

No. 41833-9-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

CLARK COUNTY WASHINGTON and BUILDING INDUSTRY
ASSOCIATION of CLARK COUNTY,

Petitioners,

v.

ROSEMERE NEIGHBORHOOD ASSOCIATION, COLUMBIA
RIVERKEEPER, and NORTHWEST ENVIRONMENTAL
DEFENSE CENTER,

Respondents.

BRIEF OF PETITIONER BUILDING INDUSTRY ASSOCIATION OF
CLARK COUNTY

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I. ASSIGNMENT OF ERROR

Petitioners ask this Court of reverse several rulings made by the Pollution Control Hearings Board overturning Clark County's stormwater program under an Agreed Order with the Department of Ecology. The Pollution Control Hearings Board ignored the correct governing standard of review, failed to give deference to the Department of Ecology, failed to account for Constitutional and statutory issues and bypassed Washington's vested rights doctrine. When viewed in light of the substantial evidence and the appropriate standards for judicial review, the decision of Pollution Control Hearings Board must be reversed.

II. STATEMENT OF FACTS

The federal Clean Water Act ("CWA") contains the National Pollutant Discharge Elimination System ("NPDES") permit program that regulates point sources that discharge pollutants into the waters of the United States. The NPDES permit requires the states to implement stormwater management programs. In Washington, the regulated jurisdictions are split between Phase I communities, those with over 100,000 persons and Phase II communities those with less than 100,000

persons that also meet other conditions. Clark County is one of Washington's six Phase I communities.

The Washington Department of Ecology ("Ecology") issued a new NPDES permit for Phase I communities in February 2007.¹ This new NPDES permit required jurisdictions to either implement the Western Washington Stormwater Manual requirements as the default standard or to implement an alternative flow control program provided the alternative program provided "equal or similar" protection to the default standard.²

Immediately after Ecology issued this new NPDES permit, Clark County began updating its stormwater program by holding open houses, convening a technical and stakeholders advisory committee and eventually drafting code.³ But it became apparent to Clark County and its various constituencies that the default permit contained legal and practical problems some specific to the geography of Clark County.⁴ In particular

¹ Testimony of Kevin Gray, Transcript of the Proceedings ("RP") at 260:5-6.

² Phase I Permit S5.C5.b.i.

³ Testimony of Kevin Gray, RP 260-264 and Exs. R-9, R-10, and R-16.

⁴ *Id.* at 266-67:8-13.

the Board of County Commissioners became concerned with the requirement in the default standard that would force new development projects to treat sites as if they were forested, despite the fact that the property may have already been developed or cleared.⁵ In particular, the Board of County Commissioners worried about potential liability under RCW 82.02.020 because new development would be mitigating for previous impacts cause by past development.⁶ In January 2009 the Board of County Commissioners adopted a new ordinance implementing Clark County's stormwater program that required developments to mitigate for existing conditions.⁷

Ecology reviewed Clark County's ordinance and issued a Notice of Violation on March 17, 2009.⁸ The Notice of Violation contained several aspects of the ordinance that Ecology deemed non-compliant with it's

⁵ *Id.* at 266:8-16.

⁶ *Id.* at 267:3-13.

⁷ *Id.* at 261.

⁸ Ex. J-2.

NPDES permit including special condition S5.C5.b.ii.⁹ At this point, Ecology and Clark County entered into an Agreed Order to resolve the aspects of the County's ordinance that Ecology deemed non-compliant.¹⁰ Clark County agreed to take on the obligation to mitigate between the existing conditions of a site and the forested conditions in the default standard.¹¹ Ecology and the County agreed that mitigation could occur at regional sites located offsite from a development project provided that the mitigation site was in the same Water Resource Inventory Area.¹²

Upon issuance of the Agreed Order, the respondents Rosemere Neighborhood Association, Columbia Riverkeeper and Northwest Environmental Defense Center ("Rosemere") filed a challenge alleging that the Agreed Order did not provide "equal or similar" protection than the default permit.¹³ And both Rosemere and Clark County moved for

