

FOSTER V. ECOLOGY: ANOTHER LOOK AT “OVERRIDING CONSIDERATIONS OF THE PUBLIC INTEREST” IN WASHINGTON

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Sara Foster, et al. v. Dept. of Ecology and City of Yelm, PCHB No. 11-155 (Findings of Fact, Conclusions of Law, and Order, March 18, 2013)

In the wake of the Washington Supreme Court’s decision in *Swinomish Indian Tribal Community v. Dept. of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), a decision issued earlier in 2013 by the Washington Pollution Control Hearings Board is receiving closer scrutiny. In *Foster v. Ecology*, the PCHB upheld a new water right issued to the City of Yelm, based on the Department of Ecology’s determination that “overriding considerations of the public interest” (“OCPI”) justified a new water right conflicting with minimum instream flows and stream closures. After oral argument in the *Swinomish* case, the Swinomish Tribe submitted the PCHB’s *Foster* decision to the Supreme Court as a statement of additional authority. The PCHB’s interpretation of the OCPI exception in *Foster* foreshadowed the Supreme Court’s highly restrictive view of the exception in *Swinomish*.

Background

The City of Yelm submitted an application for a new groundwater right from a deep aquifer in the lower Nisqually and Deschutes watersheds. Because the cities of Olympia and Lacey also had pending water right applications that impacted the same water resources, the three cities joined forces to develop a regional approach to mitigation of impacts across the affected basins. The

cities' joint effort included the development of a hydrologic model and interrelated mitigation strategies.

The cities' model is considered conservative because it over-predicts potential depletions in surface waters within the modeled boundaries. The model predicted flow depletions in portions of the lower Nisqually and Deschutes watersheds from the groundwater withdrawals sought by the three cities. Accordingly, each city developed a mitigation plan which became a condition for Ecology's approval of its water right. Ecology required the cities to first provide "water for water, in time and in place" – i.e., substitution of depleted water with water from an alternative source. Where such "in kind" mitigation was not possible, Ecology required the city to make water available during critical periods on a river or stream. Where neither of those options is possible, Ecology allowed "out of kind" mitigation, such as projects to restore stream habitat.

The City of Yelm's mitigation plan called for the city to recharge the shallow aquifer system connected to Yelm Creek with reclaimed water infiltrated at a city park. The City also committed to working with the Nisqually Indian Tribe to complete "out of kind" mitigation projects to restore and enhance severely degraded portions of Yelm Creek. Impacts on other creeks will be mitigated by the cities of Olympia and Lacey. All three cities collaborated to purchase and retire irrigation rights to offset summer month depletions in the Deschutes River, which is closed from April to November 1 each year.

Although the "in kind" mitigation provides direct offset during the summer months, two "shoulder" periods (generally covering the months of April and October) exist during which modeled depletions would not be fully offset by "in kind" mitigation water. The Washington Department of Fish & Wildlife considered the modeled depletions in the Deschutes River to be fully mitigated from a fish and wildlife perspective, even during the months of April and October, because the overall mitigation plan provided increased habitat for fish.

RCW 90.54.020(3)(a) authorizes withdrawals of water which would conflict with minimum flows established by Ecology in those situations where it is

clear that overriding considerations of the public interest (“OCPI”) would be served. In approving Yelm’s water right, Ecology used OCPI to justify groundwater withdrawals during months when modeled depletions were not fully offset by “in kind” mitigation water. Ecology resorted to the OCPI exception even though Ecology and the other resource agencies determined that the combination of in-kind and out-of-kind mitigation would outweigh any impact to the stream and river flows, and even though all parties acknowledged that the groundwater model had over-predicted the small depletions in the Nisqually and Deschutes watersheds.

The PCHB affirmed Ecology’s approach, but in doing so suggested severe restrictions on the use of the OCPI exception under RCW 90.54.020(3)(a).

Restrictions on OCPI

The PCHB began its discussion of OCPI by observing that “Ecology recognizes that OCPI, like mitigation, is a case-by-case determination based upon site specific information.” This accurately foreshadowed the Supreme Court’s ruling in *Swinomish* that OCPI is a narrow exception to be applied only on a case-by-case basis. The PCHB also noted Ecology’s position that “the process and review utilized in approving Yelm’s water right application provides important limitations and sidebars regarding Ecology’s exercise of discretion in the use of the OCPI exception.”

The PCHB observed that the “interlocal effort” by the three cities is a “preferential approach to management of water resources because it allows for a larger single package of mitigation that is all connected.” The only evidence before the Board was that the cities’ mitigation plan was “large in size and scope, feasible and funded as a single, inter-connected package, and overall, excellent and effective.” The PCHB concluded that “[s]o long as depletions are fully mitigated, it does not matter which jurisdiction is furnishing what particular mitigation.”

