No. 74841-6-I 93844-0

**IN THE COURT OF APPEALS, DIVISION ONE
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.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

POLLUTION CONTROL HEARINGS BOARD DECISIONS

STATUTES

RULES

REGULATIONS

A. IDENTITY OF PETITIONER

The Center for Environmental Law & Policy, American Whitewater, and North Cascades Conservation Council ("CELP") ask this Court to accept review of the Washington Court of Appeals decision terminating review of the case identified in Section B of this petition.

B. COURT OF APPEALS DECISION

CELP asks this Court to review the Court of Appeals, Division 1 opinion in *Center for Environmental Law & Policy, American Whitewater, and North Cascades Conservation Council v. Washington Department of Ecology, Public Utility District No. 1 of Okanogan County, and Washington State Pollution Control Hearings Board,* No. 74841-6-I, filed on October 17, 2016 (hereinafter "Decision")[1]. A copy of the Decision is attached at Appendix A. The Court of Appeals' Decision affirmed the Pollution Control Hearings Board's ("the Board's") Order on Motions for Summary Judgment in *CELP, et al. v. Ecology, et al.*, PCHB No. 13-117 (June 24, 2014), attached at Appendix B.

[1] The Court of Appeals initially filed its opinion in this case on July 11, 2016. CELP moved for reconsideration of the decision, and Ecology moved for publication of the decision. The Court then issued an Order denying the Motion for Reconsideration, granting the Motion to Publish, withdrawing the July 11, 2016 Opinion, and substituting a modified Opinion on October 17, 2016. A copy of that Order and the revised Decision is attached as Appendix A. CELP now petitions for review of the October 17, 2016 decision.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming Ecology's issuance of a water right based on a public interest finding made without adequate information, where RCW 90.03.290 and previous Supreme Court decisions require that an affirmative investigation, finding and determination of no detriment to the public interest be made *before* a water right is approved?
2. Did the Court of Appeals err in affirming the Washington Department of Ecology's ("Ecology's") deviation of flows from those required in the instream flow rule for the Similkameen River without first finding that the deviation is justified by an overriding consideration of the public interest ("OCPI") as required in RCW 90.54.020(3)(a)?

D. STATEMENT OF THE CASE

This case presents two fundamental questions of statutory interpretation regarding the scope of Ecology's authority to grant an entity the right to use Washington water. Time and again Washington courts have reiterated the importance of Ecology's mandatory duty to "look before you leap" when determining whether to grant permission to use the precious water resources that belong to the public. In a more recent line of cases, this Court has recognized there is only one narrow exception to the

principle that "a minimum flow set by rule is an existing water right that may not be impaired by subsequent withdrawal or diversion of water from a river or stream:" RCW 90.03.290(3)'s provision regarding overriding considerations of the public interest ("OCPI"). *Swinomish Indian Tribal Cmty v. WA State Dep't of Ecology*, 178 Wn.2d 571, 584, 311 P.3d 6 (2013) (quoting *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726 (2000). The Court of Appeals' decision in this case erroneously conferred nearly unfettered discretionary authority on Ecology to issue a water right without having complete information as to whether issuance of the water right would be detrimental to the public interest and without requiring compliance with the narrow statutory OCPI exception to deviate from the instream flows set by rule. For the reasons set forth herein, Appellants respectfully request that this Court accept review of this case and correct these errors of law.

1. The Similkameen River and the Enloe Hydroelectric Project.

The Similkameen River runs about 122 miles from its headwaters in British Columbia to the Okanogan River, near Oroville, Washington. Clerk's Papers ("CP") at 53. In 1904, the 315 foot-long, 54-foot high concrete Enloe Dam was constructed on the Similkameen at river mile 8.8. *Id.* Just 350 feet downstream from Enloe Dam are the Similkameen Falls, a sacred site of traditional cultural significance to the native people from

this area. *Id. at 54.* The PUD has owned Enloe Dam since 1945, but ceased generating power from it in 1958. *Id.* Since that time, natural river flows have passed over the dam and Similkameen Falls, typically ranging from about 500 to 7,000 cfs. *Id.* at 54. Typical dry season (July-October) median flows range from 514 cfs in August to 764 cfs in September. *Id.*

