NO. 47543-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

WASHINGTON STATE DEPARTMENT OF ECOLOGY'S RESPONDING BRIEF

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I. INTRODUCTION

After thorough review, the Department of Ecology issued a water permit to the Okanogan PUD authorizing the diversion of water from the Similkameen River for a new hydroelectric project at Enloe Dam. To do so, Ecology found that the permit met the statutory "four-part test" for water permits and complied with the Similkameen instream flow rule. The Pollution Control Hearings Board (PCHB) upheld this decision. Appellants Center for Environmental Law & Policy, American Whitewater, and North Cascades Conservation Council's (collectively referred to as CELP) bring this appeal, arguing that the public interest requirement in the four-part test was not satisfied and that the instream flow rule has been violated. But the record shows that the PCHB and Ecology found no detriment to the public interest and ensured for the continued protection of the public interest through permit conditions.

In making this determination, the PCHB and Ecology took into consideration compliance with other regulatory standards and conditions, the value of sustainable hydropower, the protection of aquatic habitat, and potential aesthetic (visual) impact of the project. As a permit condition, a minimum level of water must remain in the river's bypass reach at all times. These minimum flows are subject to possible adjustment based on a required study of aesthetic impact, a condition that is required by a separate governmental review and is incorporated into the water permit.

CELP's argument hinges on the aesthetic impact of the hydropower project: the effects of water diversion on views of Enloe Dam

and Similkameen Falls. CELP claims that a determination under the public interest test cannot be final until the aesthetic study is completed. But Ecology and the PCHB both correctly found that the permit, as conditioned, is appropriate at this time. Ecology has clear authority to include permit conditions that will continue to ensure that the statutory requirements for water permits, including the public interest test, are satisfied. The flow and aesthetic study conditions ensure that this permit will not be detrimental to the public interest even when new information becomes available about the view of the dam and falls. Ecology respectfully requests this Court to affirm the PCHB's and superior court's decisions.

II. RESTATEMENT OF ISSUES

1. Whether the PCHB correctly concluded that the public interest test is satisfied for Okanogan PUD's water permit by incorporating the conditions of the Clean Water Act 401 Certification, including minimum flow levels to protect aquatic habitat and a study to address aesthetic values.

2. Whether it is legal to approve a permanent water right conditioned on a 401 Certification study, where fisheries protection is ensured by the current minimum flows, but higher flow levels based on results from the study could optimize both fisheries and aesthetics.

3. Whether the permit complies with WAC 173-545, the Similkameen River Instream Flow Rule, which provides that Ecology may specifically tailor flows in a bypass reach.

III. STATEMENT OF THE CASE

A. Ecology's Water Right Permit Application Process

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[1]. RCW 90.03.290.

After review, Ecology issues a decision and report of examination (ROE). AR 8–29.[2] An ROE provides project background and addresses comments and protests from stakeholders. AR 23–28. It describes Ecology's written findings of fact and conclusions on the four-part test. AR 19–22. Ecology is authorized to approve permit applications based on the inclusion of conditions in the ROE that it finds are necessary to ensure that the four-part test is met.

In areas of the State where minimum instream flows are established by rule, these instream flows are water rights with priority as of the date of their adoption and they cannot be impaired by later diversions of water. *Postema v. Pollution Control Hearings Bd.*, 142

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[1] The statute uses both the phrase "public welfare" and "public interest," and there is not a material difference between the two terms.

[2] Appellants' Opening Brief provides Clerks Papers (CP) citations that refer primarily to Appellants' Superior Court Brief. Ecology's Response brief directs this Court to the facts before the PCHB as provided in the Administrative Record (AR).

Wn.2d 68, 81, 11 P.3d 726 (2000). Where a permit is in an area subject to an instream flow rule, the ROE includes an explanation of whether the water use would comply with the rule. AR 19; *See* WAC 173-545. Minimum instream flows often require permits to be conditioned, so that permitted uses cannot impair stream flows during times of low flow.

An ROE is appealable to the PCHB, which conducts a de novo review and applies its own expertise to reach conclusions in an administrative proceeding independent of Ecology's process. Once final, a water permit authorizes water use under its terms and conditions. After actual use of water occurs, a permit holder can request that Ecology issue a water right certificate, which documents a vested water right. RCW 90.03.330. Certificates remain subject to the conditions relating to ongoing monitoring, regulation, and interruption if necessary to protect senior water rights that are prescribed in the ROE[3].

B. The Enloe Dam Project and 401 Certification

The water right permit at issue in this case is just one regulatory component of the PUD's Enloe Dam Hydropower Project. The Enloe Dam was originally built on the Similkameen River in Okanogan County in 1920. AR 86. The dam creates a 1.5-mile reservoir upstream. It was used

[3] CELP claims that there is a "very real risk" that this hydropower water right will extend beyond the license of the hydropower project. Opening Brief at 25. This is factually inaccurate: on its face, this water right cannot be used for anything other than Enloe Dam hydropower. It cannot be changed to a different purpose of use except as provided by the change and transfer laws, RCW 90.03.380 and WAC 173-545-120, which have specific standards, process, and appeals. The Similkameen instream flows would have priority over any diversions that are consumptive to the river system. WAC 173-545-060.

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. After the dam, it flows through channels and over bedrock shelves downstream to pass over Similkameen Falls, 350 feet downstream of the dam. AR 86.

The PUD 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. AR 90. It will raise the crest of the dam by 5 feet and construct a new intake, powerhouse and tail race. The new bypass reach will only be 350 feet of river, much less than under the old project. AR 90. The project will also have additional mitigation in the form of gravel and channel enhancement downstream. AR 102–103.

