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DIVISION III
STATE OF WASHINGTON
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NO. 30288-1

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

JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

The core facts that led to the Board's summary judgment decision are undisputed. Mr. Lemire allowed his cattle unfettered access to the creek for many months of the year, resulting in a substantial potential for fecal coliform, temperature, sediment, and other types of pollution.

Mr. Lemire raises numerous issues that were not raised before the Board pertaining to regulation of "nonpoint source" pollution, alleged impairment of "stock-water" rights, and alleged conversion of agricultural property. Mr. Lemire is barred from raising these issues, but even if he could raise them, they do not constitute grounds for reversing the Board.

Mr. Lemire's taking argument rests on his position that the order impacts his ability to use his property as he sees fit. Even if this claim were substantiated, there is no per se taking because a property owner is not entitled to his preferred use of land, completely free of regulation. Thus, the superior court's invalidation of Ecology's order was erroneous and should be reversed. The Board's decision should be affirmed.

II. AUTHORITY AND ARGUMENT

A. The Board Properly Granted Summary Judgment to Ecology

The Board granted summary judgment to Ecology based on undisputed facts demonstrating that Mr. Lemire's activities caused a substantial potential to violate the state Water Pollution Control Act.

Opening Br. at 20-24. In response, Mr. Lemire argues that there was no evidence that his activities violated water quality standards, no evidence of testing conducted by Ecology, and no information related to surface water run-off from the property. Response Br. at 19. These arguments overstate Ecology's burden of proof.

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

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

RCW 90.48.080. While testing results or a violation of water quality standards might be evidence of *actual* pollution, Ecology is not required to prove actual pollution before it can act to address a substantial potential to pollute. RCW 90.48.120. Thus, the "lack of evidence" decried by Mr. Lemire is immaterial to the issue decided by the Board.

Mr. Lemire also argues that there were facts in dispute precluding summary judgment. Response Br. at 19-20. Although Mr. Lemire may

dispute that conditions on his property were as bad as they appeared to Ecology, the core material facts that the Board relied upon were undisputed. Ecology presented evidence of numerous site visits over several years by a nonpoint water quality specialist that observed polluting conditions on each visit. AR Doc. 7, Atkins Decl. ¶ 9. Mr. Lemire admitted that his cattle have access to the creek for many months of the year, he admitted they graze on stream banks causing them to break down, and he admitted the presence of cattle trails where cows cross the creek. AR Doc. 9, Lemire Decl. at 5.¹ Further, Mr. Lemire did not dispute Ecology's expert testimony that such conditions create substantial potential for pollution, ranging from fecal coliform to temperature changes to sediment pollution. AR Doc. 7, Atkins Decl. ¶¶ 11-17. Indeed, Ecology observed actual discharges of sediment from the Lemire property. *Id.* ¶ 10. Based on these undisputed facts, the Board properly granted summary judgment.

Mr. Lemire cites a handful of cases for the proposition that “substantial potential” to violate a law is a factual issue that cannot be

¹ Mr. Lemire also cites to his notice of appeal as a source of “facts” that the Board considered on summary judgment. *See, e.g.*, Response Br. at 11-13 (citing nine times to the appeal document which Lemire erroneously identifies as a declaration). However, the Board did not consider unsworn statements in the notice of appeal (CP at 8) nor should this Court consider them. If the notice of appeal is considered, it is worth noting that the document, like Lemire's declaration, contains Mr. Lemire's admissions that his cattle accessed and grazed around the creek. AR Doc. 1, Notice of Appeal at 1 (cattle “occasionally go down to the creek for a drink”) and 2 (“I use the cattle to flash graze . . . as weed control so we can get to and enjoy the creek . . .”).