Minimum instream flows for the stretch of the River that includes the Project and the proposed bypass reach obtained legal protection in 1976 when Ecology adopted an instream flow rule for the Similkameen River pursuant to RCW 90.22 and RCW 90.54. WAC 173-549-020(2); CP at 54. The instream flows set by rule range between 400 cfs in September and January-February, and 3400 cfs in May and June. *Id.* The PUD seeks to generate hydroelectric power from Enloe Dam by installing a new powerhouse and diverting up to 1,600 cfs from the River at the Dam (the "Project"). CP at 54. Water would be discharged back into the river below Similkameen Falls. *Id.* The Project would thus create a "bypass reach" that would dewater the stretch of the River that includes the Falls. *Id.* To do so, the PUD would need to impair (i.e. reduce) the instream flows currently protected by rule within this bypass reach.

2. The 401 Certification & PCHB Decision.

As required by section 401 of the federal Clean Water Act ("CWA"), the PUD applied to Ecology for certification that the Project

would comply with state water quality standards, commonly called a "401 Certification." 33 U.S.C. § 1341(a)(1). Ecology's 401 Certification, issued in 2012, set forth a "minimum flow regime in the bypass reach of 10 cfs year round and 30 cfs for mid-July to mid-September[,] otherwise known as the 10/30 flows . . . ." *Ctr. for Envtl. Law & Policy et al. v. Ecology, et al.*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law & Final Order (as amended upon reconsideration)) (Aug. 30, 2013) (hereinafter "401 Certification Decision") at 9:16-17. The 10/30 instream flow is 90-99% below the natural flows over Enloe Dam and Similkameen Falls, and 92-95% below the instream flows set in WAC 173-549-020. After a hearing on the merits, the Board found that the 10/30 cfs minimum flow requirement was deficient. *Id.* at 32:13-15. Specifically:

> The Board finds the Appellants met their burden that the aesthetic flow analysis was not sufficiently completed to make a final determination of the flows that will be protective of the aesthetic values.

Id. at 32:11-16.

After considering the evidence presented at the hearing, the Board concluded:

> [T]here is not sufficient evidence to make a finding that the 10/30 flows meet the water quality standards for aesthetic values even when balancing these with the protecting of the fisheries. The professional judgment on aesthetic flows should be based on evidence depicting flow levels, either actual or simulated.

Id. at 31:16-19. To bring the 401 Certification into compliance with the Clean Water Act, the Board added a condition to the 401 Certification directing Ecology to develop an after-the-fact aesthetic flow monitoring program to determine appropriate flows for the bypass reach. *Id.* at 34:5-7. Therefore, whether there can be minimum flows in the bypass reach that are protective of aesthetic values will not be known for up to three years after Project operations begin, or until a simulated study is undertaken. *Id.* at 34:15 ("The program shall be for a period of time that provides Ecology with sufficient data and information to review actual flow levels or simulated flows."). Neither the PUD nor Ecology has undertaken the required aesthetic flow analysis, using either simulated or actual flows, or determined what modified flows would meet all applicable water quality standards and other requirements of state law. CP at 56.

3. The Water Right & Board Decision on Appeal.

On August 6, 2013, after the Board's decision on the 401 Certification appeal,[2] Ecology issued Report of Examination ("ROE")[3] No. S4-35342 granting the PUD the right to use an additional 600 cfs of

[2] The Board's initial decision was finalized on August 3, 2013, before Ecology's issuance of the water right for the Project, but the Board's final decision was subsequently amended on reconsideration, for reasons not relevant to this appeal, in an order finalized on August 30, 2013.

Similkameen River water to generate hydropower at Enloe Dam.[4] CP at 56. The ROE was conditioned on the very same 10/30 cfs instream flow requirement that the Board found to be unsupported in its 401 Certification decision. CP at 56-57. The ROE states that the "bypass flows under the 401 Water Quality Certification are designed to protect the aesthetic values of water flowing over the falls." *Id.* As part of its decision, Ecology cited unnamed studies and documents submitted by the PUD during the FERC license application process as justification for the 10/30 instream flow requirement. *Id.* In the 401 Certification Decision, however, the Board considered these studies and found they "did not address the aesthetics of the flow of the River over the Dam or the Falls." 401 Certification Decision at 14:5-6. Due to the lack of information regarding aesthetic flows, a vital component of the public interest inquiry, Ecology was unable to undertake an investigation,[5] let alone a supported determination, regarding whether the Project would be detrimental to the public interest. Notwithstanding that lack of information, Ecology

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[3] Ecology's approval is set forth in a Report of Examination or ROE, which describes the factual findings for the subsequently issued water right permit.

