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STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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M E M O R A N D U M

July 31, 1986

To: Will Kendra  
Through: Bill Yake *BY*  
From: Art Johnson *AJ*  
Subject: Do State Water Quality Standards Apply to Irrigation Canals?

The above question came up as a result of a recent survey Bill Yake, Dale Norton, and I did on organochlorine pesticides in the Yakima River basin. Violations of EPA water quality criteria for DDT (and metabolites), dieldrin, and endosulfan were observed at the mouths of several creeks and wasteways discharging to the Yakima River. By extension, criteria violations also were occurring in irrigation canals upstream of these wasteways.

Present state water quality standards address the issue of organochlorine pesticides by stipulating that (for Class B waters such as the lower Yakima) "Toxic ... or deleterious material concentrations shall be below those of public health significance or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect characteristic water uses. . ." The attached opinion from the Attorney General's office appears to be that state water quality standards are applicable to wasteways and upstream irrigation canals, drains, and reservoirs, and that waste discharge permits are required.

In practice, however, the department considers the beneficial uses of these waters to be limited to agriculture, and does not require that state standards be met. My understanding is that discharge permits--herbicide application for example--are not required.

The basis for the present policy should be documented. The review of state water quality standards in which you are participating seems a logical forum to air this issue.

AJ:cp

Attachment

cc: Norm Glenn  
Jerry Thielen



STATE OF WASHINGTON  
 SLADIE GORTON  
 ATTORNEY GENERAL  
 TEMPLE OF JUSTICE  
 OLYMPIA, WASHINGTON

From A. Johnson  
 JOHN MAC'S  
 FILES



OFFICES AND OFFICERS--STATE--POLLUTION CONTROL COMMISSION--  
 ADOPTION OF WATER QUALITY STANDARDS FOR WATERS OF THE STATE.

(1) The water pollution control commission has the authority to establish water quality standards for waters of the state under RCW 90.48.035, including waters found in canals, drains, wasteways and reservoirs of irrigation and drainage systems located within the state.

(2) Persons who propose to discharge wastes of industrial and commercial operations into canals, drains, wasteways or reservoirs or irrigation and drainage systems are required by RCW 90.48.160 to obtain a waste discharge permit prior to such a discharge.

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February 18, 1969

Honorable James P. Behlke  
 Director, Water Pollution Control Commission  
 Olympia Municipal Airport  
 Olympia, Washington 98501

Cite as:  
 AGO 1969 No. 4

Dear Sir:

You have asked for an opinion of this office on two questions which we have paraphrased as follows:

(1) Does the authority of the water pollution control commission to establish water quality standards for waters of the state under RCW 90.48.035 include waters found in canals, drains, wasteways and reservoirs of irrigation and drainage systems?

(2) Are persons who propose to discharge wastes of industrial and commercial operations into canals, drains, wasteways or reservoirs of irrigation and drainage systems required by RCW 90.48.160 to obtain a waste discharge permit prior to such discharge?

We answer both questions in the affirmative.

ANALYSIS

As a background to your request, you have informed us that approximately one year ago the water pollution control

commission adopted regulations relating to water quality standards for that portion of the waters within the state of Washington which the commission referred to as "interstate waters."<sup>1</sup> You have also advised that your agency proposes to initiate, in the near future, appropriate administrative procedures which will ultimately lead to the adoption of a regulation relating to revised water quality standards for the remainder of the waters under the jurisdiction of the commission.<sup>2</sup>

Additionally, you have pointed out that we have in our state a substantial number of entities, primarily municipal or public corporations, which operate irrigation and drainage systems. These systems are constructed, in most cases, for the purpose of transporting water to lands for agricultural irrigation, or of draining waters from lands so as to make them suitable for agricultural and other uses. Many of these systems contain canals, drains, wasteways, reservoirs and similar facilities. Some of these systems are made up entirely of constructed facilities, while others utilize a combination of constructed facilities and natural watercourses, sinks, lakes and other natural land formations. The waters flowing in many of these systems are quite large in volume; some are located therein because of the efforts of man, while other such systems, depending on the facts of each case, are made up of a combination of natural occurring and "man-occasioned" waters. Waters in these facilities are oft-times used for such diverse purposes as fish and wildlife

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<sup>1</sup> See WAC 372-12-050, et seq. WAC 372-12-150 (1) defines "interstate waters" as follows:

'Waters of the state' or 'state's waters' or 'interstate waters' shall mean the entire stretch within the state of Washington of all rivers, lakes, and other waters that flow across or form a part of the state or international boundaries anywhere along their length including coastal waters. 'Coastal waters' are further defined as the ocean waters along straight coasts and the waters along indented coasts which are subject to the ebb and flow of the tides."