decided on summary judgment. Response Br. at 20-21. However, Mr. Lemire inaccurately describes the holdings of the cases. First, he quotes *Morris* as stating that reasonableness is a “question of fact which cannot be resolved by summary judgment” but the actual quote is “reasonableness *in the instant case is a material fact question* which cannot be resolved by summary judgment” *Morris v. McNicol*, 83 Wn.2d 491, 495, 519 P.2d 7 (1974) (emphasis added). Second, he cites *Sedwick* for the proposition that “inferences derived from circumstantial evidence are inherently factual questions” but the actual holding of the case is that inferences *as to intent* that are drawn from circumstantial evidence are factual questions. *Sedwick v. Gwinn*, 73 Wn. App. 879, 887, 873 P.2d 528 (1994). At any rate, *Sedwick* is inapposite because Mr. Lemire’s case does not involve an issue of intent nor does it involve circumstantial evidence. Rather, Ecology’s order was based on Ecology’s direct observations of site conditions and Mr. Lemire’s admissions corroborating Ecology’s observations.

In order to defeat summary judgment, Mr. Lemire had to demonstrate genuine issues of material fact based on a declaration that set forth specific facts, not just speculation, argumentative assertions,

opinions, and conclusory statements.² *See, e.g., Suarez v. Newquist*, 70 Wn. App. 827, 832, 855 P.2d 1200 (1993). “A material fact is one upon which the outcome of the litigation depends.” *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998). Here, Mr. Lemire either admitted to, or did not dispute, the material facts that formed the basis for the Board’s decision. Summary judgment was appropriate.

B. Superior Court Exceeded Its Authority When It Invalidated Ecology’s Underlying Order

The superior court incorrectly applied Administrative Procedure Act (APA) standards of review when it looked beyond the Board’s order and invalidated Ecology’s underlying order. Opening Br. at 24-28. Mr. Lemire attempts to justify the court’s action by claiming that the court granted summary judgment to Mr. Lemire as the non-moving party. Response Br. at 21-24. However, this is not what the court did.

Summary judgment can be granted to a non-moving party only when there are no disputed issues of material fact. *See, e.g., Impecoven v. Dep’t of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992). Here, the court concluded that there were disputed issues of material fact, but then

² As the Board noted, “Mr. Lemire cannot defeat summary judgment by reliance on other, conclusory allegations that state his cattle management practices have no potential to pollute, particularly in light of the documented inspections by Ecology over a multi-year period. Mr. Lemire’s assertions of the use of [best management practices] and his observations as to how cattle will behave are simply not sufficient to create a material issue of fact with respect to the presence of cattle along and in the stream.” CP at 19.

proceeded to invalidate Ecology's order anyway. CP at 191. This exceeded the court's limited appellate authority under the APA.

Mr. Lemire has no response to the argument that the court's review was limited to the final Board order. Instead, Mr. Lemire points to the court's discussion of Ecology's "lack of evidence" to support its order. Response Br. at 23. However, the court's discussion of the evidence was based on the court's erroneous belief that Ecology needed to demonstrate actual (as opposed to potential) pollution. Opening Br. at 27. Thus, the court, like Mr. Lemire, changed the language of the statute to inflate Ecology's burden of proof. Furthermore, the court erroneously assumed that Ecology put forward all of its evidence at the summary judgment stage, although Ecology's order makes it clear that Ecology has additional evidence that it opted not to present at the summary judgment stage (but presumably would have presented during an evidentiary hearing).³ The invalidation of Ecology's underlying order was erroneous and should be reversed.

C. Mr. Lemire Cannot Raise New Issues on Appeal

Mr. Lemire raises three new issues that he did not raise before the Board: (1) whether the state Water Pollution Control Act reaches nonpoint

³ The order states "Ecology has photo documented livestock impacts at Mr. Lemire's property known to cause pollution to Pataha Creek . . . [and] [s]even samples taken directly below Mr. Lemire's property show excessive fecal coliform levels greatly exceeding the state water quality standards" Opening Br., Att. 1 at 4.

source pollution; (2) whether Ecology's order violates Mr. Lemire's "stockwater" rights; and (3) whether Ecology "proved" that the order will not result in conversion of agricultural land. Response Br. at 25-36.

