NO. 93844-0

SUPREME COURT OF THE STATE OF WASHINGTON

CENTER FOR ENVIRONMENTAL LAW & POLICY; AMERICAN WHITEWATER; and NORTH CASCADES CONSERVATION COUNCIL,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY; PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, WASHINGTON, and WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD ,

Respondents.

DEPARTMENT OF ECOLOGY AND OKANOGAN PUBLIC UTILITY DISTRICT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case concerns a water permit the Department of Ecology issued to the Public Utility District No. 1 of Okanogan County. The Permit authorizes the diversion of water from the Similkameen River for a new hydroelectric Project at the long-unused Enloe Dam in north-central Washington. The Permit allows for diverting of water from above the Enloe Dam, routing it through a new powerhouse, and returning it to the river 350 feet downstream. The Permit requires the District to maintain minimum flows in the bypass reach for habitat. The Permit also requires the District to study the aesthetics of the Dam once the Project is operative. Ecology issued the Permit finding that it met the statutory four-part test for water permits and complied with the Similkameen Instream Flow Rule.

This is Appellants'[1] latest attempt to argue that no public interest finding can be made until after the aesthetic study. CELP has presented this argument to the Pollution Control Hearings Board, the superior court and the court of appeals, and Ecology's decision has been upheld at all levels of review.

[1] Appellants bringing this Petition are the Center for Environmental Law & Policy, American Whitewater, and North Cascades Conservation Council (collectively, CELP).

Appellants now seek review of the court of appeals decision, claiming that it conflicts with other decisions of this Court and court of appeals and that it involves a matter of substantial public importance. CELP argues that the public interest requirement in the four-part test was not satisfied and that the instream flow rule has been violated. CELP's arguments in support of review, however, are unpersuasive.

First, CELP claims that the court of appeals decision here conflicts with established case law and the four-part test of RCW 90.03.290 by allowing Ecology unfettered discretion to issue premature water permits. In fact, however, the decision below does not allow Ecology to issue permits without adequate information. The required aesthetic flow study will simply determine whether adjusted flows over the Dam would increase the aesthetic benefit. As the court of appeals held, regardless of the outcome of this study, the public welfare will be protected. This is all that is necessary to make a "no detriment to the public welfare" finding. Thus, there is simply no basis for CELP's hyperbolic claim that the court of appeals decision below will lead to the demise of the water permit system.

Second, CELP erroneously conflates this case with recent ones involving use of the overriding considerations of the public interest (OCPI) exception to the four-part test for water rights. OCPI has no

application here. Ecology is expressly authorized by rule to establish specific minimum flows in cases like this one involving a bypass reach.

Finally, CELP argues that this case would have "catastrophic" consequences and therefore involves issues of broad public importance. But, this case involves a carefully crafted decision by Ecology and the Board in the specific circumstance of a hydropower project. This case is an example of Ecology and the Board appropriately exercising their statutory discretion to determine when the public welfare will be protected. The court of appeals correctly reviewed the underlying decisions and applied the law and affirmed the permit. Review should be denied.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Board correctly concluded that the public interest test is satisfied for the District's water Permit because Ecology and the Board considered all aspects of the public interest and included mandatory minimum flows that may be adjusted, for aesthetic purposes, after Project operation begins and aesthetics are observed.
2. Whether the Permit complies with WAC 173-549, the Similkameen River Instream Flow Rule, which

defines instream flows to include "specifically tailored" flows in the case of nonconsumptive diversions of the bypass reach of a hydroelectric project.

III. RESTATEMENT OF THE CASE

This water right Permit authorizes a diversion of water for hydroelectric power at Enloe Dam. CP 29.

The Enloe Dam was originally built on the Similkameen River in Okanogan County in 1920. It was used to generate hydropower prior to 1958, diverting water above the Dam and returning it to the river 850 feet downstream after it passed through a powerhouse where electricity was generated. The dewatered segment of the river, between where water is diverted and later returned to the river, is called the "bypass reach." Since hydropower use ceased in 1958, water has flowed freely over the Dam. In current conditions, water flows over the Enloe Dam at varying levels: In high flow conditions, water falls over the face of the Dam to create an aesthetic feature; in normal low flow or freezing conditions, the water decreases or disappears altogether. Downstream of the Dam, water flows through channels and over bedrock shelves downstream to pass over Similkameen Falls, a natural rock formation 350 feet downstream. CP 21–22.

