

FILED

JAN 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 302881

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.

RESPONDENT'S BRIEF – JOSEPH LEMIRE

James C. Carmody
Velikanje Halverson P.C.
Attorneys for Respondent
Joseph Lemire
405 East Lincoln
Yakima, WA 98901
(509) 248-6030

FILED

JAN 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 302881

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.

RESPONDENT'S BRIEF – JOSEPH LEMIRE

James C. Carmody
Velikanje Halverson P.C.
Attorneys for Respondent
Joseph Lemire
405 East Lincoln
Yakima, WA 98901
(509) 248-6030

Table Of Contents

I.	Introduction	1
II.	Issues Related to Assignment of Error.....	3
III.	Statement of Case	4
	A. Lemire Property – Pataha Creek – Section 303(d) Listing.....	4
	B. Speculative, Conjectural and Disputed Site Observations	8
	C. PCHB Summary Judgment and Dismissal	15
	D. Superior Court Decision	15
IV.	Standard of Review.....	16
	A. Review Under Administrative Procedures Act (APA)	16
	B. Review of Administrative Summary Judgment Determinations.....	17
V.	Argument.....	18
	A. Superior Court Properly Reversed PCHB Summary Judgment and Invalidated Administrative Order No. 7178.....	18
	1. Lemire Established Genuine Issues of Material Fact and Summary Judgment was Improper.....	18
	2. Trial Court Properly Found that Administrative Order No. 7178 was not Supported by Evidence and Invalid.....	21
	B. Ecology Lacked Jurisdiction and Exceeded Statutory Authority in Issuing Administrative Order 7178	24
	1. Nonpoint Source Conditions do not Constitute A “Discharge” Under RCW 90.48.080 and Ecology Lacks Jurisdiction to Issue Administrative Orders	25
	2. Administrative Order No. 7178 is Contrary to Statutory Limitations Set Forth in RCW 90.48.422 (Impairment of Water Right) and RCW 90.48.450 (Improper Conversion of Agricultural Land to Nonagricultural Uses)	35
	C. Administrative Order No. 7178 Constitutes a Regulatory Taking	36

1.	Administrative Order 7178’s Mandate for Exclusionary Fencing and Livestock Prohibition Constituted a <i>Per Se</i> Taking Under Article I, Section 16 of the State Constitution.....	37
2.	Administrative Order No. 7178 Constitutes an Unconstitutional Exaction or Taking of Private Property in Violation of the Fifth and Fourteenth Amendments to The U.S. Constitution.....	45
3.	Ecology Incorrectly Asserts that Damages are the Sole Remedy for Regulatory Takings.....	48
D.	Award of Attorneys’ Fees and Other Expenses was Properly Granted Under Equal Access to Justice Act	49
IV.	Conclusion	50

Table of Authorities

Federal Cases:

<i>Alexander v. Sandoval</i> , 532 U.S. 275, 292 (2001)	25
<i>Bailey v. United States</i> , 78 Fed. Cl. 239, 254 (2007).....	44, 48
<i>Bulchis v. City of Edmonds</i> , 671 F. Supp. 1270, 1271 n.1 (W.D. Wash. 1987)	22
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)	45, 46, 47
<i>Environmental Defense Center v. Environmental Protection Agency</i> , 344 F.3d 832, 841, 842 n.8 (9th Cir. 2003)	33
<i>Fisherman Against Destruction of Environment, Inc. v. Closter Farms, Inc.</i> , 300 F.3d 1294, 1297 (11th Cir. 2002)	31
<i>Forest Properties, Inc. v. United States</i> , 177 F.3d 1360, 1364 (Fed. Cir. 1999)	39, 44
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).....	42
<i>Loveladies Harbor, Inc. v. United States</i> , 27 F.3d 1545, 1555-56 (Fed. Cir. 1994).....	48
<i>Loveladies Harbor, Inc. v. United States</i> , 28 F.3d 1171, 1181 (Fed. Cir. 1994)	44
<i>Lucas v. So. Carolina Coastal Council</i> , 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).....	40, 41

<i>National Pork Producers Council v. Environmental Protection Agency</i> , 635 F.3d 738, 743 (5th Cir. 2011)	31
<i>Nollan v. California Coastal Commission</i> , 483 U.S. 825, 831 (1987)	42, 45, 46
<i>Northwest Environmental Defense Center v. Brown</i> , 640 F.3d 1063, 1070 (9th Cir. 2011)	32, 33
<i>Oregon Natural Desert Association v. Dombeck</i> , 172 F.3d 1092 (9th Cir. 1999)	31, 32
<i>Oregon Natural Resources Council v. U.S. Forest Services</i> , 834 F.2d 842, 849 (9th Cir. 1987)	30, 32
<i>Tahoe - Sierra Pres. Council v. Tahoe Reg'l Planning Agency</i> , 535 U.S. 302, 326, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)	39
<i>United States v. General Motors Corp.</i> , 323 U.S. 373, 378 (1945)	42
<i>Waterkeeper Alliance, Inc. v. Environmental Protection Agency</i> , 399 F.3d 486, 505 (2nd Cir. 2005)	31
<i>Yee v. City of Escondido</i> , 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed 2d 153 (1992).....	39

State Cases:

<i>Ackerman v. Port of Seattle</i> , 55 Wn.2d 400, 409, 348 P.2d 664) (1960)	44
<i>Blacklund v. University of Wash.</i> , 137 Wn.2d 651, 657 n.1, 975 P.2d 950 (1999).....	24
<i>Bowers v. Pollution Control Hearings Bd.</i> , 103 Wn. App. 587, 595 P.3d 1076 (2000).....	16, 17

<i>Burton v. Clark County</i> , 91 Wn. App. 505, 520, 958 P.2d 343 (1998).....	46, 47, 49
<i>City of Des Moines v. Gray Businesses, LLC</i> , 130 Wn. App. 600, 611-12, 124 P.3d 324 (2005)	40, 42
<i>Community Ass'n for Restoration of the Environment (CARE) v.</i> <i>Department of Ecology</i> , 149 Wn. App. 830, 835, n.2 205 P.3d 950 (2009).....	30
<i>Community Association for Restoration of the Environment (CARE) v.</i> <i>Department of Ecology</i> , 141 Wn. App. 830, 205 P.3d 950 (2009).....	9
<i>Densley v. Dept. of Retirement Sys.</i> , 162 Wn.2d 210, 219, 173 P.3d 885 (2007).....	25
<i>Diaz v. Washington State Migrant Council</i> , ___ Wn. App. ___, 265 P.3d 956 (2011).....	49
<i>Edelman v. State ex. rel. Public Disclosure Com'n.</i> , 116 Wn. App. 876, 882, 68 P.3d 296 (2003).....	25
<i>Eggleston v. Pierce County</i> , 148 Wn.2d 760, 783, 64 P.3d 618 (2003).....	43
<i>Fort v. Department of Ecology</i> , 133 Wn. App. 90, 95, 135 P.3d 515 (2006).....	17, 38, 48
<i>Guimont v. Clarke</i> , 121 Wn.2d 586, 594, 854 P.2d 1 (1993).....	passim
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 493, 120 P.3d 56 (2009).....	30
<i>Hash v. Children's Orthopedic Hosp.</i> , 49 Wn. App. 130, 133, 741 P.2d 584 (1987), affirmed at 110 Wn.2d 912, 757 P.2d 508 (1988)	21
<i>Hertzke v. Dep't. of Ret. Sys.</i> , 104 Wn. App., 920, 928, 18 P.3d 588 (2001).....	35

<i>Impecoven v. Dept. of Revenue,</i> 120 Wn.2d 357, 365, 841 P.2d 752 (1992).....	22
<i>Lamon v. McDonald Douglas Corp.,</i> 91 Wn.2d 345, 350, 588 P.2d 1346 (1979).....	18
<i>Language Connection, LLC v. Employment Security,</i> 149 Wn. App. 575, 587, 205 P.3d 924 (2009).....	50
<i>Leija v. Materne Brothers, Inc.,</i> 34 Wn. App. 825, 827, 664 P.2d 527 (1983).....	22
<i>Litka v. City of Anacortes,</i> 167 Wash. 259, 262 (1932)	45
<i>Manufactured Housing Communities of Washington v. State of Washington,</i> 142 Wn.2d 347, 355, 13 P.3d 183 (2000).....	passim
<i>Mark v. Seattle Times,</i> 96 Wn.2d 473, 486, 635 P.2d 1081 (1981).....	23
<i>Marks v. Washington Ins. Guar. Ass'n,</i> 123 Wn. App. 274, 277-78, 94 P.3d 352 (2004)	18
<i>Miller v. Likins,</i> 109 Wn. App. 140, 144, 34 P.3d 835 (2001).....	21
<i>Miotke v. City of Spokane,</i> 101 Wn.2d 307, 329, 678 P.2d 883 (1984).....	26
<i>Moen v. Spokane City Police Dept.,</i> 110 Wn. App. 714, 717 42 P.3d 456 (2002).....	50
<i>Morris v. McNicol,</i> 83 Wn.2d 491, 495, 519 P.2d 7 (1974).....	20
<i>Orion Corp. v. State,</i> 109 Wn.2d 621, 646, 747 P.2d 1062 (1987).....	38, 42

