0162B

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

TROUTLODGE, INC.,	)	**PCHB Nos. 90-147, 148, 149 and 90-166 & 167**
Appellant,	)	
v.	)	**ORDER OF PARTIAL SUMMARY JUDGMENT**
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	
Respondent.	)	

On January 31, 1991, respondent Department of Ecology filed its Motion for Partial Summary Judgment with Memorandum and Affidavit of Bill Moore. Having considered those documents together with:

1. Brief of Troutlodge in Opposition to Ecology's Motion for Partial Summary Judgment filed February 13, 1991, with Affidavit of Edward McLeary.

2. Respondent Department of Ecology's Reply Memorandum in Support of Partial Summary Judgment filed February 19, 1991.

3. Oral argument of counsel heard on February 21, 1991,

together with the records and file herein, and being fully advised, the Board concludes:

I.

Validity of Regulations. As a threshold matter, Ecology asserts that this Board lacks jurisdiciton to rule on the validity of a

regulation. Ecology Memorandum at pp. 2, lines 9-12; 6, lines 7-9; 11, lines 10-14; 12, lines 11-13; 13, lines 2-6; 14, lines 15-19.

We disagree.

II

We have previously held that we lack jurisdiction to review the validity of regulations adopted, but not yet applied. Seattle v. Department of Ecology, PCHB No. 79-165 aff'd 37 Wn. App. 819 (1984). In terms stated by the Court of Appeals on review, Seattle was an appeal from "law making" as contrasted with "law applying." This appeal, by contrast, is "law applying" by which statutory provisions are brought to bear upon a specific person, namely, Troutlodge, Inc.

III

A challenge to "law making" can be addressed to the Superior Court for Thurston County, under RCW 34.05.570(2), "when it appears that the rule or its threatened application interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. However, this provision does not prevent another forum from reviewing the consistency of a regulation with the statute it implements, when the regulation is applied to a specific person. Other superior courts may conduct such review. State v. Rains, 87 Wn.2d 626 (1976) (Clallam County Superior Court invalidates a rule of the Public Disclosure Commission). An administrative forum may conduct such review. Bellevue v. Boundary

Review Board, 90 Wn.2d 856 (1978) (Boundary Review Board reviews and upholds the validity of a timely filing rule in contested annexation). This board has similarly reviewed the consistency of regulations with statutes where the regulations were brought to bear against specific persons. See Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310 (1976), Simpson Timber Co. v. Olympic Air Pollution Control Authority, 87 Wn.2d 35 (1976), Frame Factory v. Department of Ecology, 21 Wn. App. 50 (1978), Puget Sound Air Pollution Control Agency v. Kaiser Aluminum, 25 Wn. App. 273 (1980), Chemithon Corporation v. Puget Sound Air Pollution Control Agency, 31 Wn.App. 276 (1982), Kaiser Aluminum v. Pollution Control Hearings Board, 33 Wn. App. 352 (1982) and Asarco, Inc. v. Puget Sound Air Pollution Control Agency, 112 Wn.2d 314 (1989).

IV

Our review in adjudicative proceedings under RCW 34.05.410, such as this case, is not limited solely to compliance with WAC regulations. Our review may extend to and include consideration of the statutes which gave rise to the regulations. Thus, were a permit consistent with a regulation, but both permit and regulation were inconsistent with the statute, we would reverse the permit. Our conclusion supporting such a reversal would necessarily be that the regulation is inconsistent with the statute. We have jurisdiction to rule on the validity of a regulation in that context.

V

Established principles govern our review of regulations. Where the legislature has specifically delegated rule-making power to an agency, the regulations are presumed valid. Weyerhaeuser, supra. One asserting invalidity has the burden of proof, and the challenged regulations need only be reasonably consistent with the statutes they implement, Id.

VI

On the issues now before us upon motion for summary judgment, we are not persuaded that there is any regulation which is not reasonably consistent with the statutes which it implements.