[4] The PUD also owns two pre-existing water rights for the hydroelectric project that are not subject to this appeal. CP at 56.

[5] A full investigation was rendered impossible by virtue of the fact that critical information regarding the Project's impact on aesthetic flows did not exist. Because the aesthetic study has not been completed, the results of the study were not available.

assumed that issuing a permanent water right for the Project would not be detrimental to the public interest. CP at 57-58.

On September 6, 2013, Appellants filed a notice of appeal asking the Board to find the ROE invalid and in violation of the law. CP at 58. The parties filed cross-motions for summary judgment on all issues. *Id.* On June 24, 2014, the Board issued its decision granting summary judgment for the PUD and Ecology on all issues, but modifying the ROE to include the same language as required for the 401 Certification, i.e., requiring an after-the-fact study of appropriate flows in the bypass reach. CP at 19-43. Thurston County Superior Court affirmed the PCHB's decision in all respects. CP at 154.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

CELP seeks review pursuant to RAP 13.4(b)(1), (2), and (4), and asks the Supreme Court to accept review because the decision of the Court of Appeals conflicts with statutory law and decisions of both the Supreme Court and the Court of Appeals, and the petition involves an issue of substantial public interest.

1. The Court Of Appeals' Decision Conflicts With RCW 90.03.290 And Previous Supreme Court And Court Of Appeals Decisions.

a. Ecology Authorized The Enloe Water Right Without First Finding the Project Would Not Be Detrimental To The Public Interest As Required By Statute.

It is black letter law that, when investigating a water right application, Ecology must investigate and make four affirmative findings *before* authorizing a right to use water. RCW 90.03.290(3). The Supreme Court of Washington has repeatedly affirmed these mandatory statutory obligations that "before a permit to appropriate may be issued, Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare."[6] *Swinomish*, 178 Wn.2d at 588-9 (citing *Postema*, 142 Wash.2d at 79, 11 P.3d 726 (2000)); RCW 90.03.290; *see* also *Lummi Nation v. State of Washington*, 170 Wn.2d 247, 252-53, 241 P.3d 1220 (2011); *Postema*, 142 Wn.2d at 79; *Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 590-1, 957 P.2d 1241, (1998); *Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 384, 932 P.2d 139 (1997); *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 115, 508 P.2d 166 (1973); *Hubbard v. Dept. of Ecology*, 86 Wn. App. 119, 124, 936 P.2d 27 (1997).

[6] The requirement to prevent impairment of existing water rights includes preventing impairment of legally protected instream flow rights. RCW 90.03.247.

No case cited by Ecology or the PUD in the proceedings below provided authority to Ecology to make any part of the four-part test when critical information is admittedly absent. However, the Court of Appeals approved Ecology's issuance of water right without Ecology knowing whether and to what extent the final flows in the bypass reach would be detrimental to the public interest. That is because the aesthetic flow study that the Board deemed necessary in the 401 Certification decision has not yet been done. The Board acknowledged that the ROE contained insufficient information to support affirmative findings on the public interest tests for the Enloe water right: "Ecology still needs additional information to make a public interest determination in relation to the PUD water right." CP at 34. In spite of this admitted lack of information, the Board, and then the Court of Appeals, improperly affirmed Ecology's public interest determination even though information on aesthetic flows in the bypass reach[7] would not be gathered until *after* the water right was approved, and indeed until after the Project would be constructed.[8]

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[7] Because Ecology does not know the final flows in the bypass reach, it also cannot know how much power the project will produce since that number depends upon how much flow must be diverted away from the turbines and put into the bypass reach. This information is another aspect of the public interest inquiry that is unknown.

[8] Although Ecology is not statutorily authorized to grant a water permit when one or more of the four tests are not satisfied, the agency does have discretion to issue a preliminary permit, in lieu of a denial, under those circumstances. RCW 90.03.290(2)(a).