⁹ Agreed Order 7273, Ex. J-1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Rosemere Notice of Appeal.

partial summary judgment as to whether projects vested to development standards between August 16, 2008 and when the Agreed Order to effect on April 13, 2009.¹⁴

The Building Industry Association of Clark County ("BIA") being the industry regulated by the Agreed Order intervened in the appeal of Agreed Order because its interests diverged from respondents Ecology and Clark County.¹⁵ BIA argued that if the default standard were implemented it would create a situation where new developments would be forced to mitigate for historical conditions would contravene RCW 82.02.020 and state and federal takings law.¹⁶

Prior to issuing it's Final Order the PCHB issued an order denying summary judgment proclaiming that the vested rights doctrine is not

¹⁴ Rosemere Motion for Partial Summary Judgment and Clark County Cross Motion for Summary Judgment.

¹⁵ BIA Motion to Intervene, p. 4-5.

¹⁶ *Id.* at 7.

applicable to stormwater control ordinances because they are environmental regulations not land use controls.¹⁷

After a four day hearing the PCHB issued it's Final Order proclaiming that the Agreed Order violates the Phase I NPDES permit primarily because the Agreed Order is not "equal or similar" to the default standard.

III. STANDARD OF REVIEW

A. Standard of review.

Appellate courts review PCHB orders under Washington's Administrative Procedures Act.¹⁸ This court must limit it's review to the record before the PCHB.¹⁹ The petitioning party bears the burden of demonstrating that the PCHB's action is erroneous.²⁰

Appellate courts may grant relief if PCHB "erroneously interpreted or applied the law" or if a decision is beyond the statutory authority and

¹⁷ Pollution Control Hearings Board Order Denying Summary Judgment, p.10-15.

¹⁸ RCW 34.05; *Port of Seattle v. PCHB*, 151 Wn.2d 568, 587 (2004).

¹⁹ *Id.*; RCW 34.05.558.

²⁰ *Id.*; RCW 34.05.570(1)(a).

jurisdiction of the PCHB.²¹ Or the court may also grant relief if the PCHB's decision is "not supported by evidence that is substantial when viewed in light of the whole record before the court."²² Substantial evidence means whether the record contains a "sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order."²³ The court may also grant relief if the PCHB's decision is "arbitrary or capricious."²⁴ Arbitrary or capricious under this relief standard means whether the agency action "is willful and unreasoning and taken without regard to the attending facts or circumstances."²⁵ Relief may also be granted if the PCHB did not decide all issues requiring resolution by the agency.²⁶ And finally relief may be granted if the PCHB decision violates constitutional provision on its face or as applied.²⁷

²¹ *Id.*; RCW 34.05.570(3)(b).

²² *Id.* at 588; RCW 34.05.570(3)(e).

²³ *Id.*

²⁴ *Id.*; RCW 34.05.570(3)(i).

²⁵ *Id.* at 589.

²⁶ RCW 34.05.570(3)(f).

²⁷ RCW 34.05.570(3)(a).

Findings of fact may only be overturned if they are clearly erroneous²⁸ and the court is "definitely and firmly convinced that a mistake has been made."²⁹ And appellate courts should not "...weigh the credibility of witnesses or substitute our judgment for the PCHB's with regard to finding of fact."³⁰ Finally, courts "should not 'undertake to exercise the discretion that the legislature has placed in the agency.'"³¹

Where statutory construction is necessary, courts will interpret statutes de novo.³² But if an ambiguous statute falls within the agency's expertise, the agency's interpretation of the statute is "accorded great weight, provided it doesn't conflict with the statute."³³

²⁸ *Port of Seattle v. PCHB*, at 589, citing *Schuh v. Ecology*, 100 Wn.2d 180, 183 (1983).