With limited exceptions, none of which apply here, RCW 34.05.554 prohibits the introduction of new issues on appeal. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 73, 110 P. 3d 812 (2005). The prohibition on new issues "serves the important policy purpose of protecting the integrity of administrative decision making." *Id.* (citing *King Cy. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993)). It also supports the policies of allowing an agency to develop the necessary factual background on which to base its decision and allowing for the exercise of agency expertise in the first instance. *Orion Corp. v. State*, 103 Wn.2d 441, 456-57, 693 P.2d 1369 (1985).

Mr. Lemire tries to overcome his failure to raise the issues below by arguing that the Court has inherent authority to consider all issues necessary to reach a proper decision. Response Br. at 35. To support this, Mr. Lemire cites the *Peste* case where the court actually refused to consider issues that could have been raised in an appeal to the Growth Management Hearings Board, but the court did hear constitutional issues that the court found could be raised for the first time in an appeal under the Land Use Petition Act. *Peste v. Mason Cy.*, 133 Wn. App. 456, 467-

70, 136 P.3d 140 (2006). The three new issues raised by Mr. Lemire are not constitutional issues.

Contrary to Mr. Lemire's argument, courts have refused to exercise inherent authority when there has been a failure to exhaust administrative remedies. *Kreager v. Wash. State Univ.*, 76 Wn. App. 661, 664-65, 886 P.2d 1136 (1994). This policy "reflects a belief the judiciary should defer to administrative bodies having expertise in areas outside the experience of judges If the inherent power of the court is available to circumvent established administrative review procedures, there is substantial risk that the power would be abused." *Id.* at 665.

The Court should reject Mr. Lemire's attempt to circumvent the Board process by raising issues for the first time on appeal. Furthermore, since the superior court expressly declined to reach the stockwater issue (CP at 191) and Mr. Lemire did not cross appeal, there is another basis for refusing to reach that issue. *See State v. Stritmatter*, 25 Wn. App. 76, 80, 604 P.2d 1023 (1979) (declining to reach issues in defendant's brief when defendant did not cross appeal). However, if the Court does reach the issues, Mr. Lemire is not entitled to relief on any of the issues, as described in the next two sections of this brief.

D. Ecology Is Authorized To Address Nonpoint Source Pollution

Mr. Lemire argues that the State has no authority to address nonpoint source pollution because the federal Clean Water Act authorizes permits only for point source pollution. Response Br. at 25-35. Thus, according to Mr. Lemire, the State cannot require a permit or take any other enforcement measures to prevent pollution from nonpoint sources. Mr. Lemire's arguments are contrary to state and federal law.

The state Water Pollution Control Act was passed in 1945, 27 years prior to the passage of the federal Clean Water Act. Laws of 1945, ch. 216; *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002) (discussing passage and purpose of the federal act). The original state provision, unchanged today, provided broad authority to "control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington." Laws of 1945 ch. 216, § 10 (*codified as* RCW 90.48.030). The original state provision, also unchanged to this day, contained broad language describing what constitutes a "discharge." *Id.*, § 14 (*codified as* RCW 90.48.080). Nothing in the state Act's broad terms suggests that the Act is intended to address only point source pollution. Furthermore, the federal Clean Water Act itself recognizes that

states are free to be more stringent than the federal government in their efforts to control and prevent water pollution. 33 U.S.C. § 1370.

After Congress passed the federal Clean Water Act in 1972, the state Legislature amended the state Act so that Ecology could serve as the delegate for administration of the federal Act within the state. Laws of 1973 ch. 155, § 1 (*codified as* RCW 90.48.260). This involves administration of the National Pollutant Discharge Elimination System (NPDES) permit system for the regulation of discharges from point sources. *Envtl. Prot. Agency v. Calif. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205-08, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976) (discussing states' role in implementing NPDES requirements); RCW 90.48.260. However, the state Act is not limited to NPDES implementation. Rather, the state Act was and continues to be broader than the federal Act.⁴