VII

Whether the policy of maintaining the "propogation and protection of . . . fish" as enunciated in RCW 90.48.010 applies to hatchery fish as well as those living in the wild? There is no genuine issue of material fact as to this issue. Appellant concedes that it proposes this issue only for consideration when resolving other issues such as entry and an operation plan. Brief in Opposition, p. 2, lines 15-23. The public policy expressed in RCW 90.48.010 is "to insure the purity of all waters of the state." The policy is presumed to benefit the propagation of both wild and hatchery fish. Nevertheless, water purity is the statutory object. Fish propagation is not the statutory object except as an adjunct to maintaining the purity of all waters of

the state. Summary judgment should be granted for respondent on this issue.

VIII

Whether the Entry Provision of the General Permit violates appellant's right under the U.S. Constitution and Washington Constitution to be free of unreasonable search and seizure? We lack jurisdiction to resolve constitional issues. Yakima Clear Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255, 534 P.2d 33 (1975). We will exclude evidence that is excludable on constitutional grounds. RCW 34.05.452(1). However, this case does not present either an entry or evidence. We decline to rule upon this issue as it is beyond our jurisdiction in this case.

IX

Whether the entry provisions of the General Permit create sanitation and quarantine risks to the hatchery and therefore violate the Department's mandate under the Washington Clean Water Act and Troutlodge's Water Rights. There is a genuine issue of material fact concerning this issue. Compare affidavit of Edward McLeary pp. 3-4 and affidavit of Bill Moore, pp. 3-4. Summary Judgment should be denied.

X

Whether the definition of "Severe Property Damage" includes the loss of brood stock, the loss of other units of fish or eggs and the

loss of production capability and if not, whether the definition violates applicable statutes and regulations? There are no genuine issues of material fact regarding this issue. Ecology concedes that the loss of brood stock, fish or eggs could be "severe property damage." See affidavit of Bill Moore, p. 3, lines 1-6. Whether such loss is "severe" is a matter of degree to be determined in light of an actual incident. Summary judgment should be granted for respondent on this issue.

XI

Whether the provision of the General Permit requiring appellant to develop an operation plan is unnecessary, overly obtrusive and requires appellant to divulge trade secrets and proprietary information. Does the requirement violate applicable statutes and regulations? Appellant has not set forth by affidavit specific facts which would render an operating plan unreasonable or overly obtrusive as to it. There is no genuine issue of material fact concerning this issue. The general permit addresses, inter-alia, fish feeding (p. 22, 5.a.), pond and raceway cleaning (p. 22, 5b.), accumulated solids (p. 23, 5c and d), chemicals (p. 23, e and f) and wastes (pp. 23-24, g). As a general matter, these subjects are reasonably related to maintenance of the purity of public waters under RCW 90.48.010. Information on these subjects is necessary to regulation under the Clean Water Act and is not overly obtrusive.

XII

Trade secrets and proprietary information are protected under 33 U.S.C. 1318(B); RCW 90.48.095, RCW 90.52.020, WAC 173-220-080 and WAC 173-216-080. Appellant is thereby protected from divulging this information.

XIII

Ecology is authorized to require operating plans. ITT Rayonier v. Ecology, PCHB No. 85-218, citing RCW 90.48.180 which provides:

> *The department shall issue a permit unless it finds that the disposal of waste material as proposed in the application will pollute the waters of the state in violation of the public policy declared in RCW 90.48.010. The department shall have authority to specify conditions necessary to avoid such pollution in each permit under which waste material may be disposed of by the permittee. Permits may be temporary or permanent but shall not be valid for more than five years from date of issuance. (Emphasis added.)*

This provision was enacted in 1967 (Laws of 1967, ch. 13, sec. 16) and is not limited to municipal discharges despite the section title which was not part of the enactment. Permits for municipal discharges were required by later enactment, RCW 90.48.162, in 1972. The requirement of an operating plan does not violate applicable statutes and regulations. The general permit requirement for an operating plan should be affirmed. Summary judgment should be granted for respondent on this issue.

