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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSEPH LEMIRE

Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL HEARINGS BOARD,

Appellant.

RESPONDENT LEMIRE'S ANSWER TO AMICUS CURIAE BRIEF OF PACIFIC COAST SHELLFISH GROWERS ASSOCIATION and LUMMI NATION, PORT GAMBLE S'KLALLAM TRIBE, JAMESTOWN S'KLALLAM TRIBE, NISQUALLY TRIBE, NOOKSACK TRIBE, QUINAULT TRIBE, SWINOMISH TRIBAL INDIAN COMMUNITY, STILLAGUAMISH TRIBE OF INDIANS, THE SUQUAMISH TRIBE, AND THE TULALIP TRIBES

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ORIGINAL

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I. INTRODUCTION

Pacific Coast Shellfish Grower's Association ("Pacific Coast Shellfish") and Lummi Nation, Port Gamble S'Klallam Tribe, Jamestown S'Klallam Tribe, Nisqually Tribe, Nooksack Tribe, Quinault Tribe, Swinomish Tribal Indian Community, Stillaguamish Tribe of Indians, the Suquamish Tribe, and the Tulalip Tribes (collectively "Tribes") submitted Amicus Curiae Briefs.[1] The Amicus briefs focus on Department of Ecology's (Ecology) purported authority to utilize administrative orders to restrict, modify and eliminate legal agricultural activities based upon to perceived (but unsubstantiated) nonpoint source pollution. The asserted authority is not found in the plain language of the statutes, legislative history or developed case law. And administrative orders were never utilized in the first 65 years of the Washington Water Pollution Control Act ("WPCA") to regulate nonpoint source pollution. There is no legal foundation for this "new found authority."

II. OVERVIEW OF AMICI AND ISSUES

Pacific Coast Shellfish and the Tribes assert that Ecology possesses "broad authority" to regulate *nonpoint source pollution* under

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[1] Supreme Court granted motion and accepted Amicus Briefs from Pacific Coast Shellfish and the Tribes on August 16, 2012. Respondent Lemire was allowed to answer the Amici briefs. The answer will address both briefs in a single brief. RAP 10.1(e). Respondent's answer is limited to 20 pages for each Amicus brief. RAP 10.4(b). This answer will adhere to limitations and be less than 40 pages in the aggregate.

the Washington Water Pollution Control Act ("WCPA") through issuance of administrative enforcement orders. Pacific Coast Shellfish characterizes the salient issue in this case to be a challenge to "rescind Ecology's authority to regulate nonpoint source pollution." Brief of Pacific Coast Shellfish at 1-2. The fact is that Ecology has never exercised administrative order authority in a case involving nonpoint source pollution. Despite more than 200 pages of briefing, neither Ecology nor Amici have cited a single federal, state or administrative decision authorizing imposition of severe (and unconstitutional) conditions with respect to nonpoint source conditions through administrative orders. Contrary to Pacific Coast Shellfish's assertion that Lemire seeks to rescind DOE authority, Lemire challenges the exercise of authority that had apparently laid dormant for 65 years.

At the heart of the issue is the distinction between "point source" or "nonpoint source" pollution. "Point source" pollution derives from human activity and is regulated under both federal and state law through an integrated permit system.[2] Any "discharge of pollutants" through a discernable, confined and discrete conveyancing vehicle requires a

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[2] Federal law and state regulation contain identical definitions of "point source." 33 U.S.C. § 1362(14) and WAC 173-220-030(18). A "point source" also includes a "concentrated animal feeding operation" (CAFO). All parties acknowledge that Lemire's modest cow-calf operation is not a CAFO.

discharge permit. Agricultural stormwater discharges and return flows from irrigated agriculture are exempt from the permit requirements. 33 U.S.C. §1362(14) and WAC 173-220-030. Nonpoint source pollution, on the other hand, results from natural conditions such as rainfall, snowmelt, surface and water runoff, or subsurface or underground sources. There is no human component to these naturally occurring conditions or events. Nonpoint and point sources are "... not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance." *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1071 (9th Cir. 2011). Administrative Order No. 7178 sought to impose permit-like requirements on nonpoint source exempt activities.

Administrative Order 7178 was built on speculation and conjecture. It is acknowledged that there were no substantial discharges of pollutants from the Lemire property. And there were no on-site inspections or testing of waters to substantiate assumptions of adverse impacts on water quality. The Tribes have offered an interesting reference document – *How Does Ecology Work with Non-Dairy Livestock? Washington Department of Ecology, February 2011, Publication No. 11-10-015.* (Br. of Tribes at 6). In this publication, Ecology identifies mechanisms for financial and technical assistance together with a

procedure for verification of adverse water quality impacts from non-dairy livestock activities:

> We rarely need to use our enforcement tools. Most problems can be addressed by Ecology and producers working together. ... *when it becomes clear that the water quality problem cannot be addressed through financial and technical assistance, Ecology uses a combination of multiple site visits, complaints, photographs, water samples and extensive scientific research to demonstrate verifiable threats to water quality.*

(Italics added). Ecology failed to follow their own guidelines – there were not multiple site visits (only off-site observations in February every two years); no complaints; no water samples; and no extensive scientific research to demonstrate verifiable threats to water quality. Ecology has not identified a pipe, ditch, channel, conduit or other conveyancing mechanism to carry natural runoff.[3] And there is no information on

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[3] Pacific Coast Shellfish makes the following unsubstantiated statement:

> Therefore, Ecology can properly issue orders whenever a person creates a substantial potential to allow contaminants to run, seep, or drain into state waters, in violation of RCW 90.48.080. *Id.* That is precisely what the undisputed facts show occurred with respect to Mr. Lemire, and Ecology was fully authorized to issue the administrative order that is the subject of this proceeding. Br. of Appellant at 5-9.

Br. of Pacific Coast Shellfish Brief – 5. The facts are not undisputed. The record is void any evidence establishing an impact on water quality at the Lemire property (i.e. no testing or water samples); no identification of conveyancing vehicle or path for natural runoff; no analysis of slope, rainfall, snowmelt or other factors affecting likelihood, frequency or amount of natural runoff; no substantiated findings with respect to manure, vegetation, runoff or regular access to the stream; and no substantive dispute regarding application of best management practices. Ecology observations were made during single day visits in the winter without any on-site inspection or investigation. Cattle did not have access to the riparian corridor during winter months or times of high water flow;

topography, precipitation, runoff patterns or snowmmelt. Administrative Order No. 7178 was built on pure guesswork.