The District proposes construction of a new hydropower operation at the Dam. The new Project is designed to be of greater benefit to fish resources than the pre-1958 hydropower operation. Administrative Record (AR) 90. It will raise the crest of the Dam by 5 feet and construct a new intake, powerhouse, and tail race. As a result of these changes, the new bypass reach will only be 350 feet of river, much less than 850 feet under the old project. AR 90. The Project will also have additional mitigation for fish in the form of gravel and channel enhancement downstream. AR 102–103.

The record shows that as natural water falls over the Dam, pools over the bedrock shelves, and passes over Similkameen Falls, it increases in temperature and decreases in quality. Therefore, diverting water for hydropower will *benefit* the downstream fishery resource, as it is returned to the river through the tailrace at a lower temperature and higher quality. AR 91. In consultation with the Washington Department of Fish and Wildlife, Ecology determined that a minimum flow of 30 cubic feet per second (cfs) during the summer, and a minimum flow of 10 cubic feet per second during the rest of the year would be acceptable for the protection of fishery resources. AR 91. These are known as the "10/30" flows.

The Project was subject to licensing by the Federal Energy Regulatory Commission (FERC), and has already undergone extensive

review, including state certification under Section 401 of the Clean Water Act. CP 23. The 401 Certification process confirmed that a new hydropower project would not adversely affect fish habitat and all other environmental and regulatory provisions were satisfied. CP 25–27. As a result of this process, Ecology conditioned the Project to require minimum flows from the base of the Dam and over the Falls. These "10/30 flows" will ensure adequate water to protect temperature for fish. The Dam cannot divert water for hydropower if doing so will reduce flows below the 10/30 level. CP 26–28.

The 401 Certification requires minimum flows for fish and ongoing monitoring of water quality standards (temperature and dissolved oxygen). CP 24. Based on the assumption that flow releases would be driven primarily by fish needs, the aesthetic appearance of flow levels was not studied. CP 25. During the appeal of the 401 Certification, the Board determined that when water falls over the face of the Dam, it constitutes a cognizable (albeit man-made) aesthetic feature. To determine "the need for and impact of aesthetic flows over the dam" the Board required an aesthetic study to be conducted upon Project operation. CP 26. The aesthetic study and determination of flow adjustment or confirmation is a binding condition of the District's FERC license.

After the 401 Certification was final, Ecology considered the District's water permit application.[2] Ecology has authority to issue water right permits under RCW 90.03. Water is regulated under a prior appropriation system, with earliest users entitled to seniority over later users. To secure a water right, prospective water users submit applications which Ecology reviews under the four-part test: (1) whether water is available, (2) whether the proposed appropriation is for a beneficial use of water, and (3) whether the proposed water use will impair existing water rights (4) or be detrimental to the public welfare. RCW 90.03.290. After review, Ecology issues a decision and Report of Examination. This provides project background and addresses comments and protests from stakeholders. The report describes Ecology's written findings of fact and conclusions on the four-part test. AR 19–23. Ecology is authorized to approve permit applications based on the inclusion of permit conditions it finds are necessary to ensure that the four-part test is met. CP 32–33. In areas of the state where minimum instream flows are established by rule, the defined instream flows cannot be impaired by later diversions of water. CP 39.

In this case, Ecology issued a draft Report of Examination, accepted comments, and responded to comments (including those from

[2] The permit appealed here is one of three water permits for hydropower. The others were not appealed. CP 23.

CELP) in its final report on the water Permit. At the conclusion of this process, Ecology issued an ROE approving the District's application for the Permit. Ecology found that the water Permit satisfies all elements of the four-part test of RCW 90.03.290. Ecology determined that the proposed use for hydroelectric power production (1) represents a beneficial use of water, (2) water is physically available in the Similkameen River for the hydropower right, and (3) no other water rights will be impaired by diversion of the water for approximately 350 feet through the bypass reach. As to the fourth element of the four-part test—the public welfare analysis—Ecology determined that, given that minimum instream flows necessary to protect the aesthetic and fisheries resource "will be a required condition of project operation," the Project would not be detrimental to the public welfare. AR 28. To reach this conclusion, Ecology staff reviewed information on fish protection, hydropower, and aesthetics, consulting with the District. AR 19–28, 452–53.

As a condition of the Permit, Ecology incorporated the "10/30" flows from the 401 Certification, along with the requirement for the flows to be studied for aesthetics and adjusted, if necessary, upon Project operation. CP 29–30. Ecology considered the value of sustainable hydropower, the protection of fisheries and aquatic habitat, and potential

aesthetic impact of the Project, and found that the public interest would be protected by the "10/30" flow condition. AR 23. Ecology also considered the Similkameen Instream Flow Rule, WAC 173-549, and determined that the temporary diversion of water from a stretch of the river was consistent with the rule. CP 39.

