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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30288-1

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

JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

**APPELLANT STATE OF WASHINGTON'S ANSWER TO BRIEF
OF AMICUS CURIAE WASHINGTON CATTLEMEN'S
ASSOCIATION, CATTLE PRODUCERS OF WASHINGTON, U.S.
CATTLEMEN'S ASSOCIATION, AND SPOKANE COUNTY
CATTLEMEN**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. AUTHORITY AND ARGUMENT2

 A. Contrary To The Cattlemen’s Arguments, Ecology Has
 Not Taken The Position That Cattle Ranching *Per Se*
 Causes Pollution.....2

 B. Ownership Of Riparian Land Does Not Include A Right
 To Pollute State Waters5

 C. Contrary To The Cattlemen’s Arguments, Ecology Is Not
 Requiring Mr. Lemire To Get A Permit9

 D. There Was Undisputed Evidence Before The Board That
 Fecal Matter And Sediment Tend To Cause Pollution11

III. CONCLUSION17

TABLE OF AUTHORITIES

Cases

<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	8
<i>McEvoy v. Taylor</i> , 56 Wn. 357, 105 P. 851 (1909).....	5, 6
<i>Miller v. Baker</i> , 68 Wn. 19, 122 P. 604 (1912).....	6, 7
<i>Morris v. McNicol</i> , 83 Wn.2d 491, 519 P.2d 7 (1974).....	6, 7
<i>State v. Meyers</i> , 61 Wn.2d 772, 380 P.2d 735 (1963).....	15
<i>Tiegs v. Boise Cascade Corp.</i> , 83 Wn. App. 411, 922 P.2d 115 (1996).....	13
<i>Tiegs v. Watts</i> , 135 Wn.2d 1, 954 P.2d 877 (1998).....	13
<i>Wash. Educ. Ass'n v. Wash. State Public Discl. Comm'n</i> , 150 Wn.2d 612, 80 P.3d 608 (2003).....	8

Statutes

33 U.S.C. § 1315.....	15
RCW 90.03.240, .250, .290, .330	6
RCW 90.14.041-.121	6
RCW 90.48.010	5
RCW 90.48.030	7
RCW 90.48.080	10, 12

RCW 90.48.120	9
RCW 90.54.020(3).....	8

Other Authorities

S. Rep. No. 92-414 (1971), <i>reprinted in</i> 1972 U.S.C.C.A.N. 3668.....	15
U.S. Environmental Protection Agency, National Water Quality Inventory (2000), http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2003_03_21_305b_2000report_rivy.pdf	15
Washington’s Water Quality Management Plan to Control Nonpoint Sources of Pollution, Dep’t of Ecology, Pub. No. 05-10-027 (June 2005), <i>available at</i> http://www.ecy.wa.gov/pubs/0510027.pdf	16

Rules

ER 201(b)(2)	15
RAP 10.3(a)(5).....	4

Regulations

WAC 173-220-030.....	9
WAC 173-220-030(5), (18)	9

I. INTRODUCTION

The Washington Cattlemen's Association, Cattle Producers of Washington, U.S. Cattlemen's Association, and Spokane County Cattlemen (collectively the "Cattlemen") argue that the Court should reverse the decision of the Pollution Control Hearings Board (Board). In support of their position, the Cattlemen advance numerous flawed arguments.

First, in disregarding the specific well-documented evidence of pollution problems at the Lemire ranch, the Cattlemen argue that upholding the Board's order amounts to a *per se* determination that cattle operations on riparian land cause pollution. Next, disregarding the fact that Mr. Lemire has not proven the existence of a water right, the Cattlemen argue that a riparian stock watering right includes the right to have livestock pollute the adjacent water body. Next, they repeat Mr. Lemire's legally erroneous argument that Ecology's order equates to the imposition of point source permitting requirements on Mr. Lemire. Last, they engage in a convoluted and incorrect statutory interpretation argument related to the phrase "tend to cause pollution."

As described in detail below, none of these arguments supports reversing the Board's decision in this case. The Board's decision is well grounded in the law and the undisputed facts presented to the Board.

Thus, the Board did not commit an error of law and its decision should be affirmed.

II. AUTHORITY AND ARGUMENT

A. **Contrary To The Cattlemen's Arguments, Ecology Has Not Taken The Position That Cattle Ranching *Per Se* Causes Pollution**

The Cattlemen argue that Ecology's order to Mr. Lemire amounts to a *per se* determination that cattle near a stream cause pollution. Cattlemen Br. at 8, 9, 12, 17. That is incorrect and is not supported by the specific facts of this case.

