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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30288-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

***AMICUS CURIAE* BRIEF OF PACIFIC COAST SHELLFISH
GROWERS ASSOCIATION IN SUPPORT OF STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY**

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I. IDENTITY AND INTEREST OF AMICUS

The Pacific Coast Shellfish Growers Association (“PCSGA”) was founded in 1930 to represent the interests of shellfish growers in the states of Alaska, Washington, Oregon, California, and Hawaii. PCSGA works on behalf of its members on a broad spectrum of issues, including environmental protection, shellfish safety, regulations, technology, and marketing. Its members grow a wide variety of healthy, sustainable shellfish including oysters, clams, mussels, and geoduck.

PCSGA disagrees with the decision of the Columbia County Superior Court in the proceeding below. Moreover, PCSGA disagrees with Mr. Lemire’s contention that the Department of Ecology (“Ecology”) lacks authority to regulate nonpoint source pollution that contaminates the state’s waters. This contention is contradicted by the law and would prevent Ecology from regulating a major source of pollution and fulfilling its statutory duty to maintain the highest possible standards of water quality.

Rescinding Ecology’s authority to regulate nonpoint source pollution would have dire consequences for shellfish growers throughout the state. Maintaining the highest possible standards of water quality is critical for shellfish aquaculture because degradation in water quality can result in the closure of commercial shellfish beds.¹ And, when improperly managed, upland uses and activities degrade water quality through

¹ The need to maintain the highest possible water quality standards for the protection of aquatic life is embodied in both state statutes and regulations. RCW 90.48.010; WAC 173-201A-010.

nonpoint source pollution, including fecal coliform contamination. Thus, to ensure upland activities do not degrade water quality and result in the closure of commercial shellfish beds, Ecology needs authority to require upland users to implement measures (such as best management practices) to prevent nonpoint source pollution.

Further, rescinding Ecology's authority to regulate nonpoint source pollution would harm broad, statewide interests. As recognized in Governor Gregoire's Washington Shellfish Initiative ("Initiative"), shellfish aquaculture is critically important to the state's ecology, economy, and culture.² Washington leads the country in the production of farmed clams, oysters, and mussels with an estimated, total economic contribution to the state of \$270,000,000 annually. Washington shellfish growers directly and indirectly employ thousands of people in the state and are among the largest private employers in some counties. In addition, shellfish are an important part of the solution to restore and preserve water quality because they filter and improve marine waters. Therefore, the Initiative directs \$4,500,000 to help reach the Puget Sound Partnership's goal of upgrading 10,800 acres of harvestable shellfish and reversing recent downgrades in Samish Bay.³ The Initiative highlights the need to effectively regulate nonpoint source pollution by specifically

² Governor Gregoire launched the Initiative in December, 2011. A white paper providing an overview of the Initiative is available at the Governor's website: http://www.governor.wa.gov/news/shellfish_white_paper_20111209.pdf.

³ The Puget Sound Partnership is an agency of the state government created to restore the environmental health of Puget Sound. RCW 90.71.210.

directing \$2,000,000 of this funding to nonpoint sources, such as farm animals, pets, sewage, and stormwater runoff.

II. ISSUE TO BE ADDRESSED BY AMICUS

Whether Ecology has authority to regulate nonpoint source pollution under the Washington State Water Pollution Control Act, Chapter 90.48 RCW.

III. STATEMENT OF THE CASE

Amicus, PCSGA, incorporates the Statement of the Case set forth in the Brief of Appellant.

IV. ARGUMENT⁴

A. The Water Pollution Control Act Authorizes Ecology to Regulate Nonpoint Source Pollution

1. The Water Pollution Control Act Prohibits Pollution Regardless of Source

Ecology issued the underlying administrative order to Mr. Lemire in this action pursuant to the Washington State Water Pollution Control Act (“WPCA” or “State Act”), Chapter 90.48 RCW. The WPCA was enacted in 1945 “to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life . . .” RCW 90.48.010.

To implement this policy, the WPCA uses broad language to prohibit water pollution. RCW 90.48.080 states in full:

⁴ In its Reply Brief, Ecology argues this Court should not address the issue of whether Ecology has authority to regulate nonpoint source pollution because Mr. Lemire failed to raise this issue before the Pollution Control Hearings Board. Reply Br. at 6-8. PCSGA supports Ecology’s position and offers this amicus curiae brief only to the extent this Court deems it necessary or appropriate to address the issue of Ecology’s authority to regulate nonpoint source pollution.

