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NO. 90386-7

SUPREME COURT OF THE STATE OF WASHINGTON

SARA FOSTER,

Appellant,

v.

WASHINGTON DEPARTMENT OF ECOLOGY; THE CITY OF
YELM, and WASHINGTON POLLUTION CONTROL HEARINGS
BOARD,

Respondents.

**RESPONDENT STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY'S, ANSWER TO
AMICUS BRIEF OF THE CARNEGIE GROUP &
CENTER FOR ENVIRONMENTAL LAW AND POLICY**

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I. INTRODUCTION

The Amicus Brief of the Carnegie Group and the Center for Environmental Law and Policy (Amici) fails to confront the statutory authority that authorizes Ecology to permit the withdrawal of water that impairs the base flow in a stream based on “overriding considerations of public interest” (OCPI). That is, of course, the issue presented by this case and by application of RCW 90.54.020(3)(a) to the Yelm permit. Rather than address the statute and the facts, Amici rely on a general overview of the water code. They urge the Court to conclude that the OCPI exception cannot apply for no reason other than the fact that application of the exception will affect instream flows.

Whatever dispute the parties have over the meaning of OCPI, the starting point is the statute. It provides a narrow exception where a withdrawal of water may be permitted despite a known impact on base flows in a stream. Amici, therefore, start from a flawed foundation when they argue that the OCPI exception can have no application to affect minimum instream flows. They provide no reason why the PCHB erred in affirming that Yelm’s permit fit within the statutory OCPI exception.¹

¹ The Amici Brief also raises issues and arguments that fall outside the issues raised by the parties. Ecology addresses those last because they are irrelevant to the Court’s resolution of the Yelm permit and the OCPI exception.

II. RESPONSE TO AMICUS ARGUMENT

A. In Extraordinary Circumstances, the OCPI Exception Allows Impairment of Instream Flows and Closed Surface Waters

Amici's entire brief rests on a single premise: where water permits are junior in priority to instream flows that are established by Ecology rule, they cannot impair senior instream flows or closed surface waters. Amicus Brief at 11, 15. This argument simply restates the general rule of water law, and fails to address the statutory exception at issue in this appeal. Amici simply read the exception out of the general rule without responding to the argument on how it applies in the scenario in this case. Thus, Amici's starting point—that the Water Code allows “no exception” to impairment—is simply wrong. Amicus Brief at 15.

For example, Amici state: “*Swinomish* stands for the proposition that impairment to an established instream flow is the same as impairment to an out of stream preexisting water right—the Water Code does not allow it.” Amicus Brief at 11 (emphasis added). While there is no exception allowing impairment of out of stream water rights, such as an agricultural or municipal use right, RCW 90.54.020(3)(a) expressly allows an exception applicable to instream flows based on “overriding considerations of the public interest.” Amici's foundational argument thus

runs contrary to the rule of construction that requires the courts give effect to exceptions, not render them meaningless or superfluous. *G-P Gypsum Corp. v. Dep't of Rev.*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010).

But OCPI is the *exception* that “allows impairment of stream base flows when overriding considerations of the public interest are served.” *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 576, 311 P.3d 6 (2013). Indeed, the Court has twice now stated that “the overriding-considerations exception is applicable to minimum flows.” *Swinomish*, 178 Wn.2d at 580 (citing *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726 (2000)).

Consistent with the general rules of water law, Ecology processes water permit applications and denies or conditions permits that would impair instream flows set by agency rule: RCW 90.03.290(3) (requiring findings of fact that an application will not impair existing rights); *see also* RCW 90.03.247 (directing Ecology to condition permits to “protect the levels or flows” that are in effect at the time of approval). It therefore follows that overriding considerations of the public interest are an exception to the same permitting process referenced elsewhere by the Legislature. Applying this exception in the permitting process is not a “sidestep” as claimed by Amici; it is the exercise of the authority granted by statute.

The Court should therefore reject Amici's overbroad statement that "The Water Code does not allow exceptions." Amicus Brief at 15. OCPI, narrow as it may be, allows for withdrawals of water affecting minimum instream flows in "narrow" circumstances. *Swinomish*, 178 Wn.2d at 576. As valuable as the permit process and instream flow rules are, there is a statutory exception that supports the Yelm permit that was properly affirmed by the Pollution Control Hearings Board (PCHB).

B. The Statutory Authority to Consider "Public Interests" as "Overriding" Provides Authority to Consider Habitat Enhancement

The Foster appeal asks this Court to address the meaning of the OCPI statute and whether the Yelm permit fits within that statute in light of the uncontested findings of the PCHB. The Amici show no error in the PCHB conclusion that the Yelm permit fits within the statutory exception for a withdrawal that serves as overriding considerations of the public interest.