<sup>2</sup> General standards established for these waters are presently on file in the office of the code reviser as a regulation of the water pollution control commission, filed March 1, 1960. See former codification thereof as WAC 372-12-030, which will be restored in WAC as a part of Supplement 3 thereof.

propagation, feeding and resting areas, and as places for persons to fish, boat, swim and engage in other outdoor recreational activities. The questions you pose relate to the jurisdiction of the water pollution control commission over the various waters which are found in these canals, drains, wasteways, reservoirs and other similar facilities.

As we note in AGO 1967 No. 39, the first comprehensive water pollution control statute of this state was chapter 216, Laws of 1945, now codified in chapter 90.48 RCW. The thrust of this statute was to place primary control over the regulation of water quality in Washington in a state agency designated as the "Pollution Control Commission." Since its original enactment, this act has been significantly supplemented or amended on two occasions, in 1955, and in 1967.<sup>3</sup> Now named the "Water Pollution Control Commission,"<sup>4</sup> this agency has, by RCW 90.48.030:

" . . . the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington."

The next code section, RCW 90.48.035, empowers the commission to adopt such rules and regulations as are necessary to carry out the provisions of the chapter.<sup>5</sup>

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<sup>3</sup> See chapter 71, Laws of 1955, and chapter 13, Laws of 1967.

<sup>4</sup> The agency's name was changed by the legislature with the addition of the word "Water" to "Pollution Control Commission" in § 2, chapter 13, Laws of 1967.

<sup>5</sup> RCW 90.48.010, the first section of chapter 90.48 RCW, provides:

"It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the

". . . including but not limited to rules and regulations relating to standards of quality for waters of the state and for substances discharged therein, as such substances relate to the characteristics of the receiving waters." (Emphasis supplied.)

"Waters of the state" are defined in RCW 90.48.020, for purposes of the chapter, to include:

". . . lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington. . . ." (Emphasis supplied.)

The answers to your questions involve the meaning of the phrase "waters of the state." Are waters flowing or stored in the aforementioned facilities "waters of the state" as the term is used in chapter 90.48 RCW?<sup>6</sup>

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use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington." (Emphasis supplied.)

- 6 The Washington state supreme court has not construed the phrase "waters of the state" as used in chapter 90.48 RCW. Other courts have, however, interpreted the same words as used in water pollution control acts of sister states to include waters, whether public or private, in natural or artificial conveyance systems. A New York Court of Appeals has, for example, in Application of City of Johnstown, 209 N.Y.S. 2d 982 (Sup. Ct. 1961), construed the words "waters of the state" in the New York state water pollution statute, which is the same in significant respects as chapter 90.48 RCW (see, for example, the policy of the act as stated in RCW 90.48.010 which is almost identical with the policy statement in 33 New York Public Health Law § 1200) to mean waters in both public and private streams. See, also, People v. Miles, 143 Cal. 636, 77 Pac. 666 (1904); and Modesto Properties Co. v. State Water Rights Board, 179 Cal. App. 2d 856 (1960).

The definition of this term in RCW 90.48.020, supra, is all-inclusive. After setting forth a specific list of waters, based either on their location, e.g., lakes, or on their quality, e.g., salt waters, which are within the scope of the chapter, the legislature included the following words of extremely broad coverage - "all other surface waters and water-courses within the jurisdiction of the state of Washington."

To the extent that this language is not completely free from ambiguity, resort may be made to the rules of statutory construction, the fundamental object of which is to ascertain and give effect to the intent of the legislature. In re Kurtzman's Estate, 65 Wn. 2d 260, 396 P. 2d 786 (1964).

