

March 22, 2013

# Pollution Control Hearings Board Clarifies Use Of Overriding Consideration Of Public Interest Statute

## Foster Pepper attorneys assist City of Yelm in securing future water supply and approval of regional mitigation

The Washington state Pollution Controls Hearing Board on Monday affirmed 942 acre-feet of new water rights for the City of Yelm. The new water supply comes just in time as the City was quickly approaching its limit on new water connections. The case is significant in a number of respects. Most notably, in approving the new water rights the Board's decision recognizes the regional mitigation efforts developed in cooperation with the cities of Olympia and Lacey, which share the same watersheds as Yelm, and accepts application of the Overriding Consideration of Public Interest statute (OCPI) at RCW 90.54.020).

Yelm initially filed its application with the Department of Ecology in 1994. The Washington Department of Ecology approved the water rights in October 2011. Ecology's approval was appealed by a group of Yelm residents who alleged impairment to local water rights, inadequate mitigation, and improper application of the OCPI statute.

The Board upheld the regional mitigation package advanced by Yelm, which included participation in in-kind and out-of-kind mitigation efforts with Olympia and Lacey in the Nisqually and Deschutes River basins. Yelm Mayor Ron Harding said in a press release, "It has been a monumental regional effort to secure this water and we are proud that the outcome not only provides our city water for the future, but also provides a high standard of environmental stewardship for our watershed."

Ecology applied the OCPI statute to approve the new appropriation of water where a hydrologic model showed potential impacts could occur to closed streams or streams subject to minimum flow requirements. The Board upheld Ecology's application of the OCPI statute based on a three-step balancing test articulated by Ecology. The Board noted that the OCPI statute must be narrowly construed, yet it found that Yelm had thoroughly investigated every feasible option to ensure that in-kind mitigation was provided before turning to out-of-kind mitigation. Those out-of-kind mitigation and benefits to fish and wildlife were "significant and clearly established through sound science." The Board also cited favorably the use of a conservative hydrologic model to predict impacts to water bodies, minimal depletions, use of reclaimed water, and extensive stakeholder involvement, among the factors supporting the application of OCPI.

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Contact Foster Pepper attorneys [Joe Brogan](#) or [Steve DiJulio](#) for additional information about this important ruling.

Click [here](#) to view a pdf of the Board's Order. Click [here](#) to view Foster Pepper's Water Rights Practice webpage.

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