²⁹ *Id.*, citing *Buechel v. Ecology*, 125 Wn.2d 196, 202 (1994).

³⁰ *Id.*

³¹ *Id.*, quoting RCW 34.05.574(1).

³² *Id.* at 587.

³³ *Id.*

B. Agency Deference.

1. Statutes and Regulations.

The Legislature entrusted Ecology with administering Washington's NPDES program and therefore Ecology's interpretation of water quality rules and statutes are entitled to "great weight".³⁴

2. Technical Judgments.

Deference is given to PCHB's factual conclusions which respects their role as an independent reviewer of Ecology actions.³⁵ But great deference will be given to Ecology on technical issues where Ecology maintains specialized expertise.³⁶

IV. DISCUSSION

A. PCHB Failed to Give Appropriate Deference to Ecology.

1. BIA adopts and incorporates the arguments set forth in the County's brief as to the PCHB's lack of deference to Ecology.

³⁴ *Id.* at 594.

³⁵ *Id.* at 594.

³⁶ *Id.* at 595.

2. **The PCHB failed to give the appropriate deference to Ecology.**

The PCHB must give Ecology the appropriate deference.³⁷ But in the present case the PCHB substituted its own judgment in concluding that the Agreed Order's approach to stormwater management did not meet alternative program conditions of the Phase I permit.

Ecology is the agency with expertise that implements Washington NPDES program.³⁸ And Ecology is the agency that originally drafted the default permit with Mr. O'Brien being the principal author.³⁹ Ecology has the expertise to determine whether the approach under the Agreed Order met the "equal or similar" requirement under the NPDES permit. But the PCHB disregarded Ecology's expertise that the approach of the Agreed Order met the "equal or similar" to requirement of the permit.

In particular, Mr. O'Brien and Mr. Moore of Ecology both testified that the approach set forth under the Agreed Order achieves the default

³⁷ *Id.* at 594-595.

³⁸ *Id.* at 594.

³⁹ Testimony of Ed O'Brien, RP 734:1-3.

standard under an "...alternative administrative way."⁴⁰ The Agreed Order achieves this by obligating the County to substitute itself for a developer in mitigating the difference between the current and historic condition. The County remains on the hook for the mitigation. And furthermore Mr. Schriever at Ecology and Mr. O'Brien testified that as far back as 1999 and 2000 that Ecology considered the approach under the Agreed Order as an alternative to the eventual adopted default standard.⁴¹

And yet the PCHB dismissed the technical and policy expertise of the writers of the permit because the PCHB viewed an alternative to the default NPDES permit as requiring the County to conduct a basin plan or a "...similar rigorous, science-based planning effort."⁴² The PCHB misinterpreted the standards of an alternative program. An alternative to the default permit "...may be tailored to local circumstances through the use of basin plans or **other similar water quality and quantity planning**

⁴⁰ Testimony of Ed O'Brien, RP 785:11-21; Testimony of Bill Moore, RP 841; 17-22..

⁴¹ Testimony of Garin Schriever, RP 696-697:8-10 and Testimony of Ed O'Brien, RP 751-753:15-5.

⁴² PCHB Order No. 10-013, p. 47:18-19.

efforts."⁴³ [Emphasis added]. Ecology's experts appropriately determined that the County's approach to doing mitigation met this standard. And yet the PCHB elected to ignore this expertise and modify the language of the permit to require a "...similar rigorous, science based-planning effort."⁴⁴

Simply put, this ruling by the PCHB replaces the words in the permit thereby elevating the standard. For the PCHB to then turn around and deny a program based on this elevated standard is an arbitrary and capricious action. The PCHB fundamentally misunderstands that the County remains obligated to provide the mitigation between the current and historic condition. Ecology firmly believes the County can achieve this. And this is evident by Mr. Moore's statement that "...the program proposed by the county allows a more effective targeting of flow control mitigation or flow control retrofits than the current default in the permit, which is effectively random, wherever developments happens to occur."⁴⁵

⁴³ J-16 at Condition S5.C5.b.i.

