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DEC 14 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30288-1

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR	3
III.	ISSUES RELATED TO ASSIGNMENTS OF ERROR.....	4
IV.	STATEMENT OF THE CASE.....	5
	A. Conditions at the Lemire Property	5
	B. Issuance of Ecology’s Order and Appeal to the Pollution Control Hearings Board	9
	C. Mr. Lemire’s Appeal to Columbia County Superior Court	13
V.	STANDARD OF REVIEW.....	14
	A. Scope of Review Under the Administrative Procedure Act.....	14
	B. Summary Judgment Decisions are Reviewed Under the Error of Law Standard	15
	C. Constitutional Challenges are Reviewed De Novo.....	17
VI.	ARGUMENT	17
	A. Overview of Relevant Enforcement Provisions in the State Water Pollution Control Act.....	17
	B. The Board Did Not Commit an Error of Law When It Granted Summary Judgment to Ecology Based on Undisputed Facts Demonstrating that Mr. Lemire’s Cattle had Regular and Extended Access to the Creek and Created a Substantial Potential to Pollute State Waters.....	20
	C. The Superior Court Improperly Applied APA Standards of Review When it Invalidated the Underlying Ecology	

Order Based on an Alleged “Modicum of Evidence” to Support the Order.....	24
1. The court reviewed the wrong order under the APA.	24
2. The court also applied the wrong standard of review under the APA.	25
D. Ecology’s order Does Not Constitute a Per Se Taking.....	28
1. Ecology’s order does not constitute a physical invasion of Mr. Lemire’s property.	32
2. Ecology’s order does not constitute a “total taking” as it does not deprive Mr. Lemire of all economically viable use of the property.	34
3. Ecology’s order does not destroy or derogate a fundamental attribute of property ownership.	37
E. The Award of Attorneys Fees and Other Expenses to Mr. Lemire Under the Equal Access to Justice Act was Improper.....	40
1. Attorneys’ fees under the Equal Access to Justice Act are awarded only when a party prevails.	40
2. The agency’s action was reasonable in law and fact and therefore substantially justified.....	41
VII. CONCLUSION	43

TABLE OF AUTHORITIES

Cases

<i>Alpine Lakes Prot. Soc’y v. Dep’t of Natural Res.</i> , 102 Wn. App. 1, 979 P.2d 929 (1999).....	15
<i>Bates v. Grace United Methodist Church</i> , 12 Wn. App. 111, 529 P.2d 466 (1974).....	16
<i>Conner v. City of Seattle</i> , 153 Wn. App. 673, 223 P.3d 1201 (2009).....	38
<i>Constr. Indus. Training Coun. v. State Apprenticeship & Training Coun. of Dep’t of Labor & Indus.</i> , 96 Wn. App. 59, 977 P.2d 655 (1999).....	42
<i>Dep’t of Ecology v. City of Kirkland</i> , 84 Wn.2d 25, 523 P.2d 1181 (1974)	15
<i>Fusato v. Wash. Interscholastic Activities Ass’n</i> , 93 Wn. App. 762, 970 P.2d 774 (1999).....	17
<i>Galvis v. Dep’t. of Transp.</i> , 140 Wn. App. 693, 167 P.3d 584 (2007).....	41
<i>Griffith v. Dep’t of Empl. Sec.</i> , 163 Wn. App. 1, 259 P.3d 1111 (2011).....	14
<i>Guimont v. City of Seattle</i> , 77 Wn. App. 74, 896 P.2d 70 (1995).....	29, 30
<i>Guimont v. Clarke</i> , 121 Wn.2d 586, 854 P.2d 1 (1993).....	29, 30, 32, 33, 34, 37, 39
<i>Herman v. Shorelines Hearings. Bd.</i> , 149 Wn. App. 444, 204 P.3d 928 (2009).....	27
<i>Jacobsen v. State</i> , 89 Wn.2d 104, 569 P.2d 1152 (1977).....	16

<i>Keystone Bituminous Coal Ass'n v. DeBenedictis</i> , 480 U.S. 470, 107 S. Ct. 1248, 94 L. Ed. 2d 472 (1987).....	35
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975).....	16
<i>Lingle v. Chevron U.S.A., Inc.</i> , 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).....	37
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).....	32
<i>Magula v. Benton Franklin Title Co., Inc.</i> , 131 Wn.2d 171, 930 P.2d 307 (1997).....	16
<i>Manufactured Housing Communities v. State</i> , 142 Wn.2d 347, 13 P.3d 183 (2000).....	38
<i>Maple Leaf Investors, Inc. v. Dep't of Ecology</i> , 88 Wn.2d 726, 565 P.2d 1162 (1977).....	35
<i>Margola Assoc. v. City of Seattle</i> , 121 Wn.2d 625, 854 P.2d 23 (1993).....	30
<i>Motley-Motley, Inc. v. State</i> , 127 Wn. App. 62, 110 P.3d 812 (2005).....	14, 26
<i>Orion Corp. v. State</i> , 109 Wn.2d 621, 747 P.2d 1062 (1987).....	31
<i>Peste v. Mason Cy.</i> , 133 Wn. App. 456, 136 P.3d 140 (2006).....	31, 39
<i>Presbytery of Seattle v. King Cy.</i> , 114 Wn.2d 320, 787 P.2d 907 (1990).....	31, 35
<i>Pub. Util. Dist. 1 of Pend Oreille Cy. v. Dep't of Ecology</i> , 146 Wn.2d 778, 51 P.3d 744 (2002).....	14, 19
<i>Schreiner Farms, Inc. v. Smitch</i> , 87 Wn. App. 27, 940 P.2d 274 (1997).....	35

<i>Snider v. Bd. of Cy. Comm'rs of Walla Walla Cy.</i> , 85 Wn. App. 371, 932 P.2d 704 (1997).....	35
<i>Tahoe-Sierra Pres. Coun., Inc., v. Tahoe Reg'l Planning Agency</i> , 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).....	29
<i>Thun v. City of Bonney Lake</i> , No. 40717-5-II, 2011 WL 5345374 (Wash. Ct. App. Nov. 9, 2011)....	38
<i>Verizon Nw., Inc. v. Wash. Empl. Sec. Dep't</i> , 164 Wn.2d 909, 194 P.3d 255 (2008).....	15, 16
<i>Willman v. Wash. Util. & Transp. Comm'n</i> , 122 Wn. App. 194, 93 P.3d 909 (2004).....	41
<i>Yee v. City of Escondido</i> , 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992).....	32, 33

Constitutional Provisions

U.S. Const. amend. V.....	28
Wash. Const. art. 1, § 16.....	28

Statutes

33 U.S.C. § 1313(d).....	20
Laws of 1945, ch. 216.....	17
RCW 34.05.010(11)(a)	14
RCW 34.05.558	14, 24
RCW 34.05.570(1)(a)	14, 24
RCW 34.05.570(1)(b)	14
RCW 34.05.570(3).....	25
RCW 4.84.350(1).....	41, 42

RCW 90.48	17
RCW 90.48.010	18
RCW 90.48.020	19
RCW 90.48.030	18
RCW 90.48.037	18
RCW 90.48.080	10, 18, 19, 20, 21
RCW 90.48.120	<i>passim</i>
RCW 90.48.120(1).....	20
RCW 90.48.120(2).....	20
RCW 90.48.260	19
RCW 90.48.260(1).....	19

Other Authorities

Roger D. Wynne, <u>The Path Out of Washington’s Takings Quagmire: The Case for Adopting the Federal Takings Analysis</u> , 86 Wash. L. Rev. 125-181 (2011)	39
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I. INTRODUCTION

The State of Washington, Department of Ecology (Ecology) is charged with protecting state waters and may issue administrative orders to prevent activities that cause water pollution. Ecology issued an order to Mr. Joseph Lemire, a Columbia County rancher whose practice of allowing his cattle unfettered access to Pataha Creek created a substantial potential to pollute by introducing fecal coliform, sediment, and other pollutants into the creek. Among other things, Ecology's order required Mr. Lemire to put fencing around the creek to prevent his cattle from having unrestricted access to the water. Mr. Lemire appealed Ecology's order to the Pollution Control Hearings Board (Board), particularly challenging the fencing requirement.

On appeal, the Board granted summary judgment to Ecology. The undisputed facts on summary judgment demonstrated that Mr. Lemire's cattle had regular, extended access to the creek, that the cattle defecated in and around the stream bed, and that the cattle were breaking down the stream banks surrounding the creek. The undisputed facts also demonstrated that these activities result in fecal coliform, temperature, and sediment pollution.