Natural flow in the river ranges from median highs of 6,000 cfs to median lows of 514 cfs. AR 86. The record shows that as 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 fish habitat, as it is returned to the river at through the tailrace at a lower temperature and higher quality. AR 91. In consultation with the Washington Department of Fish and Wildlife (WDFW), Ecology determined that a

minimum flow through the bypass reach 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 10/30 flows are not achieved simply by leaving water in the river; the project would pipe cold water directly from the reservoir behind the dam and release it below, directly at the base of the dam, so that it flows through the bypass reach and over Similkameen Falls, with no flow over the face of the dam. AR 102. These flows are designed to benefit fish species and aesthetics. AR 102. It is not known how *higher* bypass flows would appear aesthetically—they could pass alongside the Similkameen Falls unseen in side channels or flow over it as an aesthetic feature. AR 99. This information may be available after further aesthetic study.

This PUD's new hydropower project requires a license from the Federal Energy Regulatory Commission (FERC). In order for a FERC license to be issued to the PUD, Ecology was required to issue a 401 Certification under the Clean Water Act. AR 100–01. Ecology issued the 401 Certification in 2012. The 401 Certification process required review of all state and federal water quality standards and other appropriate requirements of state law. AR 101. The 401 Certification was appealed by CELP to the PCHB.[4] AR 84. The PCHB examined water quality criteria for temperature and dissolved gases, and determined that

[4] Appellants in the 401 Certification appeal were the Center for Environmental Law and Policy, American Whitewater, Columbia River Bioregional Education Project, North Cascades Conservation Counsel, and the Sierra Club. AR 83.

the proposed hydropower project would adequately prevent and mitigate impacts to aquatic life. AR 102.

For purposes of a 401 Certification, the "water quality criteria" include consideration of aesthetics. This is because the definition of water quality includes requirements "on a case-specific basis, where determined necessary to provide full support for designated and existing uses." WAC 173-201A-260(3). AR 104. Aesthetics is a "designated use" for water quality purposes. WAC 173-201A-200, -210(a), -600. In its decision on the 401 Certification, the PCHB pointed out that the water quality policy is guided by the Water Resources Act of 1971, RCW 90.54, which also lists aesthetics as a "designated and beneficial use of the waters of the state." AR 105, RCW 90.54.020(1) and (3)(a). Because the Water Resources Act is also part of the water code (and integrated with water rights permitting system), there is overlap between the regulatory inquiry of the 401 Certification and the permit appeal at issue here.

The PCHB found that:

> A conceptual understanding of how the different flows affect all the various river resources is required. Many of these uses may be competing and have different optimum flows. As with all designated uses, the preferred flows for aesthetics become part of the trade-offs and negotiations to determine flow regime that maximizes the beneficial uses of the water and provides the most opportunities for the use of the water, including power production. While there is this balancing of beneficial uses of water, flows for aesthetics are not necessarily a priority of use when competing with flows for other beneficial uses, most importantly water quality for the protection of the fisheries resource.

AR 98. In order to "assure compliance with the aesthetic values of state water quality standards," the PCHB found that "[m]inimum instream flows to protect aesthetics will comply with the anti-degradation policy." AR 106. Aesthetic flows must be integrated and balanced with flows for fisheries and hydropower. AR 107.

At the conclusion of the 401 hearing, the PCHB found inadequate "evidence of flows above the 10/30 flow regime" that will optimize both aesthetics and fishery resource. AR 110. Without being able to conclude that the Clean Water Act requirement for "aesthetic values," as described in WAC 173-201A-600, was met, the Board added a condition that an aesthetic study must be completed during initial operation of the project, after which Ecology may revise the flows upward. AR 115-16. Pursuant to the 401 Certification, flows cannot be adjusted below the 10/30 minimum that is necessary for aquatic life. The PCHB therefore directed Ecology to revisit aesthetic flows and then integrate them with the needs for fish and other values. AR 109.

C. Ecology's Issuance of the Water Right Permit to the PUD

Ecology's ROE for this Water Permit is a matter of record in this case; the facts stated in the ROE were undisputed in briefing on cross-motions for summary judgment. AR 8–29. The PUD first submitted an application for Water Right Permit No. S4-35342 in 2010. AR 8. The water right would authorize the diversion of 600 cfs for hydropower use. It is one of six water rights for this hydropower project, but is the only one on appeal. It is considered a permit for non-consumptive use, as water

would be diverted for the production of hydropower and returned to the river downstream. AR 8. In reviewing the application, Ecology solicited comments from the Colville Confederated Tribes, the Yakama Nation, and WDFW. AR 23. WDFW responded that it did "not have concerns in regards to the water right applications" and supported mitigation to address any impacts of project operations. AR 23.

CELP also provided comments in protest of the application. CELP complained that the 600 cfs diversion is "not non-consumptive and will have negative impacts on de-watered reaches of the Okanogan River." AR 26. Ecology responded in the ROE that water is consumptive only as to the specific reach of stream bypassed by the diversion, and explained how this complies with WAC 173-549-020(5), which allows for specifically tailored minimum flows in a bypass reach for a hydroelectric project. AR 25. Ecology also described how minimum flows will prevent adverse impacts to habitat and native aquatic species. AR 25. CELP also protested the ROE on the grounds that the diversion would cause adverse aesthetic impacts and that it would therefore be detrimental to the public interest. Ecology responded that, as to aesthetics, diversions would only be allowed when bypass reach instream flows were satisfied (the minimum 10/30 flows), which were designed to protect the aesthetic value of water flowing over Similkameen Falls. When flows are below the minimum, water would not be diverted under this right. AR 27. Any aesthetic value of water passing over the artificial structure of the Enloe Dam itself will be determined by the required aesthetic study. AR 116.