1. OCPI Must Consider Habitat Values as a Potentially Overriding Public Interest

Amici argue that Ecology is not authorized to consider mitigation that would protect and enhance fish and wildlife habitat when weighing overriding considerations of the public interest. Amicus Brief at 1, 2, 15. This is a novel and distinct statutory authority attack that was not litigated

below and not separately decided in the PCHB Order. As such, it should not be addressed by this Court. RCW 34.05.554(1) (“issues not raised before the agency may not be raised on appeal”); *see also* RAP 2.5(a) (prohibiting review of any claim of error not raised below); *State v. Eriksen*, 172 Wn.2d 506, 515, 259 P.3d 1079 (2011) (ignoring issues raised only by amici curiae).

However, even if this issue was properly before this Court, it should be rejected. Amici’s argument implies that Ecology cannot weigh any value, including habitat, as a “public interest” absent additional, independent statutory authority to do so. This approach would render the statutory exception either superfluous or meaningless. If the “public interests” to be considered as “overriding” are limited to factors that Ecology addresses elsewhere in the water code, then there would have been no reason for the Legislature to enact the exception.²

The better interpretation starts from the plain language of RCW 90.54.020(3)(a), which refers to “public interests” generally, and does not limit what interests may be considered. The habitat values

² The OCPI exception is not the only context where Ecology is directed by statute to consider the public interest. Ecology regularly determines whether approval of a water permit would be “detrimental to the public welfare” or “public interest.” RCW 90.03.290. While this is a lower “public interest” threshold than that of OCPI, it reflects a similar statutory responsibility. In both instances, Ecology must identify and assess the public interest as part of its role in approving or denying permit applications.

afforded by our state's waterbodies were recognized by the Legislature when it directed Ecology to protect such values in the very statute that creates the OCPI exception. RCW 90.54.020(3)(a) (directing Ecology to maintain base flows "necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values"). Similarly, RCW 90.22.010 authorizes "minimum water flows or levels" for "the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest."

In light of these statutes, protection and enhancement of fish and wildlife resources is the most basic public interest that instream flows are designed to protect, along with recreational, aesthetic, and navigational values. A water permit that requires and results in land preservation, vegetative buffers, channel improvement, and erosion reduction is a project that promotes and preserves the same public interests protected by instream flows under RCW 90.54 and RCW 90.22. The Court should therefore reject Amici's argument. If overriding considerations for the public interest is to have meaning (and the Legislature surely intended it to have meaning), then the most apt and compelling "public interest" is the very habitat values protected by base flows.

While Ecology and Amici both agree that the OCPI exception is extraordinary and limited, Amici incorrectly describe Ecology's permit analysis as nothing more than the economic "balancing" test rejected in *Swinomish*. Amicus Brief at 9. In fact, Ecology considered the totality of habitat improvements, in addition to the public benefits of municipal water, in order to determine that public interest override instream flows. As explained in Ecology's Response Brief, this permit was not issued based on the economic balancing test rejected in *Swinomish*, and should not be reversed on those grounds. Ecology Resp. Br. at 35-37.

Neither *Swinomish* nor the statutes support Amici's theory that stream habitat enhancement is not a public interest to be considered in determining whether the impacts of a withdrawal are overridden by suitable public interests.

2. The Yelm Plan Provides "Excellent and Effective" Mitigation

The Court should also reject Amici's attempt to minimize the substantial and important public benefits resulting from Yelm's mitigation plan. The Amicus Brief dismisses the confirmed net ecological benefits, asserting there are no public interest considerations that will be advanced by the plan except for the "benefits accruing from new water supplies," which alone would not be sufficient. Amicus Brief at 16. It is true that

the project will generate water for the public—the municipal water service of Yelm, together with Lacey and Olympia through their Interlocal Agreement. But future growth is not the basis for the PCHB or this Court to conclude that there are overriding considerations of public interest that justify the known, minor impairment to baseflows.

The instream and habitat benefits were demonstrated at hearing and are discussed in the uncontested findings of fact by the PCHB. Although Amici dismiss the public interest benefits as “[i]ndirect, unquantified, and unproven habitat improvements,” Amicus at 16, the findings say otherwise. The PCHB repeatedly affirmed the value of the mitigation in its final order:

- “The amount of value provided by the out-of-kind mitigation in this case will clearly benefit fish and the hydrology of the water body, and in some instances will address limiting factors that have been identified as barriers to salmon recovery.” AR 001285.
- “Indeed, the only evidence before the Board was that the mitigation plan offered by the cities was large in size and scope, feasible and funded as a single, interconnected package, and overall, excellent and effective.” AR 001285.
- The out-of-kind mitigation projects are “required and not permissive.” AR 001285. Yelm must complete these projects or their equivalent in order to be in compliance with their permit. AR 001278.
- The majority of depletions from the permit are fully mitigated with in-kind water, and the rest “have been mitigated with out-of-kind efforts that serve as a substantial and compelling basis for Ecology’s OCPI determination.” AR 001283.