The Board affirmed the permit.[3] CELP petitioned for judicial review. The Board's decision was upheld by Thurston County Superior Court and by the Court of Appeals, Division I.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. This Decision Presents No Conflict with Supreme Court or Court of Appeals Precedent Under RAP 13.4(b)(1) and (2)

Appellants ask for review under RAP 13.4(b)(1), arguing that the court of appeals decision conflicts with prior decisions of the Supreme Court. In support of this, they cite cases that have no bearing on the decision here. The Department relied on statutory authority to grant a permit if it finds no detriment to the public welfare under RCW 90.03.290. The cases relied upon by Appellants to show a conflict do not preclude Ecology's decision to protect the public interest with an ongoing condition, and have no bearing on the provision of the instream flow rule, WAC 173-549, for bypass reach flows.

[3] Ecology's permit incorporated the aesthetic study condition from the 401 Certification by reference. The Board revised the permit so that the condition is quoted completely in full. CP 43.

1. This Court of Appeals decision presents no conflict with RCW 90.03.290 or appellate precedent

CELP claims that the court of appeals decision presents a "conflict" with RCW 90.03.290 and case law construing the statute. *See* Petition for Review (Petition) at 8–10. CELP offers no analysis or statutory construction in support of its argument, but only emphasizes that the public interest test is "mandatory"—a point that is not in dispute.

CELP introduces a variety of water law cases to claim "conflict" under RAP 13.4(b)(1) and (2). Petition at 9–10 (citing *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000); *Lummi Nation v. State of Wash.*, 170 Wn.2d 247, 252–53, 241 P.3d 1220 (2011); *Hubbard v. Dep't of Ecology*, 86 Wn. App. 119, 124, 936 P.2d 27 (1997)). While these cases all aptly state the four-part test for a water right, none conflict with the issue presented here: the protection of the public interest with binding, ongoing permit conditions.

In fact, the court of appeals decision here is fully consistent with prior cases. The published cases that address the public interest test hold that whether a water right will be a detriment to the public interest is a discretionary decision of Ecology. *Schuh v. Dep't of Ecology,* 100 Wn.2d 180, 667 P.2d 64 (1983). Importantly, the cases hold that Ecology has authority under RCW 90.03.320 to condition a water right permit "to

satisfy any public interest concerns which arise." *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 597–98, 957 P.2d 1241 (1998) ("[A]n agency which has authority to issue or deny permits has authority to condition them."). The Supreme Court has recognized "that Ecology is in a far better position to judge what is in the public interest regarding water permits than a court." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997); *Schuh*, 100 Wn.2d. at 187. The Court has specifically held that Ecology can consider a wide range of factors under the public welfare test. *Stempel v. Dep't of Water Resources*, 82 Wn.2d 109, 508 P.2d 166 (1973).

CELP's argument relies entirely on the faulty and misleading premise that "Ecology authorized the Enloe water right without first finding the project would not be detrimental to the public interest." Petition at 9. In fact, Ecology expressly found that the project would not be detrimental to the public interest, and CELP simply disagrees with that conclusion. Ecology's Report of Examination for the Permit described the breadth of its public interest determination:

> Given that this project will produce valuable electrical energy and will do so in a sustainable manner, that the impacts on the bypass reach are reduced from those under previous project scenarios, that minimum instream flows necessary to protect the aesthetic and instream resources in the bypass reach will be a required condition of project operation, and that any negative impacts are further

> mitigated by the downstream discharge channel, there is no basis on which to determine that this project will be detrimental to the public welfare.

AR 23. Thus, Ecology concluded, based in part on the condition requiring further aesthetic study, that the Project as a whole would not be detrimental to the public interest.

Still, despite the clear record of Ecology's findings, CELP insists that Ecology made no public interest determination at all. For support, CELP relies on the fact that aesthetics will continue to be studied with flows adjusted to optimize aesthetics as a condition of project operation. *See* Petition at 10. CELP's position is that, without complete information regarding the exact aesthetic impact of the Project, Ecology lacked the ability to make any public interest determination and therefore did not do so. CELP likewise attempts to show that the Board agreed that no public interest finding was made, while in fact the Board agreed that the public interest was protected by the future condition.[4] In reality, none of the reviewing bodies to have considered this issue have adopted CELP's confounding description of Ecology's decision. CELP's entire basis for

[4] For example, CELP attributes the following quote to the Board: "Ecology still needs additional information to make a public interest determination in relation to the PUD water right." *See* Petition at 10. But CELP omits that the Board started that sentence with the phrase: "Thus, as argued by CELP . . . ." CP 34. The Board was therefore clearly describing CELP's theory, not adopting it.

the alleged "conflict" with precedent relies on characterizing Ecology's findings as no findings whatsoever.