Both federal and state courts have recognized that states retained primary jurisdiction over nonpoint source pollution after passage of the federal Act. Indeed, the federal Act's "disparate treatment of discharges from point sources and nonpoint sources is an organizational paradigm of the Act. From the passage of the Act, Congress imposed extensive regulations and certification requirements on discharges from point

⁴ For example, in addition to directly reaching nonpoint source pollution, the state Act applies to both groundwater and non-navigable surface waters whereas the federal Act's reach is limited to navigable surface waters. RCW 90.48.020 (defining waters of the State); 33 U.S.C. § 1362(7) (defining navigable waters).

sources, but originally relied almost entirely on state-implemented planning processes to deal with nonpoint sources” *Oregon Natural Desert Ass’n v. United States Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008). This distinction is premised on the fact that regional differences “make nationwide uniformity in controlling non-point source pollution virtually impossible,” and most mechanisms to address nonpoint source pollution, like land use controls, “are traditionally state or local in nature.” *Id.* at 785 (citation omitted). “Because of these practical difficulties, Congress was forced to shift primary control for the control of nonpoint source pollution to the states.” *Shanty Town Associates L.P. v. Env’tl. Prot. Agency*, 843 F.2d 782, 791 (4th Cir. 1988).

Although the states have primary regulatory control over nonpoint source pollution, the federal government exerts substantial (indirect) control over nonpoint sources through the state planning process mandated by the federal Act.⁵ *Id.*; see also *Pronsolino*, 291 F.3d at 1127-29. Specifically, Section 319 of the federal Act directs states to develop nonpoint source management programs that include “[a]n identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from . . . nonpoint source[s].”

⁵ Pataha Creek (where Mr. Lemire discharges) is on a list of polluted waters as mandated by the federal Act, and it is a tributary of the Tucannon River which provides critical habitat for endangered salmon species. AR Doc. 7, Atkins Decl. ¶ 5.

33 U.S.C. § 1329(b)(2)(A). States are also required to submit a certification from the state attorney general that the laws of the state provide adequate authority to implement the nonpoint source management program. 33 U.S.C. § 1329(b)(2)(D).

The California Court of Appeals recognized the differing state and federal roles over nonpoint source pollution when it addressed an argument similar to the one Lemire makes here. That court rejected the notion that the federal Act constrains state authority to regulate nonpoint source pollution. In doing so, the court noted that both federal and California state law “contemplate . . . *state* regulation of *nonpoint* sources of pollution pursuant to *state* law.” *Tahoe-Sierra Pres. Coun. v. State Water Resources Control Bd.*, 210 Cal.App.3d 1421, 1432 (Cal. App. 1989). In fact, states “are not only free to adopt but are *mandated* to adopt and enforce standards with [nonpoint] enforcement mechanisms derived from state law.” *Id.* at 1434. In essence, the federal Clean Water Act “recognizes the problem of nonpoint sources of pollution but leaves it to the states to fashion remedial devices.” *Id.* at 1436.

1. “Discharge” is not limited to point source discharges.

Mr. Lemire’s arguments to the contrary are unpersuasive. First, he alleges that the statutory definition of “discharge” limits discharges to

point sources only. Response Br. at 26-30. That is incorrect. The statute prohibits discharges into state waters, and broadly defines discharge:

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

RCW 90.48.080 (emphasis added).⁶ Nothing in the statute suggests that “discharge” is limited to point sources. To the contrary, use of the words run, drain, and seep demonstrate the opposite.

Mr. Lemire also cites a regulatory definition for his argument that “discharge” is limited to point source discharges. Response Br. at 27-28 (citing WAC 173-220-030(5)). The definition he cites is part of Chapter 173-220 WAC, the purpose of which is “to establish a state individual permit program . . . operating under state law as part of the National Pollutant Discharge Elimination System” WAC 173-220-010. The regulation that defines “discharge” specifies that the definition applies only in the context of permit issuance: “For purposes of *this chapter*, the following definitions shall be applicable” WAC 173-220-030 (emphasis added). Thus, the definition of “discharge” in WAC 173-220-

⁶ Although Mr. Lemire omits the italicized portion of the definition in his brief (Response Br. at 29), it is this part of the definition that most aptly describes conditions at the Lemire property.

