

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SCOTT CORNELIUS, PALOUSE
WATER CONSERVATION NETWORK,
and SIERRA CLUB PALOUSE GROUP,

Appellants,

v.

WASHINGTON DEPARTMENT OF
ECOLOGY and WASHINGTON STATE
UNIVERSITY,

Respondents.

PCHB No. 06-099

**ORDER ON RECONSIDERATION
RE: SUMMARY JUDGMENT**

The Pollution Control Hearings Board (Board) issued an Order on Summary Judgment in this matter on December 7, 2007. The Respondent Washington State University (WSU) filed a petition for reconsideration on December 17, 2007, requesting the Board reconsider those portions of its Order in which the Board granted summary to Appellants with respect to enlargement of Water Right Permit G3-28278P. On December 19, 2007, Appellants filed a motion for reconsideration, requesting the Board to reconsider its finding that WSU was physically capable of deepening or replacing its wells at the same location.¹ Appellants and WSU each filed a response to one another's reconsideration requests, and Respondent Department of Ecology (Ecology) joined in WSU's petition. Appellants filed a reply regarding their motion.

¹ Appellants also filed a request for clarification at the same time, and the Board issued its Order of Clarification re: Summary Judgment on January 10, 2008.

1 Having fully considered the record in this case, the pleadings on reconsideration, and
2 being fully advised, the Board enters the following ruling:

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4 **WSU’s Request for Reconsideration re: Enlargement of Water Right Permit G3-28278P**

5 Respondents request the Board to reconsider its decision granting summary judgment in
6 favor of Appellants with respect to enlargement of Water Right Permit G3-28278P and instead to
7 grant summary judgment in favor of Respondents as to Issue No. 7. WSU argues that the
8 Board’s summary judgment ruling on Permit G3-28278P misinterprets the proper
9 “supplemental” nature of the right, fundamentally changes a long-standing regulatory practice,
10 and would have drastic unintended consequences for the many rights Ecology has historically
11 issued to replace or substitute for older, more uncertain rights or claims.

12 WSU’s position, joined in by Ecology, is that Permit G3-28278P is a separate, alternate
13 right to Claim 098524 (and the other rights referenced in the permit) and that its validity and
14 extent is not dependent on the validity of the related Claim. They contend that the annual and
15 instantaneous quantities authorized under Permit G3-28278P are not based on or derived from
16 the quantities claimed under Claim 098524, and that the Board’s interpretation of Permit G3-
17 28278P is a misreading of the permit’s pumping limitation and wrong as a matter of law.

18 In response, Appellants urge the Board not to reconsider its interpretation of the permit,
19 which they argue is supported by a plain reading of the original Report of Examination (ROE)
20 for Permit G3-28278P that identifies the permit as supplemental to an invalid claim. Appellants
21 argue Respondents’ interpretation of the permit would validate illegal use of water based on

1 claims that do not meet statutory requirements, and that the Board was correct in ruling the
2 quantities associated with the invalid claim are not available for transfer.

3 Upon reconsideration, the Board finds that material facts remain in dispute regarding the
4 relationship between the rights at issue, including facts related to overlapping characteristics of
5 the rights, the amount of water embodied in each right and basis for those amounts, and the
6 original intent of Permit G3-28278P. These factual disputes make a legal conclusion on the issue
7 of enlargement of Permit G3-28278P premature. The Board believes that because there are
8 disputed facts, conflicting interpretations of the law, and potentially significant implications for
9 the regulatory scheme involving “supplemental” water rights, it is appropriate to reserve
10 judgment at this time. The Board therefore denies summary judgment on Legal Issue No. 7 with
11 respect to enlargement of Permit G3-28278P, and sets this issue over for hearing.

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13 **Appellants’ Request for Reconsideration re: Rehabilitation/Replacement of Existing Wells.**

14 Appellants request the Board to reconsider its factual findings with respect to questions
15 of whether WSU is capable of deepening or replacing its wells. Appellants argue that they did
16 not, and do not, concede WSU is physically capable of deepening or replacing its existing wells
17 and contend that evidence to support such a finding is lacking in the record. Appellants contest
18 this fact and believe it should not serve as a basis for the Board’s legal conclusions regarding
19 issues of enlargement, aquifer depletion, or the State Environmental Policy Act (SEPA).

