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Washington Pollution Control Hearings Board Rules Ecology Exceeded Its Authority Under CWA, Invalidates NPDES Permit Condition

Washington state's Pollution Control Hearings Board ruled on February 26 that the Washington Department of Ecology exceeded its Clean Water Act authority by inserting a permit condition in the Aquatic Mosquito Control General Permit, which required compliance with the Endangered Species Act. The PCHB held that the CWA and Washington's Water Pollution Control Act (WPCA) do not authorize Ecology to include the condition and remanded the general permit to Ecology. The PCHB's decision clarifies Ecology's authority to condition CWA permit compliance with other federal statutory schemes.

### **Background: Ecology's Clean Water Act Authority**

The CWA prohibits the discharge of pollutants from a point source absent a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342(a). EPA establishes baseline requirements for NPDES permitting programs, but states have the authority to add requirements or restrictions. *See generally* 40 C.F.R. Part 123. In Washington, Ecology is the delegated agency that administers the NPDES program. RCW 90.48.260(1).

Under that delegated authority and Washington's WPCA, Ecology issues individual and general NPDES permits. WAC 173-220-020, -226-020. General permits are issued every five years and apply to several categories of discharges, such as industrial wastewater and stormwater. WAC 173-226-050. Ecology promulgates water quality standards for the state, which includes narrative criteria for protecting the beneficial uses of Washington waters, numeric criteria for toxics, and an antidegradation policy. *See* 33 U.S.C. § 1313(c)(1); WAC 173-201A-010, -200-040(2); RCW 90.54.020(3).

### **The 2019 Aquatic Mosquito Control General Permit**

One of the general NPDES permits that Ecology issues is the Aquatic Mosquito Control General Permit (general permit). This general permit authorizes application of pesticides near and in waterbodies to control disease-causing mosquitos. The general permit is issued in Washington to local mosquito control agencies, whose mission is to protect public health by controlling mosquitos.

On March 6, 2019, Ecology released revisions to the general permit for public comment. The draft general permit contained a condition requiring compliance with the Endangered Species Act (the ESA condition). EPA and other entities commented on the draft general permit to argue that Ecology does not have authority under the CWA to implement the ESA. Nevertheless, Ecology reissued the general permit on June 5, 2019, with the ESA condition. The Benton County Mosquito Control District (District), a local public health agency responsible for controlling mosquitos in Benton and Yakima Counties, appealed the general permit, challenging Ecology's authority to include the ESA condition.

### **The PCHB Decision**

The District's appeal to the PCHB raised two legal issues: (1) whether Ecology acted within its authority to include the ESA condition in the general permit; and (2) whether the ESA condition is reasonably necessary.

The PCHB held that Ecology lacked express or implied authority to include the ESA condition. Ecology conceded that it has no express statutory authority to include the ESA condition in the general permit. The ESA does not delegate any power to state agencies like Ecology, and the CWA and the WPCA's general policy statements of protecting the environment do not give Ecology the power to implement separate federal environmental statutes.

Ecology also lacked the implied authority to include the ESA condition. Implied authority arises when a statute delegates powers and duties to an agency but is silent as to how the agency should achieve the statute's goals. Typically, agencies have discretion in carrying out their implied authority and a court will often defer to an agency's expertise on the matter. However, the PCHB declined to defer to Ecology's interpretation of its own statutory authority, relying on a recent Washington State Supreme Court decision invalidating portions of Ecology's Clean Air Rule because Ecology exceeded its authority under the state's Clean Air Act. *See Ass'n of Wash. Bus. v. Dep't of Ecology*, 455 P.3d 1126, 1130 (2020). Similarly, here, Ecology unlawfully enlarged its authority under the CWA and WPCA by including the ESA condition.

Ecology's final argument was to claim that the ESA condition was "reasonably necessary" to achieve the goals of the CWA and the WPCA. The PCHB disagreed for three reasons. First, the PCHB noted that, although the CWA and the ESA share a common goal of protecting wildlife, consistency between two statutes, by itself, does not give Ecology the authority to act. Second, compliance with the ESA is not necessary to achieve water quality standards. Finally, endangered species protection is adequately regulated without the ESA condition—the EPA regulates the use of pesticides, and mosquito control districts are separately required to participate in the ESA Section 7 consultation process.

The PCHB remanded the general permit to Ecology to remove the ESA condition.

## **Future Implications**

This decision is limited to the general permit and does not require Ecology to remove similar conditions from other permits. However, the PCHB's reliance on the Clean Air Rule decision is significant and signals that although agencies receive deference for certain actions, an agency's interpretation of its own scope of authority will not be accorded deference. Even if an agency's attempted action is consistent with the goals and policies of a statute, the agency cannot enlarge its authority outside the express or implied authority granted to it by the legislature.

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