In explaining its public interest finding, Ecology directly responded to CELP's protest in the ROE as follows:

> Given that this project will produce valuable electrical energy and will do so in a sustainable manner, that minimum instream flows necessary to protect aesthetics 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 side channel enhancement, *there is no basis on which to determine that this project will be detrimental to the public welfare.* In addition, WDFW supports the project as proposed including bypass reach flows and the side channel enhancement project.

AR 27 (emphasis added).

At the conclusion of this process, Ecology issued an ROE approving the PUD's application for Water Right Permit No. S4-35342. AR 8–29. Ecology found that the water permit satisfies all elements of the four-part test of RCW 90.03.290. AR 19–24. 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. AR 19–22. 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 23. To reach

this conclusion, Ecology staff reviewed information on fish protection, hydropower, and aesthetics, consulting with the PUD. AR 452–53.

To ensure protection of the public interest, Ecology incorporated the aesthetic study condition from the 401 Certification:

> The water right holder must comply with Ecology's 401 Water Quality Certification No. 9007, related to licensing of the Enloe Hydroelectric Project (FERC No. 12569) on the Similkameen River, Okanogan County, Washington issued on July 13, 2012, and any subsequent updates.

AR 10.

In doing so, Ecology found that 10/30 flows are protective, but determined that if the flows are modified after the aesthetics study is complete, the modified flows will automatically become a condition of the water right. AR 452.

D. CELP's Appeal of the Water Permit to the PCHB

CELP appealed the water permit to the PCHB, and the matter proceeded on cross-motions for summary judgment by CELP and the PUD. AR 504-28. Although facts were undisputed, Ecology submitted additional information describing its approval of the water permit and recommended that the PCHB find that approval of the water right will not be detrimental to the public welfare. AR 451–53. The PCHB agreed with Ecology's analysis in the ROE and found the four-part test was satisfied. AR 522. It upheld the water permit with additional protective conditions, directing that the water permit be revised to quote the exact language of the condition in the 401 Certification, rather than simply incorporating the 401 Certification by reference. AR 504–28. In its ruling, the PCHB found

that, in the ROE, "Ecology found that the appropriation of water for the Project would not be detrimental to the public welfare if flow requirements imposed by the §401 Certification were met." AR 515.

The PCHB found that, while "some additional assessment is needed to finalize the appropriate level of aesthetically protective flows on the Similkameen River," it is appropriate to approve a final water right at this time. AR 522–23. The PCHB also found that the water permit is consistent with the Okanogan River Basin Instream Flow Rule, WAC 173-549-020(5), which explicitly excludes projects that reduce streamflows only in a bypass reach from having to comply with the minimum flows required in the Rule. AR 525–26. CELP appealed to the superior court, where the decisions of Ecology and the PCHB were affirmed on judicial review. The decision of the PCHB is the final administrative action on review before this Court.

IV. ARGUMENT

A. Standard of Review

Under the Administrative Procedure Act (APA), this Court reviews the PCHB decision applying the standards of review set forth in RCW 34.05.570. "Agency action may be reversed where the agency has erroneously interpreted or applied the law, the agency's order is not supported by substantial evidence, or the agency's decision is arbitrary and capricious." *Postema,* 142 Wn.2d at 77; *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). CELP carries the burden of demonstrating the invalidity of the agency order.

RCW 34.05.570(1)(a). Where the original administrative decision was on summary judgment, the reviewing court overlays the APA standard of review with the summary judgment standard. *Skagit Cty. v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 318, 253 P.3d 1135, 1140 (2011). The Court evaluates the facts in the record de novo and the law in light of the error of law standard. RCW 34.05.570(3)(d); *Verizon Northwest, Inc. v. Wash. Emp't Sec. Dep't,* 164 Wn.2d 909, 916, 194 P.3d 255 (2008).

The parties agreed before the PCHB that there were no genuine issues of material fact and that this matter was appropriate for resolution on summary judgment. AR 516. It is the decision of the PCHB, not the superior court, on review before this Court de novo.

B. The Water Permit Satisfies the Public Interest Test

1. A Sufficient Public Interest Analysis Has Been Completed

Ecology does not dispute its obligation, emphasized repeatedly throughout CELP's brief, to apply the four-part test of RCW 90.03.290 before issuing a water permit. *Postema*, 142 Wn.2d at 79. Ecology must make a finding that the exercise of the proposed water right will not "be detrimental to the public welfare." RCW 90.03.290(3). CELP concedes that "Ecology found that issuing a permanent water right for the Project was not detrimental to the public welfare," Opening Brief at 8, and that the PCHB found that the water right complied with the public interest and public welfare requirements, Opening Brief at 13. CELP argues, however, that Ecology and the PCHB made their public interest determinations

"in the face of incomplete information," and alleges this was an erroneous interpretation and application of the law. *Id.*

Ecology's statutory obligation is to "investigate, determine, and find . . . whether the proposed development is *likely to prove detrimental to the public interest*, having in mind the highest feasible use of the waters belonging to the public." RCW 90.03.290(1) (emphasis added). The law requires denial of a water permit where the right "threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public." RCW 90.03.290(3). Ecology shall issue a right after it finds the right "will not impair existing rights or be detrimental to the public welfare." RCW 90.03.290(3).

Whether approval of a water right will be detrimental to the public interest is a discretionary decision of Ecology. *Schuh v. Dep't of Ecology,* 100 Wn.2d 180, 187, 667 P.2d 64 (1983). Ecology's public interest determination should be reviewed under an abuse of discretion standard and reversed only if discretion was manifestly unreasonable or exercised on untenable grounds for untenable reasons. *Schuh*, 100 Wn.2d. at 186, citing *Wilson v. Board of Governors*, 90 Wn.2d 649, 656, 585 P.2d 136 (1978). On questions of the public interest, a reviewing court should provide due deference to the specialized knowledge and expertise of the agency, and not substitute its judgment for that of Ecology; the agency is in a far better position to judge what is in the public interest regarding water permits than a court. *Schuh*, 100 Wn.2d. at 187.