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 discharged 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.

The Legislature did not restrict the scope of RCW 90.48.080 to pollution discharges from point sources. Instead, the WPCA applies to any potential means by which a person could “permit or suffer” pollutants to enter waters, including through runoff, drainage, and seepage—the exact methods by which pollutants have a substantial potential to enter Pataha Creek at Mr. Lemire’s property. *Id.*; Br. of Appellant at 5-9.

Under well-established rules of statutory construction, a court may not ignore the plain language of a statute or add words to a statute that the Legislature chose not to include. *Anderson v. City of Seattle*, 78 Wn.2d 201, 204, 471 P.2d 87 (1970); *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). Therefore, because the Legislature did not restrict the scope of RCW 90.48.080 to point source pollution, this restriction cannot be added to the plain language of the statute. *Anderson*, 78 Wn.2d at 204; *Rest. Dev., Inc.*, 150 Wn.2d at 682.

The WPCA grants Ecology broad powers to enforce RCW 90.48.080, including authority to issue administrative orders “[w]henever, in the opinion of the department, any person shall violate or creates a substantial potential to violate the provisions of this chapter . . .” RCW

90.48.120. 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.

2. Imposing a Point Source Requirement Would Thwart the Purpose of the Water Pollution Control Act

Restricting RCW 90.48.080 to apply only to point source pollution would do more than violate well established rules of statutory construction. *Supra*, at 4. It would defeat the purpose of the WPCA and thwart Ecology's ability to maintain the purity of the state waters and protect the public health.

The WPCA does not distinguish between point and nonpoint source pollution because if a type of matter causes or tends to cause pollution, it will do so regardless of whether it enters state waters through a point as opposed to nonpoint source. RCW 90.48.080. There is nothing intrinsic about nonpoint source pollution that makes it less harmful than point source pollution. *Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984) ("point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution"). In fact, nonpoint source pollution currently represents one of the greatest threats to water quality in the nation:

Nonpoint source pollution constitutes a substantial portion of all water pollution and significantly affects the quality of

both surface water and groundwater. Nonpoint sources have been blamed for sixty-five to seventy-five percent of the pollution in the nation's most polluted waters, but all the surface waters of the country have suffered from nonpoint source problems. In thirty-three states, nonpoint source pollution is the most significant form of pollution affecting streams and rivers, and in Iowa, Missouri, Montana, Nebraska, and Wisconsin, nonpoint source pollution accounts for over ninety percent of stream and river pollution. In forty-two states, nonpoint sources are the predominant source of pollution for polluted lakes; in six states, it accounts for 100% of lake pollution. Nonpoint sources account for forty-three percent of the pollution in the nation's estuaries. Similarly, the groundwater has suffered from nonpoint source pollution because of increased chemical contamination from nitrates and other carcinogens.

David Zaring, Note, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 Harv. Envtl. L. Rev. 515, 517 (1996) (footnotes omitted). See also William L. Andreen, *Water Quality Today-Has the Clean Water Act Been a Success?*, 55 Ala. L. Rev. 537, 564 (2004) (“[t]oday, non-point source pollution, especially from agriculture, is the chief impediment to achieving national water quality objectives”); Erika N. Hartlieb, Comment, *Federal and Pacific Northwest State Water Laws Pertaining to Dairies*, 37 Idaho L. Rev. 681, 692 (2001) (“nonpoint source pollution accounts for the majority of water pollution today”).

Nonpoint source pollution has significantly degraded Washington State waters in the past and continues to represent a serious threat today. Chad Atkins is Ecology’s Water Quality Specialist responsible for

inspecting Mr. Lemire's property, and he has expertise on agricultural, livestock, and nonpoint source pollution in relation to water quality. Administrative Record ("AR") Doc. 7, Atkins Decl. at 1, ¶ 2.⁵ As Mr. Atkins established below, nonpoint source pollution degrades water quality by discharging fecal coliform and other pathogens in state waters, increasing water temperature, altering the pH of water, reducing levels of dissolved oxygen in waterbodies, and increasing suspended solids and turbidity in waters. *Id.* at 4-9. Mr. Lemire's property is especially prone to result in fecal contamination from nonpoint sources because it has little vegetation to filter or attenuate runoff. *Id.* at 5, ¶ 11.