Pacific Coast Shellfish and the Tribes express concern over nonpoint source pollution impacts on finfish and shellfish environments.[4] That is understandable. The administrative record, however, contains no evidence, proof, or argument establishing a causal relationship between Lemire's cow-calf operation and adverse impacts on finfish and shellfish. More importantly, Amici ignore statutory and regulatory processes designed to address nonpoint source pollution as it affects their industries. The Shellfish Protection Act provides for the development of shellfish protection districts and local plans to address discharges and impacts from "animal waste." RCW 90.72.065. The Tribes' concerns about dairy operations are addressed by specific statutory regimens regulating dairy producers and dairy animal feeding operations. RCW 90.64.017 and .020.[5] And application of federal nonpoint source processes establishing

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vegetation grew and flourished during spring and summer months; Pataha Creek would dry up during summer months; and the area lacked woody vegetation because of rocky soil conditions.

[4] Pacific Coast Shellfish and the Tribes allege facts throughout their briefs related to nonpoint source pollution that are irrelevant and were not included in the record below. Facts that were not before the fact finder may not be considered on appeal. Additional evidence may be accepted by an appellate court only in limited circumstances, none of which exist here. RAP 9.11.

[5] A specific analytic structure is provided with respect to determinations regarding a dairy animal feeding operations' contribution to pollution of surface or ground waters of

Total Maximum Daily Loads (TMDL) for the Nooksack River have been highly successful in restoring shellfish beds. Brief of Tribes, Appendix A.[6]

Amicus also ignore the legislative balance established between water quality and agriculture. Significantly, when water quality control was first addressed by the legislature in 1945, the Water Pollution Control Act ("WPCA") recognized that a primary purpose of water quality legislation was to assure that water quality would not have a deleterious effect on or "... to the carrying on of any agricultural, or horticultural pursuit which may be injuriously affected; to the lawful conduct of any

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the state. The inspection and permit require consideration of (a) size of the animal feeding operation and the amount of wastes reaching waters of the state; (b) the location of animal feeding operations relative to the waters of the state; (c) the means of conveyance of animal wastes and process waters into the waters of the state; (d) the slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process waste waters into the waters of the state; and (e) other relevant factors as established by rule. RCW 90.64.020. Ecology did not establish any of these factors with respect to Administrative Order 7178. There was no determination of the amount of waste purportedly reaching the waters of the state; no identification of the means of conveyance of animal wastes or process waters; no consideration of a slope, vegetation, rainfall or other factors affecting likelihood or frequency of discharge of animal wastes; and no other substantive evidence. It is incongruous to apply a strict statutory structure to a known source of pollution such as a dairy farm and allow a lesser standard or analysis with respect to small grazing operations.

[6] The Tribes provide supplemental materials related to closures of shellfish beds on the Nooksack River in Whatcom County, Washington. Also attached to the amicus brief are materials related to water quality in Portage Bay Shellfish (Appendix A). The identified problems relate to dairy discharges and not grazing operations. Note Attachment A attributes improvements in water quality to "... the development and implementation of a Total Maximum Daily Load (TMDL)" for the water course nonpoint source pollution is addressed primarily through TMDLs. Department of Ecology has not completed TMDLs for Pataha Creek or Tucannon River.

livestock industries; to the use of such waters for domestic animals; . . .." Laws of 1945, ch. 216 § 13. It is incongruous that Administrative Order No. 7178 effectively terminates the exact activity (legal livestock industries and use of waters for cattle) sought to be protected by the original legislation. WPCA establishes a statutory structure that is particularly sensitive to protecting agricultural activities. Enforcement actions "... *shall* consider whether an enforcement action would contribute to the conversion of agricultural land to nonagricultural purposes." RCW 90.48.450(1). And, actions "... may not abrogate, supersede, impair, or condition the ability of a water right holder to fully divert or withdraw water ... ." RCW 90.48.422(3) (Recognizing established stock water rights). Finally, agricultural stormwater runoff and returns from irrigated agriculture are exempt from permit requirements. WAC 173-220-020(18). The balance is clear from a complete reading of the statutes.

All citizens of this state are concerned about water quality. Pacific Coast Shellfish has a legitimate interest in protecting its business operations. And the Tribes maintain recognized treaty rights. The recognized goal of maintaining and improving water quality does not, however, provided unfettered administrative authority to impose land use restrictions and take private property. Agency authority can only be

exercised in the context of the statutory directives, language and boundaries.

III. ARGUMENT

A. Water Quality Management is Implemented Through an Integrated Statutory Regimen Under Both State and Federal Law.

The management and regulation of water quality in this state derives from an integrated structure of federal and state law. The Clean Water Act (CWA), originally known as the Federal Water Pollution Control Act (FWPCA), provides an overarching framework for water pollution regulation and permit processes. The state has assumed "complete authority" to administer the National Pollutant Discharge Elimination System (NPDES) permit program. *Pederson v. Washington State Department of Transportation,* 25 Wn. App. 781, 784, 611 P.2d 1293 (1980) ("The Washington Department of Ecology has taken over the federal role in issuing permits under the statute."). Virtually every state statutory and administrative process reflects federal mandates and directives. State of Washington has implemented water quality standards, individual and general permit programs, and nonpoint source management plans based on federal directives. WPCA is structured to work "... cooperatively with the federal government in a joint effort to extinguish sources of water quality degradation." RCW 90.48.010.

Pacific Coast Shellfish and the Tribes essentially ask this Court to ignore the integrated nature of federal and state water quality regulation.[7] The argument is that WPCA provides independent enforcement authority with respect to nonpoint source pollution and that CWA may be disregarded in the analysis. This argument is contrary to stated legislative purposes, rules of statutory construction, and common sense. The legislature clearly contemplated that state and federal law would be integrated and applied in a consistent manner. RCW 90.48.262 provides:

> (1) The powers established under RCW 90.48.260 shall be implemented by the department through the adoption of rules in every appropriate situation. The permit program authorized under RCW 90.48.260(1) shall constitute *a continuation of the established permit program of RCW 90.48.160 and other applicable sections within chapter 90.48 RCW*. The appropriate modifications as authorized in this 1973 amendatory act are designed to avoid duplication and other wasteful practices and to insure that the state permit program contains all required elements of and is compatible with the requirements of any national permit system.