The Court of Appeals, relying on Ecology's decision to make its public interest inquiry based on incomplete information, grievously misinterpreted the law in holding that Ecology's discretion to issue a water right, even without critical information, is essentially without limit. The Court of Appeals' decision affirming the Board squarely conflicts with RCW 90.03.290, and with years of Supreme Court precedents. *See, e.g., Lummi Nation*, 170 Wn.2d at 252-3; *Postema*, 142 Wn.2d at 79 (Ecology must make an affirmative public interest determination "before a permit to appropriate may be issued"); *Stempel*, 82 Wn.2d at 115 (statute requires Ecology make four determinations "prior to" issuance of permit); *Hillis*, 131 Wn.2d at 383-4 (*accord,* explaining Ecology's "responsibilities with regard to the public waters of the state").

The significance of the Court of Appeals' departure from strict compliance with the statutory four-part test cannot be overstated. The Legislature's creation of the four-part test promotes critical state interests regarding the proper allocation of the state's finite and valuable water resources. The Washington Supreme Court has previously recognized the finite nature of water resources:"[t]he prior appropriation doctrine and the first in time first in right priority principle are founded on the idea that at some point the water in a stream or lake will be insufficient to satisfy all potential users . . . ." *Swinomish*, 178 Wn.2d at 591. Water rights, once

perfected in accordance with RCW 90.03.330(1), are permanent property rights. *Ecology v. Grimes*, 121 Wn.2d 459, 477, 852 P.2d 1044 (1993). An appropriated water right is perpetual and operates to the exclusion of all subsequent claims. *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wn.2d 232, 237, 814 P.2d 199 (1991). Issuance of a water right therefore has permanent implications for the allocation of water resources. Accordingly, the Legislature imposed a mandatory duty on Ecology to affirmatively "investigate, determine and find" that each of the four-part tests is met *before* Ecology grants a permanent water right. RCW 90.03.290(1); (3).

The Court of Appeals' decision allows Ecology to forestall a final finding as to whether the appropriation will be detrimental to the public interest, in violation of the plain language of RCW 90.03.290 and overwhelming precedent. Because the Board has previously determined (in the 401 certification proceeding) that an aesthetic flow study must be conducted in order to ascertain what flows would protect aesthetic values,[9] this information is critical to inform the public interest determination. If Ecology is given the discretion to make a public interest finding based on incomplete information, it necessarily follows that Ecology could also assume that other aspects of the four-part test are met, without actually

investigating or making such a determination. For example, Ecology could assume, either by failing to undertake the requisite analysis, or by deferring to an after-the-fact study, that there is water available for appropriation. Similarly, Ecology could find a proposed appropriation does not impair existing water rights, without knowing whether that is in fact the case.

The Court of Appeals' legal error is made clear when turning to other statutory language in the Water Code. The Legislature contemplated a scenario whereby a water right application did not contain "sufficient information on which to base" its findings under the four-part test, and for that reason it authorized Ecology to issue a *preliminary* permit when faced with this situation. RCW 90.03.290(2)(a) ("If the application does not contain, and the applicant does not promptly furnish sufficient information on which to base such findings, the department may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary."). The Court of Appeals' decision in this case renders the preliminary permit language superfluous,

[9] The Court of Appeals correctly recognized that "[a]esthetics is a component of the public interest analysis." Decision at 13.

which is impermissible. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988).

The Legislature did not confer upon Ecology the discretion to authorize a *permanent* water right when information is lacking as to one of the four mandatory findings. The Court of Appeals' decision could significantly disrupt Washington water law, which has followed a "look before you leap" model for decades. Given the scarcity of water in many parts of the state, this departure from the plain language of RCW 90.03.290 would not only be illegal, but would have significant ramifications for those who depend upon certainty and reliability regarding current and future water use. *Wilson v. Angelo*, 176 Wn. 157, 160, 28 P.2d 276 (1934) ("Taking the water code as a whole, its very purpose is to settle and determine all rights and priorities to the use of the water under investigation.").