Shellfish are particularly vulnerable to harm from nonpoint source pollution because they feed by filtering suspended particles in the water, and shellfish beds can be closed to commercial harvest when exposed to polluted water. As discussed above, a major goal of the Washington Shellfish Initiative is to protect and restore thousands of acres of shellfish beds from water pollution, such as recently degraded beds in Samish Bay. *Supra*, at 2-3.⁶ It provides \$4,500,000 in funding to achieve this goal and allocates over \$2,000,000 to address nonpoint pollution from sources such as farm animals, sewage, and stormwater runoff. Rescinding Ecology's

⁵ Citations to the Administrative Record will appear as AR followed by the document number, a short description of the document, page number and, for declarations with numbered paragraphs, paragraph number where appropriate.

⁶ The Court can take judicial notice of the Washington Shellfish Initiative because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b)(2). Judicial notice may be taken of "reports of committees, scientific bodies and any source of information that is generally considered accurate and reliable . . ." *State v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963) (quoting *Ritholz v. Johnson*, 244 Wis. 494, 502, 12 N.W.2d 738, 741 (Wis. 1944)).

ability to regulate nonpoint pollution would impede these efforts and imperil shellfish beds throughout the state.

In summary, because the plain language of RCW 90.48.080 authorizes Ecology to regulate all forms of pollution, regardless of source, it would be improper to add a point source limitation to this statute by judicial fiat. Further, imposing such a limitation would defeat the purpose of the WPCA and thwart Ecology's ability to maintain the purity of the state waters. Thus, Mr. Lemire's argument that Ecology lacks authority to regulate nonpoint source pollution under the WPCA must be rejected.

B. Federal Law Supports Ecology's Authority to Regulate Nonpoint Source Pollution

Federal law supports Ecology's authority to regulate nonpoint source pollution. The federal Clean Water Act of 1972 ("CWA" or "Federal Act"), 33 U.S.C. § 1251 et seq. requires permits for pollution discharges from point sources and recognizes that state and local governments can most effectively regulate nonpoint source pollution. Therefore, the CWA does not require permits for the discharge of nonpoint source pollution but contemplates states will enact and enforce nonpoint source pollution regulations such as the WPCA.

1. The Federal Clean Water Act Requires Permits for Discharges into Federal Waters from Point Sources

As noted by Ecology, Congress enacted the CWA 27 years after Washington State passed the WPCA. Reply Br. at 9. The goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA uses

several programs to achieve this goal. One of the primary programs is the National Pollutant Discharge Elimination System (“NPDES”), which prohibits the discharge of pollutants into waters of the United States unless authorized by a permit. 33 U.S.C. § 1311(a). “Discharge of a pollutant” is a statutorily defined term in the CWA and means “any addition of any pollutant to navigable waters from any point source . . .” 33 U.S.C. § 1362(12). “Point source” is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. § 1362(14).

Courts hold pollutants that run, drain, or seep into waters without a discernible, confined and discrete conveyance are not point source discharges and do not require an NPDES permit. *Oregon Natural Desert Ass’n v. Dombeck* (“ONDA”), 172 F.3d 1092, 1095 (9th Cir. 1998) (runoff from cattle grazing is not a point source discharge requiring an NPDES permit); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1359 (D.N.M. 1995) (seepage where shallow subsurface water emerged through soil into an arroyo were nonpoint sources similar to storm water and thus not subject to the CWA's permit requirements).

The CWA authorizes the United States Environmental Protection Agency to administer the NPDES program but provides this authority may be delegated to an agency within each state. 33 U.S.C. § 1342(b). Ecology is designated as the state water pollution control agency for administering the NPDES program in Washington State. RCW 90.48.260.

To carry out these duties, Ecology has adopted regulations at Chapter 173-220 WAC. These regulations contain definitions for “discharge of pollutant” and “point source” consistent with the CWA. WAC 173-220-030. These definitions, however, apply only “[f]or purposes of this chapter” and thus do not apply generally to the use of “discharge” and “pollution” throughout the WPCA. *Id.*

2. The Federal Clean Water Act Contemplates State Regulation of Nonpoint Source Pollution

The CWA expressly acknowledges nonpoint source pollution poses a serious threat to water quality. One of the CWA’s goals is “that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.” 33 U.S.C. § 1251(a)(7). Therefore, the CWA’s requirement that a NPDES permit be obtained only for discharges of point source pollutants does not reflect a belief that nonpoint source pollution is harmless. Instead, the CWA does not require NPDES permits for nonpoint source pollution for a practical reason – state and local governments can most effectively regulate this type of pollution:

The reason for the CWA’s focus on point sources rather than nonpoint sources is simply that “[d]ifferences in climate and geography make nationwide uniformity in controlling non-point source pollution virtually impossible. Also, the control of non-point source pollution often depends on land use controls, which are traditionally state or local in nature.”