030(5) does not apply outside of the permit context. Here, Ecology is not requiring Lemire to get a permit so the definition is irrelevant.

For the same reason, the federal cases cited by Mr. Lemire that define discharge in the NPDES context are irrelevant. Response Br. at 30-33. And Mr. Lemire's statements that Ecology cannot require him to get a Concentrated Animal Feeding Operation or other NPDES permit are irrelevant because Ecology is not requiring Lemire to get a permit. Resp. Br. at 28, 33-34.

2. Ecology can require implementation of best management practices.

Mr. Lemire cites WAC 173-201A-510(3)(b) for the argument that Ecology cannot require him to take any actions other than implementation of best management practices. Response Br. 28. The regulation cited by Mr. Lemire is not directly on point because it pertains to violations of water quality standards, and Ecology does not allege that Mr. Lemire violated a water quality standard. However, even if the regulation did apply, its language is clear that Ecology can *require* the implementation of best management practices ("If a discharger is applying all best management practices appropriate or *required* by the department" WAC 173-201A-510(3)(b) (emphasis added)); *see also* WAC 173-201A-510(3)(a) ("The primary means to be used for requiring compliance with the standards shall be through best management practices *required in*

waste discharge permits, rules, orders, and directives issued by the department for activities which generate nonpoint source pollution.”) Ecology’s order does require implementation of best management practices, including exclusionary fencing around the creek. This is a permissible exercise of Ecology’s authority to address nonpoint pollution.

3. Ecology’s exercise of nonpoint regulatory authority in this case will not result in enforcement actions against homeowners.

Last, Mr. Lemire claims that if the order against him stands, runoff from residential roofs, driveways, lawns, and parks will become subject to enforcement actions. Response Br. at 29 n.11. However, many of these other types of surface water runoff are already addressed through a series of stormwater permits. *See* 40 C.F.R. § 122.26 (federal requirements for municipal, industrial, and construction stormwater permits); § 123.25(a)(9) (states with delegated authority to administer the NPDES program must have authority to implement federal stormwater requirements). In contrast, most agricultural runoff is not addressed through permits. Therefore, if voluntary compliance is unsuccessful in addressing agricultural pollution, as it was in the present case, enforcement may be necessary.

Ecology’s order was issued under its broad state authority to control and prevent pollution. The federal Clean Water Act does not limit

this pre-existing authority. Thus, if the Court reaches this issue, the Court should conclude that Ecology's order was authorized.

E. Ecology's Order Neither Violates Stock-Watering Rights Nor Results In Conversion Of Farm Land To Other Uses

Mr. Lemire argues that Ecology's order also violates his "stockwater rights." Response Br. at 35-36. However, as the superior court found, the record contains no evidence of a violation of a water right for stock-watering purposes. CP at 191. Therefore, it is impossible to reach this issue even if Mr. Lemire had properly raised it below.

In order to demonstrate that stock-water rights are impaired by Ecology's order, Mr. Lemire would first need to prove that he has a valid water right authorizing the use of water from Pataha Creek for stock-watering purposes. A surface water right established after the enactment of the state Water Code in 1917 is documented either by a water right certificate or permit issued by Ecology. RCW 90.03.250, .290, .330. In addition, water rights that were established prior to the Water Code must be documented by a statement of claim for a water right that is filed in the state water rights claim registry. RCW 90.14.041-.121. If a claimed water right is confirmed in a general adjudication of water rights in a superior court, Ecology will issue a certificate to document the right. RCW 90.03.240. Thus, whenever someone asserts a right to use water, the person must have some physical documentation of the claim or the right in

the form of a certificate, permit, or claim form.⁷ Mr. Lemire presented no evidence of any of these things. Therefore, there is no evidence that he has a stock-water right.