A well-established rule of statutory construction, which is most helpful in this discussion, is that when a statute is ambiguous the interpretation placed on it by the department charged with its administration, while not binding, is entitled to considerable weight in determining the intention of the legislature. Smith v. Northern P. R. Co., 7 Wn. 2d 652, 110 P. 2d 851 (1941). The persuasive force of such administrative interpretation is strengthened when the legislature, by its failure to amend the statute subsequently, "silently acquiesces" in the interpretation of the administrative agency. White v. State, 49 Wn. 2d 716, 306 P. 2d 230 (1957). This is particularly true when a code section is subsequently considered by the legislature and amended in some other particular, while leaving the administrative construction undisturbed. State ex rel. Pirak v. Schoettler, 45 Wn. 2d 367, 27 P. 2d 852 (1954). For an extended discussion of these principles see, 1 Davis, Administrative Law Treatise, §§ 5.05 and 5.06 (1958).

The long-standing interpretation given to chapter 90.48 RCW by the water pollution control commission, when coupled with the history of legislative amendments to this chapter, is most significant in the light of the rule just referred to. As noted earlier, the basic enactment of chapter 90.48 RCW took place with the passage of chapter 216, Laws of 1945. This statute included the definition of "waters of the state" found in RCW 90.48.020, supra.<sup>7</sup> During the next nine years the commission adopted a number of regulations relating to various aspects of water quality control. One set of these regulations, adopted on February 19, 1954, and now designated as chapter

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<sup>7</sup> Section 2, chapter 216, Laws of 1945.

372-36 WAC dealt with waters in the Columbia Basin Project area of east central Washington.<sup>8</sup>

WAC 372-36-020, which is a part of these regulations, provides as follows:

"The following regulations regarding the discharge of "waste products" to the canals, drains, wasteways, reservoirs and ground waters of the Columbia Basin Irrigation Project Area and the minimum standards for the treatment and disposal of sewage and industrial wastes in this area are hereby adopted and promulgated by the Washington pollution control commission on this 19th day of February, 1954."

In the regulations that follows, WAC 372-36-030 through 372-36-130, various water quality requirements were established. An example thereof, pertinent to this discussion, is WAC 372-36-030(2)(a) which states that: "No raw sewage or septic tank effluent shall be discharged to any canal, reservoir, drain or wasteway."<sup>9</sup> (Emphasis supplied.)

It is clear from the adoption of these regulations that the commission had, as early as 1954, interpreted its authority over waters of the state to include waters in canals, drains, wasteways and reservoirs.<sup>10</sup>

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<sup>8</sup> See, generally WAC 372-36-010.

<sup>9</sup> Similar examples are found in WAC sections 372-36-030(1) (b), (c) and (f); 372-36-080(3); 372-36-090(1) and (2); 372-36-110; 372-36-120(2) and (3); and 372-36-130(1).

<sup>10</sup> You have informed us that, through administrative implementation of the "permit system," waste discharge permits relating to numerous industrial and commercial operations which discharge wastes into waters within the Columbia Basin project have been issued pursuant to RCW 90.48.160 et seq., since 1955. RCW 90.48.160 is set forth in full in footnote 12.

The legislative history of chapter 90.48 RCW since 1954, as it pertains to amendments thereto, is also important. The first major amendment<sup>11</sup> took place in 1955, with the introduction of the so-called "permit" system of water quality control into the basic law.<sup>12</sup> See chapter 71, Laws of 1955. This amendment contained no indication of any legislative repudiation of the commission's interpretation of its jurisdiction as found in its 1954 regulations.

Twelve years later, in 1967, a major review of the state's water pollution laws by the legislature's interim committee for water resources<sup>13</sup> resulted in the development and ultimately in the passage of a bill "upgrading" chapter 90.48 RCW.<sup>14</sup> See chapter 13, Laws of 1967. This amendment is especially significant

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<sup>11</sup> Prior to 1955, the act was amended once. This was a minor amendment found in chapter 58, Laws of 1949, relating to cooperation by the agency with the federal government and sister states of the union.

<sup>12</sup> RCW 90.48.160, the first section of chapter 71, Laws of 1967, as now amended, provides:

"Any person who conducts a commercial or industrial operation of any type which results in the disposal of solid or liquid waste material into the waters of the state, including commercial or industrial operators discharging solid or liquid waste material into sewerage systems operated by municipalities or public entities which discharge into public waters of the state, shall procure a permit from the pollution control commission before disposing of such waste material: Provided, That this section shall not apply to any person discharging domestic sewage only into a sewerage system."

<sup>13</sup> See House Concurrent Resolution No. 33, 1965 legislature, Ex. Sess.; and § 2, chapter 160 and § 2, chapter 169, Laws of 1965, Ex. Sess.

