 26, 2011, a BNSF freight train derailed in Pierce County near the shoreline of Puget Sound. Four tank cars carrying sodium hydroxide were involved in the derailment. On March 1, BNSF removed the four tank cars to an upland area, where one car spilled an estimated 100 gallons of sodium hydroxide. This upland spill occurred on the east side of the tracks above the ordinary high water mark, in an area Ecology described as a “large puddle of water” on and adjacent to an unpaved access road. BNSF’s spill response contractor undertook remedial actions in the upland area, including triple rinsing the tank cars, constructing a trench to collect water, removing the sodium hydroxide using a vacuum truck, and excavating and removing surface soils. BNSF submitted a report to

Ecology on the emergency spill response with details on the spill and cleanup efforts. In September 2011, Ecology confirmed that the cleanup and documentation were complete.

On November 30, 2011, Ecology issued a \$3,000 penalty order to BNSF for both the February 26 and March 1 incidents, finding that sodium hydroxide was discharged into waters of the state in violation of RCW 90.48.080. Ecology's order described the area in which the chemical release occurred as a "large puddle" of water. BNSF appealed the penalty order to the PCHB. One of the issues raised by BNSF was whether the sodium hydroxide discharged on March 1<sup>st</sup> into that "large puddle" entered "waters of the state" as defined in RCW 90.48.080. BNSF moved for summary judgment on this issue.

### **Regulatory Background**

Washington's Water Pollution Control Act (WPCA) prohibits the discharge of polluting matter to "waters of the state":

"It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of [Ecology] . . ."

RCW 90.48.080. The term "pollution" is defined in the statute with reference to "waters of the state" as well:

"[T]he word 'pollution' . . . shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life."

RCW 90.48.020. The statute gives Ecology jurisdiction "to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington." RCW 90.48.030.

Finally, "waters of the state" are defined "to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington." RCW 90.48.020.

## **What Are “Waters of the State”?**

The question before the Board on summary judgment was whether the upland discharge of sodium hydroxide on March 1, 2011 was a discharge into “waters of the state” under the Water Pollution Control Act (WPCA). The Board began its analysis by discussing *Pacific Topsoils v. Ecology*, 157 Wn. App. 629, 238 P.3d 1201 (2010), which recognized broad legislative intent to protect both surface water and groundwater as “waters of the state” and holding that Ecology had authority to regulate wetlands under the WPCA. The Board then reviewed a 1991 superior court decision, *BIAW v. Ecology*, which interpreted the terms “ponds” and “lakes” in RCW 90.48.030 and concluded that “bodies of water bigger than puddles . . . are included within the definition of ‘waters of the state’ under chapter 90.48 RCW.” The Board pointed out that Ecology adopted the *BIAW v. Ecology* analysis in the agency’s water quality guidelines for wetlands.

However, the Board cautioned that the analysis is not limited to considering only water on the surface of the land, discussing several of its prior decisions recognizing that even discharges to the land surface where there is no apparent impacted water could result in a violation of the WPCA if the activity causes pollution that somehow reaches waters of the state.

## **No Connection to Groundwater or Puget Sound**

BNSF and Ecology offered different opinions on whether the wetted area on the upland site is hydraulically connected to a larger body of water, such as an aquifer or surface water that could be affected by the chemical spill. Ecology offered a declaration by a geologist stating that the site “may” be comprised of artificial fill which “is often fairly porous” and that “it is reasonable the spill in the upland infiltrated the groundwater, Puget Sound or both, depending upon the characterization of the substrate.” However, the Board observed that Ecology’s geologist “did not visit the site of the spill,” and “[t]here is no evidence that he has actually investigated the geology of this specific site.”

By contrast, BNSF submitted a declaration from a geologist who was actually on site after the spill and testified that there appeared to be no percolation to or through the substrate. BNSF’s geologist specifically testified that the excavated soil samples indicated a neutral or slightly acidic pH value, the soil at the site was “silty, not course-grained or highly porous,” the ambient temperature at the spill site was below the freezing temperature of sodium hydroxide, which increased the viscosity of the spilled material, and that the sodium hydroxide was clearly visible on the soil surface, indicating that it was not percolating into the subsurface.

Comparing BNSF's and Ecology's expert testimony, the Board found that other than the declaration by its geologist, Ecology did not provide any evidence to refute BNSF's evidence. Ecology's geologist offered opinions based on "conjecture" and "did not present competent evidence supporting his opinions, . . . Ecology may not rely on speculation or argumentative assertions that unresolved factual issues remain, or rely on its affidavits at face value." The Board found that Ecology had failed to demonstrate a disputed issue of material fact regarding whether the spill percolated to or through the substrate into either the groundwater or Puget Sound.

### **A Puddle Is Still A Puddle**

The only remaining issue was whether the standing surface water where the spill occurred is "waters of the state" as defined in RCW 90.48.020. With respect to this issue, Ecology did not contend that this standing water is a wetland or part of the shoreline, but simply argued that the wetted area was "bigger than a puddle" under the definition enunciated in *BIAW v. Ecology*. Both parties submitted photographs and declarations from observers present during the cleanup. BNSF also pointedly relied on Ecology's description of the site in its penalty order as a "large puddle of water."

Here as well, the Board applied the summary judgment standard to rule that Ecology failed to meet its burden:

"The photographs show standing water, but in an amount and manner consistent with the presence of rain that was occurring and the rinsing of the tank cars. . . . It appears that the site consists of shallow depressions full of water that is muddy or dirty – i.e. puddles. . . . The Board concludes that BNSF met its initial burden to show the absence of disputed material fact regarding the characteristics of the surface water at the upland site. The evidence shows that surface water was standing water and no more than a large puddle. The evidence was sufficient to require Ecology, who has the burden in this case, to show a violation of RCW 90.48.080, and to submit competent evidence that there was a disputed issue of material fact. . . . Ecology's evidence that the wetted area on the upland site was 'larger than a puddle' fails to set forth specific facts that sufficiently rebut BNSF's contentions and disclose that a genuine issue as to a material fact exists."

The Board emphasized that both parties' photographs "show a shallow depression full of . . . muddy or dirty water, which the Superior Court in *BIAW v. Ecology* specifically defined as a puddle." The Board concluded: "Such a small, shallow depression, unconnected to any other water body, with no outlet to any other water body, and wholly transitory in nature, is not a 'water of the state' for purposes of RCW 90.48.080."

Following the Board's grant of summary judgment on this issue to BNSF, the parties reached a settlement agreement and the remainder of the appeal was dismissed.

### **Conclusion and Implications**

Although it is tempting to treat this case as much ado about a puddle, it does suggest some potentially noteworthy developments in PCHB appeal procedure. In particular, it may herald the PCHB's inclination to use summary judgment more aggressively to dispose of cases. Non-moving parties before the PCHB should take seriously the Board's admonition that a party opposing summary judgment "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." It is also possible to see this decision as a reaction to Ecology's regulatory overreaching as well as to the agency's less than rigorous response to a summary judgment motion. "Good grief," the PCHB seems to be saying, "Sometimes . . . a puddle is just a puddle."

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