The Court of Appeals expressly acknowledged the risks associated with Ecology's decision to base the public interest finding on an after-the-fact study, but justified the risks by noting, "Ecology's decision to amend or not amend the conditions after the study will be subject to challenge." Decision at 16, n16. But that analysis misses the mark and is contrary to what the Legislature required in RCW 90.03.290. The four-part test contains questions that must be answered before issuance of the water

right. It is simply unrealistic to assume that Ecology will make an unbiased investigation, determination and finding after substantial resources have already been invested in constructing the Project and putting the water to beneficial use. The law recognizes that reality, as reflected in the four-part test required by RCW 90.03.290 and prior precedent.

b. Ecology's Improper Interpretation Of The Narrow OCPI Exception In This Case Is In Conflict With Supreme Court Precedent.

A regulatory exception to the 1976 instream flow rule for the Similkameen River, and its OCPI implications, is at issue in this case. In order to issue the Enloe water right, Ecology had to apply an administrative exception contained in the instream flow rule because it recognized that the flows in the bypass reach (whatever they turn out to be) would be significantly less than the flows required by the Instream Flow Rule. The exception states:

> Projects that would reduce the flow in a portion of a stream's length (e.g. hydroelectric projects that bypass a portion of a stream) will be considered consumptive only with respect to the affected portion of the stream. Such 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. When studies are required to determine such reach- and project-specific flow requirements, the department may require the project proponent to conduct such studies.

WAC 173-549-020(5). Thus, Ecology reserved itself authority to deviate

from the established instream flows for the Similkameen River, which were adopted to "provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a).

As an exception to the established instream flows, the WAC 173-549-020(5) proviso may only be exercised in a limited manner, i.e., only "in those situations where it is clear that overriding considerations of the public interest will be served." RCW 90.54.020(3)(a). In recent years, this Court has twice emphasized the need for narrow application of the OCPI exception that preserves the paramount intent of the Legislature to protect instream flows. *Swinomish Indian Tribal Cmty.*, 178 Wn.2d at 576, *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 473, 362 P.3d 959 (2015).

Here, Ecology's interpretation of the WAC 173-549-020(5) exception to issue the Enloe water right directly contradicts the *Swinomish* and *Foster* precedents. Ecology's issuance of a water right impairing instream flows by 92-95% is not a "narrow" use of the exception, especially because it was done without the benefit of any specifically tailored study as called for in WAC 173-549-020(5).

Indeed, Ecology did not even analyze "overriding public interests" in issuing the Enloe water right, nor did the Board. According to the Court of Appeals, this was acceptable because the exception was adopted as part

of the original rule and therefore OCPI analysis was not required. Decision at 21. The Court of Appeals cited no authority for this holding, and indeed it is wholly inconsistent with both the plain language of the statute and the *Swinomish* and *Foster* precedents.

2. This Case Involves Issues Of Substantial Public Interest Because It Dramatically Alters The Statutory Scheme For Allocation Of Washington Water.

Water use and scarcity is an issue that affects all citizens of Washington. In recent years, Washingtonians in many parts of the state have experienced unprecedented water shortages, a condition likely to worsen in light of climate change. *Foster et al. v. Ecology*, King County Superior Court No. 14-2-25295-1 SEA (Order Affirming the Department of Ecology's Denial of Petition for Rule Making) (Nov. 19, 2015)[10] (finding "that current scientific evidence establishes that rapidly increasing global warming causes an unprecedented risk to the earth, including land, sea, the atmosphere and all living plants and creatures" and quoting Ecology report that "climate extremes like floods, droughts, fires and landslides are already affecting Washington's economy and

[10] The court vacated "portions of the November 19, 2015 order the denied petitioners' requested relief and put the matter back in the hands of Ecology," but "[a]ll other portions of the November 19, 2015 Order remain in full force and effect." *Foster, et al. v. Ecology*, King County Superior Court No. 14-2-25295-1 SEA (Order on Petitioners' Motion for Relief Under CR 60(b)) (May 16, 2016). This order has been appealed to the Washington Court of Appeals. WA Court of Appeals No. 75374-6-I.

environment."). To address these concerns, the Legislature has enacted an integrated scheme of water law designed to ensure that all relevant interests are investigated and weighed *before* allocation of the public's water resources. RCW 90.03.290; *Lummi Nation*, 170 Wn.2d at 252-53; *Postema*, 142 Wn.2d at 79; *Theodoratus*, 135 Wn.2d at 590-91; *Hillis*, 131 Wn.2d at 384; *Stempel*, 82 Wn.2d at 115; *Hubbard*, 86 Wn. App. at 124.