Mr. Lemire appealed the Board's summary judgment decision to Columbia County Superior Court. The court reversed the decision after

concluding that there were material facts in dispute. In doing so, the court failed to apply the standards of review found in the Administrative Procedure Act (APA). Instead, the court substituted its judgment for that of the Board and concluded that summary judgment was inappropriate based on facts that are not in the record or are not material to the dispute.

In addition to reversing the Board, the court invalidated Ecology's underlying order on the basis that it was supported by "only a modicum of evidence." This decision is wrong for two reasons. First, in its appellate capacity under the APA, the court was limited to reviewing the final Board order, not Ecology's underlying order. Second, no provision of the APA authorizes invalidation of an agency order based upon a purported "modicum of evidence." Again, this reflects a failure to apply the proper APA standards of review.

Last, the court invalidated Ecology's underlying order as a *per se* taking of Mr. Lemire's property. A *per se* taking can exist where: (1) the government physically invades property; (2) all economically viable uses of the property are destroyed; or (3) a fundamental attribute of property ownership is destroyed. Here, the court found none of these things but instead premised its finding of a *per se* taking on the alleged "modicum of evidence" that supported Ecology's order. In fact, the order does not result in physical invasion of Mr. Lemire's property nor does it destroy all

economically viable uses of the property or otherwise destroy any fundamental attribute of property ownership. It merely requires that Mr. Lemire keep his cattle away from the creek to prevent water pollution. This is a permissible exercise of agency authority—not a per se taking.

The Board’s summary judgment decision is proper and should be affirmed. The court’s invalidation of Ecology’s order is legally flawed and exceeds the proper scope of review under the APA. The court’s invalidation of Ecology’s order should be reversed and the order should be reinstated.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in ruling in paragraph 2 of its order that the Board’s summary judgment decision and dismissal of the appeal was erroneous based on the existence of disputed material facts.

2. The superior court erred in ruling in paragraph 3 of its order that Ecology’s order was invalid because it was supported by only a “modicum of evidence.”

3. The superior court erred in ruling in paragraph 4 of its order that Ecology’s order was invalid because it constituted a per se taking of Mr. Lemire’s property.

4. The superior court erred in paragraph 6 of its order by granting attorney's fees and costs to Mr. Lemire under the Equal Access to Justice Act.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Before the Board, it was undisputed that Mr. Lemire's cattle had regular, extended access to Pataha Creek and that Ecology observed accumulations of manure in the streambed, extensive hoof damage and erosion on the stream banks, and a lack of vegetation along stream banks due to cattle grazing and trampling. Based on these undisputed facts, did the Board commit an error of law when it concluded that Mr. Lemire engaged in activities that created a substantial potential to pollute waters of the state?

2. The superior court invalidated Ecology's order on the basis that it was supported by only a "modicum of evidence through testing, timing, and frequency of Ecology's observations" Under the APA's standards of review, did the court improperly invalidate the underlying Ecology order when it was the quasi-judicial Board's order that was subject to review?

3. When Ecology's order does not result in physical invasion of the property, destroy all economic use of the property, or destroy any

fundamental attribute of property ownership, does the order constitute a per se taking of Mr. Lemire's property?

4. Is Mr. Lemire entitled to attorney's fees and costs under the Equal Access to Justice Act?

IV. STATEMENT OF THE CASE

A. Conditions at the Lemire Property

In 2003, Ecology and the Columbia Conservation District (Conservation District) performed a watershed evaluation in Columbia County. As part of this evaluation, Ecology and the Conservation District assessed stream corridors to determine the existence of any activity or conditions that would negatively impact water quality. The agencies identified Mr. Lemire's ranch as having conditions detrimental to water quality. Administrative Record (AR) Doc. 7, Atkins Decl. at 2, ¶ 8.¹

The Lemire Property is intersected by Pataha Creek, which runs through the property for approximately 5,000 feet. *Id.* at 2, ¶ 6. Pataha Creek is on a state list of polluted waterbodies. *Id.*, at 2, ¶ 4. The listing of polluted waterbodies is a requirement of the federal Clean Water Act, which requires states to identify those waterbodies that fail to meet state water quality standards. Pataha Creek is on the list because it fails to meet

¹ Citations to the Administrative Record will appear as AR followed by the document number, a short description of the document, page number and, for declarations with numbered paragraphs, paragraph number.

state water quality standards for fecal coliform, pH, temperature, and dissolved oxygen. *Id.*

In reaching its conclusion that Mr. Lemire's ranch contributes to water quality impairment, Ecology observed and documented cattle management operations at the Lemire property on eight occasions between 2003 and 2009. *Id.* at 3, ¶ 9. Inspections were conducted by Chad Atkins, an Ecology Water Quality Specialist with expertise in agricultural and livestock pollution. *Id.* at 1, ¶ 2. Mr. Atkins holds an environmental science degree and has additional training in water quality and stream erosion processes. He has reviewed hundreds of published studies on water quality and livestock and has over ten years experience working with livestock producers in Eastern Washington to help them implement practices designed to prevent pollution and protect state waters. *Id.* at 1-2, ¶ 3.

During each inspection, Mr. Atkins observed cattle with direct and uncontrolled access to Pataha Creek, manure visible in the stream corridor, severe overgrazing of the stream corridor, cattle confinement areas adjacent to the stream, numerous bare ground cattle trails leading to and along Pataha Creek, extensive hoof damage and erosion along stream banks, and a lack of vegetation by the stream due to livestock grazing and trampling. *Id.*, at 3 ¶¶ 9-10. Although Ecology made several attempts to

offer technical and financial assistance to Mr. Lemire, conditions at his property did not improve over the years. *Id.* at 9, ¶ 19, at 13-14, ¶ 32. Based on these consistent observations of the Lemire property, Ecology concluded that the regular and extended access of cattle to Pataha Creek over the course of many years created a substantial potential to cause water pollution. *Id.*

Regular and extended livestock access to streams results in defecation both in and adjacent to surface waters. *Id.* at 4-5, ¶ 11. Fecal matter enters surface waters by being directly deposited in the water or through surface runoff and groundwater. *Id.* Infectious organisms in animal waste can exist in the waste for up to one year (fecal coliform) and in the water for up to six weeks (fecal coliform and fecal streptococcus). *Id.* Therefore, manure accumulations near streams can cause infectious organisms to enter the stream long after the waste is deposited by the animal. *Id.*

The presence of fecal coliform and other infectious organisms in a waterbody is a serious public health issue. *Id.* at 5, ¶ 12. Their presence can spread numerous diseases to humans and animals, including salmonellosis, leptospirosis, anthrax, and brucellosis. *Id.* Fecal coliform contamination can also impair a stream by depleting oxygen needed by

fish and other aquatic animals, affecting the pH balance of the water, and creating odor problems. *Id.*

Regular and extended access of cattle to streams also causes sediment and temperature pollution. *Id.* at 6, ¶ 13. This occurs because cattle hooves exert pressure on the streambank, causing sediment in the streambank to slough off into the stream. *Id.* Also, when cattle remove excess amounts of vegetation from streambanks through grazing or trampling, the banks become unstable and erode into the stream. *Id.* The additional sediment in the stream creates shallower water and increased temperature as a result of increased solar heating of the water. *Id.* The removal of streambank vegetation decreases the shade that would otherwise be available to cool the water. *Id.* Also, more precipitation runs off into the stream when banks are compacted or eroded, further driving temperatures up because water from precipitation is typically warmer than the receiving waterbody. *Id.*

Temperature is important to the health of a stream because it governs the type of aquatic life that can live in the stream. *Id.* at 6-7, ¶ 14. Temperatures too far above or below a preferred range can impact a species' overall population. *Id.* Warm water engenders increased growth of algae and bacteria, which can negatively impact aquatic habitat and

human health. Also, warm water holds less oxygen than cool water, which can result in too little oxygen for some aquatic species. *Id.*

There are other pollution impacts that arise when cattle are given unfettered access to a stream. For example, manure, sediment, and urine discharges can result in increased pH which affects the chemistry of the stream. *Id.* at 7, ¶ 15. Sediment pollution reduces or ruins shelter and spawning areas for fish. *Id.* at 8-9, ¶ 17. Bank erosion from cattle trampling the banks increases stream velocity which in turn increases the erosive power of the stream, thereby increasing sediment pollution. *Id.* Increased nutrient loading from animal waste decreases dissolved oxygen levels, further impacting aquatic species. *Id.* at 7-8, ¶ 16. It is these serious pollution problems, combined with conditions observed over many years at the Lemire property, that led Ecology to conclude it needed to take action to protect Pataha Creek.

B. Issuance of Ecology's Order and Appeal to the Pollution Control Hearings Board

Beginning in 2003, Ecology made several attempts to give Mr. Lemire technical and financial assistance to improve the conditions at his property. *Id.* at 9, 13-14, ¶¶ 19, 32. After years of unsuccessfully urging Mr. Lemire to voluntarily improve his cattle operations, Ecology issued an administrative order on November 23, 2009, directing Mr.