<i>Owen v. Burlington N. Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).....	21
<i>Peste v. Mason County</i> , 133 Wn. App. 456, 470, 136 P.3d 140 (2006).....	35, 37, 38, 48
<i>Presbytery of Seattle v. King County</i> , 114 Wn.2d 320, 330, 787 P.2d 907 (1990).....	41, 42, 43
<i>Puget Sound Harvesters Assn. v. Department of Fish & Wildlife</i> , 157 Wn. App. 935, 951, 239 P.3d 1140 (2010).....	50
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 50, 830 P.2d 318 (1992).....	43
<i>Sedwick v. Gwinn</i> , 73 Wn. App. 879, 887, 873 P.2d 528 (1994).....	21
<i>Skagit County v. Skagit Hill Recycling, Inc.</i> , 162 Wn. App. 308, 318, 253 P.3d 1135 (2011).....	17, 18
<i>Staats v. Brown</i> , 139 Wn.2d 757, 775, 991 P.2d 615 (2000).....	20
<i>State v. Castillo</i> , 144 Wn. App. 584, 591, 183 P.3d 355 (2008).....	25
<i>State v. Wofford</i> , 148 Wn. App. 870, 881-82, 201 P.3d 389 (2009), review denied 170 Wn.2d 1010, 245 P.3d 773 (2010).....	29
<i>Tapper v. Emp't. Sec. Dept.</i> , 122 Wn.2d 397, 402 858 P.2d 494 (1993).....	17
<i>Thun v. City of Bonney Lake</i> , _____ Wn. App. _____, 265 P.3d 207, 210 (2011).....	38, 39
<i>Tiegs v. Watts</i> , 135 Wn.2d 1, 14, 954 P.2d 877 (1998).....	26

<i>Tukwila School District No. 406 v. City of Tukwila</i> , 140 Wn. App. 735, 739, 167 P.3d 1167 (2009)	30
<i>Unruh v. Cacchiotti</i> , 172 Wn.2d 98, 114, 257 P.3d 631 (2011).....	28, 29
<i>Verizon Northwest, Inc. v. Wash. Emp't. Sec. Dept.</i> , 164 Wn.2d 909, 916, 194 P.3d 255 (2008).....	17, 18, 22
<i>Wash. Ass'n of Child Care Agencies v. Thompson</i> , 34 Wn. App. 225, 234, 660 P.2d 1124 (1983).....	24

Statutes:

33 U.S.C. §1251.....	30
33 U.S.C. §1311(a)	31
33 U.S.C. §1342.....	30
33 U.S.C. §1342(b).....	30
33 U.S.C. §1362(12).....	27
RCW 90.48.450	35
RCW 34.05.570(3).....	48
RCW 34.05.570(3)(a)	48
RCW 34.05.570(3)(b)	17
RCW 34.05.570(B)(a).....	17
RCW 4.84.350(1).....	49
RCW 43.21B.180.....	16
RCW 90.48.080	passim
RCW 90.48.120	20, 21, 25, 28
RCW 90.48.260	30
RCW 90.48.422	35
RCW 90.48.422(3).....	3, 36
RCW 90.48.450(1).....	3, 5, 6, 36
RCW 90.48120	25
RCW Ch. 90.48.....	20, 23, 25, 30
WAC 173-201A.....	8, 10, 11, 12
WAC 173-201A-020.....	28

WAC 173-201A-200.....	35
WAC 173-201A-510(3).....	13, 14, 34
WAC 173-201A-510(3)(b).....	14, 28
WAC 173-220-030.....	27, 33
WAC 173-220-030(18).....	33
WAC 173-220-330(5).....	27
WAC 173-226-010.....	28
WAC 173-226-020.....	26
WAC 173-226-030(21).....	27
WAC Ch. 173-220	26
WAC Ch. 173-226	26

I. INTRODUCTION

This proceeding presents issues of state-wide significance. Department of Ecology (“DOE” or “Ecology”) has utilized the administrative order process to regulate historic ranching and farming activities in the absence of statutory authority or established discharge of pollutants. Lemire has been subjected to onerous requirements in the absence of any proof that his modest cattle operation has contributed in any manner to degradation of water quality. While everyone shares the goal of improved water quality, that goal is not an open and unconstrained license to restrict or limit ranching and property rights that have existed for more than 100 years.

Administrative Order No. 7178 and the subsequent administrative processes have been wrong on many levels. Pollution Control Hearings Board (“PCHB”) entered summary judgment on a record containing clearly disputed factual issues. No evidence was presented establishing a causal relationship between perceived “site conditions” (e.g. cattle trails, sparse winter vegetation, assumed manure piles) and purported water degradation. In fact, there was no evidence that water quality was actually impaired at the Lemire property. The entire process was a house of cards built upon speculation, conjecture and unsubstantiated inference.

On a broader level, Ecology's administrative actions have even more significance to the farming and ranching community of the state. Ecology has used its purported administrative authority to severely restrict the use of private property and abrogate fundamental property rights. Each and every farmer and rancher will be subject to administrative mandates and loss of farming rights without any proof of wrongdoing. The lynchpin of asserted authority was the classification of the Tucannon River and Pataha Creek as "impaired waters" under the Clean Water Act. Ecology asserts that it has virtually unfettered discretion in the issuance of administrative orders where it *perceives* that site and property conditions have a substantial potential to pollute waters of the state. The purported conditions on the Lemire property exist on virtually every riparian farm property. Ecology has ignored the statutory language regarding necessity of a "discharge" (i.e. point source) and extended enforcement to nonpoint source site conditions. Such extension is in direct conflict with the clear and unambiguous statutory language (RCW 90.48.080) as well as the multitude of federal cases expressly holding that nonpoint source conditions do not constitute a "discharge" under the Clean Water Act.

And finally, the limitations and restrictions imposed on ranching operations will virtually destroy both the small business and established property rights in a manner that transgresses fundamental constitutional

protections. More than 7.23 acres will be lost to livestock grazing and watering. Stockwater rights that have existed for more than 100 years will be forever lost. The drastic restrictions will be imposed on a rancher that has applied best management practices, not violated a single law and has conscientiously managed his small operation.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did PCHB commit an error of law in granting summary judgment where there were genuine issues of material fact?

2. Did the trial court improperly invalidate Administrative Order No. 7178 where the record failed to establish a prima facie case of potential violation of RCW 90.48.080 and was otherwise contrary to law?

3. Does nonpoint source runoff constitute a “discharge” under RCW 90.48.080 in the absence of a discernable, confined and discrete conveyance mechanism?

4. Did Administrative Order No. 7178 impair stock water rights in violation of RCW 90.48.422(3)?

5. Did Administrative Order No. 7178 result in conversion of agricultural lands to nonagricultural uses as prohibited by RCW 90.48.450(1)?

6. Did Administrative Order No. 7178 destroy or derogate a fundamental attribute of property ownership and constitute a per se

constitutional taking under Article I, Section 16 of the Washington State Constitution?

7. Did the trial court abuse its discretion in awarding attorney's fees and costs under the Equal Access to Justice Act?

III. STATEMENT OF CASE

Ecology and Lemire paint fundamentally different pictures of the property, stream configuration and corridor, site conditions and modest cattle operations. Ecology made infrequent and superficial site observations and reached unsubstantiated conclusions and assumptions in support of Administrative Order No. 7178. Judge Acey found that the evidence was so sparse and attenuated that (1) PCHB improperly granted summary judgment in favor of Ecology, and (2) there was an insufficient factual foundation for Administrative Order No. 7178 in the first place. He was correct.

A. Lemire Property – Pataha Creek – Section 303(d) Listing.

Lemire owns approximately 265.6 acres of farm property located in rural Columbia County, Washington. Administrative Record (AR) Doc. 9. *Lemire Decl. *1*.¹ The property was originally homesteaded in the

¹ Citations to the Administrative Record will appear as "AR" followed by the document number; a short description of the document and page number. The factual foundation for this case is set forth primarily in three (3) documents: (1) Declaration of Chad Atkins, AR 7; (2) Declaration of Joseph "Joe" Lemire, AR 9; and (3) Administrative Appeal Statement, AR 1.

1880's and has always been utilized for farming and cattle operations. *Id* at 1. Approximately 152 acres is cropland and 114 acres is pastureland. *Id.* Lemire is an experienced cattleman and has operated a small cow-calf, select breeding operation since approximately 1994.² *Id* at 2-3. The ranch will support 24 to 29 calf/pairs in addition to herd and resale bulls. *Id.* at *6. The operation does not include a "concentrated animal feeding operation." (CAFO). AR Doc 1, *Appeal Decl.* 1 *3. An extremely dry climate and lack of rainfall over the years have presented problems for both farming and ranching operations. AR Doc 9, *Lemire Decl.* *1.

Pataha Creek is a tributary of the Tucannon River and bisects the Lemire property, with an estimated 4,200-5,000 feet of creek bed meandering through the acreage. *Id* at *1. The topography includes hillside, flatland and some creek areas. Most of the property is shadowed by a large bluff. AR 9, *Lemire Decl.* *1. The creek divides the property and separates four small parcels of select farmland and three small grazing parcels. Pastures are located on both sides of the creek and primary grazing areas are situated outside of the riparian corridor. *Id.*

² Lemire runs a herd of Registered Polled Herefords on the property, which includes cow/calf pairs, replacement heifers, and bulls for both breeding purposes and resale. AR 9 *5. The operation does not include feeder calves or have a concentrated animal feeding operation (CAFO).

Pataha Creek dries up in most years, generally between July and December. *Id.* at 1. That portion of Pataha Creek located on the Lemire property is situated on bedrock and formed with straight vertical banks that limit access to the stream. *Id.* at 1. The cut banks vary from 2' to 75' in height and average 12' to 14'. *Id.* at 5. The actual gorge created by the creek formation has the capacity to carry high flood stage waters without creating a creek drainage event. *Id.* Interstream terraces limit livestock access to the stream areas and drift fences have been built adjacent to steeper banks. AR 9, *Lemire Decl.* *5. Limited crossing locations exist for movement of livestock between grazing areas. *Id.* Such crossings are necessary to access pasture areas. *Id.* *5.

The Tucannon River and Pataha Creek are listed on the State's Water Quality Assessment as Category 5 impaired waterbodies.³ AR 7, *Atkins Decl.* ¶7. The Water Quality Assessment and listing of impaired water bodies arises from the requirements of the Federal Clean Water

³ Washington State Department of Ecology – 2008 Water Quality Assessments can be found at www.ecy.wa.gov/programs/wq/303d/2008/index.html. The website includes the 2008 Water Quality Assessment together with interactive mapping and listings for both waterbodies. The water quality assessment divides waterbody impairments into five categories (Categories 1-5). A single water body segment may be listed multiple times, depending on the number of tested pollutants. For example, a water body may have been tested for a group of pollutants might be listed in Category 5 because of temperatures; in Category 2 because some high bacteria counts were found, but not enough to list it as impaired; and in Category 1 because dissolved oxygen levels were good. Each listing also includes the medium in which the pollutant was measured – water, sediment, habitat or tissue.