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[7] Pacific Coast Shellfish misconstrues the principle issue in the case. It summarizes Lemire's argument position as follows:

> A central theme of Mr. Lemire's Response Brief is that Ecology's authority under the WPCA is limited by federal authority to require NPDES permits under the CWA because the State Act implements the Federal Act. Response Br. at 30. This reflects a basic failure to understand state and federal regulatory authority over water pollution.

Br. of Pacific Coast Shellfish at 17. Lemire is not arguing that this case presents an issue of federal preemption or prohibition. CWA and WPCA must be construed *in pari material* in order to have a coherent integrated regulatory system.

(Italics added). Our courts have recognized that "... [t]he functional heart of the scheme is the reviewable permit system to regulate the discharge of pollutants from 'point' sources." *Pederson*, 25 Wn. App. at 785. A common and uniform permit structure has evolved over 40 years with accepted terms, definitions and concepts. The common terminology must be respected in order to have a coherent and understandable regulatory process. And significantly, it must be recognized that neither permits nor administrative orders were utilized in the first 65 years of WPCA to impose site-specific requirements and restrictions related to nonpoint source runoff and pollution.

1. The Clean Water Act Does Not Give Ecology Direct Authority to Regulate Nonpoint Source Pollution.

As a simple beginning proposition, CWA does not provide direct authority for issuance of Administrative Order 7178.[8] CWA imposes permit requirements for "discharges of pollutants" from point sources, requires development of water quality standards, and directs development of programs for impaired waterbodies.

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[8] Pacific Coast Shellfish argues that "... Federal law supports Ecology's authority to regulate nonpoint source pollution." Br. of Pacific Coast Shellfish at 8. Pacific Coast Shellfish does not cite legal authority but simply argues that CWA allows states to regulate nonpoint source pollution. The Tribes make similar arguments but do recognize that CWA requires states to list water bodies that fall below minimum water quality standards ("Section 303(d)" List); develop of Total Maximum Daily Loads (TMDLs) for listed waters; and develop an antidegradation policies. Br. of Tribes at 16-18. No federal laws have been cited to establish authority to issue Administrative Order 7178.

A historic overview of CWA's regulatory structure and approach is helpful in the analysis. Prior to 1972, the federal law of water pollution regulation was based upon a water quality oriented scheme. See generally, *City of Bellingham v. Department of Ecology*, PCHB No. 84-211, 1985 WL 21854, *2 (1985).[9] When Congress enacted sweeping revisions to CWA in 1972, it shifted the focus from the effects of pollution (water quality standards) to the preventable causes of pollution (discharges of pollutants). *Oregon Natural Desert Assoc. v. Dombeck*, 172 F.3d at 1096 (9th Cir. 2008).[10]

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[9] Pollution Control Hearings Board provided a historic summary of both federal and state water control legislation in *City of Bellingham v. Department of Ecology*, PCHB No. 84-211, 1985 WL 21854 (1985). The Board noted conflicting theories regarding water quality management and stated:

> The history of efforts to combat water pollution in this country reflects this same clash between two theories of regulation: management based on receiving water quality and management based on control of effluent at the point of discharge.
>
> The water quality approach focuses exclusively on conditions in the ambient receiving medium to which pollutants are discharged. Water quality standards are based on conditions considered necessary for uses desired to be made of the receiving waters. Such standards are, indeed, an indirect definition of pollution itself.
>
> The effluent control approach centers on the pollutant reduction which can be achieved prior to discharge by the application of technology. For so-called point sources, this approach pushes toward requiring that what goes out the end of the pipe be as clean as the state-of-the-art makes possible.

Id. *1.

[10] Congress enacted the CWA in 1972, amending earlier federal water pollution laws that had proven ineffective. *EPA v. California*, 426 U.S. 200, 202 (1976). Prior to 1972, federal water pollution laws relied on "water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism ... for the control of water pollution." *Id.* The pre-1972 laws did not, however, provide

> The 1972 Act prohibited discharge of pollutants to navigable waters from point sources, except as in compliance with various treatment requirements. These requirements were to be imposed, principally, through a system of federal permits, entitled the National Pollutant Discharge Elimination System, giving rise to the acronym of extravagant unpronounceability-NPDES.
>
> The Act provided for state administration of the federal program where the laws and administrative resources of the state were found adequate to the task. *The State of Washington, through DOE, qualified for and undertook this function, merging the NPDES permit system with a pre-existing system of waste discharge permits under state law alone.*

(Italics added). State and federal laws were "merged" with respect to permit requirements for the discharge of pollutants. RCW 90.48.262. CWA prohibits "the discharge of any pollutant by any person" unless done in compliance with the law. *South Florida Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004); (holding that facility may be "point source" even though it does add pollutants but simply conveys pollutants from nonpoint sources); and 33 U.S.C. §1311(a). This state adopted the federal structure and recognized that the

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concrete direction concerning how those standards were to be met over time. *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). Congress made sweeping revisions to the water pollution laws which began from the premise that the focus "on the tolerable effects rather than the preventable causes of pollution" constituted a major shortcoming in the pre-1972 laws." *Oregon Natural Desert Assoc. v. Dombeck*, 172 F.3d at 1096 (quoting *EPA v. State Water Resources Control Board*, 426 U.S. 200, 202-03 (1976)). The 1972 Act therefore sought to target primarily "the preventable causes of pollution," by emphasizing use of technological controls on point source discharges. *Pronsolino*, 291 F.3d at 1126.

permit system was a continuation of all matters under RCW Ch. 90.48. RCW 90.48.262.

Point source discharges require permits. RCW 90.48.160 and .260. A discharge permit is required even if the point source (i.e. the manmade conveyancing vehicle) does not add pollutants or even reduces the level of pollutants. *Miccosukee Tribes*, 541 U.S. at 105 (permit required even if activity does not add pollutants); *Pederson,* 25 Wn. App. at 786 (permit required even though system actually reduced level of discharged pollutants). Nonpoint source runoff and activities do not require permits. Pacific Coast Shellfish, the Tribes, and Ecology acknowledge that there has been no "discharge of pollutants" from Lemire's small farming operation, and neither a federal nor state individual discharge permit is required for the operation. Br. of Pacific Coast Shellfish at 9. ("Courts hold pollutants that run, drain, or seep into waters without a discernable, confined and discrete conveyance are not point source discharges and do not require an NPDES permit." The state permit system is a continuation of the NPDES permit and, in a similar manner, does not require an individual discharge permit. WAC 173-220-020. Lemire's property conditions do not constitute a point source under either state or federal law.

Unlike point source pollution, nonpoint source pollution arises from many disbursed activities over large areas and is not traceable to a single discrete source.