Lemire to take four actions. Attachment (Att.) 1.² First, Mr. Lemire was directed to develop a plan for Ecology approval that stated how he would prevent pollution and protect water quality. The plan required several elements, including livestock exclusion fencing to prevent cattle from having unrestricted access to the stream. Att. 1 at 4-5. Second, the order required Mr. Lemire to implement the practices in the approved plan. *Id.* at 5. Third, the order directed Mr. Lemire to allow Ecology to inspect for the purpose of ensuring compliance with the order. *Id.* Fourth, the order required Ecology to review and approve any changes to the plan. *Id.*

Ecology's order was issued under two provisions of the state Water Pollution Control Act: RCW 90.48.080 and RCW 90.48.120. RCW 90.48.080 prohibits the discharge of pollutants into waters of the state. RCW 90.48.120 allows Ecology to issue a corrective order whenever Ecology determines that someone has violated or creates a substantial potential to violate the Water Pollution Control Act. Based on its observations of Mr. Lemire's ranch, Ecology concluded that Mr. Lemire operated his ranch in a way that created a substantial potential for a discharge of pollutants.

² Ecology's order was attached to Mr. Lemire's notice of appeal filed with the Board. AR Doc. 1. For ease of reference, Ecology has added page numbers to the order and attached the order to this brief.

Mr. Lemire appealed Ecology's order to the Board. He raised numerous issues that were dismissed for lack of jurisdiction.³ Ecology moved for summary judgment on the remaining issues. AR Doc. 7, Ecology Motion to Dismiss and Motion for Summ.J. To support summary judgment, Ecology submitted the declaration of its Water Quality Specialist, Chad Atkins, who had observed the property many times from 2003 through 2009, when Ecology issued the order. Mr. Atkins documented his observations on each of these site visits and provided expert testimony about the serious pollution problems that arise from conditions such as those present on the Lemire property. AR Doc. 7, Atkins Decl.

In response, Mr. Lemire admitted that his cattle had unrestricted access to the creek for many months out of the year. AR Doc. 9, Lemire Decl. at 5. He also admitted that there were cattle trails leading to the creek and that some grazing occurs on stream banks. *Id.* However, he noted that he implemented some best management practices such as locating salt licks and feeding areas away from the creek and that he believes these practices generally keep the cows away from the water. *Id.* at 3-4. Mr. Lemire disputed that there is much risk of serious disease from

³ For example, the Board dismissed issues involving alleged Freedom of Information Act violations, alleged tort claims involving infliction of harm and emotional distress, and constitutional takings issues. CP at 13-15. With the exception of the takings issue, Mr. Lemire did not resurrect the dismissed issues in his appeal to superior court.

fecal coliform or other infectious organism contamination, but he did not support his assertions with expert testimony. *Id.* at 6-7. Mr. Lemire did not dispute Mr. Atkins's conclusions that conditions at his property could lead to sediment pollution, increases in temperature and pH, and a decrease in dissolved oxygen. *Id.*, generally.

On summary judgment the Board concluded that that there were no material facts in dispute and that Ecology had met its burden of demonstrating that conditions at the Lemire property create a substantial potential to pollute. Therefore, the Board granted summary judgment to Ecology:

It is undisputed in the record before us on summary judgment that cattle have access to the creek, cross it, and have, at a minimum, the potential to deposit organic material in the stream and around the riparian corridor. Mr. Lemire disputes the amount of time the cattle may stay in and around the creek, but concedes the cattle "trail across the creek to pasture" (but he adds, in "small trails"), and that "some grazing does occur on banks" (but, he states with heavy vegetated cover)...Mr. Lemire's Declaration notes that he has installed fencing to address areas where the cattle were breaking down banks, and to direct the cattle to more desirable areas for ingress and egress. Thus, in key respects, Mr. Lemire's statements confirm the observations made by Ecology.

Ecology does not need to present scientific analysis that the livestock wandering or crossing the stream actually caused pollution of the waters of the state, nor does Ecology have to rule out all other contributing factors...Ecology need only show that the actions at the Lemire property posed substantial potential to discharge pollution to the waters of the state. Ecology has met its

burden by presenting the detailed observations of well-qualified Water Quality Specialist, with expertise in Agricultural, Livestock, and Non-point Source Pollution.

Mr. Lemire cannot defeat summary judgment by reliance on other, conclusory allegations that state that his cattle management practices have no potential to pollute, particularly in light of the documented inspections by Ecology over a multi-year period. Mr. Lemire's assertions of the use of [best management practices] and his observations as to how cattle will behave, are simply not sufficient to create a material issue of fact with respect to presence of cattle along and in the stream. The undisputed fact that cattle travel in and through the riparian corridor and stream, depositing manure as they travel, serves as an adequate basis for the Administrative Order and allows us to conclude that Ecology appropriately issued the Order to address water pollution concerns.

CP at 18-19.

C. Mr. Lemire's Appeal to Columbia County Superior Court

Mr. Lemire filed a petition for judicial review of the Board's decision with the Columbia County Superior Court. CP at 1-21. Following briefing and oral argument by the parties, the court ruled that Ecology's order was invalid. CP at 190-92. First, the court concluded that the Board should not have granted summary judgment to Ecology because there were genuine issues of material fact. CP at 191. However, rather than remand to the Board for an evidentiary hearing, the court next concluded that Ecology's order was invalid "because there was such a modicum of evidence through testing, timing and frequency of Ecology's observations to substantiate the Administrative Order." *Id.* Last, the court

concluded that Ecology's order constituted a per se taking of Mr. Lemire's property and based this conclusion in part on the alleged "modicum of evidence" that supported the issuance of the order. *Id.* The court also granted attorney's fees and costs to Mr. Lemire under the Equal Access to Justice Act. *Id.* This appeal follows.

V. STANDARD OF REVIEW

A. Scope of Review Under the Administrative Procedure Act

In an APA appeal, the appellate court sits in the same position as superior court and applies the APA standards of review directly to the administrative record rather than the superior court record. *Griffith v. Dep't of Empl. Sec.*, 163 Wn. App. 1, 6, 259 P.3d 1111 (2011); RCW 34.05.558 (court's review of facts confined to the record). The burden of demonstrating the invalidity of the agency's decision is on the party asserting invalidity, in this case, Mr. Lemire. RCW 34.05.570(1)(a). *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 71-72, 110 P.3d 812 (2005).

The standards of review are to be applied to the agency action at the time it was taken. RCW 34.05.570(1)(b); *Pub. Util. Dist. 1 of Pend Oreille Cy. v. Dep't of Ecology*, 146 Wn.2d 778, 789-90, 51 P.3d 744 (2002). It is the final agency action that is subject to review. *See* RCW 34.05.010(11)(a) (defining order as a written statement that "finally

determines” the legal rights or duties of a person); *Dep’t of Ecology v. City of Kirkland*, 84 Wn.2d 25, 30, 523 P.2d 1181 (1974) (agency order is reviewable when it imposes an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process). In this case, the Board’s order is the final order and it is that order which the Court reviews.

B. Summary Judgment Decisions are Reviewed Under the Error of Law Standard

Here, the Board granted summary judgment to Ecology. “[W]here the original administrative decision was on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard.” *Verizon Nw., Inc. v. Wash. Empl. Sec. Dep’t*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). The decision is reviewed directly, based on the record before the Board. *Alpine Lakes Prot. Soc’y v. Dep’t of Natural Res.*, 102 Wn. App. 1, 14, 979 P.2d 929 (1999). Thus, the relevant record for this Court’s review consists of the summary judgment briefing of the parties, with accompanying declarations of Mr. Atkins and Mr. Lemire. AR Docs. 7, 9.

The propriety of summary judgment is a question of law, and therefore courts do not apply the substantial evidence standard typically used for factual findings. *Verizon*, 164 Wn.2d at 916 n.4. The facts in the

administrative record are viewed in the light most favorable to the non-moving party, and the law is evaluated de novo under the error of law standard. *Id.* at 916. Under this standard, substantial weight is accorded to an agency’s interpretation of a statute within its expertise. *Id.* at 915. “Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law.” *Id.* at 916.