Ecology was given statutory authority to issue permits for appropriations of water. RCW 90.03.250. Courts have previously held that approval of a water right is a discretionary act. *Hubbard*, 86 Wn. App. at 127. However, an agency may only act within the bounds of its statutory authority. *Snohomish County Pub. Transp. Ben. Area v. State Pub. Employment Relations Comm'n*, 173 Wn. App. 504, 515, 294 P.3d 803 (2013). The Water Code sets forth *mandatory* legal requirements that must be met *before* Ecology can exercise its discretion to issue a water right. Ecology "shall" affirmatively find: 1) water is available 2) for a beneficial use, 3) that the appropriation will not impair existing rights and 4) the appropriation will not be detrimental to the public welfare. RCW 90.03.290(1); (3); Section E.1.a, above. As the Supreme Court has recognized, these mandatory statutory duties constrain Ecology's exercise of its discretion in issuing water rights. *Hillis*, 131 Wn.2d at 384 (Ecology must deny permit if RCW 90.03.290(3)'s requirements not met). In other

words, Ecology does not have the unfettered discretion to authorize a water right if it has not even investigated, whether for a lack of information or otherwise, let alone affirmatively found, that each prong of the four-part test has been satisfied.

This constraint serves to protect the public's interest in wise use of its waters and preservation of environmental and instream values, as well as to ensure that conflicts between water users are not created. The Court of Appeals' decision in this case has the unprecedented effect of giving Ecology the discretion to make one of the findings required by RCW 90.03.290(3) without having critical information, a result that potentially upsets the entire statutory scheme enacted by the Legislature.[11] Indeed, Ecology now believes it has authority to issue a water right without first finding that all elements of the four-part test are met. *See* Ecology Mtn. for Publication (filed July 29, 2016) at 2-3. This interpretation affects not only the public interest test for new water rights, but also could be applied in the contexts of water availability and impairment of senior rights.

By conferring upon Ecology unfettered discretion to interpret its statutory mandate under RCW 90.03.290 (here in a manner that was unlawful), the Court has essentially eliminated a key structural basis for

water management in Washington. The devastating effect of this is that the "ladder of priority" for water rights (including both out-of-stream and instream flow rights) will be replaced with a unmanageable system of contingent, conditional permits in which it is impossible to know who has how much water or when that water will be available and put to beneficial use. Strict compliance with the plain language of the Water Code is needed to avoid this catastrophic result.

F. CONCLUSION

This Court should accept review for the reasons set forth herein, and (1) reverse the Court of Appeals' decision and (2) remand this matter to Ecology with instructions to reconsider the PUD's water right application using the correct legal standards.

Respectfully submitted this 16th day of November, 2016,

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[11] If the Legislature wished to confer this discretion on Ecology, it could readily do so through amendment of RCW 90.03.290(3).

DECLARATION OF SERVICE

I, Dan Von Seggern, hereby declare that on this day I caused this Petition for Review to be served on the Appellees via electronic mail in accordance with the parties' electronic service agreement, and on the Court of Appeals by personal delivery.

Stated under oath this 16th day of November, 2016, in Seattle Washington.

s/ Dan Von Seggern
Dan Von Seggern
Attorney for Appellants

APPENDIX A

Center for Environmental Law & Policy, American Whitewater, and North Cascades Conservation Council v. Washington Department of Ecology, Public Utility District No. 1 of Okanogan County, and Washington State Pollution Control Hearings Board, No. 74841-6-I, October 17, 2016.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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CASE #: 74841-6-I
Center for Environmental Law & Policy, et al., Appellants v. Dept of Ecology, et al., Respondents

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration, Withdrawing Opinion, Granting Motion to Publish and Substituting Opinion entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh
Enclosure
c: The Hon. Gary Tabor

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CENTER FOR ENVIRONMENTAL LAW AND 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.	No. 74841-6-I ORDER DENYING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, GRANTING MOTION TO PUBLISH, AND SUBSTITUTING OPINION

The appellants, Center for Environmental Law and Policy, American Whitewater, and North Cascades Conservation Counsel, have filed a motion for reconsideration of the opinion filed on July 11, 2016. At the request of the panel, the respondents, Washington Department of Ecology and Public Utility District No. 1 of Okanogan County, have filed a response.