With controlling, on-point precedent requiring deference to Ecology's discretion in applying the public interest test, CELP cannot—and indeed does not—ask this Court to revisit the substance of the public interest determination. CELP instead attempts to raise an argument out of the undisputed principle that a public interest finding is "mandatory," Opening Brief 1, 19, 20, 24, 27. By characterizing Ecology's information on the public interest as being "incomplete" at the time Ecology made its application decision, CELP frames Ecology's decision as an attempt to "waive or defer the four-part findings," Opening Brief at 19.

But Ecology's information was not incomplete at the time it made the application decision, and the record is clear that Ecology did find the PUD's proposed water use would not be detrimental to the public interest. In addition to the ROE itself, the record before the PCHB included a Declaration of Kelsey Collins, the Ecology Water Resources Permitting Specialist who managed the application review process which included preparation of the ROE. AR 451–53. Ms. Collins described her extensive review, explaining her conclusions that the water right would not be detrimental to the fish population and would likely provide valuable sustainable energy. Ms. Collins stated that, "while Ecology believed the 10/30 cfs minimum flow would adequately protect the aesthetic values of the project, the Pollution Control Hearings Board has ruled additional studies are necessary for Ecology to confirm or revise this minimum flow." AR 451–52. Ms. Collins explained the ROE's basis for 10/30 minimum flow for the bypass reach and, because "the aesthetic study can

only operate to increase flows, the minimum possible flows in the bypass reach would remain at the 10/30 cfs level listed in the permit, [with] the possibility that the Okanogan PUD would be limited to higher flows" after the study is completed as required by the 401 Certification. AR 452–53.

During its review of the water permit, Ecology had access to the substantial depth and breadth of information that was provided in the PCHB's 401 Certification decision. AR 83–116. Ecology considered the totality of this information in applying the four-part test. And while the available information on aesthetics was not adequate for the PCHB to unconditionally approve the 401 Certification, it was not lacking in its entirety. The PUD "did conduct an analysis regarding the aesthetics of flows," although the PCHB found that this was "more an analysis" based on interpretation and cannot be considered an aesthetic study for the purposes of a 401 Certification. AR 94–95. At that hearing, the PCHB heard three witnesses testify as to the aesthetic value of the 10/30 regime, and after extensive information on the flows and recreational use of the area was presented, the PCHB concluded that the evidence was not sufficiently adequate to be conclusive on whether the flows are adequately protective of aesthetics values. AR 111. To meet the requirement of the 401 Certification for all applicable water quality criteria, the PCHB required further study of aesthetics. AR 106. The PCHB issued this condition realizing that aesthetic flows would be balanced with flows required for fisheries and hydropower. AR 107.

Ecology, subsequently applying RCW 90.03.290 to the water permit, determined that given this condition, the permit was "not likely to prove detrimental to the public interest." Ecology does not dispute that aesthetic considerations may be a component of the public interest test for purposes of RCW 90.03.290, as aesthetics are a listed value of the State's waters under RCW 90.54.020. But nowhere is there an express requirement that water uses can *only* be permitted upon a specific finding that there will be *no* aesthetic impact. Certainly most water diversion structures, wells, and intakes have some visual component. The law has no mandate that an aesthetic study be completed for all water permit applications.[5] Instead, aesthetics are only part of an assortment of values to be considered by Ecology as part of the public interest determination. AR 518.

In reviewing the water permit application, given the ruling on the 401 Certification, Ecology considered this information in total and determined that the water permit, as conditioned with the same provision requiring an aesthetics study in the 401 Certification, would not pose a detriment to the public welfare. AR 23. The PCHB affirmed, emphasizing the importance of the aesthetic flow study (requiring it to be expressly

[5] It is notable that as to water quality criteria, hydropower is not a beneficial use; the PCHB could not "recognize minimum flow impacts on the Project's hydropower use of water for the purposes of a §401 Certification." AR 109. For the 401 Certification, aesthetics must therefore be determined independently of the project. AR 109. In contrast, for purposes of the water resources act (at issue in this appeal), hydropower is a beneficial use. Thus, the value of hydropower production is properly considered in the weighting of public interest factors during review of a water right permit application. RCW 90.54.

restated in the water permit), and upholding Ecology's conclusion that the public interest test was satisfied.

CELP is wrong in saying that Ecology was "without information to determine whether the withdrawal would be detrimental to the public interest." Opening Brief at 28–29. The PCHB simply determined that more information is necessary to see whether a higher flow for aesthetic purposes should be approved for the 401 Certification. Neither Ecology nor the PCHB concluded that the 10/30 flows *do* risk a detriment to the public interest—as suggested by CELP, which goes so far as to note that Ecology *must reject* an application and refuse to issue a permit if . . . withdrawal will detrimentally affect public welfare." Opening Brief 24, citing *Hubbard v. Dep't of Ecology*, 86 Wn. App. 119, 124, 936 P.2d 27 (1997). In fact, *nothing* in the record supports an affirmative conclusion that the exercise of the water right *will* result in harm to the public interest. CELP may not agree with the public interest conclusion, but it cannot dispute that a conclusion was made. CELP's assertion of an error of law fails.