As noted in Ecology's opening brief, Ecology has had a long history with the Lemire property. In 2003, Ecology and the Columbia Conservation District completed a watershed evaluation in Columbia County which included the identification of activities negatively affecting water quality. Through this process, Mr. Lemire's ranch was specifically identified as having conditions that negatively impact water quality. Administrative Record (AR) Doc. 7, Atkins Decl. at 2, ¶ 8.

In making its determination, an Ecology water quality specialist made numerous site visits to the Lemire property between 2003 and 2009. *Id.* at 3, ¶ 9. During each site visit, the water quality specialist observed the same conditions: cattle with direct and uncontrolled access to Pataha Creek, manure visible in the stream corridor, severe overgrazing of the

stream corridor, cattle confinement areas adjacent to the stream, numerous bare ground cattle trails leading to and along Pataha Creek, extensive hoof damage and erosion along stream banks, and a lack of vegetation by the stream due to livestock grazing and trampling. *Id.* at 3, ¶¶ 9–10. These conditions are well known to cause fecal coliform, sediment, temperature, and pH pollution. *Id.* at 4–9, ¶¶ 11–17.

Ecology tried for several years to work with Mr. Lemire to address the problems, including offering financial assistance to help fund solutions. *Id.* at 9, ¶ 19; 13–14, ¶ 32. Only when these voluntary attempts failed did Ecology issue the order that is the subject of this appeal. AR Doc. 1; Opening Br., Attachment 1.

As these facts demonstrate, Ecology issued its order based on repeated observations of the Lemire property over a period of several years. The Cattlemen’s argument that this is akin to determining that cattle operations *per se* cause pollution is inaccurate and greatly overstates the implications of Ecology’s action.

The Cattlemen’s overstatements persist when they argue what they allege will be the policy impacts of any decision affirming Ecology’s order. Cattlemen Br. at 18–20. Specifically, they argue that allowing Ecology to enforce its order would result in a grant of “unprecedented jurisdiction” to Ecology resulting in “harmful unintended consequences.”

Id. at 20. In support of this argument, they make numerous factual allegations that are not supported by the record and which should therefore be disregarded by the Court. RAP 10.3(a)(5) (factual assertions in brief must be supported by citations to the record).¹

Ecology's order to Mr. Lemire is not unprecedented nor does it expand Ecology's jurisdiction. To the contrary, it reflects an effective application of legal authority that Ecology has exercised numerous times to address livestock pollution when voluntary compliance measures fail. The prior exercise of that authority under appropriate factual circumstances has not resulted in "harmful unintended consequences" nor will it in the case of Mr. Lemire. Instead, it will result in protection of Pataha Creek from pollution with limited impact to Mr. Lemire's current operations.

Thus, instead of having negative policy impacts, Ecology's action furthers the public and environmental protection policies of the state Water Pollution Control Act:

It is declared to be the public policy of the state of Washington to maintain the highest possible standards to

¹ In addition to the unsupported allegations on pages 18–19 of their brief, the Cattlemen make additional unsupported and exaggerated statements of fact in other sections of their brief. For example, they cite to Ecology's guidance on recommended buffer widths for wetlands for the proposition that Ecology could "announce that as much as 200 feet of riparian buffer be provided on either side of the stream[.]" Cattlemen Br. at 4, n.2. Not only is the wetlands guidance not relevant here, but the Cattlemen do not explain why this is a likely or even possible scenario in light of the fact that Ecology's order requires that a much smaller portion of the land around the stream be fenced off.

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, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state.

RCW 90.48.010. Ecology's order is firmly grounded in the law and public policy. The Board's decision upholding Ecology's order should be affirmed.

B. Ownership Of Riparian Land Does Not Include A Right To Pollute State Waters

The Cattlemen argue that ownership of riparian land includes the right to have livestock pollute the adjacent waterbody as long as such pollution is consistent with a reasonable riparian use. Cattlemen Br. at 6-8. In support of this argument, the Cattlemen rely on an inapposite case that predates state and federal water pollution control statutes by several decades. *McEvoy v. Taylor*, 56 Wn. 357, 105 P. 851 (1909). The Cattlemen are incorrect that the *McEvoy* case limits Ecology's broad statutory authority to address water pollution.

