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12 NOV 14 PM 2:01
KITITAS COUNTY
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KITITAS COUNTY

BRUCE M. BEATTY,

Petitioner,

vs.

WASHINGTON FISH and WILDLIFE
COMMISSION, WASHINGTON
DEPARTMENT OF FISH and
WILDLIFE, and POLLUTION
CONTROL HEARINGS BOARD,

Respondent.

No. 11 2 00544 8

MEMORANDUM DECISION

PROCEEDINGS

This matter involves Mr. Beatty's (hereinafter petitioner) petition for review of the Pollution Control Hearings Board's (the Board) findings of fact, conclusions of law and order issued November 30, 2011. The Board affirmed conditions that the Washington Department of Fish and Wildlife (WDFW) placed on HPA 122729-1, which was the permit issued to the petitioner for placer mining activity along Fortune Creek in Kittitas County, Washington. Oral argument on the matter was held September 13, 2012 and attorney James Buchal appeared on behalf of the petitioner and Assistant Attorney General James Schwartz appeared on behalf of the State of Washington Department of Fish and Wildlife. The court has reviewed the memorandums of counsel and the record in its entirety that was before the Board. Said record consisted of the transcript of proceedings from the hearing held October 31, 2011 through

November 1, 2011 and all of the appellant and respondent exhibits admitted at the time of that hearing.

DISCUSSION

1. Standard of Review. This matter comes before this court as an appeal under the Administrative Procedures Act. RCW 34.05.570. When seeking judicial review of an agency action, the burden of demonstrating the invalidity of an agency action is on the party asserting the invalidity. RCW 34.05.570(1)(a). The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of by that person. RCW 34.05.570(1)(d).

The court shall grant relief from an agency order if the court determines that any of the provisions set forth in RCW 34.05.570(3)(a) through (i) have been met. When reviewing agency orders, the court engages in a de novo review of legal conclusions and must determine whether the facts found by the agency are supported by substantial evidence. Thurston County v. Western Washington Growth Management Hearings Board, 164 Wn.2d 329, 341 (2008). Substantial evidence exists when there is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” Id, quoting Callecod v. Washington State Patrol, 84 Wn.App. 663, 673 (1997). When reviewing the evidence the court should give substantial deference to agency determinations which are based heavily on factual matters, especially factual matters which are complex, technical and close to the heart of agency’s expertise. Hillis v. State Department of Ecology, 131 Wn.2d 373 (1997).

An agency decision is deemed arbitrary or capricious when the decision is willful and unreasoning and taken without regard to attending facts or circumstances. City of Bellevue v. East Bellevue Community Council, 138 Wn.2d 937, 947 (1999). Where there is room for two opinions, a decision is not arbitrary and capricious. Id at 948.

In this instance, Mr. Beatty, the petitioner, bears the burden of establishing the invalidity of the Board’s action. For the reasons set forth below, this court finds that the petitioner did not meet his burden of establishing the invalidity of the Board’s action. The agency did not commit any errors of law and the facts found by the agency are supported by substantial evidence.

A. Constitutional provisions. The court shall grant relief from an agency order if the order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied. RCW 34.05.570(3)(a). The statute at issue in this appeal concerns the State of Washington's regulatory powers that are contained within RCW 77.55 (Construction Projects in State Waters) and the rules and regulations set forth in WAC 220-110 (Hydraulic Code Rules). In particular the issues involved surround the State's regulation of small scale mineral prospecting and mining which is what the petitioner wanted to do on Fortune Creek. These statutes and regulations authorize individuals to prospect and mine within Washington streams without individual permits provided they comply with conditions that are set forth in WAC 220-110-201 through WAC 220-110-206 (the Gold and Fish Pamphlet). These regulations and others within this section reflect the best available science and practices related to protection of fish life. WAC 220-110-010. If a person wants an exception to the Gold and Fish Pamphlet, then the person must apply for an individual permit. When a person seeks an individual permit the person must submit complete plans and specifications for the proper protection of fish life. Protection of fish life is the only ground upon which approval of a permit may be denied or conditioned and when, in the judgment of the department, the project will result in direct or indirect harm to fish life unless adequate mitigation can be assured by conditioning the HPA or modifying the proposal. RCW 77.55.021(7)(a) and WAC 220-110-200(2). Approval of a permit may not be unreasonably withheld or unreasonably conditioned.