> Although nonpoint source pollution is not statutorily defined [in the CWA], it is widely understood to be the type of pollution that arises from many disbursed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffused way, it is very difficult to regulate through individual permits. The most common example of nonpoint source pollution is residue left on roadways by automobiles. Small amounts of rubber are worn off of the tires of millions of cars and deposited in a thin film on highways; minute particles of copper dust from brakelines are spread across the roads and parking lots each time a driver applies the brakes; drips and drabs of oil and gas ubiquitously stained driveways and streets. When it rains, the rubber particles and copper dust and gas and oil wash off the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean.

League of Wilderness Defenders/Blue MountainsBiodiversity Project v. Forsgren, 309 F.3d 1181, 1184 (9th Cir. 2002). See also WAC 173-201A-020. ("Non-point source" is defined to include "surface water runoff from agricultural lands"). The CWA "... focused on point source pollutors presumably because they could be identified and regulated more easily than nonpoint source pollutors." *Dombeck,* 172 F.3d at 1096, citing *Natural Resources Defense Council v. EPA,* 915 F.2d 314, 316 (9th Cir. 1990). Migrations of ground water or soil runoff (nonpoint source conditions) do not constitute an unlawful discharge of pollutants under

federal law. See e.g. *Chesapeake Bay Foundation, Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 602, 619-20 (D. Md. 2011).[11] (Dismissing citizen lawsuit alleging liability for nonpoint source discharges).

Federal courts have been clear and certain in their holdings that livestock grazing does not constitute a "discharge of pollutants" requiring a federal discharge permit. *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998); and *Oregon Natural Desert Association v. United States Forest Service*, 550 F.3d 778 (9th Cir. 2008). State law extends federal permit provisions to all point source discharges and permits. RCW 90.48.262. (... the federal permit system "... shall constitute a continuation of the established permit program of RCW

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[11] Federal law is similar to state statutory language and declares that "... the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a). The court in *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1077 (9th Cir. 2011), citing *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1375-76 (D.C. Cir. 1977) stated:

> There are innumerable references in the legislative history to the effect that the Act is founded on the "basic premise that a discharge of pollutants without a permit is unlawful and that discharge is not in compliance with the limitations and conditions for a permit are unlawful." *Even when infeasibility arguments were squarely raised, the legislature declined to abandon the permit requirement.*

State of Washington adopted a virtually identical definition of "discharge of pollutant". WAC 173-220-030. That definition states that the term "discharge of pollutants" means (a) any addition of any pollutant or any combination of pollutants to the surface waters of the state from any *point source*, (b) any addition of any pollutant or combinations of pollutants to the waters of the contiguous zone or the ocean from any *point source* other than a vessel or other floating craft. The clear intent within the regulatory regimen was to have an integrated permit process for both federal and state purposes.

90.48.160 and other applicable sections of chapter 90.48. RCW."). As a result, no permit is required for Lemire's cattle grazing under state law. This conclusion is bolstered by state regulations that specifically recognize that agricultural storm water runoff and return flows from irrigated agriculture will not be considered "point sources" subject to permit requirements. WAC 173-220-030 and 173-201A-020. The same definitions and terminology are applied at both the federal and state level with respect to individual discharge permits (NPDES or state permits).[12] Neither a federal nor state law extends permit requirements to nonpoint source discharges.

2. CWA Addresses Nonpoint Source Pollution Through Water Quality Standards, Impairment Listings and Total Maximum Daily Load (TMDL) Requirements.

The integrated federal-state discharge permit process focuses on technology-based controls that limit the discharge of pollutants from point sources. Pacific Coast Shellfish argues that "... rescinding Ecology's authority to regulate nonpoint source pollution would have dire

[12] WAC 173-220-030(5) defines "discharge of pollutants" to include "... any addition of any pollutant or combination of pollutants to the surface waters of the state from any *point source*, ..." A "discharge" is defined to be an "owner or operator of any facility or activity subject to regulation under the NPDES program." WAC 173-220-030(6). And "point source" is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation ... ." WAC 173-220-030(18). Ecology's definition mirrors federal statutory definitions. The legislative intent is that implementation of the NPDES program "... shall constitute a continuation of the established permit program of RCW 90.48.160." RCW 90.48.262.

consequences" on management of water quality. Br. of Pacific Shellfish at 1. There is no rescission of authority. CWA and state programs provide a wide array of vehicles to manage nonpoint source pollution.

CWA "... uses distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources". *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) The court in *Pronsolino* noted:

> The Act directly mandates technological controls to limit the pollution point sources may discharge into a body of water. *Dombeck*, 172 F.3d at 1096. On the other hand, the Act "provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task, ..."

See also *Oregon Natural Desert Assoc. v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998). The rationale for the distinction was summarized by the court in *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002):

> In addition to originating from point sources, pollution also comes from non-point sources, such as runoff from farm lands, mining activity, housing construction projects, roads, and so on. *Non-point sources cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point.* Therefore, to regulate non-point pollution, the Act requires states to establish water quality standards. 33 U.S.C. §§1313(a) – (c). To determine the water quality standard, a state designates the use for which a given body of water is to be protected (fishing, for example), and then determines the level of water quality needed to safely allow that use. *Id.* at §1313(c)(2)(A).

> That level becomes the water quality standard for that body of water.

(Italics added). CWA recognized that even with controls on point source discharges there may be waterbodies that do not meet water quality standards. *Natural Resource Defense Council v. EPA*, 915 F.2d 1314, 1316-17 (9th Cir. 1990). Specific programs were put into place to address impaired waterbodies. The additional mechanisms were put in place to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Those programs are in place to address impaired conditions of Tucannon River and Pataha Creek.

Nonpoint source pollution is addressed primarily by CWA through three statutory mechanisms: (1) Section 303 requiring adoption and maintenance of water quality standards, 33 U.S.C. §1313 (a) and (b); (2) identification and listing of impaired water bodies (Section 303(d) lists), 33 U.S.C. §1313(d); and (3) Section 319 requiring development of nonpoint source management plans, 33 U.S.C. §1320. Pacific Coast Shellfish and the Tribes are incorrect in their suggestion that nonpoint source conditions will be ignored in the absence of regulation through a quasi-permit process. The established structure for addressing nonpoint source pollution will remain in full force and effect.