“[T]he moving party bears the burden of demonstrating an absence of any genuine issue of material fact[.]” *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). “A ‘material fact’ is one upon which the outcome of the litigation depends.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The court must resolve all reasonable inferences from the evidence in favor of the non-moving party. *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974). However, this does not require the party moving for summary judgment to meet “every speculation, conjecture or possibility by alleging facts to the contrary.” *Id.* The non-moving party “may not rest on mere allegations in the pleadings but must set forth specific facts showing that there is a genuine issue for trial.” *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

C. Constitutional Challenges are Reviewed De Novo

The superior court invalidated Ecology's underlying order on constitutional grounds by ruling that it constituted a per se taking of Mr. Lemire's property. Constitutional challenges to an agency action are reviewed de novo by the court of appeals. *Fusato v. Wash. Interscholastic Activities Ass'n*, 93 Wn. App. 762, 767, 970 P.2d 774 (1999). The superior court did not admit new evidence prior to ruling on the constitutional issue. Therefore, this Court reviews the constitutional issue based on the record before the Board.

VI. ARGUMENT

A. Overview of Relevant Enforcement Provisions in the State Water Pollution Control Act

Ecology issued its order to Mr. Lemire under the state Water Pollution Control Act, Chapter 90.48 RCW. This Act was passed by the legislature in 1945. Laws of 1945, ch. 216. It serves the broad purpose of ensuring the integrity and purity of our state waters:

It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as

effectively as possible, to retain and secure high quality for all waters of the state.

RCW 90.48.010.

Ecology is the agency charged with implementing the broad pollution-prevention policy of the Act. Specifically, Ecology has the responsibility and 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” RCW 90.48.030. To fulfill its responsibilities, Ecology is authorized to issue orders not only for actual violations of the Act but for activities that create a substantial potential to violate the Act. RCW 90.48.120. Ecology may also pursue any appropriate action at law or equity to carry out the provisions of the Act. RCW 90.48.037.

Ecology issued the order to Mr. Lemire under its state law authority to address activities that create a substantial potential to violate the state Act. RCW 90.48.120. Specifically, Ecology concluded that that Mr. Lemire’s operations created a substantial potential to violate RCW 90.48.080, which broadly prohibits the discharge of polluting matter into state waters:

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 discharge into such waters

any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

RCW 90.48.080

Pollution, in turn, is broadly defined to include:

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 livestock, wild animals, birds, fish or other aquatic life.

RCW 90.48.020.

In addition to its broad state law authorities to prevent pollution, Ecology is charged with implementing the federal Clean Water Act within the state. RCW 90.48.260. This authority is also broad and includes authorization to “participate fully in the programs of the act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of that act.” RCW 90.48.260(1); *Pub. Util. Dist. 1 of Pend Oreille Cy.*, 146 Wn.2d at 807, 819-20.

Although the order issued to Mr. Lemire is based on state law authority, the state Act’s relationship with the federal Clean Water Act is relevant insofar as Pataha Creek is on the federal list of polluted waterbodies required under Section 303(d) of the Clean Water Act. AR

Doc. 7, Atkins' Decl. at 2, ¶ 4. Once a waterbody is on this list, Ecology is required to devise and implement a plan to address the pollutants that are contributing to degradation of the waterbody. 33 U.S.C. § 1313(d). Pataha Creek is polluted for fecal coliform, pH, temperature, and dissolved oxygen. AR Doc. 7, Atkins' Decl. at 2, ¶ 4. Ecology's order is aimed at preventing further degradation of the creek by these pollutants.

B. The Board Did Not Commit an Error of Law When It Granted Summary Judgment to Ecology Based on Undisputed Facts Demonstrating that Mr. Lemire's Cattle had Regular and Extended Access to the Creek and Created a Substantial Potential to Pollute State Waters

RCW 90.48.120 authorizes Ecology to issue an order "Whenever, in the opinion of the department, any person shall violate or creates a substantial potential to violate the provisions of this chapter" RCW 90.48.120(1).⁴ Based on the summary judgment record, the Board concluded that Mr. Lemire's operations created a substantial potential to violate RCW 90.48.080 by resulting in the discharge of pollutants to state waters.

⁴ Before issuing a formal order, Ecology typically first provides notice of its determination to the violator and gives the violator an opportunity to file a report demonstrating the steps being taken to prevent pollution or otherwise comply with Ecology's determination. RCW 90.48.120(1). However, Ecology can issue an order without first issuing a notice of determination "whenever the department deems immediate action is necessary to accomplish the purposes of this chapter" RCW 90.48.120(2). In this instance, Ecology worked with Mr. Lemire for over five years before sending him a warning letter requiring him to file the report required by RCW 90.48.120(1). AR Doc. 7, Atkins' Decl. at 13-14, ¶ 32. When that was unsuccessful, the present order was issued.

The Board correctly interpreted and applied RCW 90.48.120 and RCW 90.48.080 to the facts of this case. The undisputed facts presented on summary judgment demonstrated that Mr. Lemire's cattle operations created a substantial potential for:

- (1) a discharge—because Mr. Lemire's cattle had unfettered access to the creek, and cattle with unfettered access to a creek will introduce fecal matter and sediment into the creek; runoff from cattle trails will introduce fecal matter and sediment; and cropping by cattle of vegetation on creek banks will introduce sediment;⁵
- (2) of organic and inorganic matter—fecal matter and sediment;⁶
- (3) into waters of the state—Pataha Creek;⁷
- (4) that will cause or tend to cause pollution—fecal matter in water tends to cause fecal coliform and other infectious bacterial contamination; sediment discharge in water tends to change the temperature of the water and to increase its turbidity; and fecal matter and sediment in water tend to alter the chemical concentration of water by causing higher

⁵ AR Doc. 7, Atkins' Decl. at 4-5, ¶ 11; at 6, ¶ 13; at 8-9, ¶ 17.

⁶ AR Doc. 7, Atkins' Decl. at 4-5, ¶ 11; at 8-9, ¶ 17.

⁷ AR Doc. 7, Atkins' Decl. at 2, ¶ 6.

pH and lower dissolved oxygen which is harmful to fish and other aquatic life.⁸

Mr. Lemire made no attempt to dispute the core facts that led to the Board's conclusion. As noted in the Statement of the Case, Mr. Lemire admitted that his cows had regular unrestricted access to the creek. In fact, he categorically rejected any approach that would require fencing around the creek on the basis that doing so "would disrupt the cattles [sic] 'natural movement.'" AR Doc. 9, Lemire Decl. at 5. Mr. Lemire also made no attempt to dispute Ecology's expert testimony on the pollution problems caused by allowing cattle to have regular access to a water body other than to suggest (without expertise) that not all of the illnesses caused by fecal bacteria are likely to occur in Washington. *Id.* at 7-8.

Rather than dispute the core facts that form the basis of Ecology's order, Mr. Lemire instead emphasized that he put some practices in place to try to tempt the cows away from the creek, such as locating salt licks and water tanks away from the creek. *Id.* at 3-5. Although Mr. Lemire deserves to be commended for recognizing the problem and taking some actions to try to keep the cows away from the water, the fact is that Mr. Lemire himself admitted that the cows have regular and extended access to the creek for many months out of the year. He admitted that the

⁸ AR Doc. 7, Atkins' Decl. at 4, ¶ 11; at 5, ¶ 12; at 6, ¶ 13; at 6-7, ¶ 14; at 7, ¶ 15; at 7-8, ¶ 16; at 8-9, ¶ 17; at 9, ¶ 18.

cows graze on stream banks, that they regularly cross the creek to reach salt and water, and that they have contributed to the breaking down of stream banks. *Id.* at 5. In other words, the measures that Mr. Lemire currently has in place are not enough to prevent the pollution problems caused by cows accessing the creek and spending time on creek banks. These are the problems that Ecology's order seeks to address.

Mr. Lemire also argued that Ecology's testing protocols were flawed and that it could be wildlife rather than livestock that are polluting Pataha Creek. *Id.* at 8. Ecology does not agree with Mr. Lemire's statements about its testing protocols, but this is immaterial to the dispute. Ecology's order does not rest on any testing that Ecology conducted. Rather, the order rests on Ecology's repeated observations over a period of several years of conditions at the Lemire property "which have conclusively been shown to impact water quality." AR Doc. 7, Atkins' Decl. at 3-4, ¶ 10.

Regarding whether wildlife might also be polluting Pataha Creek, the Board properly concluded that Ecology does not have to rule out every other possible source of contamination before concluding that Mr. Lemire's operations create a substantial potential to pollute. CP at 19. The Board also noted that many of Mr. Lemire's statements are conclusory allegations, insufficient to defeat summary judgment. *Id.*

Based on the record before it, the Board properly concluded that Ecology met its burden of demonstrating a substantial potential to pollute. This Court limits its review to the Board's record and considers the validity of the Board's action at the time it was taken. RCW 34.05.558, .570(1)(a). The Board did not commit an error of law by granting summary judgment to Ecology, and the Board's decision should therefore be affirmed.