The petitioner challenges the above referenced statutory and regulatory scheme as unconstitutionally vague on its face and as applied to petitioner. The petitioner appears to argue that core due process and equal protection problems arise because the department and its employees lack any discernible guidance from the statute and regulations as to the proper scope of their permit review. As such, petitioner argues, there is a risk of arbitrary and discriminatory conduct.

This court does not agree that the statutory and regulatory scheme set forth in RCW 77.55 and WAC 220-110 is vague. On the contrary, the definitions set forth in WAC 220-110-020 set forth with particularity what is meant by "fish life" and "protection of fish life". Furthermore, this court agrees with the respondent's interpretation of State v. Crown Zellerbach Corp., 92 Wn.2d 894 (1979) in which the Washington Supreme Court found that the delegation of authority to the Department of Game and Fisheries with respect to issuance of permits for

hydraulic projects was a lawful delegation of authority to the department to impose requirements on hydraulic permits. The court found that the delegation of legislative power is justified because the statute does define in general terms what is to be done and those general terms are adequate “particularly in light of our stated view that environmental factors are not readily subject to standardization or quantification.” Id at 900. Additionally, the court found that the statute provides sufficient procedural safeguards given the “second look” that an aggrieved party may receive through the courts. Id. For the same reasons set forth in Crown, this court does not find the statute and regulations at issue as unconstitutionally vague. Likewise, this court does not find any due process or equal protection violations as applied to the petitioner and this court is not convinced, based upon the record, that the petitioner was a victim of arbitrary or discriminatory conduct. While other miners may have been granted conditional permits in similar situations, the petitioner’s absolute refusal to meet with a representative from the department to discuss where specifically on Fortune Creek he wanted to mine resulted in the department’s unwillingness to grant an exception under the permit. Had the petitioner been willing to meet with the department, it is very possible he would have been granted more access to the creek outside the designated time frame. He cannot refuse to meet and then claim that he was discriminatorily treated.

As to challenges regarding whether the agency’s regulations or permit conditions are a violation of federal mining law, this court finds pursuant to California Coastal Commission v. Granite Rock Company, 480 U.S. 572, 94 L.Ed. 2d 577, 107 S.Ct. 1419 (1987) that the Supreme Court refused to find that the federal mining law preempted the field of mining regulation on federal lands. Provided the states do not prohibit mining, the court stated that state governments may apply environmental regulations to mining activity. These state laws regarding the conditioning of hydraulic projects does not conflict with the operation or objective of federal law.

B. The agency has engaged in lawful procedure and decision-making process and did not erroneously interpret or apply the law. As stated above, the applicable law to be examined in this instance is RCW 77.55 (the hydraulics code) and the rules and regulations which WDFW adopted which are applicable to hydraulics activity. When evaluating permits, the WDFW may only deny or condition the approval of a permit based upon “protection of fish life.” Approval of a permit may not be unreasonably withheld or unreasonably conditioned. The petitioner

requested a permit because he wanted to prospect outside the work windows identified in the pamphlet for Fortune Creek. He sought a permit to use suction dredging and powered high-banking tools on Fortune Creek outside the work windows. His application was granted, however, the conditions did not allow him to engage in suction dredging for the extended time period that he requested. The agency explained that because Fortune Creek has both spring and fall spawning fish species and since fish eggs are in the gravel prior to and after the approved work windows the suction dredging could not be approved during those spring and fall periods. The agency, however, stated the following:

“However, if you were to provide us with site-specific information where we can conduct a site assessment regarding the impacts to fish life, we may be able to issue a permit to allow work with a suction dredge outside the standard work window.”

The petitioner refused to provide site-specific information despite this request. This court finds the petitioner’s refusal to meet and to discuss his specific site information as the most critical fact in these proceedings. In fact, this court finds that most arguments raised by the petitioner in this appeal could have been avoided had he been willing to meet with the department. As stated previously it is very likely the department would have granted the petitioner permission to mine exactly where he wanted to mine. The agency followed its regulations as required and did not engage in any unlawful procedure and the agency correctly interpreted and applied the statutes and hydraulic regulations.

C. The order is supported by substantial evidence. The court adopts the findings of fact as set forth by the PCHB and does find that substantial evidence exists within the record to support their findings.

CONCLUSION

For the above stated reasons, this court affirms the Pollution Control Hearings Board's decision.

DATED: November 14, 2012


JUDGE