XIV

Whether the provisions which allow the permit to be reopened are reasonably necessary to implement state water quality standards? Do the provisions violate applicable statutes and regulations? There are no genuine issues of material fact regarding this issue. Reopening the permit is provided by WAC 173-220-045(4)(b); -(4)(c); -(4)(e); WAC 173-220-150(1)(d)(iii) and WAC 173-220-150(1)(d)(iv). Permits under a state NPDES program must be subject to termination or modification under the federal Clean Water Act. 33 U.S.C. §1342(b), 40 CFR §123.25 and 40 CFR 122.62(A)(3). Ecology is authorized to meet the requirements of the federal Clean Water Act. RCW 90.48.260. Reopening provisions are reasonably necesary to maintain water quality and other clean water standards. The reopener provisions of the general permit have not been shown to violate statutes or regulations. Summary judgment should be granted for respondent on this issue.

XV

Are the limitations on the use of therapeutic compounds reasonably necessary to implement state water quality standards and do the limitations violate applicable statutes and regulations? Do the discharge limitations violate applicable statutes and regulations because they do not consider suspended solids and other pollutants entering the hatchery from upstream? There is no genuine

issue of material fact regarding these issues. Appellant concedes that the subject limitations are consistent with Chapter 173-221A WAC adopted after the general permit became applicable. Brief in Opposition, p. 13, lines 19-22. Appellant does not dispute the validity of those regulations. Id. p. 13, lines 23-25. Summary judgment should be granted to respondent on these issues.

XVI

Have Rocky Ford Creek and Hill Creek been improperly classified as AA streams in violation of applicable statutes and regulations? If these creeks are AA, then whether the temperature and dissolved oxygen requirements are reasonable? There is no genuine issue of material fact concerning this issue. Under RCW 90.48.035 Ecology has the authority to adopt regulations relating to standards of quality for waters of the state. Under WAC 173-201-070(2), Rocky Ford Creek is properly classified AA due to its status as a feeder stream to Moses Lake. Under WAC 173-201-070(6) Hill Creek is properly classified AA because it is a tributary to the Hood Canal which is AA under WAC 173-201-085(13). Appellant has not set forth by affidavit specific facts which would render the temperature and dissolved oxygen requirements for these creeks unreasonable. Moreover, the permit adopts these requirements directly from WAC 173-201-045(1). These requirements have not been shown to be unreasonable or in violation of statutes and regulations. Summary judgment should be granted to respondent on these issues.

WHEREFORE, IT IS ORDERED that:

1. Respondent's Motion for Summary Judgment is granted as to the following issues of the Pre-Hearing Order entered October 10, 1990: A, E, F, G, H, I and J.

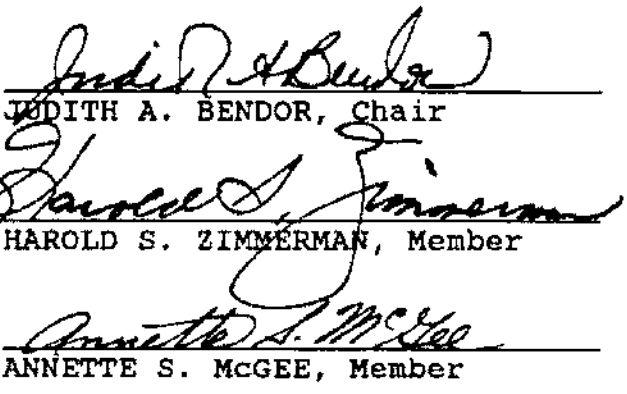
2. Issue C is dismissed for lack of jurisdiction.

3. Respondent's Motion for Summary Judgment is denied as to issue D.

4. Respondent did not move for summary judgment regarding issues B, K and L. These are accordingly preserved.

DONE at Lacey, WA, this 10th day of May, 1991.

POLLUTION CONTROL HEARINGS BOARD



JUDITH A. BENDOR, Chair

HAROLD S. ZIMMERMAN, Member

ANNETTE S. McGEE, Member

WILLIAM A. HARRISON
Administrative Appeals Judge