C. The Superior Court Improperly Applied APA Standards of Review When it Invalidated the Underlying Ecology Order Based on an Alleged "Modicum of Evidence" to Support the Order

The superior court concluded that summary judgment was inappropriate due to the existence of material disputed facts. CP at 191. However, rather than remanding to the Board for a full evidentiary hearing, the court then looked beyond the Board's order to the underlying Ecology order and invalidated that order based on an alleged "modicum of evidence" to support it. In doing so, the court failed to confine its analysis to the final Board order and failed to properly apply the APA standards of review. The superior court's invalidation of Ecology's order is erroneous and should be reversed.

1. The court reviewed the wrong order under the APA.

As noted in the Standard of Review section, review under the APA is limited to the agency's final order—in this case, the Board's order.

Once the court ruled that the Board's order was erroneous, the court should have stopped there and determined the appropriate relief. However, the court did not stop there. Instead, it reached around the Board's order and proceeded to review Ecology's underlying order. This was erroneous.

2. The court also applied the wrong standard of review under the APA.

The APA authorizes a court to grant relief from an agency's order only if it determines that:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court...
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification...was made and was improperly denied...
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

Here, the court did not identify any basis under the APA for invalidating Ecology's underlying order. Rather, the court invalidated the order based on a perceived "modicum of evidence" to support the order. This is perhaps closest to the "substantial evidence" standard of review which allows a court to reverse an agency's findings of fact if they are not supported by substantial evidence in the record. *See, e.g., Motley-Motley*, 127 Wn. App. at 77. However, the application of this standard is inappropriate here. The Board did not make any findings of fact because the matter was resolved on summary judgment which is subject to the error of law standard of review. The court simply did not have a basis under the APA for invalidating Ecology's order.⁹

The court's ruling appears to be based on what the court perceived as few and far-between visits to the Lemire property during which Ecology observed "a cow or two cross the creek" Verbatim Report of Proceedings (VRP) 5:8-13.¹⁰ The court was also under the erroneous impression that all of Ecology's site visits took place in the wintertime.¹¹ VRP 4:23-25. Last, the court was concerned about Ecology's testing

⁹ The court also invalidated the order as a constitutional taking which is discussed in the next section of this brief.

¹⁰ Citations to the verbatim report of proceedings from the superior court will appear as VRP page number:line number.

¹¹ Ecology visited the site eight times overall and four times in 2009 prior to issuance of the order in 2009. The four site visits in 2009 occurred during March, April, and May. AR Doc. 7, Atkins' Decl. at 3, ¶ 9.

protocols and was under the erroneous impression that the “pollution quantity was higher upstream . . . from Mr. Lemire’s property that it was . . . just a half mile downstream from his property.”¹² VRP 5:16-19.

In essence, the court put itself into the shoes of the initial decision maker and invalidated Ecology’s order based on the court’s belief that the order was too onerous¹³ and that Ecology’s motives in issuing the order were questionable.¹⁴ The court also erroneously concluded that Ecology needed to demonstrate actual pollution as opposed to a substantial potential to pollute. *See* VRP 6:11-13 (“[T]he record is absolutely absent of any evidence—direct evidence—that Mr. Lemire’s modest herd actually polluted Pataha creek.”).¹⁵

Under the APA, a superior court sits in a limited appellate capacity and must confine its review to the standards of review set forth in the APA. *See, e.g., Herman v. Shorelines Hearings Bd.*, 149 Wn. App. 444,

¹² Nothing in the record supports this conclusion. It instead appears to be based on arguments made in Mr. Lemire’s briefing.

¹³ “[T]hat was pretty thin evidence to be issuing such a potentially onerous, demanding, expensive administrative order . . .” VRP 5:8-10. “If you’re going to impose an administrative order as exacting . . . as this one was, and as expensive as this one clearly would be . . . shouldn’t there be something more shown by . . . Ecology . . .” VRP 5:20-6:3.

¹⁴ “It’s clear to me that the administrative order was issued not so much based on those extremely modest modicum of . . . observation as it was on their disenchantment with Mr. Lemire not coming to the table and working something out with them on a plan that both sides could live with.” VRP 5:1-5.

¹⁵ This statement not only reflects the court’s misunderstanding of what Ecology needed to demonstrate, but it is also factually inaccurate. Ecology did observe discharges of sediment into the stream from the Lemire property. AR Doc. 7, Atkins’ Decl. at 4, ¶ 10.

455, 204 P.3d 928 (2009). Thus, the court should have restricted its review to whether the Board committed an error of law in granting summary judgment to Ecology. The court erred by reaching around the Board's order and invalidating the underlying Ecology order on grounds that do not constitute a basis for relief under the APA. Thus, the court's invalidation of Ecology's order based on a "modicum of evidence" to support it should be reversed.

D. Ecology's order Does Not Constitute a Per Se Taking

The superior court additionally invalidated Ecology's order as a per se taking of property. The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use, without just compensation. U.S. Const. amend. V. ("[N]or shall private property be taken for public use, without just compensation.") Article 1, Section 16 of the Washington State Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation." Wash. Const. art. 1, § 16. Thus, key to a takings analysis is whether private property has been taken or damaged and, if so, what compensation is due and owing.

The State is vested with the power to regulate for the health, safety, morals, and general welfare, and the burdens imposed incidental to such regulations are not takings unless the burdens manifest in certain,

enumerated ways. See *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993) (articulating analytical framework for evaluating per se and regulatory takings claims and substantive due process); *Tahoe-Sierra Pres. Coun., Inc., v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (articulating requirements for federal regulatory takings). The Washington Supreme Court has laid out a framework for evaluating claims that a government action takes property, which requires a two part threshold inquiry. A court performs a takings analysis only if the threshold inquiry indicates a takings analysis is appropriate. See *Guimont*, 121 Wn.2d at 601-04.

As part of the first threshold inquiry, the court must determine if there has been a per se taking (also known as a categorical taking). *Guimont*, 121 Wn.2d at 600. “A per se violation of the taking clause occurs when the regulation constitutes either a ‘total taking’ or a ‘physical invasion’ of the property or destroys a fundamental attribute of ownership.”¹⁶ *Guimont v. City of Seattle*, 77 Wn. App. 74, 80, 896 P.2d 70 (1995); see also *Guimont*, 121 Wn.2d at 601-02, 605. A “total taking” occurs only when the regulation denies the owner all economically

¹⁶ As discussed below, Washington courts have not been entirely clear on whether destruction of a fundamental attribute of ownership is a third type of per se taking or whether a per se takings analysis only analyzes whether fundamental attributes of ownership are impaired through “physical invasions” or “total takings”. This brief analyzes the issues as though there are three types of per se takings, but we recognize that the Court may conclude that only the first two types are recognized.

beneficial or productive use of the property. *Guimont*, 77 Wn. App. at 80. A “fundamental attribute of ownership” includes the right to possess, exclude others from or dispose of property. *Id.*

A landowner alleging a per se taking must first prove that the regulation, as applied, is a “physical invasion” or “total taking” or destroys or derogates a fundamental attribute of property ownership. *Guimont*, 121 Wn.2d at 602. If a landowner can establish elements of a per se taking and the government cannot rebut the claim, a taking has occurred, no further analysis is required, and the landowner is entitled to “categorical treatment” and to receive just compensation under the Fifth Amendment. *Guimont*, 77 Wn.App at 81 (citing *Guimont*, 121 Wn.2d at 600). “However, if the landowner alleges a ‘physical invasion’ or ‘total taking’ and fails to prove either has occurred, then there is no per se constitutional taking requiring just compensation.”¹⁷ *Margola Assoc. v. City of Seattle*, 121 Wn.2d 625, 644-45, 854 P.2d 23 (1993) (citing *Guimont* 121 Wn.2d at 603).

¹⁷ If the landowner claims less than a physical invasion or a total taking and if a fundamental attribute of ownership is not otherwise implicated, then the court reaches the second threshold question. *Guimont*, 121 Wn.2d at 603. The superior court found Ecology’s order was a per se taking, and did not reach the second threshold question or the substantive due process claim. Therefore this brief focuses only on the issue of whether the superior court erred in finding a per se taking.

Mr. Lemire presented no evidence to prove that Ecology's order affects a "physical invasion" or "total taking" or destroys or derogates a fundamental attribute of property ownership. No new evidence was submitted to the superior court on the takings issue. In reviewing the record, there is no support for the superior court's determination that Ecology's order was a per se taking. In making the determination that there was a per se violation, the superior court did not specify whether Ecology's order constitutes a "physical invasion" of the property or a "total taking" or destroys a fundamental attribute of property ownership. Instead the court found that there was a per se taking of Mr. Lemire's property due to the "modicum of evidence" that supported Ecology's order. CP at 191. Such reasoning does not support a finding of a per se taking.