CELP also argued that, because a preliminary permit was likely available, a conditional permit could not be authorized. The court of appeals rejected this argument, and CELP points to no precedent in conflict with that decision. The statute provides that Ecology "***may***" issue a preliminary permit when a water right application "does not contain . . . sufficient information on which to base [the four-part test] findings." RCW 90.03.290(2)(a) (emphasis added). As described above, Ecology evaluated the available information and concluded that it was sufficient to make a public interest finding. This Court has upheld Ecology's authority to issue conditioned water rights, *see Theodoratus*, 135 Wn.2d at 597–98, and no court has construed RCW 90.03.290 so narrowly that preliminary permits are the only alternative when additional study is needed.

The relevant cases on RCW 90.03.290 make clear that Ecology has wide discretion in determining how best to protect the public interest, including through permit conditions. But the 10/30 instream flows are binding; the aesthetics of the diversion must be studied; and the instream flows must be confirmed or adjusted. CP 42–43. Because of these conditions, there will be no detriment to the public welfare. The study will confirm whether adjusted flows are appropriate to protect the aesthetic

benefit of the Dam, but the underlying issue—namely, that aesthetic views of the Dam will be protected as much as possible—is a binding condition of the FERC license and the water Permit. CP 42–43. Given that undisputed fact, there is simply no basis to claim that Ecology lacked information on which to make the permit decision. The court of appeals decision is plainly correct on this point and does not warrant review. *See Center for Envt'l Law & Policy v. Ecology,* No. 74841-6-I, slip op. at 15–16 (Wash. Ct. App. Oct. 17, 2016).

2. This case does not involve OCPI because the Permit does not impair instream flows under WAC 173-549

Appellants claim that this decision conflicts with cases construing the "overriding considerations of the public interest" exception of RCW 90.54.020. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013); *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015). Appellants seek to create a conflict where none exists by conflating unrelated legal principles. The Permit for a temporary diversion of water for hydropower here falls under an exception written into the original rule. WAC 173-549 has a specific provision for flows that "reduce the flow in a portion of a stream's length (e.g. hydroelectric projects that bypass a portion of the stream)," so that the rule's flows do not apply when Ecology establishes "flows specifically

tailored to that particular project and stream reach." WAC 173-549-020(5). Subsections (1) and (2) of the regulation, where the flows are defined, make clear that generally applicable minimum flows only apply if WAC 173-549-020(5) does not. Thus, the Similkameen Instream Flow rule defines minimum instream flows to include flows that are specifically tailored for a bypass reach.

Swinomish concerned an instream flow established in a 2001 rule,[5] amended in 2006 to provide for additional withdrawals of water. *Swinomish,* 178 Wn.2d at 583–84. The later withdrawals could not pass the four-part test because of the 2001 instream flow—water was no longer available year-round, and later uses would impair the instream flow. *Id.* at 588–90. Ecology therefore relied on the exception in RCW 90.54.020, which requires that "overriding considerations of the public interest" justify certain impacts to base flows. *Swinomish,* 178 Wn.2d at 583. This Court held that RCW 90.54.020 did not authorize Ecology to amend the rule; since new water uses were not allowed under RCW 90.03.290, they could not be approved by rule amendment under the OCPI exception of RCW 90.54.020. *Swinomish,* 178 Wn.2d at 590. Similarly, in *Foster*, the Court ruled that an individual permit could not be approved under the

[5] The rule in that case was the instream flow rule in the Skagit Basin, WAC 173-503.

RCW 90.54.020 OCPI exception if it would impair instream flows. *Foster*, 184 Wn.2d at 476–77.

The rule here includes no "overriding considerations of the public interest" standard that must be met before temporary bypass flows can be adopted. The provision for "specifically tailored flows" is within the definition of instream flow itself.