⁴⁴ PCHB Order No. 10-013,0 p.47:18-19.

⁴⁵ Testimony of Bill Moore, RP 909:16-21, also see RP 857-858:22-6.

The decision by the PCHB to not defer to the expertise at Ecology under the *Port of Seattle* case and for the PCHB, in a two to one opinion, substitute its own judgment as to whether the approach of the Agreed Order reaches an "equal or similar" result to the default permit is an arbitrary and capricious action. This is especially troubling given the testimony from Ecology that they at one point considered applying the Clark County approach as the default standard itself because it can provide a better environmental benefit by targeting mitigation.

B. The PCHB Failed to Consider the Constitutional and Statutory Issues Associated with the Default Standard.

1. As Applied the PCHB'S Ruling Violates Constitutional Provisions.

a. Federal Case Law.

By rescinding the Agreed Order the PCHB mandated the default flow control standard on all new development and redevelopment projects in Clark County. But as applied this relief puts Clark County in the position of enforcing a stormwater ordinance and program that violates the Washington and US Constitutions. In particular, Clark County will now employ an ordinance that mandates that a developer not only mitigate for

their existing impacts, but also one that increases the size of storm facilities to do restorative work as if the property were forested.

What troubles the BIA in this case is that the default standard would force an applicant beyond a mere mitigating its impact to actually requiring the developer to do restoration work. During his testimony Mr. O'Brien confirmed this stating:

We're not only mitigating for the immediate impacts of the project, but we're telling the project they have to provide flow control for land cover conversions that happened sometime previous to their project.⁴⁶

The Agreed Order's approach removes this by placing the burden of mitigating to the historic conditions on the County and the general community rather than on the solely on development projects.⁴⁷

The U.S. Constitution provides that:

No person shall be...deprived of life, liberty, or property without due process of law; nor shall property be taken for public use without just compensation.⁴⁸

⁴⁶ Testimony of Ed O'Brien, RP 738:11-15.

⁴⁷ Testimony of Kevin Gray RP 266-267: 8-13.

⁴⁸ U.S. Constitution Fifth Amendment.

The Court developed a body of case law to examine if a taking of property for public use occurs. And the most instructive case as it applies to whether the PCHB's Order creates a taking by restoring the default approach is the *Dolan* case.⁴⁹ In *Dolan* the Court held that there must be a "rough proportionality" between the conditions of approval for development and the impacts that a proposal creates.⁵⁰

And in applying this analysis to this case a developer under the default standard is not only being asked to mitigate for the impacts created by their project, but it also requires them to mitigate for historic impacts treating their property as if it were forested. This despite the fact that the forested condition may not have existed for decades. The approach of the default permit under the "rough proportionality" fails. And the approach provided for under the Agreed Order achieves a balance between a project mitigating its current impacts satisfying the "rough proportionality" test

⁴⁹ *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). And while this case is usually combined with the *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) case, we will assume that land use ordinances drafted to comply with the CWA and Ecology's NPDES program meet the nexus standard announced in *Nollan*.

⁵⁰ *Id.*

while obligating the public to take on the mitigation obligation to the historic condition.

b. As Applied the PCHB Order Violates Washington Constitution.

The Washington Constitution provides "[n]o person shall be deprived of life, liberty or property without due process of law."⁵¹ And it also states that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made..."⁵² And in analyzing these articles the Washington courts created a body of case law using the same reasoning contained in the *Dolan* case.⁵³

In the *Benchmark* case the Court held that a condition of approval for a project must be "roughly proportional" to the impact being created.⁵⁴ In *Burton v. Clark County*, this Court elaborated on *Benchmark* stating that "rough proportionality" exists when the contribution to the problem

⁵¹ Washington Constitution Article 1 § 3.

⁵² Washington Constitution Article 1 § 16.

