NO. 97684-8

Court of Appeals No. 51439-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Petitioner,

v.

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN WHITEWATER, and SIERRA CLUB,

Respondents.

REPLY OF THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

ROBERT W. FERGUSON
Attorney General

Stephen H. North
Assistant Attorney General
WSBA #31545
Attorney General of Washington
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
OID No. 91024
360-586-6770
OID No. 91024
stephen.north@atg.wa.gov
ecyolyef@atg.wa.gov

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I. INTRODUCTION

Respondents' request for review on the new and limited issue of the adequacy of the administrative rule record makes little sense because they prevailed below. In addition, the narrow issue they raise does not meet the criteria for granting review, in particular because the issue upon which they seek review is not presented by this case. This is because Ecology did not possess or consider, and therefore could not deliberately exclude from the record, the three documents that the Respondents unsuccessfully sought to add to the record below. As the Court of Appeals concluded, the rule record is fully compliant with the requirements of the Administrative Procedure Act (APA).

II. RELEVANT FACTS

In 2014, the Department of Ecology adopted WAC 173-557-050. Respondents Center for Environmental Law and Policy (CELP), American Whitewater, and the Sierra Club (Challengers) filed an action under the APA challenging that rule. CP 2. As part of that proceeding, the Challengers brought an unsuccessful motion under the APA, RCW 34.05.562, to supplement the approximately 19,000 page rule record with just three documents, all of which predated the rule by several years, and none of

which were in the possession of the agency or its rule writers during the rule adoption process.[1]

The specific documents the Challengers requested be added to the rule-making file all pertained to the Avista federal relicensing process and were in the possession of Washington Department of Fish and Wildlife (WDFW). *See* Answer to Petition for Review (Answer) at 7 n.12. The Challengers "obtained these documents through a public records act request that [CELP] sent to the WDFW, not to Ecology." *Center for Environmental Policy, et. al., v. Dep't of Ecology, et. al.,* No. 51439-7 (Wash Ct. App. Aug. 20, 2019) (Slip Op.) at 26. Consistently, Ecology's rule writers attested—and the Challengers do not dispute—that during development and adoption of the Rule, the rule writers neither possessed nor considered the specific documents that the Challengers were seeking to add to the record. Slip Op. at 26; CP 6–9.

Nevertheless, Ecology's rulemaking record contained similar information, including documents pertaining to earlier evaluations and recommendations for both higher and the same flows that Ecology ultimately adopted in the Rule. See, e.g., AR 7749–751 (2007 WDFW memorandum recommending flow of 900 c.f.s.); AR 7772–784 (2008

[1] *See* CP 11 (Order Denying Motion to Supplement the Record (May 7, 2017)).

WDFW memorandum recommending 850 cfs as the summer flow measured at the Spokane gage.).

In short, the administrative rule making file shows a deliberative process that initially contained recommendations for higher flows that were later revised based upon uncontested scientific studies that are also in the record. *See, e.g.*, AR 3833 (where WDFW biologist Dr. Beecher notes in a 2012 memo that WDFW has revised its prior seasonal flow recommendations based upon new information from the Addley and Peterson study and to integrate a re-evaluation of the EES, NHC and HD, and Parametrix studies.). The rulemaking record does not exclude contrary information regarding the flow levels; in fact, it includes that information.

III. ARGUMENT

A. Standard of Review for Rule Challenges and Efforts to Add Evidence to Administrative Records

The validity of an agency rule is determined as of the time the agency took the action adopting the rule. *Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003). The rulemaking file required by RCW 34.05.370 constitutes the "official agency rule-making file" for purposes of judicial review. RCW 34.05.370(4); and the burden of proving rule invalidity is on the challenger. RCW 34.05.570(1)(a).

In turn, RCW 34.05.562(1) sets the narrow parameters for superior court consideration of additional evidence. A superior court reviewing an agency decision:

> [M]ay receive evidence in addition to that contained in the agency record . . . only if it relates to the validity of the agency action at the time it was taken and it is needed to decide disputed issues regarding: (a) Improper constitution as a decision-making body . . . ; (b) Unlawfulness of the procedure . . . ; or (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1).

A superior court may not allow additional evidence where, like here, the proponent of the evidence alleges only that the record is incomplete. *Lewis Cty. v. Pub. Emp't Relations Comm'n,* 31 Wn. App. 853, 861, 644 P.2d 1231 (1982). Additionally, a superior court's decision not to supplement the record should be reversed only if there is a showing of a manifest abuse of discretion. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 65, 202 P.3d 334 (2009).

B. The Court of Appeals Properly Concluded That Ecology's Rule File Complies with the APA and Was Adequate for Review

At the outset, the Court of Appeals reached the right conclusion that the record is adequate for review, though it should have reviewed the Superior Court's denial of the Challengers' Motion to Supplement the Record, as just explained, for a manifest abuse of discretion.

"A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds" and it "necessarily abuses its discretion if it applies the incorrect legal standard." *Kreidler v. Cascade Nat'l Ins. Co.*, 179 Wn. App. 851, 866, 321 P.3d 281 (2014) (quoting *Gillett v. Conner,* 132 Wn. App. 818, 822, 133 P.3d 960 (2006)).