First, it is important to note that ownership of riparian land does not automatically confer a water right, nor has Mr. Lemire demonstrated

that he has a water right. Appellant's Reply Br. at 16–17; Response to Pacific Legal Foundation (PLF) Amicus Br. at 7–8. Since passage of the 1917 water code, a property owner must either establish a right through the permitting process (water right permit or certificate) or through the filing of a claim form under RCW 90.14 to assert any historical “riparian” right that might have existed prior to 1917. See RCW 90.03.240, .250, .290, .330; RCW 90.14.041–.121. Thus, whenever someone asserts a right to use water, the person will have some physical documentation of the claim or the right in the form of a certificate, permit, or claim form. Lacking any proof of a water right, the issue of whether Ecology's order impacts Mr. Lemire's alleged water right is not before the Court.

However, even if the issue were before the Court, the Cattlemen's reliance on *McEvoy* is misplaced. Unlike the present case, *McEvoy* did not involve an issue of state regulatory authority to address water pollution. Rather, it involved a dispute between two private parties where an upland riparian owner allowed his livestock to “befoul” the stream to the detriment of a downstream owner. The *McEvoy* court concluded that the upstream owner was not liable to the downstream one. *McEvoy*, 56 Wn. at 360–61. Factually, the case is not on par with the present case.²

² The two other cases cited by the Cattlemen are also not on par. *Miller v. Baker*, 68 Wn. 19, 122 P. 604 (1912); *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974). *Miller* held that a downstream riparian owner could not divert water upstream to

Thirty-six years after *McEvoy* was decided, the Washington Legislature passed the state Water Pollution Control Act which grants broad authority to Ecology to “control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state” RCW 90.48.030. Pursuant to this authority, Ecology took actions to “control and prevent” pollution at the Lemire ranch based on repeated observations of the ranch spanning several years.

McEvoy does not undermine Ecology’s exercise of its broad statutory authority to address pollution nor does it allow a water right holder to trump applicable water pollution laws. Indeed, if it did, then any person with a water right could claim the right to pollute state waters with impunity. For example, a pulp and paper mill located on a river that holds a water right for industrial purposes could claim an ability to discharge its untreated industrial wastewater directly into the river. However, a water right does not amount to a right to pollute nor does ownership of riparian land amount to a right to pollute. Rather, any water right or use of riparian land needs to be exercised consistent with applicable laws and regulations.

the detriment of upstream riparian owners. *Miller*, 68 Wn. at 22–24. *Morris* held that upland property owners could be held liable for actions on their property that caused harm to a downstream owner. *Morris*, 83 Wn.2d at 495.

Next, the Cattlemen cite RCW 90.22.040 for the general proposition that the Legislature has recognized the existence of riparian stock water rights in other contexts. Cattlemen Br. at 9. However, as noted above, Mr. Lemire has provided no proof of a water right, riparian or otherwise.

Furthermore, the statute cited by the Cattlemen is a declaration of policy contained in a statute related to setting in-stream flows for public waters. Statutory declarations of policy do not serve as substantive law but only as an important guide in interpreting the operative sections of a statute. *See, e.g., Kilian v. Atkinson*, 147 Wn.2d 16, 23, 50 P.3d 638 (2002). Nothing in this legislative declaration of policy suggests that it is intended to limit Ecology's authority to control and prevent water pollution under the Water Pollution Control Act. In fact, other statements of policy in the water rights context make it clear that management of state water resources must ensure the preservation of water quality. RCW 90.54.020(3). However, since there is no evidence of a water right, the issue is purely academic and the Court should decline to reach it just as the superior court did. *See, e.g., Wash. Educ. Ass'n v. Wash. State Public Discl. Comm'n*, 150 Wn.2d 612, 623, 80 P.3d 608 (2003) (academic or hypothetical questions are not justiciable).

C. Contrary To The Cattlemen's Arguments, Ecology Is Not Requiring Mr. Lemire To Get A Permit

The Cattlemen argue that Ecology is “seeking to impose” the national pollutant discharge elimination system (NPDES) permitting regime on Mr. Lemire. Cattlemen’s Br. at 9–11. That is incorrect. As noted in Ecology’s reply brief, Ecology is not requiring Mr. Lemire to get a permit. Appellant’s Reply Br. at 14. Rather, Ecology issued an enforcement order requiring the implementation of corrective actions. Ecology has the authority to issue such an order when, “in the opinion of the department, any person shall violate or creates a substantial potential to violate the provisions of [Chapter 90.48 RCW].” RCW 90.48.120.