ONDA, 550 F.3d at 785 (quoting Marc R. Poirier, *Non-point Source Pollution*, Env'l L. Practice Guide § 18.13 (2008)).

Because state and local governments can most effectively regulate nonpoint source pollution, “various sections of the Act encourage different, and complementary, state schemes for cleaning up nonpoint source pollution in the nation's waterways.” *Pronsolino v. Nastri*, 291 F.3d 1123, 1139 (9th Cir. 2003). For example, Section 303 of the CWA directs states “to set water quality standards for *all* waters within their boundaries regardless of the sources of the pollution entering the waters.” *Id.* at 1127⁷ (discussing 33 U.S.C. § 1313). These standards “provide federally-approved goals to be achieved *both* by state controls and by federal strategies *other* than point-source technology-based limitations.” *Id.* at 1132⁸ (discussing 40 C.F.R. § 130.3). Further, states must compile a list of waters under Section 303(d) of the CWA for which effluent limitations (i.e. restrictions on pollutants discharged from point sources) are not stringent enough to implement applicable water quality standards and establish a total maximum daily load (“TMDL”) of pollutants that can be discharged into these waters from all combined sources. *Id.* at 1127-28; 33 U.S.C § 1313(d). Waters affected only by nonpoint source pollution may be placed on 303(d) lists and TMDLs may be established

⁷ Emphasis in original.

⁸ Emphasis in original.

for such waters. *Pronsolino*, 291 F.3d at 1140-41. Patahana Creek is on Washington's Section 303(d) list.⁹ Reply Br. at 11 n. 5.

3. States Have Broad Authority to Regulate Land and Water Use, Including Nonpoint Source Pollution

While the CWA encourages states to regulate nonpoint source pollution, the CWA is not the sole basis for state authority to regulate water pollution. As the United States Supreme Court recently explained, states have traditionally exercised primary power over land and water use, and the federal government may not intrude on this authority absent a clear and manifest statement from Congress. *Rapanos v. U.S.*, 547 U.S. 715, 738, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006). The CWA does not purport to intrude on the state's traditional power to prevent and regulate water pollution. Instead, a fundamental policy of the Federal Act is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b).

Accordingly, states may enact and enforce laws that prohibit the discharge of pollutants into waters from nonpoint sources both pursuant to

⁹ Other CWA sections encourage state regulation of nonpoint source pollution, including Section 208 (directing states to identify and control nonpoint source pollution through regional planning and management) and Section 319 (charging states to prepare assessment reports identifying waters adversely affected by nonpoint source pollution and developing programs to control such pollution, including best management practices). 33 U.S.C. §§ 1288, 1329. Other federal laws also direct states to regulate nonpoint source pollution, such as Section 6217 of the Coastal Zone Management Act (requiring states to "develop and implement management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities"). 16 U.S.C. § 1455b(a)(1).

the CWA and through their traditional police power authority. *Lake Madrone Water Dist. v. State Water Res. Control Bd.*, 209 Cal. App. 3d 163, 256 Cal. Rptr. 894 (Cal. Ct. App. 1989) is an instructive example of this authority. In that case, a state agency ordered a dam operator to stop allowing sediments to be released from a dam and deposited in a creek. The order was based on section 13304 of the California state water code that, similar to the WPCA, prohibited the discharge of pollutants generally without explicitly referencing point or nonpoint sources. 209 Cal. App. 3d at 168; Cal. Water Code § 13304(a).¹⁰ The dam operator appealed, arguing “discharge” as used in the state law was limited to point source discharges because the CWA limits discharges to point sources. The court assumed the released sediments did not constitute a point source discharge but rejected the dam operator’s argument because “the federal act’s definition of ‘discharge’ does not control the meaning of the term in section 13304.” *Id.* at 171. Instead, the state law’s use of “discharge” was broader than the CWA’s since it did not expressly state that it was limited to point source discharges. *Id.* at 173-74. Further, the common definition of “discharge” was congruent with the Legislature’s intent to regulate any activity that may affect water quality, not simply point source discharges.

¹⁰ This section states, in part, “[a]ny person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit 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 the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.”