The court further erred by invalidating Ecology's order after concluding that it constituted a per se taking. The remedy for a taking is the payment of just compensation, not invalidation of the underlying regulation. *See Orion Corp. v. State*, 109 Wn.2d 621, 649, 656, 747 P.2d 1062 (1987); *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 329-32, 787 P.2d 907 (1990); *Peste v. Mason Cy.*, 133 Wn. App. 456, 470, 136 P.3d 140 (2006). Thus, even if a taking had occurred, the court should

have determined whether compensation was owed rather than invalidate Ecology's order.

As detailed below, however, the record does not support that Ecology's order is either a "physical invasion" or "total taking" and there are no fundamental attributes of property ownership which are destroyed or derogated. Therefore the Court should find there is no per se taking and that no remedy is warranted.

1. Ecology's order does not constitute a physical invasion of Mr. Lemire's property.

Central to a court's decision on whether there has been a per se taking is whether the challenged regulation constitutes a permanent invasion of land, amounting to an appropriation of, and not merely an injury to, the property. "The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Washington's Supreme Court has stated that "[t]o prove that the government has effected a physical taking through its regulation, the landowner must show that the regulation 'requires the landowner to submit to the physical occupation of [his or her] land.'" *Guimont*, 121 Wn.2d at 607 (quoting *Yee v. City of Escondido*, 503 U.S.

519, 112 S. Ct. 1522, 1528, 118 L. Ed. 2d 153, 165 (1992)) (emphasis in original). Where the landowner has other options for use of his property there is not a physical per se taking.

For example, the U.S. Supreme Court in *Yee*, 503 U.S. 519, found that a local rent control ordinance did not amount to a physical taking of a park owner's property because it did not require the landowner to submit to the physical occupation of his or her land. The park owners had several options regarding use of their property which would not trigger application of the ordinance. For example, the park owners could evict the tenants and change the use of their land. The court reasoned that since options remained available to the park owners, the regulation was therefore of the owners' *use* of the property and was not a per se physical taking. *Yee*, 503 U.S. at 527-29.

In a similar case, the Washington Supreme Court rejected a physical per se taking argument in a challenge to the Mobile Home Relocation Assistance Act. Noting the U.S. Supreme Court's reasoning in *Yee*, the Washington Supreme Court found that nothing on the face of the Act required the park owners to allow others to occupy their land, and therefore the Act was not a physical per se taking. *Guimont*, 121 Wn.2d at 608.

Ecology's order does not require physical occupation without any option for the landowner. Mr. Lemire's primary objection to the administrative order is the requirement that he submit (and then implement) a plan to prevent pollution and protect water quality that includes livestock exclusion fencing to keep animals away from the creek. By its own terms, the order does not require Mr. Lemire to permit Ecology or a third party to enter the property and install a fence. It is only if the property is being used by Mr. Lemire for pasture or rangeland grazing that Mr. Lemire must develop a plan which includes livestock exclusion fencing and implement that plan to prevent his cattle from having unrestricted access to Pataha Creek. Att. 1 at 4-5. As in *Yee*, the regulation may affect how Mr. Lemire uses his property but it does not impose a physical invasion of the property. Thus, there is no per se taking based on physical invasion of the property.

2. Ecology's order does not constitute a "total taking" as it does not deprive Mr. Lemire of all economically viable use of the property.

If the court finds no physical invasion, it next considers whether the government has committed a per se taking by denying the property owner "all economically viable use." *Guimont*, 121 Wn.2d at 600. It is important here to analyze the regulation's impact on the property as a whole, and not just on a portion of the property. Takings jurisprudence

does not divide a parcel of land into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. *Presbytery of Seattle*, 114 Wn.2d at 334. Instead, the court focuses “both on the character of the action and on the nature of the interference with rights in the parcel as a whole” *Presbytery of Seattle*, 114 Wn.2d at 334 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1248, 94 L. Ed. 2d 472 (1987)).

It is also important to assess whether there is *any* profitable use of the remaining property available. The remaining use does not have to be the owner’s planned use, a prior use, or the highest and best use of the property. *Snider v. Bd. of Cy. Comm’rs of Walla Walla Cy.*, 85 Wn. App. 371, 381, 932 P.2d 704 (1997); *see also Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 35-37, 940 P.2d 274 (1997) (a regulation prohibiting possession, sale, transfer or release of elk was not a “total taking” because an elk farm could sell the elk-handling equipment and use the property for another purpose). Courts have noted that when a portion of the property remains useable, the regulations have not prevented all profitable use of the property. *See Maple Leaf Investors, Inc. v. Dep’t of Ecology*, 88 Wn.2d 726, 734, 565 P.2d 1162 (1977) (the court denied a “total takings”

claim as 30 percent of the property was still usable after flood control regulations were applied).

Ecology's order requires Mr. Lemire to submit a plan to prevent pollution and to protect water quality. Mr. Lemire has argued that placing the livestock exclusion fencing required by Ecology's order will keep him from using the riparian area, thus impacting his cattle ranching activities. However, Mr. Lemire presented no evidence that the order will have *any* economic impact on his property, let alone deprive him of *all* economic use of the regulated property. To the contrary, the area to be fenced for exclusion of cattle does not constitute all of Mr. Lemire's property, or even a majority of his property. While the livestock elimination fencing creates a buffer of 7.23 acres of non-riparian land from which cattle are to be restricted, Mr. Lemire has 114 acres of pastureland and 152 acres of cropland. CP at 66. A significant portion (over 97 percent) of Mr. Lemire's property is completely unaffected by the fencing requirement.

Furthermore, Ecology's order does not prohibit all use of even the fenced off area. Mr. Lemire is required to submit a plan that includes livestock exclusion fencing. The plan may include provisions allowing for limited access for cattle to cross the creek to reach other pastures and providing for off-creek drinking water supply. The creek also can be used for recreational and other purposes that do not involve letting cattle spend

extended time in the near vicinity of the creek. These remaining options further illustrate that Mr. Lemire has not been deprived of all economic use of his property by Ecology's order and there is no "total taking".

3. Ecology's order does not destroy or derogate a fundamental attribute of property ownership.

Under federal takings law there are only two types of regulatory takings resulting in a per se takings: (1) physical invasion takings; and (2) "total takings" that deprive a landowner of all economic use of property. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). In the seminal case of *Guimont v. Clarke*, the Washington Supreme Court also acknowledged these two types of per se takings. *Guimont*, 121 Wn.2d at 600 ("Therefore, based on *Lucas*, we must analyze at the outset of the *Presbytery* test whether fundamental attributes of ownership are impaired through 'physical invasions' or 'total takings' without engaging in any harm-versus-benefit analysis or examining the legitimacy of the governmental interest."). However, *Guimont* created some confusion in applying the taking analysis by adding another element—"the court] must first decide whether the regulation destroys any fundamental attribute of ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable use of property." *Id.* at 604. Cases subsequent to

Guimont have broken out this statement as a third type of per se taking. However, our research revealed no cases that found a per se taking based solely on this third type.¹⁸

Identification of a third type of per se taking has created confusion in the taking analysis, as identified fundamental attributes of ownership such as the right to possess, exclude others, or dispose of property, are implicated when the state physically takes property and the right to make economically viable use of the property is implicated in a “total taking.” This can result in cases where the court notes three types of per se taking but only analyzes two. *See, e.g., Thun v. City of Bonney Lake*, No. 40717-5-II, 2011 WL 5345374, at *2 (Wash. Ct. App. Nov. 9, 2011)¹⁹ (the court noted the first threshold inquiry the plaintiff must meet was to “show that the regulation destroys a fundamental attribute of property ownership” but then states that threshold is satisfied “by showing that the regulation constitutes a physical invasion of the property by the government or by showing that the regulation denies all economically viable use of the property.”); *Conner v. City of Seattle*, 153 Wn. App. 673, 698, 223 P.3d

¹⁸ In *Manufactured Housing Communities v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000) the court found a property owner’s right of first refusal was part of the fundamental attribute of ownership to dispose of property. The court concluded that there was a taking not only because the owner was deprived of a fundamental attribute of ownership, but also because the property right was statutorily transferred. *Id.* at 369.

¹⁹ The official reporter cites for this recent published opinion out of Division Two are not yet available.