Act.⁴ A Category 5 waterbody means that water quality standards have been violated for one or more pollutants and there is no pollution control plan or Total Maximum Daily Load (TMDL). Ecology has now prepared a TMDL for the Tucannon River/Pataha Creek watershed (September 2010).⁵

Significantly, there was no testing or analysis of water quality at or near the Lemire property.⁶ None of the published listing data identifies pollutant loads or violation of water quality standards at or near the Lemire property. Ecology offered only the conclusory observation that "... Pataha Creek has exceedences to the water quality standards listed in

⁴ The Federal Clean Water Act (CWA), established a process to identify and clean up polluted waters. Every two years, all states are required to prepare a list of water bodies that do not meet water quality standards. This list is called the 303(d) list. Ecology prepared Washington's Water Quality Assessment ("Assessment") which lists the status of water quality for a particular location in one of five categories recommended by Environmental Protection Agency (EPA). Waters placed in Category 5 require preparation of a plan to improve water quality by limiting pollutant loads. "Total Maximum Daily Loads" ("TMDL") are the tool utilized in the work to clean up polluted waters.

⁵ EPA approved the final version of the Tucannon/Pataha Creek TMDL on September 27, 2010. The primary concern within the Tucannon River/Pataha Creek Watershed relates to temperature impacts. The TMDL can be found at www.ecy.wa.gov/biblio/1010019.html.

⁶ The sole downstream testing point (Pataha Creek 1-3/4 miles downstream from Lemire property) discloses minimal (if not nonexistent) water quality issues associated with fecal coliform. AR 9, *Lemire Decl.* *8. There were over 100 upstream miles of Pataha Creek that were not tested. *Id.* at *8. The assessment process evaluates segments of a water body. Not all segments are tested. Test points and categories for Pataha Creek can be found at www.ecy.wa.gov/programs/wg/303d/2008/index.html

WAC 173-201A for fecal coliform bacteria, pH, temperature and dissolved oxygen.” AR 7, *Atkins Decl.* *2, ¶7. Requests for testing or support data were consistently denied or ignored by Ecology. AR 1, *Appeal Decl.* *1.

B. Speculative, Conjectural and Disputed Site Observations.

Ecology relied solely upon superficial and unsubstantiated site observations as a basis for Administrative Order No. 7178. PCHB adopted Ecology’s statements but did acknowledge that “... Lemire disputes many of Ecology’s observations, and the scope of the Administrative Order.” AR 12 *PCHB Order* *3. The fact is that every factual contention was disputed.

As a beginning proposition, Ecology presented no direct evidence of any discharges or releases of pollutants from the Lemire property. THERE IS NO EVIDENCE THAT SITE CONDITIONS HAVE CAUSED ANY DEGRADATION OF WATER QUALITY CRITERIA. The record contains no evidence or testing of water quality at the Lemire property; no proof that Pataha Creek exceeded water quality standards for fecal coliform, pH, dissolved oxygen or temperature at the Lemire property; no information on rainfall, runoff patterns or content of runoff; no sustained site observations during spring, summer or fall months; noon-

site inspections (only observations from highway); and only speculation and conjecture regarding causal linkage between perceived (and not actual) site conditions and potential pollution. The operation is not a concentrated animal feeding operation (CAFO) and there is no proof that Lemire's operation is a ". . . significant contributor of pollutants."⁷

Ecology has also failed to identify any discernable, confined or discrete conveyance vehicle or mechanism. There were no identified conduits, pipes, ditches, channels or other conveyancing vehicles identified on the property. The assumption seems to be that surface water runoff from pastures carries pollutants (manure and sediment) to the waterway. But no evidence was presented to establish the course, volume

⁷ Ecology established a "general discharge permit" for Concentrated Animal Feeding Operation (CAFO) on July 21, 2006. A permit is required for Large and Medium Animal Feeding Operations (AFO). A large operation is classified as more than 1,000 head of cattle. A medium operation is 300-999 head of cattle. CAFO means a lot or facility in which animals are confined, fed or maintained for a total of 45 days or more in any twelve-month period and where crops and vegetation are not sustained during normal growing seasons. The general pollution discharge permit standards applicable to concentrated animal feeding operations which reviewed in *Community Association for Restoration of the Environment (CARE) v. Department of Ecology*, 141 Wn. App. 830, 205 P.3d 950 (2009). In *CARE*, the court noted:

Not all animal feeding operations (AFOs) in the state are regulated under the CAFO general permit. Whether the permit applies to a particular AFO is "based on the number of animals present, whether there is a discharge to waters of the state, or whether Ecology has formally determined that an AFO is a significant contributor of pollutants to water of the state regardless of size." *Id.* 149 Wn. App. at 835, n. 3. *It is significant that the permit structure requires a determination that Ecology has a burden to prove that smaller operations are "... a significant contributor of pollutants to water of the state ...".* Ecology has failed to prove that Lemire's ranching operation contributes "any" pollutants to the waters of this state.

or content of surface water runoff. And the uncontroverted evidence was that there was an “extremely dry climate; lack of rainfall.” AR 9, *Lemire Decl.* *1. Pataha Creek dries up in most years (July - December). *Id.* at 1. Purported site conditions (e.g. cattle trails, lack of vegetation, sloughing slopes, manure in stream corridor – not stream) cannot be causally related to a deterioration in water quality in the absence of a factual foundation establishing a conveyancing vehicle (e.g. pipe, channel, etc.) or evidence of the method, quantity and manner of surface water runoff.

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.” Brief of Appellant – 7. No evidentiary proof was offered to support this speculative and conjectural statement. The fact is that Ecology made site observations on one day in 2003 (February 21, 2003); one day in 2005 (February 25, 2005); one day in 2006 (February 27, 2006); one day in 2008 (March 5, 2008); and superficial observations in 2009. AR 7, *Atkins Decl.* *3 ¶9. Between 2003 and 2008, Ecology observed the property on four occasions over six years (four days out of 2190 days). No observations were made during spring, summer or fall periods. Ecology did not observe or substantiate any regular or extended access to the stream corridor.

Lemire noted that Ecology "... assumes ... usage when there are no cows around." AR 1, *Appeal Statement* *1. Cattle were not allowed continual access to creek pastures; no access was allowed in two of the years; no access is allowed during winter months (November to April); drift fences are present which limit access; feed, water and salt areas are located outside the riparian corridor; shade is located in upland areas; and livestock simply do not wallow in the stream and did not access the creek on any regular basis. AR 1, *Appeal Decl.* *3, AR 9., *Lemire Decl.* *3-6. Because of best management practices, cattle do not go to the creek area because feed, water, salt and shade are available in upland areas. AR, 9, *Lemire Decl.* 3-5.

Ecology based Administrative Order 7178 on purported "site conditions" observed at the Lemire property. Each of the site conditions was specifically addressed and disputed by Lemire in the record.

- Administrative Order 7178 concluded that there were "... [l]arge amounts of manure adjacent to the stream." AR 15. Atkins stated "... manure is visible in the stream corridor," AR 7 *Atkins Decl.* *3. Lemire specifically disputed these contentions and stated "... [t]here are NO LARGE amounts of manure present along the stream banks, perhaps gopher hills." AR 1, *Appeal Decl.* *1. Also stated that "... I have no flood of manure going into Pataha Creek." *Id.*
- Ecology contended that there had been a "... [p]hysical breakdown of the stream banks resulting from

excessive hoof damage.” AR 15. *Order No. 7178*. Lemire specifically disputed this factual contention. He stated:

No critical, or extensive breakdown of stream banks has occurred. The stream was formed with straight vertical banks, and the only place the banks are not steep, is where they naturally were created years ago, way before I bought the farm, by the water flows and the high water over the years.

AR 1, *Appeal Decl.* *2. Drift fences were installed “... where cattle were breaking down a higher bank.” AR 9, *Lemire Decl.* *5.

- Ecology concluded that there were “... [d]enuded and overgrazed stream banks resulting from excessive cattle grazing.” AR 15. *Administrative Order 7178*. Lemire disputed these observations. Lemire noted that observations were made during winter months when there was no vegetative growth. AR 1, *Appeal Decl.* *2. Cattle were not allowed any access to the creek during winter or runoff months (November through April). AR 9, *Lemire Decl.* *5. The property had a healthy grass cover every spring (5 inches to 7 inches, early on). AR 1, *Appeal Decl.* *2. Lemire also noted that the stream corridor is on bedrock and there has been no vegetation since he acquired the property in 1991. AR 9, *Lemire Decl.* *2. Any riparian trees have been lost to fire and beavers and there was very limited brush or woody species, at the time of purchase in 1991. *Id.* *2. Vegetative site conditions were not the product of livestock grazing. *Id.* *2.

- Ecology concluded that there existed “... [e]roding, sluffing, and slumping stream banks resulting from loss of vegetation and hoof damage.” AR 15, *Administrative Order 7178*. PCHB concluded that there was “... extensive hoof damage and erosion along stream banks.” AR 12, *PCHB Order* *3. The sole factual observation was that “... the stream banks are trampled and severely overgrazed; ...” AR 7, *Atkins Decl.* *3. Lemire specifically disputed

these facts and described the nature of the stream corridor and condition of stream banks; observed that flash fencing was in place; and noted that there had been no grazing (or “overgrazing”) of the corridor. Cattle were allowed minimal and limited access to the stream corridor for the purpose of crossing to other pasture areas. Grazing, feeding, salt and water were on upland areas away from the stream corridor. AR 1, *Appeal Decl.*, **2-3.