- Where tributaries are enhanced and restored, then there is better fish production and a better response, especially from anadromous fish like salmon. AR 001276.
- “The mitigation on Yelm Creek will produce a gain of fish habitat on the creek. . . . [P]rojects will probably keep water in the channel for a greater distance longer in the year.” AR 001277.
- Mitigation on McAllister Creek will “significantly improve[] flows to the creek and more than offset[] the depletions to the Creek.” AR 001278.
- On Woodland Creek, mitigation will “provide[] a two to one mitigation value for the slightly lesser flows.” AR 001279.
- In the Upper Deschutes Basin, in-kind mitigation will “increase stream flows during critical times for returning Chinook salmon.” AR 001279. Stream bank mitigation will reduce erosion and improve flows. AR 001279.

These habitat improvements exist because of the Yelm permit, and achieve significant and demonstrable public benefits that override harms attributed to the Yelm permit’s minor impairment of instream flow. Amici cannot dispute these Findings, nor the weight of expert evidence presented at hearing, through their vague criticism that habitat improvements are “indirect, unquantified, and unproven.” Amicus Brief at 16.

Indeed, Amici cannot now challenge the PCHB’s factual findings at all. Foster’s Brief assigns error under RCW 34.05.570(3)(d), and asserts that the PCHB erroneously interpreted and applied the law. Foster did not assign error or provide argument as to whether the PCHB’s

decision is supported by substantial evidence (RCW 34.05.570(3)(e)) or is arbitrary and capricious (RCW 34.05.570(3)(i)). Appellant's Brief at 1. Foster does not contest any of the findings, which are therefore verities on this appeal. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991); *see also City of Lakewood v. Koenig*, 160 Wn. App. 883, 887, 250 P.3d 113 (2011) (considering a challenge to a lower court's findings of fact "abandoned" once appellant does not assign error to such findings).

To the extent the Amici seek to bypass or contradict those findings, Amici's arguments are not properly before this Court. Even if Amici could raise such arguments, their assertions about the facts are deficient of evidentiary support.³

C. Habitat Enhancement Is Consistent with Other Laws and Policy, Including SEPA and POL 2035.

The consideration of habitat enhancement as a "public interest" for OCPI is consistent with other policies and statutes that apply both directly

³ Amici's specific attempts at contradicting the established adequacy of Yelm's mitigation are inconsistent with the PCHB's final order. For example, Amici state: "[a]lthough Yelm plans to expand its reclaimed water use [from Cochrane Memorial Park], that expansion is not required by the permit." Amicus Brief at 6, n.4. The PCHB clearly ruled that infiltration of reclaimed water from Cochrane Park is "in addition to any other obligations Yelm may have to provide reclaimed water at that site." AR 001286. Amici also reject the significance of the regional mitigation approach taken by Yelm, Olympia, and Lacey. Amicus Brief at 15-16. But the PCHB not only upheld the joint effort, it also found it promoted ecological benefits by allowing the cities to achieve levels of mitigation that could not happen without collaboration. AR 001286, AR 001273.

and analogously. Contrary to the Amicus Brief, the statutory authority to consider public interests is not contingent; it does not depend on Ecology first adopting rules. And similarly, the OCPI statute may be applied independent of the State Environmental Policy Act (SEPA), RCW 43.21C, and Ecology's later adopted Mitigation Policy, POL 2035.⁴ Finally, Amici's arguments regarding SEPA and Ecology's Mitigation Policy POL 2035 are not raised by the parties and should not be considered based solely on briefing by amici.

1. The OCPI Statute Is Applicable to the Yelm Permit Without the Need for Ecology to Adopt Rules

The PCHB's decision reflects a correct application of the OCPI statute and the material findings are amply supported by the evidence. The PCHB properly found that despite the absence of a formal rule or policy, "Ecology established through testimony sufficient criteria to guide the use of OCPI, as set forth [by 12 listed factors]." AR at 001292-93.