In accordance with Section 303, State of Washington has adopted water quality standards. WAC Ch. 173-201A. The regulations designate uses and water quality criteria for both fresh and marine waters. WAC 173-201A-200 and 210. The record contains no evidence that the adopted standards have been violated at or near the Lemire property. And there is no proof that conditions on the Lemire property have caused a violation of applicable standards. Ecology has also adopted are antidegradation policies. WAC 173-201A-300. No proof has been presented to establish a violation of these policies. This case simply does not involve any claim of violation of water quality standards or antidegradation policies by reason of ranching activities on the Lemire property.

Pataha Creek and Tucannon River have been placed on the Section 303(d) list of impaired water bodies. "Section 303 is central to [CWA's] carrot-and-stick approach to attaining acceptable water quality without direct federal regulation of nonpoint sources of pollution." *Pronsolino*, 291 F.3d at 1127 (holding that TMDL's are authorized even where the sole source of water quality degradation is nonpoint source pollution). For waters on the Section 303(d) list, the state must calculate permissible levels of pollution called "total maximum daily loads" or "TMDL's". 33 U.S.C. §1313(d)(1)(C). A TMDL is the maximum amount of a pollutant which can be discharged or "loaded" into the waters at issue from all

combined sources. *Dioxin/Organochlorine Center v. Clark*, 57 F.3d 1517, 1520 (9th Cir. 1995); and *Pronsolino v. Nastri*, 291 F.3d 1123, 1128 (9th Cir. 2002). The TMDL for a pollutant is the sum of: (1) the "wasteload allocations," which is the amount of pollutant that can be discharged to a water body from point sources, (2) the "load allocations", which represent the amount of a pollutant in a water body attributable to nonpoint sources or natural background, and (3) a margin of safety. 40 CFR §§ 130.2(g-i), 130.7(c)(1). The TMDL "shall be established at a level necessary to implement the applicable water quality standard." 33 U.S.C. §1313(d)(1)(c). The court in *Pronsolino* summarized the purpose of TMDL's as follows:

> As such, TMDLs serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation's waters.

Pronsolino v. Nastri, 291 F.3d at 1129.

While TMDL's "are primarily informational tools that allow states to proceed from identification of waters requiring additional planning to the required plans," they are effective. *Pronsolino,* 291 F.3d at 1129. The Tribes have acknowledged the value of an implemented TMDL for the Nooksack River:

> Monitoring data demonstrates significant improvement of a serious water quality problem has been achieved following development and implementation of a Total Maximum Daily Load (TMDL). This positive change occurred within a surprisingly short period and, if this trend continues, use of an important tribal resource could be restored next year.

(Brief of Tribes, Appendix A). The problem in this case is that Ecology has not fully complied with federal directives related to Pataha Creek. Ecology has adopted a TMDL for temperature as "... a pilot project because of its small size and largely rural character." www.ecy.wa.gov/programs/wa/tmdl/tuchannonpatahaTMDL. Ecology has not, however, adopted a TMDL for fecal coliform or pH exceedances. This primary federal mechanism for addressing nonpoint source pollution of the waterbody has not been completed by Ecology. Issuance of an administrative order is not a legal substitute for developing the required TMDL or a reason for creating a new "back-door" permit process.

B. The State Water Pollution Control Act Does Not Authorize Ecology to Regulate Nonpoint Source Pollution Through Administrative Orders.

Pacific Coast Shellfish premises its arguments on the fundamentally flawed proposition that the "... WPCA does not distinguish between point and nonpoint source pollution." Br. of Pacific Coast Shellfish at 5. WPCA makes an absolute distinction – permits are required for "point sources" and they are not required for "nonpoint

sources." RCW 90.48.160 and .260. The legislature made a conscious decision to exempt nonpoint source activities from discharge permit requirements.

The application of state law provisions begins with a set of undisputed facts: (1) there has been no discharge of pollutants from the Lemire property; (2) there is no identified pipe, ditch, channel or similar conveyancing vehicle that carries natural runoff to Pataha Creek; (3) there is no established degradation of water quality; and (4) there is no evidence regarding precipitation, runoff patterns or amounts, background conditions or topography and the natural environment. The house of cards is built on speculation and conjecture became the foundation for issuance of Administrative Order No. 7178. And there is one more significant fact missing from the discussion – a thorough review of Pollution Control Hearing Board Decisions and Orders does not disclose a single case in which RCW 90.48.120 has been involved to regulate nonpoint source activities.

1. Ecology Has Not Been Granted Broad Authority to Regulate Nonpoint Source Pollution Through Issuance of Administrative Orders.

Pacific Coast Shellfish and the Tribes each argue that Ecology has broad authority to regulate nonpoint source pollution through issuance of administrative orders containing permit-like conditions and requirements.

(Br. of Pacific Coast Shellfish at 3-4; Br. of Tribes at 10-11). It is telling, however, that after nearly 200 pages of briefing, not a single case or administrative decision has been cited that imposes permit-like requirements against an individual property owner arising solely from nonpoint source pollution. Despite more than 65 years of WPCA, this case appears to offer the first exercise of the purported broad legislative authority under WPCA.

As a beginning proposition, broad policy statements do not create regulatory authority. Pacific Coast Shellfish and the Tribes rely on the policy statement in RCW 90.48.010.[13] The statute does not contain a grant of authority to address nonpoint source pollution. "[A]dministrative agencies are creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers inferred by statutes, either expressly or by necessary implication." *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998); *Kaiser Aluminum & Chemical Corp. v. Department of Labor & Industries,* 121 Wn.2d 776, 780, 854 P.2d 611 (1993). An agency possesses only those powers granted by statute. *Cole v. Washington*

[13] The policy statement was part of the Washington Pollution Control Act. 1945 Wash. Laws, ch. 216, §1. The last two sentences were added to the statute in 1973. 1973 Wash. Laws, ch. 155, §1. The additional language recognized the integration of federal and state law regarding matters of water quality and regulation. At that time, the state assumed responsibility for administration of the NPDES permit program which was viewed as a continuation of the existing state permit program. RCW 90.48.262.

Utilities and Transportation Commission, 79 Wn.2d 302, 306, 485 P.2d 71 (1971). "Where implied authority to grant or impose a particular remedy is not clearly set forth in the statutory language or its broad implication, the courts of this state have been reluctant to find such authroity on the part of the agency." *Skagit Surveyors*, 135 Wn.2d at 565. The power of an administrative tribunal to fashion a remedy is strictly limited by statute. See e.g., *Human Rights Commission v. Cheney School Dist. 30*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982). While direct authority exists to regulate discharges from point sources (NPDES and state permits), there is no explicit grant of authority to regulate nonpoint sources.