Even if Mr. Lemire had proven the existence of a stock-water right, he cannot prove that his stock-water right is impaired by Ecology's order. Just because his cattle cannot tramp freely through the creek does not mean that he cannot divert water from the creek for stock-watering purposes (assuming a water right or claim exists). He could, for example, pump water from the creek into an upland trough for his cows to drink from. There is no evidence of violation of Mr. Lemire's "stock-watering" rights, and the Court need give no further consideration to this issue.

Last, Mr. Lemire argues that there is no proof that Ecology considered whether its action might result in conversion of agricultural land to nonagricultural uses. Response Br. at 36 (citing RCW 90.48.450(1)). However, had Mr. Lemire raised the issue as an affirmative defense below, Ecology could have presented evidence of the measures taken to "attempt to minimize the possibility of such conversion." RCW 90.48.450(1). As it stands, there is no proof that Ecology did not consider conversion prior to issuing its order, and there is

⁷ Withdrawals of *ground* water for stock-watering purposes are not subject to permitting requirements. RCW 90.44.050. The permit exemption is not relevant here because Mr. Lemire claims a right to withdraw water from a *surface* water, Pataha Creek.

no proof that conversion of agricultural land is likely to occur. Thus, the Court need not give further consideration to this issue either.

F. Ecology's Order Does Not Constitute A Per Se Taking

Mr. Lemire argues that the requirement in Ecology's order for exclusionary fencing keeping cattle from Pataha Creek constitutes a per se taking under article I, section 16 of the Washington Constitution.⁸ Mr. Lemire acknowledges that Ecology's order is not a "physical invasion" or a "total taking" of property interest, but argues that the order destroys a fundamental attribute of ownership—Mr. Lemire's right to use his property for ranch operations. *See* Response Br. at 38. There is no proof that Ecology's order impairs Mr. Lemire's ability to use his property as a ranch. However, even if it did, Mr. Lemire is incorrect that an order that impacts this use is a per se taking.

1. The ability to use property in a particular manner is not recognized as a fundamental attribute of ownership.

⁸ Mr. Lemire argues in footnote 17 that the Washington State Constitution affords broader protections than does the Fifth Amendment to the United States Constitution. Response Br. at 37 n.17. However, Mr. Lemire briefed neither the superior court nor this Court on the relevant *Gunwall* factors necessary for determining whether an independent analysis of the state constitution is proper (*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). Since Mr. Lemire has failed to brief *Gunwall*, this court should not address the argument that the state constitution provides greater protection. *See Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 33, 940 P.2d 274 (1997) (citing *Guimont v. Clarke*, 121 Wn.2d 586, 604, 854 P.2d 1 (1993) (refusing to analyze a takings claim under the state constitution because the party asserting the claim failed to brief the *Gunwall* factors)).

Mr. Lemire asserts that his “right” to use his property for ranch operations is a fundamental attribute of ownership.⁹ Response Br. at 44. To the contrary, Washington courts have recognized that the “right” to use property for a particular use is not a fundamental attribute of ownership. As the court explained in *City of Des Moines*, “[b]ecause the ability to use or lease property for mobile home use is contingent, it is not a part of the ‘bundle of sticks’ which the owner enjoys as a vested incident of ownership. It is thus not a fundamental attribute of ownership.” *City of Des Moines v. Gray Businesses, LP*, 130 Wn. App. 600, 614, 124 P.2d 324 (2005) (rejecting regulatory taking claim where the landowner had used his property for a mobile home park for almost 30 years and the challenged regulation destroyed the landowner’s ability to lease property for mobile home use). Simply put, “a regulation that may impact the property’s highest and best use is not a taking.” *Ventures Nw. Ltd. P’ship v. State*, 81 Wn. App. 353, 366, 914 P.2d 1180 (1996).