2. Ecology Is Authorized to Impose Permit Conditions to Ensure the Four-Part Test Is Met

CELP insists throughout its brief that Ecology must make an "affirmative" public interest finding. Opening Brief 1, 13, 16, 17, 22, 23, 24, 27, 28. "Affirmative" is not a term used in the water code and is apparently introduced by CELP here to suggest a specific (but undefined) standard that Ecology has not met. In fact, the law requires that Ecology

find whether a water use "is likely to prove detrimental to the public interest," and must deny where a proposed use "threatens to prove detrimental to the public interest." RCW 90.03.290.

As described above, if CELP means to suggest that *no* public interest determination has been made, this is not supported by the record and the clear language of the ROE and PCHB order. Where CELP concedes that the determination *has been* made, but is unlawful because it was based on inadequate evidence—when the public interest will be expressly protected by future study and conditions—it essentially argues that Ecology cannot find the public interest will be protected by a *conditional* permit. That question, too, is well settled and cannot be an error of law.

Ecology is authorized to condition a water right as necessary to ensure that a permit will satisfy the four-part test. "Generally, an agency which has authority to issue or deny permits has authority to condition them." *Theodoratus*, 135 Wn.2d at 597; *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 899, 602 P.2d 1172 (1979) ("the power to disapprove necessarily implies the power to condition an approval"). Ecology regularly issues permits with conditions that are contingent or flexible, depending on changing circumstances. *See Porter v. Dep't of Ecology*, PCHB No. 95-044, (Mar. 19, 1996) (permit conditions required ongoing water meter, chloride, and conductivity readings); *Bucklin Hill Neighborhood Ass'n v. Dep't of Ecology*, PCHB No. 88-177, at 19 (June 10, 1989).

CELP points to *Black Star Ranch v. Dep't of Ecology,* PCHB No. 87-19 (Feb. 19, 1988) as a case where Ecology deferred making a decision on a permit application to study whether the nearby aquifer would be affected. *Black Star* is a much different case. There, Ecology did not have adequate hydrological information to determine whether water was available from a well, and whether withdrawal from the well would impair nearby users. Ecology attempted to defer its permit decision pending aquifer study, but was under a mandamus order to reach a decision. Consequently, Ecology denied the permit application, finding that without information on water availability and potential impairment, issuing a permit would be detrimental to the public interest. *Black Star* at 9.

> When incomplete information prevents answering the water availability and impairment of existing rights questions either way . . . the appropriate response is to deny the permit, and hold that in these circumstances the proposed use "threatens to prove detrimental to the public interest."
>
> Detriment of the public interest is threatened because in the current state of knowledge in the Black Rock area the risks appear high that development of the proposed project will cause hardship to other water users and to the permittee - to others because in a situation of declining water levels their rights may be interfered with; to the permittee because the solution to an interference problem is to shut him off, thus threatening the loss of his investment.

Black Star at 11–12. Granting a permit without adequate hydrological information—without even knowing *what water* would be withdrawn from a well—means that impairment and availability cannot be assessed

whatsoever. This would defeat the core of the prior appropriation system. This poses a risk to the public interest.

In contrast, cases such as *Bucklin Hill* illustrate the Ecology and PCHB practice and precedent of issuing a permanent water right with ongoing conditions. There, Ecology approved a permit on the condition of monitoring in the future (in the Bainbridge Island area) to determine whether withdrawing from a well would cause intrusion of surrounding sea water into the aquifer. This was identified as a *potential* detriment to the public welfare, but no available data demonstrated a *likelihood* of seawater intrusion. *Bucklin Hill* at 11. Thus, the "public interest" test showed no likely detriment based on available information, and that the public interest would be protected in the future by conditions to monitor and minimize impacts to the affected water. It could not be known until project operation whether sea water intrusion would occur, but "[s]ea water intrusion, were it to occur, would violate the public welfare standard. Our findings do not support the likelihood of this effect. But, again the monitoring conditions of the permit provide a mechanism for detection and correction" of any threats to the public interest. *Bucklin Hill* at 19.

This case, like *Bucklin Hill*, addresses a situation where enough information is available to determine that there will *likely* be no detriment to the public interest, but further study will ensure the public interest is protected upon project operation. This is distinct from *Black Star*, where Ecology did not even know *what water* was withdrawn and could not

conduct a fundamental availability analysis. In that case, Ecology found that a water permit would be premature and the courts declined to force a permit through a mandamus action. This does not provide useful precedent for the current situation, where Ecology has exercised its discretion in determining that the public interest will be satisfied.

The Enloe Dam water permit, conditioned as it is on a required aesthetic study which could lead to adjustment of the minimum bypass flows, protects against detriment to the public interest by protecting aesthetic values while maintaining minimum flows for aquatic life. Both Ecology and the PCHB determined that future study and possible adjustment would be adequate to ensure protection of the public welfare. If, after the project is operational, a different flow is determined to be more appropriate for aesthetics while being protective of fish, the ROE will be adjusted accordingly to include revised minimum flow conditions.

This is the very kind of condition that Ecology is authorized to impose in order to ensure the four-part test of the water code is satisfied. This condition is clearly within Ecology's authority under *Theodoratus*, 135 Wn.2d at 598. The Board has reviewed and supported many conditioned permits, as in *Porter* and *Bucklin Hill,* where the final outcome of future monitoring and tests was not certain at the time the permits were approved. If the Enloe Dam bypass flows are revised after the aesthetic study, the modified flows will automatically be a condition of the water right. Compliance with this condition is expressly mandated

under the Permit and a final water right certificate cannot be issued prior to the completion of the study. AR 528.