1201 (2009) (in determining the first threshold question, the court reviewed only whether there was a “total taking”). In order to be thorough, Ecology analyses the third type of taking but also notes the current confusion in Washington over whether there actually is a third type of per se taking or whether per se takings are limited to the two types identified in *Lingle*.²⁰

Assuming that there is a third type of per se taking, review of whether a per se taking occurred includes determination of whether the regulation destroys a fundamental attribute of property ownership. Fundamental attributes of property ownership include rights to possess, exclude others, dispose of, and make some economically viable use of the property. See *Guimont*, 121 Wn.2d at 600-02. As discussed above, Ecology’s order does not constitute a physical invasion of Mr. Lemire’s property. The same arguments show that Ecology’s order has not destroyed a fundamental attribute of property ownership to possess, exclude others or dispose of property. See *Peste*, 133 Wn. App. at 471 (noting that the first three attributes of property ownership are likely to be implicated when the state physically takes property). The discussion above also shows that Ecology’s order does not deny Mr. Lemire all

²⁰ Washington’s confusing and unique takings analysis has prompted at least one commentator to urge the Supreme Court to adopt the simpler, federal approach. Roger D. Wynne, The Path Out of Washington’s Takings Quagmire: The Case for Adopting the Federal Takings Analysis, 86 Wash. L. Rev. 125-181 (2011).

economically viable use of his property. Therefore the order has not destroyed his fundamental right of property ownership to make some economically viable use of the property. The record does not indicate that another fundamental attribute of property ownership has been destroyed or derogated by Ecology's order. As such, this Court should find there has been no per se taking and reverse the superior court on this issue.

E. The Award of Attorneys Fees and Other Expenses to Mr. Lemire Under the Equal Access to Justice Act was Improper

This Court should reverse the award by the superior court of attorneys' fees under the Equal Access to Justice Act if Ecology's position is found to be correct, as Mr. Lemire will not have prevailed in judicial review of an agency action. Even if this Court affirms the superior court's decision, the award of attorneys fees should be reversed as Ecology's position was reasonable and therefore substantially justified.

1. Attorneys' fees under the Equal Access to Justice Act are awarded only when a party prevails.

If Ecology prevails in its appeal at this Court, the superior court's award of attorneys' fees under the Equal Access to Justice Act should be reversed. Washington's Equal Access to Justice Act provides, in pertinent part, that:

Except as otherwise specifically provided by statute, a court shall award a qualified party **that prevails in a judicial review** of an agency action fees and other

expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1) (emphasis added). If the Court affirms the Board's summary judgment decision and reverses the superior court's decision invalidating Ecology's order, then Mr. Lemire could not "be considered to have prevailed" under RCW 4.84.350(1). *See Galvis v. Dep't. of Transp.*, 140 Wn. App. 693, 712, 167 P.3d 584 (2007) (concluding because the superior court erred in entering judgment on behalf of the property owners, the court reversed the superior court's award of fees and costs); *Willman v. Wash. Util. & Transp. Comm'n*, 122 Wn. App. 194, 214, 93 P.3d 909 (2004) (finding that since a party did not prevail on the appeal, the party was not entitled to receive fees).

2. The agency's action was reasonable in law and fact and therefore substantially justified.

Ecology contends that the decision by the Board on summary judgment was proper, and that Ecology's order is not a per se taking. Even if this Court finds otherwise, the superior court's decision to award attorney's fees under the Equal Access to Justice Act should be reversed because Ecology's decision to issue the order was substantially justified. If a court finds that "the agency action was substantially justified" it shall

not award expenses, including attorneys' fees, to a prevailing party. RCW 4.84.350(1). The term "substantially justified" has been held to require the State to show that its position has a reasonable basis in law and fact. *Constr. Indus. Training Coun. v. State Apprenticeship & Training Coun. of Dep't of Labor & Indus.*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999). In other words, the agency's position need not be correct—only reasonable.

Ecology's decision to issue the order has a reasonable basis in law. As confirmed by the Board, the requirements of Ecology's order were well within Ecology's authority under RCW 90.48.120, and were not arbitrary. CP at 20-21. Ecology's decision also has a reasonable basis in fact, as Ecology relied upon observations by an agency Water Quality Specialist that Mr. Lemire's cattle had direct and uncontrolled access to Pataha Creek, there was manure visible in the stream corridor, severe overgrazing of the riparian corridor, livestock confinement area(s) adjacent to the stream, numerous bare ground cattle trails leading to and along the stream, extensive hoof damage and erosion along stream banks, and a lack of vegetation by the stream due to livestock grazing and trampling. AR Doc. 7, Atkins Decl. at 2, ¶ 8. Based on these observations, Ecology concluded that the consistent, regular, and extended access of cattle to Pataha Creek over the course of many years demonstrated negative impacts to water

quality and a substantial potential to cause water pollution, justifying issuance of an order.

Furthermore, several of Ecology's observations were later confirmed by statements by Mr. Lemire that his cattle cross Pataha Creek, graze alongside the creek, have broken down the bank of the creek, and have unrestricted access to the creek many months of the year. AR Doc. 9, Lemire Decl. at 5. As the record before this Court shows, Mr. Lemire did not dispute that cattle having unrestricted access to water tends to cause water pollution. Therefore it was reasonable for Ecology to issue an order to prevent pollution and protect water quality. As Ecology's decision to issue the order was reasonable in law and fact, the superior court's decision to award attorney's fees under the Equal Access to Justice Act should be reversed even if this Court does not affirm the Board's summary judgment decision and reverse the superior court's invalidation of Ecology's order.

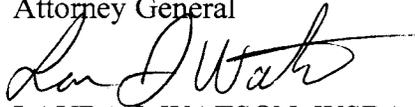
VII. CONCLUSION

The Board made the right decision on the record before it. The superior court erred in finding disputed issues of material fact based on facts that were immaterial or were not in the record. The court further erred by invalidating Ecology's order because it was supported by an alleged "modicum of evidence" and was a per se taking. Ecology

respectfully requests that the Court affirm the Board's summary judgment decision and reverse the superior court's decision invalidating Ecology's order and granting attorneys' fees and costs under the Equal Access to Justice Act. Ecology's order should be reinstated so that the pollution problems at Mr. Lemire's property can be addressed.

RESPECTFULLY SUBMITTED this 12 day of December 2011.

ROBERT M. MCKENNA
Attorney General



LAURA J. WATSON, WSBA #28452
IVY M. ANDERSON, WSBA #30652
Assistant Attorneys General

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(360) 586-6770



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

4601 N Monroe Street • Spokane, Washington 99205-1295 • (509)329-3400

November 23, 2009

Mr. Joseph Lemire
1357 Port Drive
Clarkston, WA 99403-1806

Dear Mr. Lemire:

RE: Livestock Operation on Pataha Creek, Columbia County

For six years the Department of Ecology (Ecology) and the Columbia Conservation District have made multiple efforts to assist you in preventing water quality impacts to Pataha Creek. Unfortunately, you continue to allow unrestricted livestock access to the creek and operate a confinement area on the streambank. Your property also has many streamside degraded areas that are bare, eroding, and have large manure accumulations. These issues are known to be detrimental to water quality. Furthermore, Ecology has documented violations of water quality standards for fecal coliform bacteria below your operation. Fecal coliform is an indicator that dangerous bacteria, viruses, and other pathogens are likely present at levels harmful to human health.

Since 2003, you have consistently been offered technical and financial assistance to install Best Management Practices (BMPs) that would prevent water pollution. Because you made little effort to address sources of pollution, you were sent a warning letter in May 2008. The letter informed you that on-going water pollution problems could result in a monetary penalty. At that time, you were again offered technical and financial assistance to comply with state water quality law. However, your water pollution problems have not been resolved.

Livestock production is a very important industry in the state. Instead of using traditional compliance tools that include penalties and fines, we prefer to provide livestock producers the opportunity to proactively address water quality issues. We only use compliance tools as a last resort. In order for this approach to be successful, livestock producers must be willing to work with us or their conservation district to implement measures that will eliminate water pollution. The majority of livestock producers take advantage of this opportunity. Many receive significant financial assistance to implement the needed water quality protections.

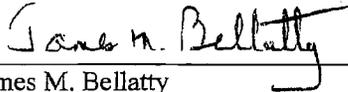
Because your operation has been identified as having a significant potential to pollute, and to date little has been done to eliminate those problems, Ecology is issuing you an Administrative Order. Enclosed is Order number 7178 requiring you to implement livestock best management practices that adequately protect water quality. All correspondence relating to this document should be directed to Chad Atkins at Department of Ecology, Eastern Regional Office, 4601 North Monroe, Spokane, WA 99205-1295.



Mr. Joseph Lemire
November 23, 2009
Page 2

If you have any questions concerning the content of the document, please contact Mr. Atkins at (509) 329-3499.