In cases where the historic or ongoing use of property was denied or changed, and a claim of a taking was made, the courts have consistently rejected the argument that a taking has occurred based on the “right” to use property in a certain way. Instead the courts look at whether the

⁹ Mr. Lemire also argues that Ecology’s order destroys stock-water rights and is therefore a taking. However, as discussed above, this issue is not properly before the Court nor is there any evidence that stock-water rights have been impacted.

regulation affecting use of the property involves a total taking, depriving the owner of any economically viable use. See *Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 35-37, 940 P.2d 274 (1997) (a regulation prohibiting possession, sale, transfer or release of elk was not a “total taking” because the elk farm could sell the elk-handling equipment and use the property for another purpose); *Snider v. Bd. of Cy. Comm’rs*, 85 Wn. App. 371, 381, 932 P.2d 704 (1997) (plaintiff claimed deprivation of the use of his property because it could not be developed for residential use, the court looked to whether the property retained any economically viable use); *Ventures Nw. Ltd. P’ship*, 81 Wn. App. at 366 (court found that denial of a permit for one particular use did not establish the absence of any economically viable use).

While Ecology’s order prohibits Mr. Lemire from giving his cattle unfettered access to the creek, there is no proof that it deprives him of any, let alone all, economically viable use, or even all use of the fenced off area. See Opening Br. at 35-37. No taking has occurred here.

2. Mr. Lemire has presented no evidence that Ecology’s order destroys a fundamental attribute of ownership.

While admitting that Ecology’s order does not affect a physical invasion or total taking, Mr. Lemire claims the order destroys one or more of the fundamental attributes of ownership (the right to possess, exclude others, and/or to dispose of property). Response Br. at 39. However,

Mr. Lemire presented no evidence to prove that Ecology's order affects these rights. To support a per se taking claim, Mr. Lemire must do more than simply assert that "several fundamental attributes or [sic] property ownerships are implicated." Response Br. at 44.

While Mr. Lemire claims that Ecology's order denies him the full and complete right to occupy and possess the subject property, there is no explanation as to how compliance with Ecology's order will destroy or derogate that attribute of ownership. Under the order, Mr. Lemire is required to submit a plan that includes livestock exclusion fencing to create a buffer for 7.23 acres of land (out of 114 acres of pastureland and 152 acres of cropland). The plan may include provisions allowing for limited access for cattle to cross the creek to reach other pastures and providing for off-creek drinking water supply. The creek also can be used for recreational and other purposes that do not involve letting cattle spend extended time in the near vicinity of the creek. Opening Br. at 36-37. These options illustrate that Mr. Lemire has not been deprived of the right to possess his property and there has been no per se taking.¹⁰

¹⁰ Furthermore, even if the regulation did restrict possession of the land to some degree, the courts consistently view the parcel of regulated property in its entirety. See *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 220, 334, 787 P.2d 907 (1990). Here, over 97 percent of Lemire's property is unaffected by the fencing requirement. Opening Br. at 36.

3. Ecology's order is not an exaction as it does not involve a condition placed on development requiring that part of the land be dedicated to public use.

Mr. Lemire argues that Ecology's order constitutes an unconstitutional exaction because Ecology has not shown a nexus between the exaction required and the problem created or exacerbated by the proposed development. Response Br. at 45-47. However the concept of exaction has no applicability in this case. Exaction is a concept in real property law where a condition for development is imposed on a parcel of land that requires part of the land be dedicated to public use. *See Burton v. Clark Cy.*, 91 Wn. App. 505, 520, 958 P.2d 343 (1998) (“*Nollan, Dolan*, and their Washington progeny stand for at least four propositions. First, *when the government conditions a land-use permit*, it must identify a public problem or problems that the condition is designed to address.” (emphasis added)). This case does not involve proposed development of Mr. Lemire's property and it does not involve conditions being imposed on a development or land-use permit.

Mr. Lemire erroneously cites *Burton* for the proposition that the law that applies to exactions includes “use restrictions.” Response Br. at 47 (citing *Burton*, 91 Wn. App. 505). However, *Burton* does not support that position. Rather, *Burton* analyzes the classic exaction scenario where a local government demands a dedication of land (in that case, a road) in

exchange for a development permit. Mr. Lemire cites no authority for his argument that the law of exactions applies to his situation, which involves a pollution control agency issuing an enforcement order to prevent water pollution. No such authority appears to exist. Since Ecology's order does not require Mr. Lemire to dedicate any of his land to public use, it does not constitute an exaction.