CELP provides no support for its supposition that the public interest test could somehow *fail* after an aesthetic flow study is completed. ". . . a legally-required study has yet to be completed to ascertain what quantity (if any) of flow will ensure protection of aesthetic, recreational and fishery values of the Similkameen River, and thereby avoid detriment to the public interest." Opening Brief at 27. CELP presumes, without support in the record, that an aesthetic study could yield new information that will wholly defeat the 10/30 minimum bypass flow levels repeatedly affirmed by Ecology and the PCHB. Ecology's experts testified (at the 401 Certification hearing), and the PCHB affirmed, that the 10/30 flows would be protective of fish. This is the minimum flow level. Because there was not adequate evidence to determine how *higher* flows would appear aesthetically over the dam and falls, the PCHB ordered an aesthetic flow study to determine whether the flows should be raised. AR 116. They cannot be lowered.

> [A]ccommodation among uses will likely be necessary because it is unlikely that any flow can simultaneously optimize the needs of all uses. In balancing the instream flow requirements, the flows protective of aesthetic values must be balanced with the requirement to assure the Project does not operate in violation of the numeric water quality standards for the aquatic life use categories of salmonid spawning, rearing and migration.

AR 107. It may be that higher flows are beneficial for aesthetics; it may not. An aesthetic study will determine this, and flows will be adjusted if necessary. AR 452-53.

Ecology has determined that, by including the conditions of the 401 Certification, the water permit *will not likely be detrimental* to the public interest. This is an "affirmative" finding as that word is used by CELP. There is no uncertainty. Ecology has discretion in finding that the public interest will be protected by requiring completion of an aesthetic flow study, and is authorized to do so under RCW 90.03.290.

C. The Permit Complies with Instream Flow Rule

The PCHB correctly concluded that the Permit is in compliance with WAC 173-549-020, the instream flow rule for the Okanogan Basin, because the 10/30 flows are specifically tailored for the bypass reach. This is allowed by the express language of the rule: "hydroelectric projects that bypass a portion of a stream" are considered consumptive only with respect to the affected portion of the stream, and are not subject to the listed instream flows at the Similkameen or other river gauges:

> Such [hydropower] projects will be subject to instream flows as specified by the department. These flows may be those established in WAC 173-549-020 or, when appropriate, may be flows specifically tailored to that particular project and stream reach.

WAC 173-549-020(5).

CELP argues that WAC 173-549-020(5)'s bypass reach exception must be narrowly construed. Opening Brief at 32. But narrow construction does not mean ignoring a statutory exception, simply because it contradicts the general purpose of the rule; that would render nearly all exceptions meaningless. *State v. Wanrow*, 88 Wn.2d 221, 230-31, 559 P.2d 548, 553 (1977).

The express language of WAC 173-549-020(5), as correctly explained by the PCHB, is "subject to only one reasonable interpretation." AR 525. Ecology is authorized to specifically tailor flows to a specific project. There is no narrower construction than here, when considering the bypass flow of a short segment of a stream for the purpose of determining what instream flows will be required for a hydroelectric project.

The "tailoring" of these bypass flows is borne out by the record, which shows the evolution of minimum flows as the project progressed. The PUD's early application requested Ecology to not require any flows in the bypass reach. Ecology consulted with WDFW to determine that minimum flows were necessary. AR 90-91. After WDFW investigated the site, including analyzing the river bed and snorkeling the bypass reach, it agreed that the 10/30 flows would be acceptable for protection of the fishery resource. AR 91. Ecology determined that this would meet water quality standards. AR 92. As the PCHB recognized in the 401 Certification, flows for aesthetics are only one consideration, and "it is unlikely that a flow can simultaneously optimize the needs of all uses." AR 107. Therefore, Ecology and the PCHB look to a future aesthetic study to identify if a *higher* flow would be preferable for aesthetics while being adequately protective of fish. AR 115. The process to date has provided ample assurance that the flows will be protective of fish. The 10/30 flow regime is the very kind of specifically tailored flow contemplated by WAC 173-549.

The *Swinomish* decision, upon which CELP relies to emphasize the value of instream flow rules, provides no guidance here. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013). *Swinomish* held that an instream flow set by rule is a water right, and that "withdrawal of water necessary to maintain minimum flows impairs an existing water right, contrary to law." *Swinomish*, 178 Wn.2d at 578–79. That case analyzed the Skagit River Basin Instream Flow Rule under the statutory exception of RCW 94.54.020, and neither that rule nor the statutory provision are at issue here. To the extent the *Swinomish* case is relevant, Ecology agrees—WAC 173-549 establishes a water right as to instream flows along the Similkameen River. The instream flow water right, however, is prescribed *by* the rule and defined within it. This includes the exception for flows that are nonconsumptive in a bypass reach associated with a hydroelectric project. AR 525–26.

CELP's argument here attempts to invoke the same fallacy as above—that Ecology has not yet made a determination on minimum flows. In fact, Ecology and the PCHB both found the 10/30 flows to be a current and binding condition of the permit. While the minimum flow may be higher after an aesthetic study, it stands until that time. The rule is therefore satisfied.

V. CONCLUSION

The Enloe Dam water right permit, as conditioned, cannot be detrimental to the public welfare. The current 10/30 minimum flows are also compliant with WAC 173-545, even though they may be modified to

higher levels in the future based on results of an aesthetics study. CELP has not met its burden to show that the PCHB committed an error of law. Ecology asks the Court to uphold the approval of the PUD's water permit, and deny CELP's request for reversal.

RESPECTFULLY SUBMITTED this 12th day of October 2015.

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Attorney General

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 12th day of October 2015 I caused to be served Washington State, Department of Ecology's Responding Brief in the above-captioned matter upon the parties herein as indicated below:

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the foregoing being the last known addresses.

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

DATED this 12th day of October 2015 in Olympia, Washington.