Id. at 174. The court explained its decision was consistent with the CWA, which authorizes states to adopt more stringent controls on discharges than the CWA. *Id.* at 173. Therefore, “by controlling what is assumed to be a nonpoint discharge of waste into the waters of the state, the State Board properly performed a state regulatory function in a manner expressly contemplated by the Clean Water Act.” *Id.* at 175.¹¹

Federal law recognizes nonpoint source pollution is a major threat to water quality and contemplates state regulation of such pollution. Therefore, Ecology’s regulation of nonpoint source pollution under the WPCA is fully consistent with, and implements the goals of, the CWA.

C. Mr. Lemire’s Arguments for Limiting Ecology’s Authority under the WPCA to Point Source Discharges are Meritless

Mr. Lemire makes several arguments to support his claim that Ecology lacks authority to regulate nonpoint source pollution. They are all meritless.

Mr. Lemire argues Ecology lacks authority to regulate nonpoint source pollution under the WPCA because the Federal Act requires NPDES permits only for point source pollution. Response Br. at 30-33. As discussed above, it is true that the Federal Act only requires NPDES permits for point source pollution. But it also is irrelevant. Ecology is not requiring Mr. Lemire to obtain an NPDES permit. Thus, federal legislation and case law cited by Mr. Lemire relating to the NPDES permit

¹¹ See also *Tahoe-Sierra Preservation Council v. State Water Res. Control Bd.*, 210 Cal. App. 3d 1421, 259 Cal. Rptr. 132 (Cal. Ct. App. 1989) (state water board could regulate nonpoint source pollution through state waste discharge permit system, as the CWA does not preclude the state from utilizing its broader authority to regulate nonpoint source pollution).

program are inapplicable and do not support his position. Similarly, Ecology regulations at Chapters 173-220 and 173-226 WAC are irrelevant. These chapters only apply for purposes of implementing the NPDES permit program and the state general permit program, neither of which applies here. Response Br. at 27-28; WAC 173-220-010; WAC 173-226-010.

Nor is Ecology utilizing RCW 90.48.120 to establish “a quasi or backdoor permit process” as Mr. Lemire asserts. Response Br. at 28. It is simply ordering Mr. Lemire to not create a substantial potential for contaminants to run, seep, or drain into state waters. This is squarely within Ecology’s statutory authority. RCW 90.48.080; RCW 90.48.120.

Mr. Lemire also argues the WPCA is limited to point source discharges because RCW 90.48.080 requires a person “to collect or direct matter into the watercourse.” Response Br. at 27. The plain language of the statute proves Mr. Lemire wrong. It does not require a person to collect or direct matter into a watercourse. Instead, it explicitly applies to cases where a person permits or suffers pollutants “to be thrown, run, drained, allowed to seep or otherwise discharged into such waters . . .” RCW 90.48.080.

Similarly, Mr. Lemire’s argument that use of the word “discharge” in RCW 90.48.080 should be interpreted similar to the term “discharge of pollution” as used in the NPDES permit program is without merit. Response Br. at 33. This is the same argument the court rejected in *Lake Madrone Water Dist.*, 209 Cal. App. 3d 163, and this Court should dismiss

it for the same reasons. As discussed above, and as Mr. Lemire takes pains to point out, courts hold pollutants that run, drain, or seep into waters without a discernible, confined and discrete conveyance are not point source discharges and do not require an NPDES permit. *ONDA*, 172 F.3d at 1095; *Friends of Santa Fe County*, 892 F. Supp. at 1359. RCW 90.48.080, on the other hand, plainly applies to pollutants that drain, run, or seep into waters, and there is no requirement that they be transported into the water through a discernible, confined and discrete conveyance. Therefore, Mr. Lemire's argument would force the Court to both add language to the statute imposing a point source requirement and strike existing language from the statute that is inconsistent with such a requirement. As the Court is aware, it can take neither of these actions, so Mr. Lemire's argument must be rejected. *Rest. Dev., Inc.*, 150 Wn.2d at 682 (courts cannot add language to a statute); *Garth Parberry Equipment Repairs, Inc. v. James*, 101 Wn.2d 220, 224, 676 P.2d 470 (1984) (courts cannot ignore the literal language of a statute).

Mr. Lemire next argues the dictionary definition of "discharge" supports his position that an unstated point source requirement should be read into the statute. Response Br. at 29-30. Mr. Lemire is wrong. The dictionary broadly defines "discharge" as "to relieve of a charge, load, or burden." Webster's Third New International Dictionary 644 (2002). This definition does not require that discharges occur from a point source or be released from a discernible, confined and discrete conveyance. As the court held in *Lake Madrone Water Dist.*, this definition does not support a

point source requirement. 209 Cal. App. 3d at 174. Instead, it is congruent with a legislative directive to regulate any activity that may affect the quality of state waters. *Id.* 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).