- Ecology observed that “... [n]umerous bare ground cattle trails leading to the stream, and adjacent to the stream.” AR 15, *Administrative Order 7178*. The sole factual basis for this contention is the Declaration of Chad Atkins which says “... cattle trails are visible.” AR 7, *Atkins Decl.* *3. Lemire noted that the purported trails were observed during winter months when there was no growing vegetation. Trails are not visible during spring and summer months because of growing grass. Livestock passage is minimal and simply to move from one pasture to another. AR 1, *Appeal Decl.* *2. Cattle trail is “only a few inches wide.” AR 9, *Lemire Decl.* *5.

- Ecology observed that there is “... [l]ack of woody riparian vegetation due to excessive livestock use of the riparian area.” AR 15, *Administrative Order No. 7178*. There was no evidence presented to support this factual contention. Lemire disputed the contention and provided a history of the property. AR 9, *Lemire Decl.* *2. No woody riparian vegetation existed at the time of purchase in 1991. AR 9, *Lemire Decl.* *2. A few trees have been lost to beavers. There has been no livestock grazing that impacted purported vegetation. AR 9, *Lemire Decl.* *2.

Administrative Order No. 7178 sought to address nonpoint source pollution i.e. natural runoff of rainwater, snow and precipitation. Nonpoint source conditions are managed through the application of best management practices (“BMPs”). WAC 173-201A-510(3). Lemire

offered uncontroverted evidence that his practices were consistent with “best management practices” established by Washington State University. AR 9, *Lemire Decl.* 3-6. Such practices included installation of offstream watering troughs away from the riparian areas (*Id.* *3-5); placement of salt and minerals near water troughs (*Id.* 3); limiting livestock access to riparian areas by fencing (drift fencing) and topography (*Id.* 5); exclusion of livestock from stream areas during winter months and times of high water (*Id.* 5); provision of shade and vegetation away from the riparian corridor; locating feed sites (high quality alfalfa) away from the riparian corridor (*Id.* 4); rotating pasture usage to coincide with physiological needs of plant species (*Id.* 5); and developing a managed grazing plan (*Id.* 5). Ecology offered no rebuttal evidence. And there was no proof that such practices resulted in “... a violation of water quality criteria.” WAC 173-201A-510(3)(b).

Administrative Order No. 7178 imposed onerous mandates to fence the entire stream corridor, such requirement being that “. . . [l]ivestock exclusion fencing that is a minimum of 35 feet from the top of the stream bank, measured horizontally.” The fencing requirement extends well beyond the stream corridor and includes pasture land outside of the riparian corridor. The fencing would extend 4,500 feet on both sides of the stream. The excluded area is not insignificant or

inconsequential. Lemire would lose more than 315,000 square feet [70 feet x 4500 feet] or 7.23 acres of grazing and farm land in addition to the riparian corridor itself. The fencing requirement eliminates all historic ranching activity; destroys stockwater rights and access; prohibits any cattle grazing or access; leaves parcels land-locked; and renders farming operations infeasible. AR 1, *Appeal Decl.* *3; and AR 9, *Lemire Decl.* *5-6.

C. PCHB Summary Judgment and Dismissal.

Pollution Control Hearings Board (“PCHB”) assumed jurisdiction of the appeal. (PCHB No. 09-159). Ecology challenged the appeal on a summary basis. A Motion to Dismiss and Motion for Summary Judgment were filed on February 25, 2010. AR 7. PCHB identified three (3) issues for consideration:

1. Whether Mr. Lemire committed a violation as alleged by Ecology in Administrative Order No. 7178.
2. Whether corrective actions ordered by Ecology in Order 7178 are valid and reasonable.
3. Whether Ecology had legal authority or followed proper procedure in issuing Order 7178.

AR 12 *PCHB Order* *5-6. PCHB determined that there were no genuine issues of material fact and granted summary judgment. AR 12.

D. Superior Court Decision.

Lemire filed a timely Petition for Judicial Review of the Board's Decision with the Columbia County Superior Court. CP at 1-21. Following extensive briefing and oral argument by the parties, the court ruled that Administrative Order 7178 was invalid. CP at 190-92. First, the court concluded that the Board improperly granted summary judgment because of genuine issues of material fact. Second, that Administrative Order 7178 was invalid because it lacked the requisite legal and factual foundation for issuance of the Order. Third, that Administrative Order No. 7178 constituted a *per se* taking of property under state and federal constitutions. And fourth, that Lemire was entitled to an award of attorney's fees under the Equal Access to Justice Act.

IV. STANDARD OF REVIEW

A. Review Under Administrative Procedures Act (APA).

Lemire sought review of three (3) primary issues: (1) review of PCHB's grant of summary judgment in the presence of genuine issues of material fact; (2) determination of the legal and statutory basis governing issuance of Administrative Order 7178; and (3) consideration of an "as applied" constitutional challenge to imposition of the onerous exclusionary fencing conditions. The Administrative Procedures Act (APA) governs judicial review of PCHB decisions. RCW 43.21B.180; *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 595 P.3d

1076 (2000). The appellate court reviews the PCHB action from the same position as the Superior Court and applies APA standards directly to the PCHB's record. *Tapper v. Emp't. Sec. Dept.*, 122 Wn.2d 397, 402 858 P.2d 494 (1993).

APA authorizes an appellate court to invalidate an administrative order when (1) the "... order is outside the authority or jurisdiction of the agency conferred by any provision of law" or (2) where the "... agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(b) and (d). Under the error of law standards, the court engages in a *de novo* review of the agency's legal conclusions. *Fort v. Department of Ecology*, 133 Wn. App. 90, 95, 135 P.3d 515 (2006). The court also has appellate jurisdiction to review constitutional challenges to administrative orders. RCW 34.05.570(B)(a).

B. Review of Administrative Summary Judgment Determinations.

Where the original decision was on summary judgment, the appellate court will overlay the APA standard of review with the summary judgment standard. *Verizon Northwest, Inc. v. Wash. Emp't. Sec. Dept.*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008); *Skagit County v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 318, 253 P.3d 1135 (2011). The summary judgment determination is reviewed under the error of law

standard. *Skagit County*, 162 Wn. App. at 318. The court evaluates the facts in the record *de novo* and the law in light of the error of law standards. *Id.*

The court must view the facts and the record in a light most favorable to the nonmoving party. *Verizon*, 164 Wn.2d at 916. Summary judgment is appropriate only where the undisputed material facts entitle the moving party to judgment as a matter of law. *Verizon*, 164 Wn.2d at 916. The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion. *Lamon v. McDonald Douglas Corp.*, 91 Wn.2d 345, 350, 588 P.2d 1346 (1979); *Marks v. Washington Ins. Guar. Ass'n*, 123 Wn. App. 274, 277-78, 94 P.3d 352 (2004).

V. ARGUMENT

A. Superior Court Properly Reversed PCHB Summary Judgment and Invalidated Administrative Order No. 7178.

Judge Acey properly reviewed and determined that (1) because genuine issues of material fact were present in this proceeding, PCHB acted improperly in granting summary judgment; and (2) there was neither a factual nor legal foundation for Administrative Order NO. 7178.

1. Lemire Established Genuine Issues of Material Fact and Summary Judgment was Improper.

PCHB improperly granted summary judgment. Literally every fact related to “site observations” was disputed by Lemire. The record of

disputed facts is detailed in the preceding section entitled “Statement of Case”.

As an initial proposition, Ecology failed to establish a *prima facie* case. No direct evidence was provided establishing an actual or potential “discharge” from the Lemire property to Pataha Creek; no testing or evidence was provided establishing degraded water quality of Pataha Creek at the Lemire property; no identification of drains, pipes or conveyancing mechanisms; no information, data or evidence with respect to surface water runoff, quantities or flow patterns; and no evidence provided regarding best management practices or violations of such practices. No proof was provided that site conditions actually caused or had the potential to cause water degradation below established water quality standards. PCHB based summary judgment upon unsubstantiated generic site observations that exist on virtually every farm and ranch in this state.

Second and perhaps more importantly, Lemire disputed virtually every asserted site condition, inference and assumption. Specific factual disputes exist with respect to the presence of manure, riparian vegetation, sloughing of banks and cattle trails. Also disputed was the nature, extent and frequency of cattle access to the stream corridor. Ignored in the analysis was Lemire’s application of “best management practices” that

directs cattle away from the stream corridor (e.g. feed, water and salt are located outside the stream corridor); placement of drift fencing that precludes livestock access to the steeper stream banks; and prohibition of cattle access during winter months and times of high water flow. Historic background was provided regarding topography, bedrock, and explanations for lack of vegetation and woody species adjacent to the stream. Each of these facts are in direct dispute and summary judgment was improper based on this record.

Third, the exercise of administrative authority in this case requires subjective determinations of “substantial potential” to violate laws as well as issues of causation (e.g. “cause or tend to cause pollution.”). RCW 90.48.120 requires proof of an actual violation or “... substantial potential to violate the provisions of [RCW Ch. 90.48]” This type of subjective determination (*i.e.*, “substantial potential”) is a question of fact that cannot be resolved at summary judgment. *See Staats v. Brown*, 139 Wn.2d 757, 775, 991 P.2d 615 (2000) (reasonableness of force is question of fact.); *Morris v. McNicol*, 83 Wn.2d 491, 495, 519 P.2d 7 (1974) (reasonableness in landowner’s use of land is a “question of fact which cannot be resolved by summary judgment.”).

RCW 90.48.080 imposes liability for a discharge of organic or inorganic matter that “...shall *cause* or *tend to cause* pollution...” RCW

90.48.080. (emphasis added). “Issues ... of proximate cause are generally not susceptible to summary judgment.” *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). *Hash by Hash v. Children’s Orthopedic Hosp.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987), *affirmed at* 110 Wn.2d 912, 757 P.2d 508 (1988). *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835 (2001).

Fourth, inferences derived from circumstantial evidence are inherently factual questions. *Sedwick v. Gwinn*, 73 Wn. App. 879, 887, 873 P.2d 528 (1994). Because Ecology has presented only circumstantial evidence to support its position, the fact finder must make a subjective inference from those facts in determining whether Lemire violated Chapter 90.48 RCW. This type of subjective determination cannot be resolved by summary judgment. See e.g. *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (negligence cannot generally be determined on summary judgment).