DEBORAH A. HOLDEN, Legal Assistant

1996 WL 221843 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

WILLIAM PORTER, APPELLANT
v.
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY AND RICHARD AND MARGARET WRIGHT, RESPONDENTS

PCHB No. 95-44
March 1996

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

*1 This appeal, contesting the Department of Ecology's (DOE's) decision to grant a ground water permit to respondents Richard and Margaret Wright, came to hearing before the Pollution Control Hearings Board (Board) on January 24, 1996, in Seattle, Washington. The Board was comprised of Richard C. Kelley, Chair, Robert V. Jensen and James A. Tupper, Jr. Administrative Appeals Judge Suzanne Skinner presided for the Board. Appellant William Porter represented himself. Respondent DOE was represented by Thomas McDonald, Assistant Attorney General. Respondent Richard Wright represented himself and Margaret Wright.

Cindy L. Ide of Gene Barker and Associates recorded the proceedings stenographically and electronically. Mr. Jensen was obliged to leave before the close of the hearing and listened to a recording of the portion of the hearing he had missed before rendering this decision.

Based upon the sworn testimony and the exhibits admitted at the hearing, the Board enters the following:

FINDINGS OF FACT

I.

Richard and Margaret Wright live on 19.7 acres in an area known as Sunnyshore Acres, in Camano Island, Washington. In 1973, the Wrights drilled a well to serve their house and garden. About that same time, they cleared three to four acres and planted three- quarters of one acre with grapes with the intention of beginning a small vineyard. In 1989, the Wrights cleared an additional seven or eight acres so that roughly half their land was cleared and the other half forested. Presently, one and three-quarter acres are planted with grapes.

II.

In 1990, the Wrights also applied for and received from Island County a downzoning of their property from a residential to an agricultural designation. Since then, the Wrights additionally had eighteen development rights on their property certified and placed 19.74 acres of their land in a conservation easement under Island County's Transferable Development Rights Program. The development rights, while certified, have not yet been transferred. If and when the rights are transferred, the Wrights' land will remain agricultural in perpetuity. Leaving the land in an agricultural designation has the corollary effect of guaranteeing that the land will also serve as an aquifer recharge zone.

III.

The Wrights intend to expand their vineyard to five acres--by planting approximately 2400 grape vine starts on three and one-quarter additional acres. The Wrights describe Camano Island as relatively drought- prone and deem grapes to be well-adapted to drought. Grape vines generally require irrigation for seven to nine months after planting to become

established. Once established, the vines survive on rainfall although they may require supplemental irrigation in dry times every two to three years. Approximately forty percent of the grape vine starts fail after planting. Presumably, the Wrights will replace the starts that fail and the replacements must be irrigated anew. Moreover, vines die after about seven years and the replacements must also be irrigated. It therefore appears that the fluctuations in the life -cycle and survival of the vines will all but ensure that some portion of the proposed, expanded vineyard will require irrigation during the dry season.

IV.

*2 In 1991, the Wrights were informed that they could not irrigate their vineyard with water from their domestic well or irrigate the additional five acres they intended to cultivate, without procuring a water right from DOE. Accordingly, the Wrights applied for a water right on June 25, 1991, seeking 3.5 gallons per minute (gpm) for their residential use and for seasonal irrigation of five acres.[1] The requested right would attach to the Wrights' existing well which is six inches in diameter and is completed to a depth of 295 feet. The point of withdrawal is 230 feet above mean sea level and is approximately three-quarters of one mile equidistant from the east and the west shores of Camano Island.

V.

DOE investigated the Wrights' application. The Wrights did not perform a pump test on their well as part of their application but instead submitted the test results for a neighbor's well. The neighbor's well is 585 feet south of the Wrights' and draws from the same aquifer.

The Wrights' well served as a monitoring well during the pump test. After the test, the static water level of their well dropped negligibly, a mere 2.68 feet from the pre-test level when pumped at a 10 gpm, twice the proposed rate for the Wrights' well.

The pump test on the neighbor's well did show tidal influence although no testing was done. However, the amount of chloride in the Wrights' well was measured before and after the pump test. The chloride level remained constant at 24 milligrams per liter (mg/l) which indicates that the proposed Wright withdrawal will also not cause a measurable change in the chloride levels of the aquifer and neighboring wells.

VI.

DOE also examined roughly ten years of chloride level measurements taken for the El Camano Water System, which owns a well approximately 2000 feet southwest of the Wrights'. Chloride levels for the system, taken over an eleven-year period, fluctuated considerably--from a summertime high of 250 mg/l in 1985 to a wintertime low of 43 mg/l in 1985.

VII.

Appellant and his wife protested the Wrights' application claiming that the withdrawal would increase seawater intrusion.

VIII.

Based upon its investigation, DOE issued a Report of Examination on June 30, 1994, which denied the Wrights' application and determined that the proposed withdrawal could increase seawater intrusion. The Report cited DOE's Seawater Intrusion Policy which states that, in an absence of specific hydrogeologic information, no further withdrawals should be permitted within at least one-half mile of wells with chloride levels greater than 99 mg/l. As the Wrights had failed to supply any specific data that showed the well's chloride levels during drought conditions, DOE applied its Seawater Intrusion Policy and denied the requested right since the withdrawal was within one-half mile of the contaminated El Camano Water System.

IX.

DOE informed the Wrights and the appellant of the denial by separate letters, both dated June 29, 1994. The Wrights timely appealed the denial to this Board. That appeal, PCHB No. 94-163, was settled by a stipulation entered between the Wrights and DOE. Mr. Porter was not a party to that appeal.

X.