In arguing that Ecology seeks to impose NPDES permitting requirements on Mr. Lemire, the Cattlemen repeat Mr. Lemire’s error by citing to a regulatory definition of discharge that applies only to point source discharges. Cattlemen’s Br. at 11, citing WAC 173-220-030(5), (18).³ However, as noted in Ecology’s reply brief, the regulation that defines discharge specifies that the definition applies only in the context of permit issuance: “For purposes of *this chapter*, the following definitions shall be applicable . . .” WAC 173-220-030 (emphasis added). Since

³ The Cattlemen actually cite WAC 173-220-330(5). However, no such regulation exists. Ecology assumes that the Cattlemen meant to cite WAC 173-220-030(5) which defines “discharge of a pollutant” for permitting purposes.

Ecology has not ordered Mr. Lemire to get a permit, the definition is irrelevant.

In determining whether Mr. Lemire's operations create a substantial potential to violate Chapter 90.48 RCW, it is instead necessary to look at the language of RCW 90.48.080 which forms the basis for Ecology's order. That statute states:

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 [of Ecology], as provided for in this chapter.

There is a substantial potential to violate RCW 90.48.080 if there is a substantial potential for any person to "throw, drain, run . . . or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged" polluting substances into waters of the state. Conditions at the Lemire property created a substantial potential for fecal matter and sediment to enter state waters. As discussed in the next section, it is undisputed that the entry of fecal matter and sediment into water causes pollution. Thus, Ecology's order is firmly grounded in the plain language of RCW 90.48.080. The Cattlemen's reliance on the

definition of “discharge” for NPDES permitting purposes is irrelevant to the issues before this Court.

D. There Was Undisputed Evidence Before The Board That Fecal Matter And Sediment Tend To Cause Pollution

In challenging Ecology’s order, the Cattlemen embark on a complicated and flawed analysis of the phrase “tend to cause pollution.” Cattlemen’s Br. at 11–17. The relevance of this analysis is unclear. The Cattlemen claim that Ecology relies on the phrase “tend to cause pollution” in order “to make a *per se* determination that all cattle operations within a riparian habitat ‘tend to cause pollution.’” *Id.* at 12. However, as noted above, Ecology does not take the position that cattle operations adjacent to streams *per se* cause pollution.

Furthermore, Ecology’s statutory construction arguments focus on the phrase “substantial potential to violate” RCW 90.48, not the phrase “tend to cause pollution.” Opening Br. at 20–24; Reply Br. at 1–2. Indeed, the only instance of Ecology discussing the phrase “tend to cause pollution” arises in the context of Ecology pointing to the undisputed evidence that fecal matter and sediment discharges cause pollution in the form of bacterial contamination, temperature changes, increased turbidity, higher pH, and lower dissolved oxygen. Opening Br. at 21–22. Thus, the

Cattlemen's emphasis on the phrase "tend to cause pollution" is misplaced.

Even if the phrase did figure more prominently in the case, the Cattlemen's interpretation of the phrase is flawed. The gist of their argument seems to be that Ecology was required to show both legal and factual causation "of pollution caused by Lemire's cattle." Cattlemen's Br. at 14. As noted in the Reply Brief, Ecology needed to show substantial potential to violate RCW 90.48, not actual pollution. Reply Br. at 1-2. Ecology presented undisputed evidence that conditions on the Lemire property created a substantial potential to violate RCW 90.48.080. Thus, the Court's inquiry can stop there.

The Cattlemen's notion that Ecology needed to go beyond this and prove legal and factual causation just as it would be proven in a tort action is wrong.⁴ For one thing, the word "cause" in RCW 90.48.080 relates to organic or inorganic matter tending to cause pollution, not the underlying activity tending to cause 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

⁴ Although tort causation is not the applicable standard, the undisputed material facts demonstrate that Mr. Lemire's cattle operations were, in fact, both a but-for and proximate cause of a substantial potential to violate RCW 90.48.080.

determination of the department [of Ecology], as provided for in this chapter.

Emphasis added.

In this case, Ecology identified a substantial potential for organic and inorganic matter (fecal matter and sediment) to enter the stream from Mr. Lemire's ranch. Before the Board, it was undisputed that fecal matter and sediment result in a wide range of pollution problems, including the spread of disease to humans and animals, depletion of oxygen needed by aquatic life, odor problems, increased temperature, increased pH, destruction of habitat, and increased algae and bacteria growth. AR Doc. 7, Atkins Decl. at 4–9, ¶¶ 11–17. In other words, it was undisputed that fecal matter and sediment “tend to cause pollution” when they enter state waters.