CELP argues that despite the explicit language of the rule allowing bypass reaches, the RCW 90.54.020 standard must be imported into WAC 173-549. This is essentially a challenge to the validity of the rule itself, but CELP has not brought a rulemaking challenge. Any challenge to a rule must comply with RCW 34.05.542 and 34.05.570(2) of the Administrative Procedure Act (APA). Not only has CELP not brought a proper rule challenge, it only recently raised the argument that the rule's exception can only be met if OCPI is also met. CELP raised this argument for the first time in its reply brief at the court of appeals, submitted after this Court released its decision in *Foster*. Appellants' Reply Brief, *Center for Envt'l Law & Policy v. Ecology,* No. 74841-6-I (Wash. Ct. App. Oct. 17, 2016). CELP did not challenge WAC 173-549 in its petition for judicial review to the superior court. CELP did not follow the review procedures of RCW 34.05.570(2)(c); the record includes no rulemaking

file and CELP has submitted no arguments to show why the exception of WAC 173-549-020(5) is invalid.

The court of appeals correctly ruled that the plain language of WAC 173-549-020(5) was properly applied here. *Center for Envt'l Law & Policy,* slip op. at 22. The exception has not been the subject of any prior decision by this Court or the court of appeals. Thus, the court of appeals decision below presents no conflict with any other case and there is no basis for review here.

B. This Decision Presents No Issue of Statewide Importance

The court of appeals decision here addresses a situation where the particular aesthetics of water falling over the Enloe Dam are best measured after Project operation. This case does not involve instream flows for fish, poses no threat of impairment to other water rights, and implicates no questions of water availability.

CELP argues that this raises an issue of "substantial public interest," under RAP 13.4(b)(4), because if a conditional water right is possible contingent upon an aesthetic study, "it necessarily follows that Ecology could also assume that other aspects of the four-part test are met" prior to issuing a water right. Petition at 12–13. CELP claims this would confer "unfettered discretion" upon Ecology, with the "devastating effect"

of upending the entire prior appropriation system, which would be a "catastrophic result." Petition at 19–20.

These imagined consequences are not the subject of this decision, and existing law already addresses those concerns. Ecology cannot issue a water right without first making findings of impairment and availability. *Postema,* 142 Wn.2d at 111; *Swinomish,* 178 Wn.2d at 589; *Foster,* 184 Wn.2d at 475. Ecology expressly made such findings in this case. The court of appeals did not hold that Ecology's discretion "is essentially without limit." Petition at 11. This is a fact-specific situation involving the study of the timing, pathway of water flow, and aesthetic appearance of water over the Dam.

Not only are the imagined consequences not implicated by the decision here, but even the specific issue here—the aesthetic value of water flowing over the Dam—can be subject to further review if Appellants or any other interested party finds the flows after the aesthetic study to be inadequate. CELP, the District, or any aggrieved party with the right to appeal can obtain APA review of the final flow decision. RCW 43.21B.110(1)(d). The District's conditional permit cannot vest as a permanent water certificate and cannot be changed to another use besides hydropower. This is the check on Ecology's discretion. This is the remedy for any concern that "[i]t is simply unrealistic to assume that Ecology will

make an unbiased investigation, determination and finding" about instream flows. Petition at 15. The Legislature has provided Ecology with that authority, and parties that disagree with Ecology's final flow decision have the ability to bring this concern to the Board and through the judicial review process of the APA. RCW 43.21B.110(1)(d), 34.05.570.

CELP's RAP 13.4(b)(4) argument reaches far beyond the scope of the court of appeals decision. The decision itself does not "dramatically" or even "potentially" alter the statutory scheme for water appropriation. Petition at 19. Contrary to CELP's argument, Ecology does not "believe it has the authority" to issue permits apart from the four-part test. The passage referred to in CELP's Petition describes Ecology's statutory authority "to issue water permits subject to monitoring and revision. In applying the statutory test for a water permit, the Court determined that Ecology can determine the public interest test is satisfied contingent on additional study." Motion for Publication of Opinion, *Center for Envt'l Law & Policy v. Ecology,* No. 74841-6-I at 2–3 (Wash. Ct. App. Oct. 17, 2016).

The court of appeals decision in this case involves a narrow issue of studying the aesthetics of a hydropower project. It is only by exaggerating the scope of this decision, and warning that it will "potentially" extend to hypothetical circumstances, that CELP can argue

that it warrants Supreme Court review. As discussed above, these arguments are unpersuasive and should be rejected.

V. CONCLUSION

CELP has failed to show why either RAP 13.4(b)(1), (2), or (4) justify Supreme Court review of the court of appeals decision. Ecology respectfully requests that the Supreme Court deny CELP's Petition for Review.

RESPECTFULLY SUBMITTED this 16 day of December 2016.

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CERTIFICATE OF SERVICE

I certify that on the 16th day of December 2016 I caused to be served Department of Ecology and Okanogan Public Utility District's Answer to Petition for Review in the above-captioned matter upon the parties herein as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of December 2016, in Olympia, Washington.

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