Had the Court of Appeals properly considered the Superior Court's exclusion of the Challengers' three documents under this standard, it would have necessarily reached the conclusion that the Superior Court properly excluded the documents under the narrow standards of RCW 34.05.562(1). This is because the Challengers do not contend that Ecology omitted any of the statutorily-required information from the rule-making file. Answer at 15–19. Notably, the Challengers do not contend that Ecology relied on the three documents in the adoption of the challenged rule. Instead, they assert only that the rule record is incomplete and that Ecology should have considered the information. The assertion that a record is incomplete does not amount to a manifest abuse of discretion any more than it satisfies the narrow standards found in RCW 34.05.562(1) for supplementing a record.

The Court of Appeals nevertheless considered the three documents and still reached the right conclusion, that the documents were not germane

to Ecology's rulemaking:

> [I]n reviewing these documents, we find that they are not directly related to the agency action challenged here. The three documents CELP contends Ecology should have included in its rule-making file were created as part of Avista's relicensing process, not as part of Ecology's formal rulemaking commenced in January 2014.

Slip Op. at 26.

The Challengers' arguments that the issue of the adequacy of the record warrants review is thus unavailing. Particularly, the issue upon which they seek review is not presented here; and so there can be no conflict with prior decisions of this court, or an issue that is of substantial public importance that warrants review.

1. The Challengers' issue regarding the record is not presented by this case and thus does not raise a conflict with prior decisions of this Court

The Challengers' issue regarding the adequacy of the record is not even presented by this case. They assert that the issue of "whether an agency may choose not to include all pertinent information in its possession in a rulemaking file appears to be one of first impression here in Washington." Answer at 15. This argument is unavailing because the documents that the Challengers sought to add to the record were not in the possession of the agency when it adopted the rule, as attested to by Ecology's rule writers. Slip Op. at 26.

The Challengers' assertion that the Court of Appeals' decision regarding the adequacy of the record is in conflict with prior decisions of this Court is unavailing for the same reasons. They cite to two pre-APA cases for the proposition that a complete record is required for review. Answer at 15 (citing *Loveless v. Yantis*, 82 Wn.2d 754, 762, 512 P.3d 1023 (1973) (decision cannot be intelligently reviewed based on "incomplete and inadequate" record because of faulty recording equipment); *accord*, *Beach v. Board of Adjustment*, 73 Wn.2d 343, 346-47, 438 P.2d 617 (1968) ("lack of a complete record was a fatal defect"). Relying on these cases, they assert without support that "the agency record was incomplete due to deliberate action by Ecology rather than technical difficulties." Answer at 15. But this is not the case. They have not shown and cannot show that Ecology deliberately excluded documents that were not even in Ecology's possession during the rule writing process.

2. The issue of adequacy of the rule file does not present an issue of substantial public importance because this case does not involve the agency keeping documents from its rule writers

Ecology did not, as the Challengers assert, selectively exclude the documents that they sought to add to the record. Thus, the issue of whether an agency may "avoid addressing issues of public concern by selectively providing its rule writers only a subset of the relevant information" is once

again not present here. Answer at 15. There is no evidence, and the Challengers presented no evidence in support of their motion to supplement the record, that Ecology ever sought to withhold the three subject documents from its rule writers in order to reach a specific outcome. Ecology should not be expected to consider documents in the possession of another agency that pertain to another process entirely. As the Challengers prevailed before the Court of Appeals in their efforts to invalidate a portion of the Spokane Rule, it is hard to fathom how exclusion of three documents that were in the possession of WDFW at the time or rule adoption presents an issue of substantial public importance that warrants further review.

IV. CONCLUSION

The Challengers have not presented an additional issue that warrants review by this Court. However, the Court should grant Ecology's petition. The validity of Ecology's instream flow rule is a matter of statewide

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importance, but the narrow procedural issue raised by Challengers regarding the adequacy of the rule-making record is not.

RESPECTFULLY SUBMITTED this 25th day of October, 2019.

ROBERT W. FERGUSON
Attorney General

STEPHEN H. NORTH, WSBA #31545
Assistant Attorney General
Attorney for Respondents
P.O. Box 40117
Olympia, WA 98504
stephen.north@atg.wa.gov
ecyolyef@atg.wa.gov
360-586-3509
OID No. 91024

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on October 25, 2019, I caused to be served a Reply of the State of Washington, Department of Ecology in Support of Petition for Discretionary Review in the above-captioned matter upon the parties herein via the Appellate Court Portal Filing system, which will send electronic notifications of such filing to the following:

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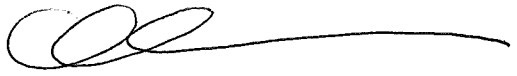
Andrew Hawley Western Environmental Law Center 1402 3rd Ave., Ste 1022 Seattle, WA 98101	[x] U.S. Mail [ ] Overnight Express [ ] By Fax: [x] By Email: hawley@westernlaw.org

DATED this 25th day of October 2019 at Olympia, Washington.



MEAGHAN KOHLER, Legal Assistant

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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