Next, the Cattlemen's reliance on the *Tiegs* case is misplaced. Cattlemen's Br. at 13–14, citing *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998). *Tiegs* involved a civil dispute between private parties. One of the issues in the case was whether the trial judge had properly instructed the jury that violation of RCW 90.48.080 could constitute a nuisance *per se*. *Tiegs*, 135 Wn.2d at 13. Both this Court and the Supreme Court held that the jury instructions were proper. *Id.* at 13–15; *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 415–20, 922 P.2d 115 (1996). Nothing

in *Tiegs* supports the proposition that standards of tort liability should be used to interpret what it means for an organic or inorganic matter to “tend to cause pollution” under RCW 90.48.080.

Last, the Cattlemen argue that Ecology’s exercise of authority here could result in penalties being issued against hikers and fishermen for stepping into a stream. Cattlemen’s Br. at 16. These far-fetched examples disregard the several years of well-documented pollution problems that existed at the Lemire ranch. Also, the comparison between Mr. Lemire’s operations and a hiker in a stream significantly downplays the very serious pollution problems caused by poor livestock management.

In passing the 1972 Clean Water Act, Congress recognized that agricultural pollution, including livestock pollution, was an “enormous problem” that needed to be effectively addressed:

Water pollution resulting from agricultural production is clearly a growing problem of great magnitude and complexity. Agriculture is now one of the major contributors to the degradation of the quality of our navigable waters. The basic problem is one of managing the inputs and outputs of agricultural production to maintain the quality of the water, air, and soil environment while economically producing food and fiber...

One of the most significant aspects of this year’s hearings on the pending legislation was the information presented on the degree to which nonpoint sources contribute to water pollution. Agricultural runoff, animal wastes, soil erosion, fertilizers, pesticides and other farm chemicals that are a part of runoff, construction runoff and siltation from mines and acid mine drainage are major

contributors to the Nation's water pollution problem. Little has been done to control this major source of pollution.

It has become clearly established that the waters of the Nation cannot be restored and their quality maintained unless the very complex and difficult problem of nonpoint sources is addressed.

S. Rep. No. 92-414, at 15, 39 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3682, 3705.

The "enormous problem" of agricultural pollution persists today.

In Washington State:

In rivers and streams, agriculture is the major source of water quality degradation, followed by hydrologic habitat modification, natural sources, and septic tanks. Causes of water quality impairment from these sources include thermal modification, pathogens, pH, metals, and low dissolved oxygen.

U.S. Environmental Protection Agency, National Water Quality Inventory (2000) at 178, http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2003_03_21_305b_2000report_riwy.pdf.⁵ Within the broader category of agricultural pollution, livestock practices are the biggest contributing source of pollution:

The most common agricultural activities leading to impairment are those associated with livestock access to

⁵ The Court can take judicial notice of this report which is required to be submitted to Congress under the Clean Water Act. 33 U.S.C. § 1315. Judicially noticeable facts are those "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b)(2). Facts contained in "easily accessible sources" such as "reports of committees, scientific bodies and any source of information that is generally considered accurate and reliable" are appropriate for judicial notice. *State v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963).

riparian areas. Those activities lead to fecal coliform bacteria from manure, increased sedimentation, and loss of trees in riparian areas that result in increased surface water temperatures.

Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution, Dep't of Ecology, Pub. No. 05-10-027, at 18 (June 2005), *available at* <http://www.ecy.wa.gov/pubs/0510027.pdf>.

In the case of Mr. Lemire, Ecology properly exercised its authority to address this source of pollution by issuing an order based on the substantial potential for a violation of RCW 90.48. Before the Board, Mr. Lemire did not dispute the material facts that the Board relied upon in upholding Ecology's order. The Board's summary judgment decision does not constitute an error of law and should be affirmed.

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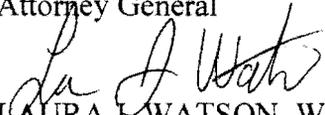
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III. CONCLUSION

Ecology respectfully asks the Court to reverse the superior court's decision invalidating Ecology's order, and affirm the Board's decision granting summary judgment to Ecology.

RESPECTFULLY SUBMITTED this 25 day of May 2012.

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