4. Damages are the exclusive remedy for a taking violation.

Mr. Lemire cites RCW 34.05.570(3)(a) for the proposition that the superior court could invalidate the order rather than require the payment of just compensation for the alleged taking. Response Br. at 48-49. That is incorrect. Although RCW 34.05.570(3)(a) does authorize relief from an unconstitutional order, a taking is unconstitutional only if government does not justly compensate the property owner.

It is well established that the remedy for a taking is the payment of just compensation, not invalidation of the underlying regulation. *See Orion Corp. v. State*, 109 Wn.2d 621, 649, 656, 747 P.2d 1062 (1987); *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 329-32, 787 P.2d 907 (1990); *Peste*, 133 Wn. App. at 470.¹¹ Here, there is evidence that Ecology offered financial assistance to Mr. Lemire. AR Doc. 7, Atkins

¹¹ However, government may, at its option, choose to amend or repeal a regulation to limit its overall liability. *Orion*, 109 Wn.2d at 668-69.

Decl. ¶ 19. The question for a taking, then, is whether the offered assistance was sufficient to make Mr. Lemire whole and, if not, what additional compensation is needed. *See, e.g., Orion*, 109 Wn.2d at 666 (when there is a regulatory taking, a constitutional violation does not occur unless it can be shown that the offered compensation was not just). The court erred by jumping straight to invalidation of the order.

G. The Award Of Attorneys' Fees And Other Expenses To Mr. Lemire Under The Equal Access To Justice Act Was Improper

Mr. Lemire argues that Ecology waived its right to contest the attorney's fee award under the Equal Access to Justice Act because Ecology agreed to entry of the superior court order. Response Br. at 49-50. This is disingenuous in light of the language in the order that reflects the parties' understanding that Ecology did not waive its ability to contest attorney's fees on appeal. Specifically, the order states "[i]t is noted that the Department of Ecology contends that its action is reasonable in law and fact, and that the agency action was substantially justified. The Department of Ecology has not waived any arguments or defenses to contest an award of attorney's fees on appeal of this case." CP at 191. To further demonstrate the parties' understanding that Ecology was preserving its arguments, the parties agreed to stay payment of fees and costs until this Court makes a final decision on the case. *Id.*

At any rate, this Court should reverse the award by the superior court of attorneys' fees under the Equal Access to Justice Act if Ecology's position is found to be correct, as Mr. Lemire will not have prevailed in judicial review of an agency action. Opening Br. at 40-41. Even if this Court affirms the superior court's decision, the award of attorneys' fees should be reversed because Ecology's position was substantially justified. Opening Br. at 41-43.

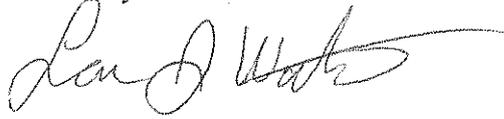
In the interests of judicial economy, the parties did not argue their positions to superior court but Ecology (with Mr. Lemire's concurrence) preserved its argument for appeal. Therefore arguments and defenses to contest the award of attorneys' fees and costs can be made to this Court and were not waived.

III. CONCLUSION

For the reasons stated in its opening brief and this reply brief, Ecology respectfully asks the Court to reverse the superior court's decision invalidating Ecology's order, and affirm the Board's decision granting summary judgment to Ecology.

RESPECTFULLY SUBMITTED this 19 day of March 2012.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in cursive script, appearing to read "Laura J. Watson", written in black ink.

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NO. 30288-1

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

JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL
HEARINGS BOARD,

Respondent Below.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 19th day of March 2012, I caused to be served a true and correct copy of the Reply Brief of Appellant in the above-captioned matter upon the parties herein as indicated below:

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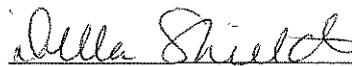
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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