<sup>14</sup> See statement of Representative Stewart Bledsoe, joined by Representatives Robert W. O'Dell, Eric Anderson and Dan Jolly, all sponsors of chapter 13, Laws of 1967, at page 531, House Journal, Washington State Legislature, 1967 Session.

because it included a large number of modifications or additions to many sections of chapter 90.48 RCW, including RCW 90.48.020, but it in no way repudiated the administrative interpretation previously given to the chapter by the commission.

With this background in mind, and following the rules of statutory construction stated in the cases of Smith v. Northern Pacific R. Co., White v. State, and State ex rel. Pirak v. Schoettler, supra, the administrative interpretation of the water pollution control commission is entitled to the greatest weight.

It is also important to note that just ten days prior to the passage by the House of Representatives of the bill which ultimately became chapter 13, Laws of 1967, an informal opinion was requested from this office by State Representative S. E. Flanagan, Chairman of the Natural Resources Committee of the House of Representatives, at the time his committee was considering the bill.<sup>15</sup> This opinion concluded that the water pollution control commission's jurisdiction extended to regulations of discharges of wastes into "canals, waterways, pipelines, drainage ditches and reservoirs within an irrigation district or project."<sup>16</sup>

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<sup>15</sup> See letter to Representative S. E. Flanagan, dated February 3, 1968, signed by the writer of this opinion, on file in the office of the attorney general.

<sup>16</sup> Three sponsors of chapter 13, Representatives Robert O'Dell, Eric Anderson and Dan Jolly, joined in a statement of a fourth sponsor, Representative Stewart Bledsoe, relating to the background and meaning of chapter 90.48 RCW as amended by chapter 13. In discussing the meaning of "pollution" and the authority of the water pollution control commission, Representative Bledsoe, the House Majority "Whip" and a member of the Interim Committee on Water Resources, made the following pertinent comments immediately preceding the vote on final passage of chapter 13, as recorded on page 531 of the House Journal, Washington State Legislature, 1967 Session:

"In Section 1 of the bill, you will find a very comprehensive definition of pollution.  
... We believe that the commission should

Another rule of statutory construction which is applicable to chapter 90.48 RCW provides that conservation statutes relating to the protection and regulation of the uses of natural resources should be given extended interpretation to accomplish the objectives the legislature intended. See, generally, 3 Horack, Sutherland Statutory Construction, § 7214 (3rd ed.1943). With this in mind, and given all of the foregoing factors - i.e., the broad definition of "waters of the state" contained in RCW 90.48.020, and as used throughout chapter 90.48 RCW, and the long-standing administrative interpretation of the scope of this definition, impliedly approved by the legislature as evidenced by its failure to modify it through statutory changes, we are of the opinion that the authority of the water pollution control commission over "waters of the state," as defined in RCW 90.48.020, includes the waters within canals, wasteways, drains and reservoirs of the various irrigation and drainage systems in our state.

Therefore, in response to your specific inquiries you are advised:

(1) That the water pollution control commission is empowered by RCW 90.48.035 to adopt water quality standards for waters

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16 Cont'd:

have full control over pollution, but we do not believe that every act which would result in a change in a condition of the state's waters should be prohibited. This is in accord with the intent of the Legislature when a comprehensive water pollution control act was first enacted in 1945.

"We all recognize, for example, that the various discharges cause a measurable change in the temperature of the Columbia River. Likewise, we recognize that normal irrigation return flows may cause some changes in the physical or chemical characteristics of the waters of an irrigation canal. We all recognize that dredging operations and road building operations by necessity cause changes in the turbidity of the waters. We do

located in canals, drains, wasteways and reservoirs of irrigation and drainage systems; and

(2) That a person who proposes to discharge wastes from a commercial or industrial operation into such waters must first obtain a waste discharge permit pursuant to RCW 90.48-.160.17

We trust the foregoing will be of assistance to you.

Very truly yours,

SLADE GORTON  
Attorney General



*Charles B. Roe, Jr.*

CHARLES B. ROE, JR.  
Assistant Attorney General

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not intend that these practices be prohibited.  
We do intend that these operations be subject  
to the control of the commission in order  
that it may regulate practices which are detri-  
mental to the public interest." (Double emphasis  
ours.)

17 The text thereof is set forth in footnote 12.