*3 DOE agreed in the settlement to issue the Wrights an amended Report of Examination granting the water right permit. DOE agreed to reverse its earlier denial of the application for two reasons according to Steven Hirschey, Section Supervisor of DOE's Northwest Regional Office. First, DOE did not believe that the denial of the application could be sustained based upon DOE's Seawater Intrusion Policy since that policy has not been adopted as an administrative rule.

Second, upon reexamination, DOE could not conclude that the Wrights' withdrawal would increase seawater intrusion since the Wrights' well had shown no increase in chloride levels during the pump test and the chloride readings from neighboring wells fluctuated considerably.

XI.

On March 30, 1995, DOE issued an Amended Report of Examination. This amended report reiterates most of the data and analysis in the initial report but differs in that DOE concludes that the requested withdrawal will not permanently degrade the aquifer if the Wrights comply with the permit conditions. The permit conditions are as follows: 1) the Wrights must install a water meter and take monthly readings; and 2) every year, the Wrights must provide DOE with chloride and conductivity readings for the well based upon samples taken in April and August of that year. The permit further states that "[d]epending on the results of this data collection, withdrawal of ground water may be limited or other action required."

XII.

Appellant timely appealed the Amended Report of Examination to this Board.

XIII.

Mr. Porter resides on the north end of Camano Island. While he is not a neighbor of the Wrights, he uses a domestic well that draws from the same aquifer as the Wrights' well. Moreover, Mr. Porter's application for a new water right was denied due to the risk of seawater intrusion.

XIV.

Appellant asserts that DOE has abdicated its responsibility to protect the aquifer in granting the Wrights' permit without first requiring the Wrights to provide technical proof that the withdrawal will not increase the risk of saltwater intrusion. Appellant contends that DOE's responsibility emanates from various documents including a 1990 Memorandum of Understanding between DOE and Island County. DOE's alleged violation of the provisions of that memorandum do not create an actionable right for the appellant. Moreover, examination of the memorandum shows that DOE has complied with its assigned responsibilities. In addition to enunciating inter-government agreements regarding chloride contamination, the memorandum assigns numerous duties to DOE in administering the water rights program in Island County. The duty Mr. Porter emphasizes is DOE's obligation to require flow meters on wells for new permits wells and to request water quality monitoring of wells where water quality is known or suspected to be degraded. DOE's imposition of conditions requiring metering and monitoring on the Wrights' permit proves that DOE has met its duty under the Memorandum of Understanding.

XV.

*4 Mr. Porter also contends that DOE reneged on the directive in DOE's Seawater Intrusion Policy that new water rights in medium and high risk areas shall be denied unless the applicant can disprove that the withdrawal requested will increase seawater intrusion. The policy deems chloride levels in excess of 100 mg/l to evince medium risk of seawater intrusion.

However, the Wrights' well clearly lies in a low-risk area for seawater intrusion. The monitoring done during the pump test showed chloride levels in the Wrights' well to be 24 mg/l--a low risk area under the policy. Moreover, while DOE initially lacked any information on seasonal fluctuations of chloride levels in the Wrights' well, the Wrights cured that deficiency by submitting chloride readings. Those readings, of 25.2 mg/l for April, 1995 and of 24 mg/l for August, 1995, prove the well to be in a low-risk area year- round.

XVI.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over this matter pursuant to RCW 43.21B.110.

II.

RCW 90.03.240 of the Water Code governs new appropriations of water and directs DOE to investigate water rights applications to determine what water is available for appropriation and, if the beneficial use is irrigation, what lands are capable of irrigation. If DOE's investigation determines that: 1) water is available for appropriation for a beneficial use; 2) the appropriation will not impair existing water rights; and 3) the appropriation will not be detrimental to the public welfare, DOE "shall issue a permit." Id.

III.

Appellant has the burden of showing that DOE erred in granting the Wrights' permit. No evidence suggests that there is insufficient water to fill the right--indeed, the Wrights will not use much more water under the permit than they already can under the 5000 gallons per day exemption for domestic use. RCW 90.44.050. Instead, appellant attempts to show that the risk of seawater contamination posed by the Wrights' well impairs existing rights and is detrimental to the public welfare. Appellant has not met his burden.

IV.

It is undisputed that population growth in Island County has taxed the limited ground water resources of Camano Island. DOE should scrutinize new applications closely and would be well-advised to require solid technical data disproving any risk of contamination during drought conditions as part of the application process. But even though the necessary data on the Wrights' well was submitted to the agency over a period of time, that data proves that the Wrights' well does not increase the risk of seawater intrusion--even during the summer--so that the application does not impair existing rights or run afoul of the public interest. The data shows that chloride levels for the well in 1995 remained virtually constant throughout the year, never exceeding 25.2 mg/l. Indeed, the circumstances of this case make granting the application a public benefit.

V.

***5** The Wrights seek this water right to commit this land to agricultural use in perpetuity and are in the process of transferring the development rights to this land. Reserving this land for agricultural use concurrently preserves it as an aquifer recharge zone-- an indisputable benefit to water quality on Camano Island.

VI.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From the foregoing, the Board issues this:

ORDER

DOE's grant of Water Right Application No. G1- 26232 to the Wrights, as conditioned by the Amended Report of

Examination, is hereby AFFIRMED.

DONE this day of March, 1996. RICHARD C. KELLEY, Chairman

ROBERT V. JENSEN
Member
JAMES A. TUPPER
Member

Footnotes

1 The amount of water sought is also equivalent to 5040 gallons per day-- just over the amount exempted by RCW 90.44.050 from the water rights registration process for domestic uses or the watering of a noncommercial garden of one-half acre or less.

1996 WL 221843 (Wash.Pol.Control Bd.)

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WASHINGTON STATE ATTORNEY GENERAL

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Ecology's Responding Brief

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