2. Trial Court Properly Found that Administrative Order No. 7178 was not Supported by Evidence and Invalid.

Judge Acey recognized that Ecology’s evidence was so lacking that there was an insufficient factual basis for Administrative Order No. 7178.⁸ Thus, although Ecology was the party that moved for summary

⁸ The trial court found that “. . . Administrative Order No. 7178 is invalid because there was such a modicum of evidence through testing, timing and frequency of Ecology’s

judgment, the court found that summary judgment was appropriate, but for Lemire—the non-moving party. This was permissible under the APA and summary judgment standards.

In reviewing an administrative summary judgment, a court is required to “. . . overlay the APA standards of review with the summary judgment standard.” *Verizon Northwest, Inc. v. Wash. Employ. Sec. Dept.*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). This is exactly what the Superior Court did. Washington law permits a court to enter summary judgment in favor of a non-moving party. *See Leija v. Materne Brothers, Inc.*, 34 Wn. App. 825, 827, 664 P.2d 527 (1983) (“a non moving party may be entitled to summary judgment.”). In *Impecoven v. Dept. of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992), the Supreme Court, in reviewing a trial court’s granting of summary judgment for the plaintiffs, found that the facts were not in dispute, reversed the trial court’s order, and entered summary judgment in favor of the non-moving party. *See also Bulchis v. City of Edmonds*, 671 F. Supp. 1270, 1271 n.1 (W.D. Wash. 1987) (recognizing that “a court may *sua sponte* grant summary

observations to substantiate the Administrative Order as far as showing actual or potential discharge of organic or inorganic material polluting Pahata Creek.” CP 191. The phrase “modicum of evidence” is synonymous with a failure to establish a *prima facie* case of actual or potential statutory violation. The trial court reviewed the summary judgment based upon the administrative record and contrary to Ecology’s inference, did not make any factual findings.

judgment to a non-moving party after full consideration if it appears that a trial would be useless.”).

Summary judgment is appropriate when the plaintiff cannot set forth facts to support a prima facie case. “To make out a prima facie case for purposes of avoiding a summary judgment [Ecology] would have to allege as to each element facts which would raise a genuine issue of fact.” *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981). The Superior Court here, in reviewing PCHB’s summary judgment order, found not only that PCHB’s order was improper because it was not supported by the record, but also that Ecology’s order was invalid because there was not enough evidence to show a violation or potential violation of Chapter 90.48 RCW. The paucity of evidence is detailed in Section III B of the brief. Judge Acey was troubled by the infrequent observations (one winter day every other year); lack of any evidence of water degradation at Lemire property; and the “thin evidence” supporting an expensive and demanding order. He noted the obvious - “[T]he record is absolutely absent of any evidence - direct evidence - that Mr. Lemire’s modest herd actually polluted Pataha Creek.” VRP 6:11-13. The court refused to validate an administrative order built on speculation, conjecture and unsubstantiated assumptions.

As a final point, invalidation of Administrative Order No. 7178

was supported as a matter of law. RCW 90.48.080 prohibits “discharges” which are products of *point sources*. The order may not be issued with respect to nonpoint sources. [See Section V(B).]

Remand is inappropriate because the validity of Administrative Order 7178 was properly resolved by summary judgment. *Wash. Ass’n of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 234, 660 P.2d 1124 (1983) (remanding is inappropriate when the case was “subject to disposition by summary judgment.”). In reviewing Ecology’s motion for summary judgment, PCHB and the Superior Court reviewed the entire record and all of Ecology’s evidence in support of Administrative Order No. 7178. The legal issues presented to PCHB included whether Administrative Order No. 7178 was “valid and reasonable” and whether Ecology had “legal authority” to issue the order. AR 12, *PCHB Order* *5-6. Ecology’s position was fully considered, and the issues presented in this case are reviewed *de novo* under the error of law standard. See *Blacklund v. University of Wash.*, 137 Wn.2d 651, 657 n.1, 975 P.2d 950 (1999) (recognizing that judicial economy and fairness permit a reviewing court to determine a case without remanding).

B. Ecology Lacked Jurisdiction and Exceeded Statutory Authority in Issuing Administrative Order 7178.

Ecology exceeded its statutory authority in issuance of Administrative Order No. 7178 in two ways: (1) nonpoint source conditions do not constitute “discharges” under RCW 90.48.080; and (2) mandated exclusionary fencing impaired or destroyed stockwater rights and resulted in illegal conversion of agricultural lands.⁹ As noted by the Supreme Court: “Agencies may play the sorcerer’s apprentice but not the sorcerer himself.” *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001).

1. Nonpoint Source Conditions do not Constitute a “Discharge” Under RCW 90.48.080, and Ecology Lacks Jurisdiction to Issue Administrative Orders Based on Nonpoint Source Conditions.

Ecology exercised authority under RCW 90.48.120. An administrative order issued under RCW 90.48.120 requires proof of an actual violation or “*substantial potential* to violate the provisions of this chapter [RCW Ch. 90.48].” Administrative Order No. 7178 was issued and based on Ecology’s determination that “. . . a person has violated RCW 90.48.080.” AR 15.

⁹ “An agency has only the authority that the Legislature grants it by statute.” *Edelman v. State ex. rel. Public Disclosure Com’n.*, 116 Wn. App. 876, 882, 68 P.3d 296 (2003). As long as a statute is rational, a court may not add or subtract language, even if it believes that the Legislature intended something otherwise. *State v. Castillo*, 144 Wn. App. 584, 591, 183 P.3d 355 (2008). A court cannot use statutory construction to read additional words into the statute. *Densley v. Dept. of Retirement Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). Rather, courts “should assume the Legislature means exactly what it says” and apply the statute as written. *Id.*

The logical beginning point for review of Order No. 7178 is the statutory foundation for the order. RCW 90.48.080 provides:

It shall be unlawful for *any person to throw, drain, run, or otherwise discharge* into any waters of this state, *or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged* into such waters any organic or inorganic material *that shall cause or tend to cause pollution of such waters* according to the determinations of the department, as provided for in this chapter.

A violation or potential violation of RCW 90.48.080 specifically requires proof that (1) a *person* has (2) “...thrown, drained, run, *or otherwise discharged* organic or inorganic material into the waters of the state.” Any *discharge of pollutants* without required permit is unlawful.¹⁰ The operative factor is the presence of a “discharge” of pollutants. Ecology acknowledges that there has been no established actual discharge of pollutants from the Lemire property. (CP 118 – “Ecology was not required to prove an actual discharge into Pataha Creek, but instead a substantial potential for a discharge.”) The order was premised upon the

¹⁰ WAC 173-226-020 prohibits the *discharge of pollutants* into the waters of the state from any point source without a permit. *See also Tieggs v. Watts*, 135 Wn.2d 1, 14, 954 P.2d 877 (1998) (“ . . . discharge of contaminants or pollutants into state waters is prohibited unless authorized by a permit.”); *Miotke v. City of Spokane*, 101 Wn.2d 307, 329, 678 P.2d 883 (1984) (“ . . . it is clear from the federal and state statutory schemes and the DOE regulations that the discharge of pollutants into state waters is prohibited unless authorized by a permit.”). Ecology has adopted rules for both individual permits (WAC Ch. 173-220) and general permits (WAC Ch. 173-226).

assumption that surface water and natural runoff would carry organic and inorganic material into the stream.

The operative words of RCW 90.48.080 – “throw, drain, run or otherwise discharge” – are verbs requiring a “person” to collect or direct matter into the watercourse. WAC 173-220-330(5) defines “discharge of pollutants” as follows:

(5) “Discharge of pollutant” and the term “discharge of pollutants” each means (a) any addition of any pollutant or combination of pollutants to surface waters of the state *from any point source*, (b) any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean *from any point source*, other than a vessel or other floating craft which is being used as a means of transportation.

The discharge must derive from a “point source”. See also WAC 173-226-030(21) and 33 U.S.C. §1362(12) (virtually identical federal definition). WAC 173-220-030(18) defines “point source” as follows:

“Point source” means any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discreet fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include return flows from irrigated agriculture.*

The regulation is clear in exempting “return flows from irrigated agriculture.” Lemire’s farm is irrigated. And *point sources* are to be distinguished from *nonpoint sources*, which are defined as follows:

“Nonpoint source” means pollution that enters any waters of the state from any dispersed land-based or water-based activities including, but not limited to, atmospheric deposition; *surface water runoff from agricultural lands*, urban areas, or forest lands; subsurface or underground sources, or discharges from boats or marine vessels not otherwise regulated under the National Pollutant Discharge Elimination System program.

WAC 173-201A-020. A waste discharge permit is required for any “... discharge of pollutants, wastes or other materials to the waters of the state” WAC 173-226-010. A discharge permit is required with respect to any discharge from a “point source.” Ecology has no authority to require agricultural operators to obtain permits for nonpoint source pollution which are addressed through the application of best management practices. WAC 173-201A-510(3)(b). There are no identified point sources on the Lemire property and the uncontroverted evidence was that best management practices were applied to the ranching operation.

Ecology is improperly attempting to utilize RCW 90.48.120 in a manner to establish a quasi or backdoor permit process. A court may not, however, stray from settled principles of statutory construction and read words or requirements into the legislation. *Unruh v. Cacchiotti*, 172

Wn.2d 98, 114, 257 P.3d 631 (2011). If this unlawful exercise of authority is upheld, literally every property in this state (agricultural or otherwise) could be subjected to administrative orders.¹¹

The distinction between point source and nonpoint source is consistent with the plain language of RCW 90.48.080, which recognizes that “...it shall be unlawful for *any person* to *throw, drain, run, or otherwise discharge...any organic or inorganic material that shall cause or tend to cause pollution.*” The focus of the statute was to impose liability and responsibility upon *human actions* (a “person”) that result in discharge (“throw, drain, run or otherwise discharge”) of pollutants.¹² Webster’s Dictionary defines discharge (verb) as “to relieve of a charge, load or burden; to release from confinement; to give outlet or vent to, to throw off or deliver a load, charge or burden; to pour forth fluid or other

¹¹ Every ranching and agricultural operation would be subject to potential administrative orders without any identified discharge from the property or proof of deteriorated water quality standards. The simple fact that stormwater runs over land (of any type) would give rise to the imposition of regulatory conditions and requirements. Runoff from residential roofs, driveways, lawns would be subject to enforcement. Public parks and play fields would be subject to regulation if natural runoff carried water to a stream or citizens swam in public lakes. The statutory regulatory structure did not contemplate extension of authority.