The Tribes set forth edited portions of RCW 90.48.010 to support the proposition that "... [t]he Legislature left no ambiguity about its intention to outlaw water pollution, regardless of source." (Br. of Tribes at 10-11). This contention is inconsistent with the legislative history, regulatory structure and plain language of RCW 90.48.080. Washington Water Pollution Control Act ("WPCA") was adopted in 1945. [14] 1945 Wash. Laws, ch. 216. The original legislation focused on receiving water

[14] A history of WPCA is set forth in detail in *City of Bellingham v. Department of Ecology*, PCHB No. 84-211, 1985 WL 21854 (1985). WPCA was adopted in 1945. Section 1, Ch. 216, Laws of 1945. The original legislation created the "Pollution Control Commission." In a manner similar to federal law, the state legislation placed an emphasis on receiving water quality *Butler & King,* 23 Wash. Practice Environmental Law and Practice § 7.1 (2d.ed 2012).

quality and required that *industries* "... use all known available and reasonable methods ... to prevent and control the pollution of the waters of the state of Washington." *Id.* Sec. 1. Contrary to the Tribes' position, the original legislation was actually intended to protect agriculture, livestock and domestic animals.

> Sec. 13. The Commission shall determine what qualities and properties of water shall indicate a polluted condition of such waters of the state, *which is or may be deleterious* to the public health; to the prosecution of any industries; to the lawful occupation on which or in which any such waters may be lawfully used; *to the carrying on of any agricultural, or horticultural pursuit which may be injuriously affected; to the lawful conduct of any livestock industries; to the use of any such waters for domestic animals; ... .*

1945 Wash. Laws, ch. 216, §13. In 1955, the legislature created a waste permit program for commercial and industrial operations. 1955 Laws of Wash., Laws, Ch. 71; RCW 90.48.160. The permit program was expanded in 1967 to include municipal sewer systems. 1967 Wash. Laws, ch. 113. The state permit process focused on specific operations that disposed of "solid or liquid waste into the waters of the state." This concept is the equivalent of a "point source." The state and federal permit systems were merged in 1973. 1973 Wash. Laws, ch. 155. RCW 90.48.262. Washington laws now made it clear that "... no pollutants shall be *discharged* to any surface water of the state from a *point source,*

except as authorized by an individual permit issued pursuant to this chapter ... ." WAC 173-220-020.

The legislature directed consistency between state and federal law. RCW 90.48.262(1). The state chose to regulate discharges from point sources. The permit requirements do extend to nonpoint sources. Under the maxim *expression unius est exclusion alterius* – where a statute specifically designates the things or classes of things on which it operates – an inference arises in the law that the legislature intentionally omitted all things or classes of things omitted from it. *Mason v. Georgia-Pacific Corporation*, 166 Wn. App. 859, 864, 271 P.3d 381 (2012); and *Wash. Natural Gas Co. v. Pub Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). By addressing and establishing permit processes for point source discharges, an inference arises that the legislature did not intend to regulate nonpoint source activities through either permits or administrative orders. This inference is bolstered by the recognition that WCPA has been in place for 67 years and there have been no administrative enforcement actions for nonpoint sources – until Lemire. It seems odd that it took 67 years to find this "clear authority".

WPCA makes no mention of nonpoint source pollution. The courts have consistently "... declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did

not adequately express it." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). (Court held that age was not listed as a protected class under statute and it would be improper to add language that was not included in this legislation.) The legislature made a conscious choice not to subject nonpoint source runoff to permit requirements. Authority should not be inferred where the legislature has spoken clearly on the subject. WPCA statutory structure authorized regulation of commercial, industrial and municipal point sources and established a permit system. It did not create a quasi-permit or back door process for nonpoint sources.

2. Neither RCW 90.48.080 nor 90.48.120 Authorize Administrative Enforcement Actions Related to Nonpoint Source Pollution.

Administrative Order No. 7178 was issued pursuant to RCW 90.48.120. Ecology's authority exists only to the extent there is a substantiated determination that a "... person shall violate or creates the substantial potential to violate the provisions of this chapter ... ." 90.48.120(1). Administrative Order No. 7178 was premised on a potential violation of RCW 90.48.080. The operative words of RCW 90.48.080 are clear and unambiguous – "[i]t shall be unlawful for any person to throw, drain, run *or otherwise discharge* into any of the waters of this state ... organic or inorganic matter that shall cause or tend to cause pollution ... ." The language is clear and unambiguous. And the operative requirement of

a "discharge" has been consistently applied under both state and federal law.

While Pacific Coast Shellfish and the Tribes take great liberties with the language of RCW 90.48.080, the fundamental objective when interpreting a statute is "to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The best indication of the legislature's intent is the plain language of the statute. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011). Plain meaning of a statute may be discerned from "related statutes which disclose legislative intent about the provision in question." *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002). An examination of related statutes aides in the analysis "... because legislators enact legislation in light of existing statutes." *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 594, 28 P.3d 157 (2012). Statues dealing with the same subject matter must be interpreted and applied *in pari materia*. *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) ("... statutes which stand *in pari materia* are to be read together as constituting a unified whole to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.") These principles are clearly applicable because the legislature integrated state and federal procedures

in 1973. RCW 90.48.260 and .262. The use of common words and terms (e.g. "discharge" and "point source") and permitting structures mandate an interpretive integration of the provisions.

Analysis begins with the plain language of RCW 90.48.080. Pacific Coast Shellfish and the Tribes ignore the first operative requirement in the statute—that a violation requires that a "person" discharge organic or inorganic matter into state waters. The word "person" is defined "... to include any political subdivision, government agency, municipality, industry, public or private corporation, copartnership, association, firm, individual or any other entity whatsoever." RCW 90.48.020. Nonpoint source runoff occurs as a result of rain, snow melt, and natural runoff.[15]

Nonpoint source is natural and has no human component. The Tribes then argue:

> Likewise, the fact that the word "discharge" may have a limited, defined meaning in one statutory context does not negate the fact that a cow is a "otherwise discharge[ing]"

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[15] Tribes attached materials which contain the following description of nonpoint source pollution:

> Nonpoint Source (NPS) Pollution, unlike pollution from industrial and sewage treatment plants, comes from many diffuse sources. *NPS pollution is caused by rainfall or snow melt moving over and through the ground. As the runoff moves, it picks up and carries away natural and human-made pollutants, finally depositing them into lakes, rivers, wetlands, coastal waters and ground waters.*

(Br. of Tribes Brief at Appendix B).