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. As discussed above, states have traditionally exercised primary power over land and water use, and the CWA does not purport to intrude on this authority. *Rapanos*, 547 U.S. at 738. Rather, it seeks “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . .” 33 U.S.C. § 1251(b). Therefore, Congress chose to leave control of nonpoint source pollution to state and local governments, as they are best equipped to address this problem. *Supra*, at 10-11. And as the court held in *Lake Madrone Water Dist.*, a state’s broad regulation of nonpoint source pollution is entirely consistent with the CWA. 209 Cal. App. 3d at 175. Washington has been regulating nonpoint source pollution pursuant to the WPCA since 1945 –

27 years prior to enactment of the WCA – and it would be inappropriate and dangerous to rescind that authority now. Reply Br. at 9.

Further, to effectively address all forms of water pollution, states need broader regulatory authority than the federal government. Federal authority is limited under the CWA to navigable surface waters, which include only (1) permanent, standing or flowing bodies of water and (2) those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right. *Rapanos*, 547 U.S. at 732, 742. The WPCA seeks to effectively address all forms of water pollution in the state by regulating waters and pollution beyond the federal government’s direct control, including non-navigable waters and nonpoint source pollution.

Finally, Mr. Lemire argues WAC 173-201A-510(3) supports his position that he has complied with the WPCA by using best management practices. Response Br. at 34-35. As Ecology notes, this argument is misplaced because Ecology did not directly rely on this regulation in issuing the administrative order. Reply Br. at 14-15. Further, best management practices include exclusionary fencing – precisely the practice that Ecology has required but Mr. Lemire refuses to implement. Reply Br. at 15. Finally, WAC 173-201A-510(3) is fatal to Mr. Lemire’s argument that the WPCA does not cover nonpoint source pollution. It explicitly states Ecology can regulate nonpoint source pollution under the WPCA by, among other things, requiring the application of best management practices and issuing administrative orders. Mr. Lemire’s

argument that the WPCA does not extend to nonpoint source pollution would therefore render this regulation void and must be rejected. *Hayes v. Yount*, 87 Wn.2d 280, 290, 552 P.2d 1038 (1976) (“a statute or regulation should, whenever possible, be interpreted so that no portion of it is superfluous, void, or insignificant”).

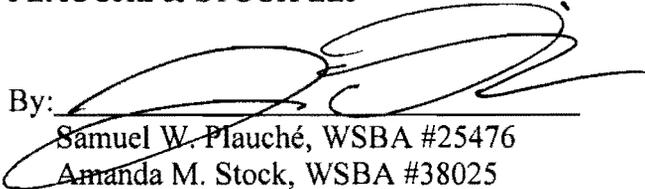
In summary, the plain language of RCW 90.48.080 is not limited to point source pollution. Instead, it includes discharges that courts hold are non-point pollution, including runoff, drainage, and seepage. Therefore, restricting RCW 90.48.080 to only cover point source discharges would require both adding and removing language from this statute. It would also frustrate federal and state laws that protect downstream users from nonpoint source pollution, including shellfish growers. Finally, it would jeopardize the public health, as nonpoint source pollution is currently recognized as one of the greatest threats to water quality in the nation.

V. CONCLUSION

PCSGA appreciates that upland agriculture activities are an important element of the State’s economy and culture. However, these activities must be conducted in a manner that does not harm the quality of the state’s waters and threaten the public health. PCSGA therefore respectfully requests that the Court reverse the superior court’s decision invalidating Ecology’s order and affirm the Pollution Control Hearing Board’s decision granting summary judgment to Ecology.

Respectfully submitted this 15th day of June, 2012.

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30288-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

CERTIFICATE OF SERVICE

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I, Terri A. Tyni, declare as follows:

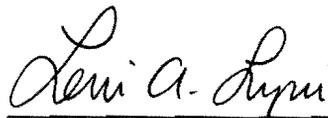
That I, as a legal assistant in the office of Plauché & Stock LLP, caused true and correct copies of the Pacific Coast Shellfish Growers Association's Motion to File *Amicus Curiae* Brief in Support of State of Washington, Department of Ecology, and *Amicus Curiae* Brief of Pacific Coast Shellfish Growers Association In Support of State of Washington, Department of Ecology, to be delivered as set forth below:

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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.

EXECUTED at Seattle, Washington on June 15, 2012.



Terri A. Tyni, Declarant