¹² Under the last antecedent rule of statutory construction, Ecology must prove some affirmative act by Lemire that causes or results in a “discharge”. The words “throw, drain and run” are types of “discharges.” “The last antecedent statutory construction rule provides that unless a contrary intent appears in the statute, a qualifying phrase refers to the last antecedent, and, a comma before the qualifying phrase is evidence that the phrase applies to all antecedents.” *State v. Wofford*, 148 Wn. App. 870, 881-82, 201 P.3d 389 (2009), *review denied* 170 Wn.2d 1010, 245 P.3d 773 (2010). The qualifying phrase “or otherwise discharge” refers to all antecedents – “throw, drain, run.”

contents.” *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 493, 120 P.3d 56 (2009) (undefined terms are given their ordinary definition as defined in the dictionary). The dictionary definition is consistent with point source definition requiring a “... discernable, confined and discrete conveyance.”

In Washington, the Water Pollution Control Act (WPCA) (RCW Ch. 90.48) implements the federal Clean Water Act (CWA).¹³ *Tukwila School District No. 406 v. City of Tukwila*, 140 Wn. App. 735, 739, 167 P.3d 1167 (2009); and *Community Ass’n for Restoration of the Environment (CARE) v. Department of Ecology*, 149 Wn. App. 830, 835, n.2 205 P.3d 950 (2009). Federal case authority under CWA is instinctive regarding discharges and regulation of point sources and nonpoint sources. The court in *Oregon Natural Resources Council v. U.S. Forest Services*, 834 F.2d 842, 849 (9th Cir. 1987) recognized that nonpoint source pollution “... is pollution that does not result from the ‘discharge’ or ‘addition’ of pollutants from a point source ...” and cites as examples runoff from irrigated agricultural activities. In a manner similar to RCW

¹³ The Federal Clean Water Act (Federal Pollution Control Act) was enacted into law in 1972. The law declares that the “objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251. To carry out this objective, the Clean Water Act establishes programs to control discharges through the National Pollutant Discharge Elimination System (NPDES) permit program. 33 U.S.C. §1342. While the Environmental Protection Agency administers the NPDES program, the states may obtain designated authority to be the administering body with EPA oversight. 33 U.S.C. §1342(b). In Washington, the Department of Ecology has been delegated as the administering agency for the Federal Clean Water Act. RCW 90.48.260. State statutory provisions and regulations reflect federal law in virtually every aspect related to this proceeding.

90.48.080, the Clean Water Act prohibits *discharge of pollutants*. 33 U.S.C. §1311(a) (“... the discharge of any pollutant by any person shall be unlawful.”)

Runoff from agricultural operations (i.e. nonpoint source conditions) are not “discharges” or point sources. *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486, 505 (2nd Cir. 2005) (“... in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations, ... and no statutory obligation ... to seek or obtain an NPDES permit in the first instance.”); *National Pork Producers Council v. Environmental Protection Agency*, 635 F.3d 738, 743 (5th Cir. 2011) (“Relevant here, the definition of point source excludes ‘agricultural stormwater discharges.’ ... This occurs, for example, when rainwater comes in contact with manure and flows into navigable waters”); *Fisherman Against Destruction of Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002) (holding that “agricultural stormwater discharges” exemption applies to any “discharges [that] were the result of precipitation.”). It has been specifically held that grazing activities, such as Lemire’s small ranch, do not constitute “discharges” under the Clean Water Act. *Oregon Natural Desert Association v.*

Dombeck, 172 F.3d 1092 (9th Cir. 1999)¹⁴ Also recognized is CWA's separate treatment of point and nonpoint source pollution. *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 849 (9th Cir. 1987) (rejecting argument that efficient standards apply to nonpoint sources.) Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not to be considered a discharge. *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011). The court in *Brown* elaborated on the distinction between point and nonpoint source responsibilities:

However, when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a "discernable, confined and discrete conveyance" of pollutants, and there is therefore a discharge from a point source. In other words, runoff is not inherently a nonpoint or point source of pollution. Rather, it is a nonpoint or point source under [Clean Water Act] depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).

Northwest Environmental Defense Center v. Brown, 640 F.3d at 1070-71.

The federal structure is identical to the state statutory regimen in that

¹⁴ The court in *Dombeck* described grazing activities as follows: "The cattle graze several months a year in and around Camp Creek and the Middle Ford of the John Day River, polluting these waterways with their waste, increased sedimentation, and increased temperature." *Dombeck*, 172 F.3d at 1094. The court noted that grazing is a nonpoint source. *Id.* 172 F.3d at 1095.

liability is predicated upon the existence of a man-made system that collects, channels and discharges stormwater runoff. "... [D]iffuse runoff, such as rain water that is *not* channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation." *Environmental Defense Center v. Environmental Protection Agency*, 344 F.3d 832, 841, 842 n.8 (9th Cir. 2003). There should be consistency between federal and state law interpretations and applications of the Clean Water Act.¹⁵

Ecology fails to cite a single case (state or federal) where regulatory authority has been extended to enforcement actions arising from surface water runoff from agricultural properties or activities that originate from nonpoint source conditions. Lemire does not operate a concentrated animal feeding operation (CAFO) because his operation is

¹⁵ As an additional point, Federal legislation specifically identified issues with agricultural pollution arising from nonpoint sources. Senator Dole explained his understanding of the distinction as it related to agricultural activities and pollution:

Most of the problems of agricultural pollution deal with nonpoint sources. Very simply, a nonpoint source of pollution is one that does not confine its pollution discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit; thus, a feed lot would be considered to be a nonpoint source as would pesticides and fertilizers.

Northwest Environmental Defense Center v. Brown, 640 F.3d at 1072. Congress went on to recognize the unique circumstances related to agriculture and exempted return flows from irrigated agriculture and provided that stormwater runoff from agricultural activities was not to be considered a point source. *Northwest Environmental Defense Center v. Brown*, 640 F.3d at 1073. The same distinction was made under state regulations. WAC 173-220-030(18) (point source "... does not include return flows from irrigated agriculture.").

too small and there is no confinement of animals (cattle graze in pastures). Ecology may exercise authority over smaller operations where there is proof that the Animal Feeding Operation (AFO) is "... significant contributor of pollutants to waters of the state." CAFO General Permit (July 21, 2006). Ecology offered *no proof* that Lemire's small operation was a "significant contributor of pollutants."

And as a final point, there is an established process for addressing nonpoint source pollution and that is through the application of "best management practices." WAC 173-201A-510(3) provides, in part, as follows:

(b) Best management practices shall be applied so that when all appropriate combinations of individual best management practices are utilized, violation of water quality criteria shall be prevented. If a discharger is applying all best management practices appropriate or required by a department *and a violation of water quality criteria occurs, the discharger shall modify the existing practices or apply further water pollution control measures, selected or approved by the Department, to achieve compliance with water quality criteria*"

(c) *Activities which contribute to nonpoint source pollution shall be conducted utilizing best management practices to prevent violation of water quality criteria*"

(Italics added). Lemire has applied best management practices. Any challenge to those practices requires *proof* that conditions result in "... a violation of water quality criteria." Water quality criteria and standards

are set forth in WAC 173-201A-200. There has been no proof that the application of best management practices has resulted in the violation of water quality criteria at the Lemire property.

2. Administrative Order No. 7178 Is Contrary to Statutory Limitations Set Forth in RCW 90.48.422 (Impairment of Water Right) and RCW 90.48.450 (Improper Conversion of Agricultural Land To Nonagricultural Uses).

WPCA contains specific limitations on the exercise of authority where the regulatory action impairs existing water rights or leads to the conversion of agricultural land to nonagricultural uses. RCW 90.48.422 and .450. While the trial court did not reach these issues, an appellate court has "... inherent authority to consider all issues necessary to reach a proper decision." *Peste v. Mason County*, 133 Wn. App. 456, 470, 136 P.3d 140 (2006); and *Hertzke v. Dep't. of Ret. Sys.*, 104 Wn. App., 920, 928, 18 P.3d 588 (2001). The inherent appellate authority has been recognized where the challenge is to agency authority. *Hertzke*, 104 Wn. App. at 928.

Administrative Order 7178 mandates the installation and maintenance of "exclusionary fencing" for the entire stream corridor and specifically prohibits all livestock from the steam corridor. The practical impact of the order is to eliminate the exercise of established stockwater rights. Livestock are precluded from accessing or drinking from Pataha

Creek. Pataha Creek has served as a water source for livestock for more than 100 years. RCW 90.48.422(3) specifically provides that Ecology "... may not abrogate, supersede, impair, or condition the ability of a water right holder to fully divert or withdraw water under a water right permit, certificate, statutory exemption or claim" Administrative Order No. 7178 destroyed this historic water right.

RCW 90.48.450(1) provides that "... [p]rior to issuing a notice ... related to discharges from agricultural activity on agricultural land, [Ecology] *shall* consider whether an enforcement action would contribute to the conversion of agricultural land to nonagricultural purposes." The intent of the statute is clear – agricultural land will not be sacrificed in the context of water quality enforcement actions. Ecology offered no proof or evidence regarding compliance with this statutory mandate.

C. Administrative Order No. 7178 Constitutes a Regulatory Taking.

Judge Acey specifically reviewed a constitutional challenge to Administrative Order No. 7178. The salient factual issues were not disputed – Administrative Order No. 7178 mandated installation of exclusionary fencing and prohibited livestock from the riparian corridor. Lemire lost the most fundamental possessory right for this agricultural land.