Amici, however, maintain that the PCHB has no authority to uphold Ecology's decision without a rule or policy. Amicus Brief at 12-13. This is incorrect as a matter of law and should be rejected because it would frustrate the legislative intent by preventing application

⁴ The effective date of POL 2035 (Evaluating Mitigation Plans) was February 20, 2013. At the time of the December 2012 PCHB hearing, this policy was in draft form. Deputy Program Manager, Tom Loranger nonetheless testified that Ecology's approval of Yelm's mitigation plan followed the draft version of the policy. Tr. of Proceedings Day 2 at 288-303 (Loranger Test. Dec. 18, 2012).

of RCW 90.54.020(3)(a). As a general rule of statutory construction, Ecology has discretion to apply a statute on a case-by-case basis without rulemaking. “[A]n agency has wide discretion in deciding to forgo rulemaking.” *Squaxin Island Tribe v. Dep’t of Ecology*, 177 Wn. App. 734, 742, 312, P.3d 766 (2013). When a statute doesn’t specifically require adoption of a rule, it is appropriate for agencies to implement policy on a case-by-case basis. *Budget Rent a Car Corp. v. Dep’t of Licensing*, 100 Wn. App. 381, 997 P.2d 420 (2000), remanded by 144 Wn.2d 889 (2001) (remanded on other grounds). Similarly, it is within the PCHB’s adjudicative authority to issue specific conclusions as to how an agency action complies with a statute, with or without rules that provide guidance. *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 74, 110 P.3d 812 (2005) (“[The PCHB] has all of the powers granted to an agency for adjudicative proceedings under the APA.”).

Thus, while the PCHB has urged the adoption of rules to guide future cases, it does not prevent Ecology, the PCHB, or this Court from deciding if there are overriding considerations of public interest that warrant granting the Yelm permit despite the known impact on instream flows for certain months.

2. The Approval of the Yelm Permit Is Consistent With Ecology's Policies

Amici attempt to defeat the PCHB's decision by pointing to Ecology's adoption of Policy 2035 and the agency's engagement with the Legislature on similar issues involving mitigation. Amici rely on the guidance of Policy 2035 to point out that in-kind mitigation options should be exhausted and out-of-kind benefits should be monitored. Amici then claim that Ecology's "Record of Examination" (ROE) violates this policy because there is no evidence that Yelm exhausted in-kind options for mitigation before relying upon out-of-kind actions. Amicus Brief at 7.

As a threshold matter, this is a factual argument not raised by the parties which the Court cannot reach. But even if it was properly raised by Amici, it is directly contradicted by the PCHB's uncontroverted findings. The PCHB concluded that Ecology "exhausted every feasible in-kind option" before turning to out-of-kind mitigation. AR 001292. The PCHB also found Yelm's mitigation plan "requires monitoring in the form of a joint mitigation summary report." AR 001282. Therefore, there is no merit to Amici's alleged inconsistency with the later adopted POL 2035.

3. Amici's SEPA Arguments Are Not Before the Court and Have No Merit

No SEPA challenge has been raised in this appeal, but Amici argue that the Mitigation Plan fails because it is not consistent with the

principles of SEPA. The record shows that Ecology complied with SEPA in taking this action. The Yelm water permit itself is exempt from SEPA under WAC 197-11-800. For the projects that are part of the complete permit and provide overriding considerations of public interest, Ecology issued a SEPA Determination of Non-significance on April 11, 2011. AR 001351. That SEPA determination was not appealed by any party and is final.

Amici, however, argue that the Yelm Mitigation Plan cannot meet the OCPI exception because it does not satisfy SEPA. While it is correct that Ecology used the SEPA mitigation tool as a reference point in assessing out-of-kind mitigation, Ecology did not assume and does not argue that a SEPA mitigation policy standard defines the OCPI exception. Nor does the PCHB order suggest that mitigating impacts under SEPA would serve to bring a permit within the OCPI exception. The relevant and material facts are those found by the PCHB, which show that habitat impacts are fully mitigated and the OCPI exception is being applied narrowly based on overriding and substantial considerations of the public interest.

III. CONCLUSION

Amici's argument relies on extensive factual assertions that are unsupported by—or directly contradicted in—the record in this case. The

Yelm permit is aptly conditioned on “excellent and effective” mitigation that will provide a net ecological benefit to the very habitat values protected by the instream flow rule in question. Yelm achieves where others traditionally fail by enhancing our natural environment while serving a city’s growing water needs—two public objectives that are inherently at odds. For the foregoing reasons, and as stated in Ecology’s Response Brief, Ecology asks the Court to affirm the PCHB’s decision and uphold Yelm’s water right permit.

RESPECTFULLY SUBMITTED this 6 day of May, 2015.

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