> polluting fecal matter in violation of RCW 90.48.080 when it defecates in Pataha Creek.

Br. of the Tribes at 11. A cow is not a "person". The courts have consistently recognized that a cow constitutes a nonpoint source. *Dombeck*, 172 F.3d at 1099 ("it would be strange indeed to classify as a point source something as inherently mobile as a cow."). There is simply no "person" or human intervention at play in this matter. Ecology and Amici seek to impose liability and use limitations on individuals for naturally occurring events. If Ecology's interpretation were accepted, nearly every property owner in this state would be subject to administrative orders resulting from natural or human-made pollutants (sand, fertilizer, oil from cars) being carried off-site by rain or snowmelt. The courts should avoid a construction that results in "unlikely, absurd, or strained consequences." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).

Second, the operative word in the statute is "discharge" – "it is unlawful for a person to throw, drain, run *or otherwise discharge* ... organic or inorganic matter that shall cause or tend to cause pollution." RCW 90.48.080. Pacific Coast Shellfish consistently excludes the last antecedent – "or otherwise discharge" - from its argument. Br. of Pacific

Coast Shellfish at 17.[16] The last antecedent rule of statutory construction provides that unless 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. *Clark County Public Utility District No. 1 v. State of Washington*, 153 Wn. App. 737, 754, 222 P.3d 1232 (2009). Each of the antecedents (throw, drain, run) are types of "discharges." It is also significant that the term "discharge" permeates WPCA and implementing regulations. RCW 90.48.080 ("Discharge of polluting matter in waters prohibited"); RCW 90.48.144 (illegal to conduct point source discharge operation without permit); RCW 90.48.165 (municipal authority to issue permits for "discharge of waste"); RCW 90.48.215 (standards for waste "discharge" from finfish hatching and rearing facilities); and RCW 90.48.240 (immediate action against person "discharging" without a permit). WAC 172-220-030(5) defines

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[16] Pacific Coast Shellfish consistently omits the phrase "or other discharge" from its argument and analysis. In arguing that the dictionary definition of "discharge" is not relevant, the argument is as follows:

> More fundamentally, "discharge" cannot be interpreted to exclude the specific activities covered by RCW 90.48.080, including allowing pollutants to drain, run, or seep into state waters. *Echo Bay Cmty. Ass'n v. State, Dept. of Natural Res.*, 139 Wn. App. 321, 326, 160 P.3d 1083 (2007) (Courts must give meaning to every word and interpret the statute as written).

Br. of Pacific Coast Shellfish at 17. The operative phrases in the statute are "to throw, drain, run, *or otherwise discharge*" and "to be thrown, run, drained, allowed to seep *or otherwise discharged*". The last antecedent in each phrase is "or otherwise discharge". Pacific Coast Shellfish ignores the two most important words in the statute – person and discharge.

"discharge of pollutants" as "any addition of any pollutant or combination of pollutants ... from any point source." Amici simply argue that this definition applies only to permits. It is illogical to have different definitions for different applications within the statute.

Third, this Court should construe the term "discharge" in a manner consistent with federal law under the Clean Water Act (i.e. a point source) and adopted state regulations (WAC 173-220-030(5)). The legislature recognized that CWA and WPCA should be integrated and that "... appropriate modifications as authorized in the 1973 amendatory act are designed to avoid duplication and other wasteful practices and to insure that the state permit program ... is compatible with the requirements of any national permit system." RCW 90.48.262(i). Ecology and Amici construe RCW 90.48.080 in a manner that is inconsistent with the CWA.

Finally, Pacific Coast Shellfish finds instructive the case of *Lake Madrone Water Dist. v. State Water Resources Control Board*, 209 Cal. App. 3.d 163, 256 Cal. Rptr. 894 (1989). It is instructive. In that case, a state agency issued an order to a dam operator that prohibited flushing of sediment into a downstream creek area. Lake Madrone is a private recreational lake used by the owners of houses and cabins on its shores. It was created in 1930 by the building of a dam to impound the waters of Berry Creek, a tributary creek. Sediment regularly flowed into Lake

Madrone from upstream sources such as road construction and maintenance, logging, and land development. Sediment accumulated behind the dam was periodically discharged when a gate valve was opened at the base of the dam. Opening the valve flushed accumulated sediment into Berry Creek. As a result of dam operations, the State Water Resources Control Board ordered the operators of the dam to refrain from flushing accumulated sediment into the creek. The dam owner appealed the order and challenged authority under state law.

The court in *Lake Madrone* did not apply the federal definition of "discharge" but rather construed the term under state law. *Id.* 209 Cal. App. 3d at 171-172.[17] The court applied the dictionary definition of "discharge" which was: "to relieve of a charge, load or burden; to give outlet to: pour forth: emit ... ." Webster's New Internat. Dict. (3rd ed. 1961)). *Id.* 209 Cal. App. 3.d at 174. This definition is virtually identical

[17] The court in *Lake Madrone* was construing provisions of the Porter-Cologne Water Quality Control Act §13304. Subdivision (a) of §13304 provided in pertinent part: "Any person ... who has caused or ... causes ... any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up such waste or abate the effects thereof or, in the case of threatened pollution or nuisance, take other necessary remedial action." *Id.* 209 Cal. App. 3d at 168. A primary consideration in the decision was the appropriate definition of "discharge" under the statute. California chose the same operative term – "discharge" - as used by the State of Washington.

to the definition proposed by Lemire.[18] The court recognized that the operative component was the **human activity** in constructing the dam and flushing of collected sediment.

> Contrary to the District's suggestions, its dam is not a mere conduit through which a substance dangerous to aquatic life (e.g., chemical) passes. Rather the dam receives a natural substance – silt – which, in its unconcentrated form in a creek is innocuous, and, by furnishing a man-made artificial location for its concentration, changes the innocuous substance into one that is deadly to aquatic life. [citation omitted] ... . Once the sediment is trapped by the dam it is the operation of the gate valve that controls the discharge of the silt.

Id. 209 Cal. App. 3.d at 169-170. Unlike the dam operators in *Lake Madrone,* Lemire did not furnish a man-made artificial location or vehicle for the transport or discharge of pollutants. Lemire has not "controlled" nonpoint source runoff.[19] This court should apply the same dictionary definition. Lemire did not relieve a charge, load or burden and did not emit or pour forth any pollutants. If pollutants reach Pataha Creek (which is suspect), it is by naturally occurring events such as rainfall or snowmelt.