Sincerely,



James M. Bellatty
Water Quality Section Manager
Eastern Regional Office

JMB:CA:eh
Enclosure

Hand Delivered by Sheriff

DEPARTMENT OF ECOLOGY

IN THE MATTER OF AN ADMINISTRATIVE)
ORDER AGAINST) ORDER NO. 7178
Mr. Joseph Lemire)

To: Mr. Joseph Lemire
1357 Port Drive
Clarkston, WA 99403-1806

For the site located at: Lemire property on Pataha Creek near the intersection of US Route 12 and State Route 261 (Section 20 Township 12N Range 39E)

This is an Administrative Order requiring Mr. Joseph Lemire to comply with RCW90.48.080 and Washington Administrative Code (WAC) 173-201A-510 by taking certain actions which are described below. RCW90.48.120 authorizes the Department of Ecology (Ecology) to issue Administrative Orders requiring compliance whenever it determines that a person has violated RCW90.48.080.

Ecology's determination that conditions present at the Lemire property creates a substantial potential to pollute, and therefore violate the provisions of RCW90.48.080, is based on the following facts:

Mr Lemire owns property near the intersection of US Route 12 and State Route 261, in Columbia County (Section 20 Township 12N Range 39E). Pataha creek runs through the Lemire property for approximately 5,000 ft.

Pataha Creek fails water quality standards and is listed as a Category 5 polluted waterbody for fecal coliform bacteria, pH, temperature, and dissolved oxygen. WAC 173-201a establishes water quality standards to protect aquatic life and public health.

In 2003, Ecology identified conditions present on Mr. Lemire's property which created a substantial potential to cause pollution in Pataha Creek. From 2003 until present, the following conditions have been observed on the Lemire property, which threaten water quality:

- Large amounts of manure adjacent to the stream.
- Physical breakdown of the streambanks resulting from excessive hoof damage.
- Denuded and overgrazed streambanks resulting from excessive cattle grazing.
- Eroding, sloughing, and slumping streambanks resulting from loss of vegetation and hoof damage.
- Livestock present on the banks of the stream.
- Numerous bare ground cattle trails leading to the stream, and adjacent to the stream.
- Lack of woody riparian vegetation due to excessive livestock use of the riparian area.

These site conditions are directly associated with a substantial potential to cause water pollution, including contribution of pathogens, sediment, and excess nutrients. These site conditions also contribute to exceedences of the fecal coliform, dissolved oxygen, and temperature water quality standards.

Since 2003, Ecology has made five attempts to provide Mr. Lemire technical and financial assistance to remedy the identified pollution problems. The local conservation district has also offered technical and financial assistance. Nevertheless, Mr. Lemire has made no effort to implement Best Management Practices (BMPs) to prevent the conditions present which threaten water quality.

Ecology has photo documented livestock impacts at Mr. Lemire's property known to cause pollution to Pataha Creek on the following dates: February 5, 2005, March 28, 2008, March 12, 2009; March 25, 2009; April 3, 2009; and May 4, 2009.

Seven samples taken directly below Mr. Lemire's property show excessive fecal coliform levels greatly exceeding the state water quality standards to protect human health. Samples were taken on the following dates: January 1, 2009; March 4, 2009; March 25, 2009; April 8, 2009, May 4, 2009; May 6, 2009, and August 8, 2009.

For these reasons, and in accordance with RCW 90.48.120(2), IT IS ORDERED that Mr. Joseph Lemire, take the following actions:

Corrective Action 1: Develop a plan which states how you will prevent pollution and protect water quality.

The plan should be approvable and must be submitted to Ecology by **January 15, 2010**.

The plan must include the following elements:

- For pasture or rangeland grazing areas:
 - Livestock exclusion fencing that is a minimum of 35 feet from the top of the streambank, measured horizontally.
 - Livestock fencing that is permanent wire or wood and meets NRCS specifications for livestock fencing.
- For confinement and feeding areas:
 - Confined animals must be fenced a minimum distance of 75 feet from surface waters.
 - Explain how you will eliminate polluted run-off from feeding areas. In doing so, please provide how you will:
 - collect and store manure
 - prevent and control mud, erosion, and runoff
 - determine the distance and location of the confinement area in proximity to the nearest surface water
- A map with:
 - The location of the following existing and proposed management measures for the entire operation:
 - fences
 - gates
 - off-stream watering facilities
 - confinement areas

- And the following geographic features:
 - topography
 - all surface waters, including diversions
 - natural and manmade drainages
- A maintenance schedule that details regular inspection of all management measures, including fences and gates. Maintenance and repairs will be performed as needed to facilitate the intended operation of the installed practices.
- An implementation schedule that outlines when necessary fence, off-stream water, and confinement area improvements will be made. Improvements must be installed and operational by May 31, 2010.

Corrective Action 2: Install the practices in the approved plan by May 31, 2010.

Construct livestock fence and off-stream water facilities consistent with the plan approved by Ecology. Fence must be constructed consistent with NRCS Code 382. Fencing materials shall be of a high quality and durability, and the construction performed to meet the intended management objective of livestock exclusion. All fencing materials will have a minimum life expectancy of 10 years. Livestock access to the stream corridor eliminated by May 31, 2010. All practices identified in the plan must be installed and operational by that date.

Corrective Action 3: Allow the Department to inspect Pataha Creek property to ensure compliance with the Order.

Allow Ecology access to the Pataha Creek property in order to inspect the operation and ensure water quality is being protected. Inspections shall be scheduled with prior notification and at reasonable times with Mr. Lemire.

Corrective Action 5: Changes to the previously approved plan must be reviewed and accepted by Ecology.

Ecology will only approve deviations from the plan, which ensure compliance with the order; and therefore, continue to prevent pollution and protect water quality.

Failure to comply with this Order may result in the issuance of civil penalties or other actions, whether administrative or judicial, to enforce the terms of this Order.

You have a right to appeal this Order. To appeal this you must:

- File your appeal with the Pollution Control Hearings Board within 30 days of the “date of receipt” of this document. Filing means actual receipt by the Board during regular office hours.
- Serve your appeal on the Department of Ecology within 30 days of the “date of receipt” of this document. Service may be accomplished by any of the procedures identified in WAC 371-08-305(10). “Date of receipt” is defined at RCW 43.21B.001(2).

Be sure to do the following:

- Include a copy of this document that you are appealing with your Notice of Appeal.
- Serve and file your appeal in paper form; electronic copies are not accepted.

1. To file your appeal with the Pollution Control Hearings Board

Mail appeal to:

The Pollution Control Hearings Board
PO Box 40903
Olympia, WA 98504-0903

OR

Deliver your appeal in person to:

The Pollution Control Hearings Board
4224 – 6th Ave SE Rowe Six, Bldg 2
Lacey, WA 98503

2. To serve your appeal on the Department of Ecology

Mail appeal to:

The Department of Ecology
Appeals & Application for Relief
Coordinator
PO Box 47608
Olympia, WA 98504-7608

OR

Deliver your appeal in person to:

The Department of Ecology
Appeals & Application for Relief Coordinator
300 Desmond Dr SE
Lacey, WA 98503

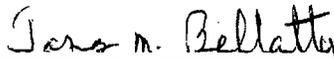
3. And send a copy of your appeal to:

Chad Atkins
Department of Ecology
Eastern Regional Office
4601 North Monroe
Spokane, WA 99205-1295

*For additional information visit the Environmental Hearings Office Website: <http://www.eho.wa.gov>
To find laws and agency rules visit the Washington State Legislature Website:
<http://www.leg.wa.gov/CodeReviser>*

Your appeal alone will not stay the effectiveness of this Order. Stay requests must be submitted in accordance with RCW 43.21B.320. These procedures are consistent with Ch. 43.21B RCW.

DATED this 23rd day of November, 2009 at Spokane, Washington



James M. Bellatty
Water Quality Section Manager
Eastern Regional Office

NO. 30288-1

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL
HEARINGS BOARD,

Respondent Below.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 12th day of December 2011, I caused to be served a true and correct copy of the Brief of Appellant State of Washington, Department of Ecology in the above-captioned matter upon the parties herein as indicated below:

TONI MEACHAM
1420 SCOOTENEY RD
CONNELL, WA 99326

U.S. Mail
 State Campus Mail
 Overnight Express
 By email:

JAMES C. CARMODY
VELIKANJE HALVERSON P.C.
405 EAST LINCOLN AVE
P.O. BOX 22550
YAKIMA, WA 98907

U.S. Mail
 State Campus Mail
 Overnight Express
 By email:

ORIGINAL

MARC WORTH
ASSISTANT ATTORNEY GENERAL
LICENSING & ADMINISTRATIVE LAW
DIVISION
800 FIFTH AVENUE, SUITE 2000
MAILSTOP TB-14
SEATTLE, WA 98164-1012

U.S. Mail
 State Campus Mail
 Overnight Express
 By email:

the foregoing being the last known addresses.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of December 2011, at Olympia, Washington.



DELLA SHIELDS, Legal Assistant