Regulatory exactions may be challenged as unconstitutional takings, violations of substantive due process or both. *Peste v. Mason County*, 133 Wn. App. 456, 469, 136 P.3d 140 (2006). A takings claim is first evaluated with substantive due process reviewed after consideration of the regulatory taking. *Guimont v. Clarke*, 121 Wn.2d 586, 594, 854 P.2d 1 (1993).¹⁶ Judge Acey found a *per se* taking and did not reach either (1) the second step of *Guimont* analysis, or (2) the substantive due process challenge.

1. Administrative Order 7178's Mandate for Exclusionary Fencing and Livestock Prohibition Constituted a *Per Se* Taking Under Article I, Section 16 of the State Constitution.

Article I, section 16 of the Washington Constitution provides, “no private property shall *be taken or damaged* for public or private use, without just compensation having been first made.”¹⁷ An order or regulation constitutes an unconstitutional *per se* taking where such regulation “... destroy or derogates one or more of the fundamental

¹⁶ In *Guimont*, an association of mobile home park owners brought suit against the state claiming that a statute requiring landowners to provide monetary assistance for tenant relocation costs was unconstitutional. The Supreme Court held that (1) statute did not constitute a taking without just compensation, but (2) the statute violated substantive due process rights of landowners, as it placed an oppressive burden on the landowners.

¹⁷ Article I, Section 16 affords broader protections than does the Fifth Amendment to the United States Constitution. The Fifth Amendment simply states: “... nor shall private property be taken for public use, without just compensation.” The state constitution adds the words “or damaged” and such language has led to greater protections for property owners. *Manufactured Housing Communities v. State of Washington*, 142 Wn.2d at 358.

attributes of ownership (the right to possess, exclude others, or to dispose of property).” *Guimont*, 121 Wn.2d at 602 (does regulation “destroy or derogate any fundamental attribute of property ownership”); *Manufactured Housing Communities of Washington v. State of Washington*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000) (holding that infringement on right of transfer constitutes taking even though there was no physical invasion or total taking). See, e.g., *Thun v. City of Bonney Lake*, _____ Wn. App. _____, 265 P.3d 207, 210 (2011); *Orion Corp. v. State*, 109 Wn.2d 621, 646, 747 P.2d 1062 (1987). The challenge can either be “facial” or “as applied.” *Peste v. Mason County*, 133 Wn. App. at 471. This case is an “as applied” challenge to an administrative order.

Ecology engages in a long and convoluted analysis pertaining to *per se* constitutional takings. The analysis includes consideration of issues related to “physical invasion” or “total takings” of property interests. Appellant’s Brief – 28-37. Neither a “physical invasion” nor “total taking” are at issue in this case.¹⁸ This proceeding is based upon the

¹⁸ A *per se* taking does not require proof of either physical invasion or total taking. Physical invasion and total taking are only two of four recognized *per se* taking categories. *Manufactured Housing Communities*, 142 Wn.2d at 355. “A partial takings plaintiff need not show that he has been denied all reasonable beneficial use of his land – that is the showing required for a total taking.” *Thun*, 265 P.3d at 214. *Manufactured Housing* addressed a statutory requirement establishing a right of first refusal on the part of mobile home park residents in the event a park sale. The regulation did not effectuate

clearly recognized constitutional right that a property owner may proceed with a *per se* taking claim where a regulation or order destroys one or more of the fundamental attributes of ownership (the right to possess, exclude others and/or to dispose of property). *Manufactured Housing Communities of Washington*, 142 Wn.2d at 355.

It is well settled under state and federal law that partial regulatory takings claims are actionable. *Thun*, 265 P.3d at 214. “In a regulatory taking the government prevents the landowner from making a particular use of the property that would otherwise be permissible.” *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999).¹⁹ A “regulatory taking” does not require either physical occupation or a “total taking” but rather focuses on the derogation or destruction of a fundamental attribute of property ownership. *Guimont*, 121 Wn.2d at 603. *Manufactured Housing Communities*, 142 Wn.2d at 355 (holding statute unconstitutional because it granted right of first refusal to mobile home

a “total taking” of the property but rather unconstitutionally infringed upon the right to dispose of property. *Id.* at 368 (“Here, the statute deprives park owners of a fundamental attribute of ownership.”))

¹⁹ Ecology relies on *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) with respect to “physical takings” analysis. *Yee* involved a challenge by mobile home park owners to a local rent control ordinance. The Court addressed only the narrow question of physical taking associated rent controls. The Court did not address rent controls in the context of “regulatory takings”. *Yee*, 503 U.S. at 538 (“We leave the regulatory taking issue for the California courts to address in the first instance.”) It should be noted that federal courts, unlike the courts of Washington, have not adopted a *per se* rule in partial regulatory takings cases. *Tahoe – Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

park tenants). *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 611-12, 124 P.3d 324 (2005) (derogation of fundamental attribute of property ownership, physical invasion and total taking are alternative types of *per se* takings).

The applicable analysis for regulatory takings was set forth in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993).²⁰ A two-step analysis was adopted: (1) does the regulation or requirement destroy or derogate any fundamental attribute of property ownership (i.e. a *per se* constitutional taking); and, if not, (2) does the regulation advance a legitimate state interest and if so, the court proceeds with a balancing of interests assessment (i.e. regulations economic impact on property, investment backed expectations, and character of government action).²¹

²⁰ *Guimont* involved a challenge by mobile home park owners to a statutory requirement to provide relocation assistance for tenant relocation costs arising from a park closure. The court held that the requirement did not constitute a taking but did violate substantive due process. The *Guimont* analysis was predicated upon the court's earlier decision in *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 387 P.2d 907, *cert. denied*, 498 U.S. 911 (1990). The court reversed the analytic order established in *Presbytery* based upon the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Guimont*, 121 Wn.2d at 600-602. The initial inquiry is now whether the regulation destroys or derogates a fundamental attribute of property ownership.

²¹ Since the trial court found a *per se* constitutional taking, it did not reach the second step of the *Guimont* analysis. CP 191. A regulation will constitute a taking if it goes "too far". A regulation goes too far if it "goes beyond preventing real harm to the public which is directly caused by the prohibited use of the property and instead imposes on those regulated the requirement of providing an affirmative public benefit." *Guimont*, 121 Wn.2d at 603. Ecology presented no proof that Lemire's operation caused "real harm to the public."

Id. 121 Wn.2d at 602 and 603-04. Contrary to Ecology’s argument, there is no confusion in Washington law regarding the legal analysis.²²

The fundamental lynchpin of the takings analysis is the destruction or derogation of a fundamental attribute of property ownership. The court in *Guimont* set forth the initial inquiry as follows:

Under the *Presbytery* threshold inquiry, as revised above, the court must *first ask whether the regulation destroys or derogates any fundamental attribute of property ownership*: including the right to possess; to exclude others; or to dispose of property. [citations omitted]. In light of *Lucas*, another “fundamental attribute of property” appears to be the right to make *some* economically viable use of the property. [citations omitted].

Guimont, 121 Wn.2d at 602. The court in *Manufactured Housing Communities*, 142 Wn.2d at 355 summarized partial takings as follows:

Under existing Washington and federal law, a police power measure can violate amended Article I, Section 16 of the Washington State Constitution or the Fifth Amendment of the United States Constitution and thus be subject to a categorical “facial” taking challenge when: (1) a regulation affects a total taking of all economically viable use of one’s property, *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); or

²² Ecology engages in a prolonged (and irrelevant) discussion of “physical invasion” and “total taking”. Brief of Appellant 32-34 (physical invasion) and 34-37 (total taking). Those concepts are inapplicable to a partial regulatory taking involving derogation or destruction of fundamental attributes of ownership. Ecology argues that *Guimont* “. . . created some confusion in applying the taking of analysis by adding another element - [the court] must first decide whether the regulation destroys any fundamental attributable ownership, including the right to possess, to exclude others, dispose of property, or to make some economical viable use of the property.” Brief of Appellant - 37. The court in *Manufactured Housing Communities* clearly established the legal proposition that derogation of a fundamental attribute of property ownership (i.e. right to transfer) is a *per se* taking without physical invasion of total taking. 142 Wn.2d at 355.

(2) the regulation has resulted in an actual physical invasion upon one's property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); or (3) a regulation destroys one or more of the fundamental attributes of ownership (the right to possess, exclude other and to dispose of property); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990); or (4) the regulations were employed to enhance the value of publically-held property, *Orion Corp. v. State*, 109 Wn.2d 621, 651, 747 P.2d 1062 (1987).

The court recognized four (4) alternative categories of *per se* takings. If governmental regulation “destroys or derogates *any* fundamental attribute of property ownership ...”, it constitutes a *per se* constitutional violation and further inquiry is unnecessary. *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 612, 124 P.3d 324 (2006); *Guimont*, 121 Wn.2d at 602-03. This case involves a *per se* violation because there has been a destruction or derogation of fundamental property rights.

The United States Supreme Court has long held property consists of a “group of rights inhering in the citizen’s relation to the physical thing, has the right to possess, use and dispose of it.” *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987) (“the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.”) “Property” has often been analogized to a “bundle of sticks” representing the right to possess, exclude, alienate, etc.

Eggleston v. Pierce County, 148 Wn.2d 760, 783, 64 P.3d 618 (2003).