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[18] *See* Br. of Appellant at 29 (citing Webster's Dictionary definition of discharge 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 contents.")

[19] Pacific Coast Shellfish also cites the case of *Tahoe-Sierra Preservation Council v. State Water Resources Control Board,* 210 Cal. App. 3.d 1421, 259 Cal. Rptr. 132 (1989). This case is inapposite to this proceeding. The issue presented related to permit requirements associated with subdivision development which would result in increased surface water runoff. The state utilized the waste discharge permit system to regulate the amount of impervious surface coverage within residential developments. Plaintiffs sought invalidation of the use of the state permit system to implement the regulations. The court rejected the argument and found that authority existed under state law.

3. Existing State Nonpoint Source Regulation and Antidegradation Policy Do Not Support or Provide Authority for Issuance of Administrative Order No. 7178.

Pacific Coast Shellfish makes an odd series of arguments related to WAC 173-201A-510(3). Brief of Pacific Coast Shellfish at 18-19. Pacific Coast Shellfish correctly notes that "... Ecology did not directly rely on this regulation in issuing the administrative order." (Br. of Pacific Coast Shellfish at 18). Review of the regulation, however, is instructive. WAC 173-201A-510(3)(b) 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 the department and a violation of water quality criteria occurs, the discharger shall modify existing practices or apply further water pollution control measures, selected or approved by the department, to achieve compliance with water quality criteria.*

Lemire voluntarily applied best management practices. Any further action by Ecology requires *proof of a violation of water quality criteria.* Ecology has no proof of a violation of water quality criteria and has no authority under this regulation to issue an enforcement order.

The Tribes make reference to antidegradation policies of WAC 173-201A-501. Brief of Tribes at 18. These policies are simply inapplicable. Administrative Order No. 7178 was not issued based on a

violation of the policies. More significantly, there is no claim or proof that site conditions at the Lemire property violated or invoked antidegradation policies. This provision, like WAC 173-201A-510, did not provide authority for issuance of the Administrative Order No.7178.

C. Amici Ignore Applicable Statutory Provisions Protecting Agriculture and Stock Water Rights.

Pacific Coast Shellfish notes that it "appreciates that upland agriculture activities are an important element of the State's economy and culture." Br. of Pacific Coast Shellfish at 19. Both federal and state legislation have recognized the importance of agriculture and been sensitive to the impacts of water quality regulation on farm activities. In fact, one of the original purposes of WPCA was to "... determine what qualities and properties of water ... is or may be deleterious ... to the carrying on of any agricultural or horticultural pursuit which may be injuriously affected; to the lawful conduct of any livestock industries; to the use of any such waters for domestic animals." 1945 Laws, ch. 216, Section 13. The Legislature has made agriculture an important consideration.

The CWA and WPCA have factored agriculture into the statutory and regulatory structure. Point source definitions and permit requirements specifically exclude "return flows from irrigated agriculture." WAC 173-

220-030(18). Nonpoint source definition includes "surface water runoff from agricultural lands." WAC 173-201A-020. The regulatory structure discloses a clear intent to remove grazing activities, runoff from agriculture, and return of irrigation waters from the permit processes.

Special attention has been directed to concentrated animal feeding operations (CAFO). A discharge permit is required for CAFO's. See generally, RCW 90.48.260(1). Dairy farm activities are also separately regulated by statute. RCW 90.64.010 *et seq.* The Tribes predicate the majority of their arguments upon impacts from dairy farming. But CAFO operations and diary farmers are covered under separate statutory schemes and are irrelevant to the issues presented in this case.

Additionally, the state legislature recognizes the impact of water quality regulation on agricultural activities in RCW 90.48.450. RCW 90.48.450(1) specifically provides:

> (1) Prior to issuing a notice of violation related to discharges from agricultural activity on agricultural land, the department shall consider whether an enforcement action would contribute to the conversion of agricultural land to nonagricultural uses. Any enforcement actions shall attempt to minimize the possibility of such conversion.

Lemire engages in an "agricultural activity" (raising of livestock) on "agricultural land" (at least five acres of land devoted primarily to commercial production of livestock). Administrative Order No. 7178

failed to comply with this statutory mandate by failing to consider that the directives mandated in its order converts a significant portion of Lemire's property from agricultural to nonagricultural use.

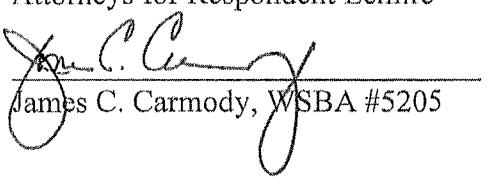
Finally, Ecology also ignores a rancher's exercise of stock water rights. RCW 90.48.422(3) provides that Ecology "... may not abrogate, supersede, impair, or condition the ability of a water right holder to fully divert or withdraw water under a water right permit, certificate, statutory exemption or claim ... ." Administrative Order 7178 requires the installation of exclusionary fencing and prohibits any livestock access to the stream corridor. The practical impact of such prohibition is to terminate Lemire's exercise of historic stock water rights. Chapter 90.48 RCW cannot be interpreted without considering these important statutory schemes that work to protect and value agricultural activities in this state.

IV. CONCLUSION

Pacific Coast Shellfish and the Tribes incorrectly interpret and apply Chapter 90.48 RCW by ignoring the fact that Ecology must show a discharge or point source pollution to bring an activity within the existing regulatory scheme. It is undisputed that the modest agricultural conditions on Lemire's property constitute a nonpoint source. Ecology did not have authority under the CWA or Chapter 90.48 RCW to issue an administrative order containing land use restrictions aimed at regulating

nonpoint source pollution. Consequently, this Court should affirm the trial court's decision in favor of Lemire.

VELIKANJE HALVERSON P.C.
Attorneys for Respondent Lemire



James C. Carmody, WSBA #5205

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I am attaching the following documents to be filed with the Supreme Court:

1. Motion for Filing of Answer to Amicus Curiae Briefs; and
2. Respondent Lemire's Answer to Amicus Curiae Brief of Pacific Coast Shellfish Growers Association and Lummi Nation ...

Case Name: Lemire v. State of Washington, Department of Ecology and The Pollution Control Hearings Board;
Case No.: 87703-3

I am filing on behalf of: Attorney James C. Carmody; 509.248.6030; WSBA No.: 5205. Mr. Carmody's email address is jcarmody@vhlegal.com.

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