⁵³ *Trimen Dev. Co. v. King County*, 124 Wn2d 261 (1994); *Benchmark Land Co. v. City of Battle Ground*, 94 Wn. App. 537 (1999), *affirmed on other grounds*, 146 Wn.2d 685 (2001); *Isla Verde Holdings, Inc. v. City of Camas*, 141 Wn.2d 1011 (2000).

⁵⁴ *Benchmark*.

and the solution are proportional to each other.⁵⁵ And yet under the default standard a developer of a project is being asked to move beyond the impact they are creating to restore some historic condition. As it is applied, it fails the "rough proportionality" test. But the approach under the Agreed Order does meet the test by placing the additional mitigation burden on the County.

c. The PCHB Order Restoring the Default Standard Will Cause Clark County to Violate RCW 82.02.020.

RCW 82.02.020 states that:

Except as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or any other building or building space or appurtenance thereto, or no the development, subdivision, classification or reclassification of land.

RCW 82.02.020 allows a local government to impose conditions that are a reasonably necessary to mitigate for impacts caused by

⁵⁵ *Burton v. Clark County*, 91 Wn. App. 505 (1998).

development. But local governments employing development conditions may only impose a permit or fee "...provided, [t]hat no such **charge shall exceed the proportionate share** of such utility or system's capital costs which the county, city, or town can demonstrate are attributable to the property being charged."⁵⁶ In *Isle Verde* our Supreme Court held that "RCW 82.02.020 does not permit conditions that satisfy a 'reasonably necessary' standard for all new development collectively; it specifically requires that a condition be 'reasonably necessary' as a direct result of the proposed development or plat."⁵⁷ The approach employed by Ecology and Clark County under the Agreed Order achieves functionally equivalent protections while requiring that developments meet standards that are proportionate to the direct impact being caused.

But if the PCHB's ruling is upheld by this Court and the County is required to impose the NPDES permit default approach it will result in stormwater facilities disproportionate to the size of development impacts.

⁵⁶ RCW 82.02.02(3).

⁵⁷ *Isle Verde*.

As stated above, Ecology's own Mr. O'Brien the primary author of the permit stated during his testimony that they are asking projects to restore conditions that may have disappeared long before the project got there.

If the PCHB's Order is upheld and the Agreed Order between the County and Ecology is not restored, Clark County will face legal challenges under RCW 82.02.020 and the Washington and US Constitutions on a case by case basis for each project. BIA therefore believes this Court needs to carefully consider whether the Agreed Order achieves better "rough proportionality" between new development and its impacts. And this Court has the authority to overturn the PCHB's decision for violating Constitutional and statutory provisions as applied.⁵⁸

C. The PCHB Purged Washington's Vesting Doctrine.

1. The PCHB Cannot Ignore Vesting Doctrine.

Vesting refers to the idea that, under certain conditions, a land use application will be evaluated under the land use statutes and ordinances in

⁵⁸ RCW 34.05.570(3)(a) and RCW 34.05.570(3)(b).

effect at the time of application submittal.⁵⁹ The purpose of vesting is "to provide a measure of certainty to developers and to protect their interests against fluctuating land use policy."⁶⁰ Mr. Killian and Mr. Golemo astutely noted in their testimony the basis for this rule in that any changes to land use ordinances could have a significant impact on the feasibility of a project once a developer commits.⁶¹ The Legislature deemed this such an important issue that it codified this common law doctrine and expanded it to include land divisions in 1987.⁶² The statute requires that permits be considered under the "zoning or other land use control ordinances" in effect on the date a fully complete application is submitted.⁶³ Neither section contains a provision allowing local jurisdictions to ignore the vesting statute to protect the public health, safety, and welfare except to

⁵⁹ *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 275 (1997).

⁶⁰ *Id.* at 278.

⁶¹ Testimony of Lance Killian, RP 930-931:8-4.; Testimony of Eric Golemo, RP 952-953: 8-21.