20 WSU responds that reconsideration should be denied for two reasons: first, because the
21 request is untimely; and second, because the evidence and record support a finding that WSU

1 could modify or reconstruct its existing wells, or construct replacement wells, to enable full
2 utilization of its existing water rights.²

3 The arguments raised by Appellants do not provide a basis for the Board to modify its
4 Order on Summary Judgment. Other than clarifying that they had not intended to concede the
5 issue, Appellants' request for reconsideration offers no new facts or legal arguments that were
6 not previously considered by the Board in its deliberations on the summary judgment motions.
7 The Board's legal conclusions regarding enlargement, aquifer depletion, and SEPA were not
8 based solely on the fact that WSU is legally and physically capable of rehabilitating or replacing
9 its existing wells. However, to the extent the Board considered this fact, we note that the record
10 adequately supports such a finding and find no merit to Appellants' request.

11 In addition to Appellants' briefing which appeared to concede that WSU could legally
12 and practically modify or replace its existing wells,³ WSU submitted affirmative evidence on this
13 point that was not disputed by Appellants. WSU offered, by declaration, the professional
14 opinion of Gary Wells, the civil engineer who provides technical support for the operation,
15 maintenance, and expansion of WSU's water system. Mr. Wells stated:

16 In my professional opinion, each of the inoperable or inactive wells in the WSU
17 water system could be physically modified or replaced. In lieu of modifying or
replacing each individual well, the University elected to pursue the well

18 ² Because we agree with Respondents that the evidence and record support WSU's position regarding its ability to
19 rehabilitate or replace its wells, we need not address WSU's argument that Appellants' request for reconsideration
was untimely.

20 ³ "Ecology has argued that WSU could have deepened or rehabilitated its failing wells or constructed replacement
wells without using the process set forth in the groundwater change statutes, RCW 90.44.100(2). 2d Osborn Decl.,
21 Att. 1 (Brown Dep. At 21). Appellants agree – WSU could have done that." *Appellants' Response to the Motions of
Department of Ecology and WSU for Partial Summary Judgment on Issues 1 through 18A, at 7* (underlining added,
italics in original).

1 integration proposal as a way of achieving system efficiency, flexibility, and
2 reliability at a lower overall cost. *Second Wells Decl. at 4-5.*

3 Appellants have offered no evidence, either in the summary judgment briefing or their
4 reconsideration motion, that WSU's wells could not be modified or replaced to enable full
5 utilization of its existing water rights. They have offered no expert opinion to counter Mr.
6 Wells' professional opinion. Instead, Appellants allege that "at least with respect to Well No.
7 5...[it is] probably not capable of rehabilitation or replacement at the same location," due to its
8 proximity to a hazardous waste site. *Appellants' Motion for Reconsideration at 5.* Appellants'
9 unsubstantiated allegations fall short of the showing needed to establish a triable issue exists in
10 response to WSU's motion for summary judgment. *Young v. Key Pharmaceuticals, Inc.*, 112
11 Wn.2d 216, 225-226, 770 P.2d 182 (1989).

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15 Based on the foregoing analysis, the Board enters the following:

16 **ORDER**

- 17 1. Respondents' petition for reconsideration is GRANTED IN PART. The Board
18 modifies its Order on Summary Judgment to deny summary judgment on Legal Issue
19 No. 7 with respect to enlargement of Water Right Permit No. G3-28278P. This issue
20 is set over for hearing, and an Amended Order on Summary Judgment is issued
21 herewith modifying the December 7, 2007 Order on p. 29, line 2; page 30, line 10
through page 34, line 6; and page 50, lines 2-6.
2. Appellants' motion for reconsideration is DENIED.

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So ordered this 18th day of January 2008.

POLLUTION CONTROL HEARINGS BOARD

ANDREA MCNAMARA DOYLE, Presiding

KATHLEEN D. MIX, Chair

WILLIAM H. LYNCH, Member