The destruction of any “stick” within the bundle may serve as a basis for an unconstitutional regulatory taking. See e.g. *Manufactured Housing Communities of Washington v. State of Washington*, 142 Wn.2d 347, 13 P.3d 183 (2000) (statutory imposition of right of first refusal unconstitutionally impaired the free exercise of transfer). The court in *Manufactured Housing Communities* commented:

Property is not one single right, but is composed of several distinct rights, which each may be subject to regulation. “[T]he right of property includes four particulars: (1) right of occupation; (2) right of excluding others; (3) right of disposition, or the right of transfer in the integral right to other persons; (4) right of transmission”

Manufactured Housing Communities, 142 Wn.2d at 367 (citing *Nichols on Eminent Domain* 5.01[2][d], at 5-10 (3d. ref. ed. 1999)). Washington courts have consistently recognized that “the right to possess, to exclude others, or to dispose of property” are “fundamental attributes of property ownership.” *Guimont*, 121 Wn.2d at 595; *Robinson v. City of Seattle*, 119 Wn.2d 34, 50, 830 P.2d 318 (1992); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990); and *Manufactured Housing Communities*, 142 Wn.2d at 364. Another fundamental attribute of property ownership is “. . . the right to make some economically viable use

of the property.” *Guimont*, 121 Wn.2d at 602. The court in *Manufactured Housing Communities* incorporated the following argument:

“Property in a thing consists not merely of its ownership and possession but in *even the unrestricted right of use, enjoyment and disposal*. Anything which destroys any of these elements of property, to that extent destroys property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.”

Manufactured Housing Communities, 142 Wn.2d at 364 (citing *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664) (1960).

It should be noted that regulatory takings claims have been recognized as an appropriate basis for challenges to governmental actions arising under the Clean Water Act.²³ Lemire’s argument is not new or novel in the context of land use restrictions in the context of the Clean Water Act.

Here, several fundamental attributes or property ownerships are implicated. Most fundamentally, the order destroys the right to use and occupy more than seven (7) acres of farm land for historic ranching operations. Cattle are precluded from the area and denied access to water. This has been the only use of the property for over 100 years.

²³ See, e.g. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); (Court found that the regulation went beyond the power of the state to regulate and affirmed the trial court’s decision finding a taking); *Forest Properties, Inc. v. United States*, 177 F.3d 1360 (Fed. Cir. 1999); and *Bailey v. United States*, 78 Fed. Cl. 239 (2007) (claim alleging regulatory taking via application of Clean Water Act Requirements to plat its subdivision held: land owner possessed viable claims).

Administrative Order No. 7178 also destroys stockwater rights. In Washington, riparian water and stockwater rights are property rights, and as such they cannot be taken or regulated without just compensation to the owner. *Litka v. City of Anacortes*, 167 Wash. 259, 262 (1932). The exclusionary fencing requirement derogates fundamental property interests by denying the full and complete right to occupy and possess the subject property. Judge Acey properly found that the order as it relates to exclusionary fencing constituted a *per se* constitutional taking.

2. Administrative Order No. 7178 Constitutes an Unconstitutional Exaction or Taking of Private Property in Violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

In addition to state law analysis, the United States Supreme Court has addressed regulatory exactions in the context of land use determinations. The Court has set forth an analytic framework for exactions in two cases, *Nollan v. California Coastal Comm'n.* 483 U.S. 825 (1987) (holding that dedication of beach access as condition for building permit was unconstitutional); and *Dolan v. City of Tigard* 512 U.S. 374 (1994) (finding unconstitutional requirements to dedicate two sections of property: one for open space within floodplain of nearby creek and a second for a bike path). Administrative Order No. 7178 violates the holdings in *Nollan* and *Dolan*.

The Supreme Court in *Nollan* held that the required beach access easement was unconstitutional because there was no “essential nexus” between the exaction required (the easement), and any problem *created or exacerbated* by the proposed development. *Id.* at 837. In this case, there is no proof that site conditions at Lemire’s property caused or exacerbated assumed water quality degradation. The court in *Dolan* supplemented the *Nollan* requirements and held that the city effected an unconstitutional taking when it required the property owner to dedicate open space adjacent to creek for floodplain management and a pedestrian and bicycle pathway. *Dolan v. City of Tigard*, 512 U.S. 374, 379-380 (1994). The Court held that the city had to show a “rough proportionality” between the required dedication and the impact of the proposed development. *Id.* at 395. It was noted that one of the principal constitutional purposes of the takings clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Id.* at 384. The dedication of a floodplain open space in *Dolan* is the equivalent of exclusionary fencing and use prohibition in the present case. Ecology has failed to establish either *nexus* or *rough proportionality*.

Washington courts have adopted the *Nollan/Dolan* analysis. *Burton v. Clark County*, 91 Wn. App. 505, 520, 958 P.2d 343 (1998). The

court in *Burton* recognized that when the State demands an exaction or imposes a use restriction, it must identify a public problem that the exaction is designed to address. *Id.* Second, the government must show that a proposed development or use *will create or exacerbate* the identified public problem (the “essential nexus”). *Id.* This requires the state to show that the land owner’s use of his land will make the identified public problem worse. *Id.* In this case, there is no proof that site conditions actually cause water degradation adjacent to the Lemire property. Third, the government must show that its proposed exaction, which is the government’s solution to the public problem, tends to solve or alleviate the identified public problem. *Id.* at 521. Lemire applies best management practices and there has been no showing that such practices have been ineffective. Finally, the government must show that its proposed solution to the identified public problem is “roughly proportional” to that part of the problem that is created or exacerbated by the landowner’s development. *Id.* This is the *Dolan* requirement. This requires an individualized determination that the required exaction is related in both nature and extent to the impact of the proposed development. *Id.* Ecology has not established either the causal relationship or rough proportionality required by the constitution.

3. Ecology Incorrectly Asserts that Damages are the Sole Remedy for Regulatory Takings.

Ecology argues that the trial court erred by invalidating Ecology's Order. It is argued that "... [t]he remedy for a taking is the payment of just compensation, not invalidation of the underlying regulation ..." and that "... the court should have determined whether compensation was owed rather than invalidate Ecology's order." Brief of Appellant - 31. This statement is simply incorrect. RCW 34.05.570(3) recognizes that relief may be granted from an agency order where "... the order ... is in violation of constitutional provisions on its face or as applied;" RCW 34.05.570(3)(a). A property owner may pursue alternative courses of seeking invalidation of the governmental decision or requesting award of just compensation. *Bailey v. United States*, 78 Fed. Cl. 239, 254 (2007); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1555-56 (Fed. Cir. 1994); and *Peste v. Mason County*, 133 Wn. App. at 470. The courts have consistently invalidated ordinances and orders based upon constitutional transgressions. See e.g. *Manufactured Housing Communities of Washington v. State of Washington*, 142 Wn.2d 347, 13 P.3d 183 (2000) (invalidating state statute that granted right of first refusal to mobile home park tenants); *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). (invalidating tenant relocation assistance on basis of substantive due

process); *Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 (1998) (invalidating road dedication requirement).

D. Award of Attorneys' Fees and Other Expenses was Properly Granted Under Equal Access to Justice Act.

Ecology challenges the award by the Superior Court of attorneys' fees under the Equal Access to Justice Act. RCW 4.84.350(1). Lemire was the prevailing party at the trial court and clearly entitled to the award of attorneys' fees and costs under the statute. Ecology agreed to the entry of the order and made no objection to the trial court. The sole issue reserved for appeal was whether additional fees would be awarded on appeal. CP 191 ("...Ecology has not waived any arguments or defenses to contest an award of attorneys' fees on appeal . . .").

Ecology now argues for the first time that the award by the trial court was improper. An argument raised for the first time on appeal should not be heard by this court. RAP 2.5; *Diaz v. Washington State Migrant Council*, ___ Wn. App. ___, 265 P.3d 956 (2011) (court will not review invited error). The application of this rule is particularly appropriate in this case. RCW 4.84.350(1) provides:

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

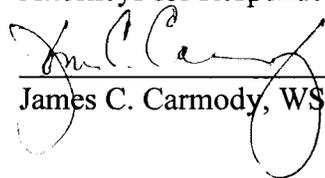
qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

Ecology has the burden of proving its action was substantially justified. *The Language Connection, LLC v. Employment Security*, 149 Wn. App. 575, 587, 205 P.3d 924 (2009). To meet the burden the agency must demonstrate that its position has a reasonable basis in law and fact. *Id.* That factual and legal position should have been presented to the trial court and the trial court's decision is to be reviewed under an abuse of discretion standard. *Moen v. Spokane City Police Dept.*, 110 Wn. App. 714, 717 42 P.3d 456 (2002); *Puget Sound Harvesters Assn. v. Department of Fish & Wildlife*, 157 Wn. App. 935, 951, 239 P.3d 1140 (2010). The issues were not presented to the trial court and the trial court did not abuse its discretion in awarding fees and costs. Lemire is also entitled to award of fees and costs on appeal. *Id.*

VI. CONCLUSION

Lemire requests the affirmation of the trial court determination, invalidation of Administrative Order No. 7178 and award of fees and costs on appeal.

VELIKANJE HALVERSON P.C.
Attorneys for Respondent Lemire



James C. Carmody, WSBA #5205

CERTIFICATE OF SERVICE

I, TORI DURAND, hereby state and declare as follows:

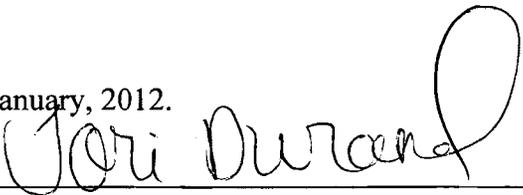
1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 24th day of January, 2012, I caused to be served via the method indicated below, a true and correct copy of Respondent's Brief – Joseph Lemire, with proper postage affixed thereto to:

TONI MEACHAM 1420 Scootenev Road Connell, WA 99326	Via U.S. First Class Mail
IVY M. ANDERSON Attorney for State/Dept. of Ecology P.O. Box 40117 Olympia, WA 98504-0117	Via U.S. First Class Mail Via Email
Laura Watson Attorney for State/Dept. of Ecology P.O. Box 40117 Olympia, WA 98504-0117	Via U.S. 1 st Class Mail Via Email
MARC WORTHY Asst. Attorney General Attorney for Pollution Control Hearings Board 800 Fifth Avenue, Ste. 2000 Seattle, WA 98104	Via U.S. 1 st Class Mail Via Email

I DECLARE UNDER PENALTY OF PERJURY UNDER THE
LAWS OF THE STATE OF WASHINGTON that the foregoing is true
and correct.

DATED this 24th day of January, 2012.



TORI DURAND, Legal Assistant