⁶² *Id.* at 275.

⁶³ RCW 19.27.095(1) (building permits); RCW 58.17.033 (land divisions).

the extent they may do so under the SEPA which is explicitly excepted from the statute.⁶⁴

State statutes fail to define "land use control ordinance." But Washington courts have held that a wide range of ordinances are subject to the vesting doctrine including those regulating wetlands,⁶⁵ geologic hazards,⁶⁶ and steep slopes.⁶⁷

Indeed, this Court already affirmed that stormwater regulations are subject to vesting. In *Westside Bus. Park v. Pierce County*, the court held that vesting applies to "land use control" ordinances, and that a "land use control" ordinance is one that exerts a "restraining or directing influence" over land use.⁶⁸ Under this definition, the court stated that a stormwater ordinance is a "land use control" ordinance and subject to vesting. *Id.* Similarly, in *Phillips v. King County* the Supreme Court held that "absent

⁶⁴ RCW 19.27.095(3); RCW 58.17.033(6).

⁶⁵ *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 895 (1999).

⁶⁶ *Audubon Soc'y v. Partners*, 128 Wn. App. 671, 679 n.4 (2005).

⁶⁷ *Girton v. City of Seattle*, 97 Wn. App. 360, 362 (1999).

⁶⁸ *Westside Bus. Park v. Pierce County*, 100 Wn. App. 599, 607 (2000).

some SEPA consideration, the County was bound by the vested rights rules to apply the requirements of the [surface water drainage code] in effect at the time of the project's application."⁶⁹ Development vested prior to the adoption of a new stormwater are subject to vesting, just like the stormwater drainage ordinances at issue in *Westside Business Park* and *Phillips*.

But the Pollution Control Hearings Board ignored the holding of *Westside* proclaiming that "[t]he Board finds no reason why the vested rights doctrine should be expanded to apply to an environmental regulation such as a pollution control permit that implements the federal Clean Water Act."⁷⁰ What the PCHB fails to understand is that the NPDES permit isn't being enforced by Ecology as an environmental regulation. But rather local governments comply with Ecology's NPDES permit by

⁶⁹ *Phillips v. King County*, 136 Wn.2d 946, 963 (1998).

⁷⁰ Pollution Control Hearings Board Order Denying Summary Judgment, p. 15:12-14.

drafting local development code ordinances that exert a "restraining or directing influence" over land use.⁷¹

Environmental regulations have general applicability and enforcement occurs without a permit being sought. For instance, the environmental agency can require compliance of other property and business owners for some issue they create. The PCHB fails to understand this is different from a land use ordinance.

Land use ordinances get enforced when a party seeks a development permit. Here the NPDES permit comes into play only when an applicant seeks a development permit from the County. And "the basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit."⁷² Ordinances that are in derogation of this common law right to use private property should be strictly construed in favor of property owners.⁷³ To the extent that there is ambiguity whether stormwater regulations are land use control ordinances

⁷¹ *Westside* at 607.

⁷² *Norco Construction, Inc. v. King County*, 97 Wn.2d 680, 684 (1982)

⁷³ *Morin v. Johnson*, 49 Wn.2d 275, 279 (1956).

and therefore subject to vesting, the ambiguity should be resolved in favor of property owners.

2. **The Federal Clean Water Act Does Not Preempt State Vesting Doctrine.**

BIA anticipates that Rosemere will argue that the CWA preempts state vesting law. But it does not. The state's vesting doctrine protecting private development rights is an issue distinct from Ecology's and the County's obligation under the CWA to adopt stormwater regulations that comply with the CWA. Nothing about the vested rights doctrine supersedes Ecology's ability to issue new NPDES permits and have new local regulations under those NPDES permits adopted on a going forward basis.