The PCHB found that “the majority of depletions to various affected surface water bodies from Yelm pumping of SW Well 1A are fully mitigated with in-kind water, and those that are not fully mitigated with in-kind water have

been mitigated with out-of-kind efforts that serve as a substantial and compelling basis for Ecology's OCPI determination."

The PCHB concluded that "[w]hen mitigation is provided out-of-kind, close scrutiny is required to ensure that this mitigation does, in fact, provide enhanced value to fish habitat and the values of the particular water body." The PCHB explained that it was "guided by several principles" in evaluating Ecology's use of OCPI to justify allowing small modeled depletions to some surface waters. The first is the general declaration of fundamentals in the Water Resource Act, RCW 90.54.020(3)(a), authorizing the establishment of "base flows" and allowing withdrawals that conflict with such base flows only where it is clear that OCPI would be served. The PCHB also cited the authorization in RCW 90.22.010 for Ecology to establish "minimum flows or water levels" to protect fish, etc., the fact that minimum flows established by rule are treated as appropriations with priority dates as of the dates the minimum flows were established, and the fact that the Water Code "does not differentiate between impairment of existing rights based on whether the impairment is de minimus or significant."

The PCHB relied upon its prior ruling refusing to apply OCPI in *Black Diamond Associates v. Ecology*, PCHB No. 96-90 (1996), in which the Board concluded that the OCPI exception must be narrowly construed, that the burden of proving entitlement to the exception is on the party asserting the entitlement, and that the exception is applied on a case-by-case basis. The Board ruled in *Black Diamond* that the proposed appropriation must serve a public – rather than a private – interest, and that the public interest must be so great as to override the harm to other public interests, requiring a balancing test. The PCHB briefly mentioned but dismissed as "not instructive" another PCHB decision at the same time, *Auburn School District v. Ecology*, PCHB No. 96-91 (1996), in which the Board approved the use of the OCPI exception, stating that *Auburn* "should be limited to the facts in that case" – an odd observation, because that would appear to be true for any case-by-case application of the OCPI exception.

The Board reviewed the balancing test used by Ecology and concluded that in the context of the Yelm application, a more stringent test is required,

explaining: “The conflict between population growth and the lack of available water will only continue to grow in coming years. If a simple balancing test is used, environmental values, including those set out by way of instream minimum flow and stream closure regulations, can easily be dismissed because people need potable water for their homes. The very term ‘overriding consideration of public interest’ demands a more stringent approach before Ecology may, in effect, suspend rules which were carefully considered and adopted to protect a variety of values.”

The PCHB ruled that because the Yelm application involves permanent reduction in streamflow to salmon-bearing streams, “any balancing test requires more substantial mitigation than if a temporary reduction in streamflow is sought.” The Board cited with approval twelve other factors considered by Ecology:

1. Ecology will use the OCPI exception only when the water is to be used for a public purpose.
2. Ecology exhausted every feasible option to make sure that in-kind mitigation was provided before turning to out-of-kind mitigation.
3. All depletions/impacts were fully mitigated and trackable over time.
4. For out-of-kind mitigation, the benefits to fish, habitat, and “the values of the water body” were significant and clearly established through “sound science.”
5. Out-of-kind mitigation provided a permanent and net ecological benefit to the affected streams.
6. Potential impacts were estimated using a conservative hydrologic model.
7. The hydrologic model was prepared by a professional modeler, was subject to rigorous peer review, and can be modified if needed.
8. The amount of modeled depletion is so small that there is no or only minimal impact to water resources.
9. Water in streams should not be diminished during times critical to fish.
10. Stakeholders were involved and supportive of the mitigation plan.
11. Mitigation was consistent with adopted watershed plans.

12. Water conservation efforts will be utilized (e.g., use of reclaimed water).

The PCHB observed that Ecology, rather than the Board, should establish the framework of a policy or rule for the use of OCPI. The PCHB was reluctant to use an adjudicatory process to define the limits or requirements for use of OCPI, and was “hampered in this case by Ecology’s lack of a policy or rule in this area.” Nevertheless, the PCHB concluded that Ecology’s use of the OCPI exception in this case was appropriate “because there is a net ecological benefit to the streams and rivers from the mitigation package as well as municipal water supply benefits.”

Finally, the Board warned that use of OCPI “would not be sustainable were it based merely on the need to serve additional population with increased water supplies, nor where the mitigation offered was frail in comparison to the effects on instream flows and closures.”

Conclusion and Implications

The Supreme Court’s subsequent disapproval of Ecology’s basin-wide use of OCPI in the *Swinomish* decision provides additional guidance about where OCPI is not appropriate. In the *Foster* decision, purporting to be a “fact-specific” analysis of a “case-by-case” exception, the PCHB endorsed so many “sidebars” on Ecology’s application of the OCPI exception that it remains to be seen whether the exception will ever again be successfully employed.