Instead, we maintain that the CWA's direction to the City to adopt compliant stormwater regulations has nothing to do with Washington's vested rights doctrine. Washington's vesting doctrine does not conflict with or prevent Ecology or the County from complying with the CWA through the adoption of new stormwater regulations. Although Washington courts have not reviewed directly whether the CWA preempts state vesting rules, this Court has indicated that the CWA does not

preempt Washington's vested rights doctrine.⁷⁴ In *Westside*, this Court stated plainly that there is nothing to suggest that the state vested rights doctrine makes compliance with the CWA impossible, nor that it frustrates the CWA's purposes and objectives.⁷⁵

Additionally, in its Report to the Legislature on the Municipal Stormwater NPDES Program, Ecology itself concedes that the CWA does not preempt the state's vested rights doctrine. Specifically, Ecology explains that the vested rights doctrine protects private development rights. Therefore, Ecology continues, "if the state requires the local jurisdiction to raise the standard, the jurisdiction cannot retroactively change the private development standard."⁷⁶

V. CONCLUSION

The County and Ecology entered into the Agreed Order to achieve an "equal or similar" result as that of the NPDES default permit. But the PCHB in a two to one opinion proclaimed that the Agreed Order did not

⁷⁴ *Westside* at 608-609.

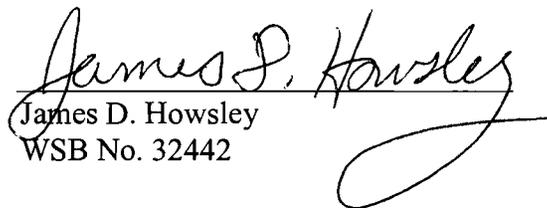
⁷⁵ *Id.* at 609.

⁷⁶ Ecology's Report to the Legislature, p. 20, January 2004.

meet this standard. The PCHB ignored the agency with expertise who drafted the permit who knew the technicalities of the permit and any alternatives. The PCHB modified the language of the permit arbitrarily and capriciously by adding language not found in the permit. And the PCHB ruled directly against this Court on Washington's vesting doctrine. Finally, the PCHB ignored the U.S. and Washington Constitutions along with RCW 82.02.020 in resurrecting the default standard. For all of these reasons this Court should reverse the PCHB's Order Denying Summary Judgment as it pertains to vested rights and reverse Final Order and approve the Agreed Order between the County and Ecology.

Dated this 19th day of July, 2011.

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

CLARK COUNTY AND BUILDING INDUSTRY ASSOCIATION OF
CLARK COUNTY,

Petitioners,

v.

ROSEMERE NEIGHBORHOOD ASSOCIATION, COLUMBIA
RIVERKEEPER, AND NORTHWEST ENVIRONMENTAL DEFENSE
CENTER,

Respondents,

and

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent Below.

CERTIFICATE OF SERVICE

Attorney for Petitioner:

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FILED
COURT OF APPEALS
DIVISION II
11 JUL 21 AM 11:30
STATE OF WASHINGTON
BY  DEPUTY

I, James D. Howsley, hereby certify and state the following: I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein.

On this 19th day of July, 2011, I electronically filed *Brief of Petitioner Building Industry Association of Clark County and Certificate of Service* with the Court of Appeals of the State of Washington, Division II, by mailing and e-mailing as specified below:

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Washington State Court of Appeals, Division Two
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Tacoma, Washington 98402-4454
Email: coa2filings@courts.wa.gov

On this 19th day of July, 2011, I caused true and correct copies of *Brief of Petitioner Building Industry Association of Clark County and Certificate of Service* to be served on the parties below by mailing and e-mailing as specified below:

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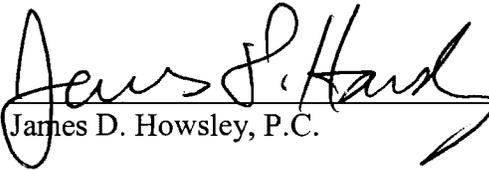
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of July, 2011.


James D. Howsley, P.C.