No. 74841-6-I/2

The Department has filed a motion to publish the unpublished opinion filed on July 11, 2016, and the Center for Environmental Law & Policy, American Whitewater, and North Cascades Conservation Council have filed a response.

A panel of the court has considered both motions and has determined that the motion for reconsideration should be denied but the opinion should be withdrawn and a substitute opinion shall be published in the Washington Appellate Reports. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; it is further

ORDERED that the motion to publish is granted; it is further

ORDERED that the opinion filed on July 11, 2016 is withdrawn; and it is further

ORDERED that the substitute opinion shall be filed and published in the Washington Appellate Reports.

DATED this 17th day of October, 2016.

Appelwick, J

WE CONCUR:

Spearman, J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

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October 17, 2016

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CASE #: 74841-6-I
Center for Environmental Law & Policy, et al., Appellants v. Dept of Ecology, et al., Respondents

Thurston County, Cause No. 14-2-0148-1

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Honorable Gary Tabor

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CENTER FOR ENVIRONMENTAL LAW AND 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.	No. 74841-6-I DIVISION ONE PUBLISHED OPINION FILED: October 17, 2016

APPELWICK, J. — The Pollution Control Hearings Board (PCHB) affirmed the Department of Ecology's (Ecology) issuance of a Report of Examination (ROE), ordering the approval of a water right for the Public Utility District No. 1 of Okanogan County's (PUD) hydroelectric project. The project would divert water from a portion of the Similkameen River through a powerhouse. To satisfy the public interest requirement of RCW 90.03.290, the ROE included a condition that the PUD would be required to ensure that the minimum flows in the bypass reach portion of the river would be the same as those found to be adequate to protect

aesthetic values as determined by a future study. Appellants assert that the PCHB erred in affirming Ecology's issuance of the ROE when the aesthetic study has not yet been completed and when Ecology did not condition the ROE on the minimum instream flow rule in WAC 173-549-020. We affirm.

CLEAN WATER ACT CERTIFICATION

The Enloe Dam is located on the Similkameen River near Oroville, Washington in Okanogan County. Approximately 350 feet downstream from the dam, there is a natural waterfall known as Similkameen Falls. The dam operated to produce hydroelectric power from 1922 to 1958. The PUD has owned the dam since 1945. The PUD seeks to resume hydropower operations at the dam. Consequently, it launched the Enloe Dam Project (the Project).

The Project includes constructing a new powerhouse for hydropower generation that will be situated on the bank of the river, raising the height of the existing dam by five feet and increasing the size of the reservoir behind the dam. The Project will withdraw water from the reservoir behind the dam, diverting the water around the dam and through the new powerhouse. The diverted water will be returned to the river 370 feet downstream from the dam, directly below the waterfall. The 370-foot stretch of river impacted by the diversion is referred to as the "bypass reach."

The PUD has received various federal and state permits or approvals for the Project. The PUD received a license from the Federal Energy Regulatory Commission (FERC) for construction of the Project. That license required Ecology approval of a Section 401 Water Quality Certification (401 Certification)

under the authority of the Federal Clean Water Act (CWA).[1] The CWA provides that a certification made by a certifying agency—here, Ecology[2]—shall include a statement that there is a "reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3).

Ecology issued the 401 Certification in July 2012. Ecology had investigated the proposal for conformance with both state and federal law. Ecology found reasonable assurance that the operation of the Project would comply with state and federal water quality standards and other appropriate requirements of state law. But, it made that finding subject to several conditions. Among them, Ecology imposed conditions specifically related to the aesthetics of the Project. One such condition was that the PUD would be required to ensure that the Project divert water from the reservoir, pipe it around the dam, and release it near the base of the dam. This would be done at a rate of 30 cubic feet per second (cfs) from September 16 to July 15 and 10 cfs ("10/30 flows") from July 16 to September 15, for aesthetic purposes as well as for fish and other aquatic life purposes. This condition was ostensibly to prevent water from warming as it flowed over the dam and through the bypass reach—something that would be harmful for fish. The condition did not require a minimum flow over the dam. Ecology also required a monitoring program for the period of the license, with a five year adaptive management approach that required increasing

[1] 33 U.S.C. §§ 1313, 1341

[2] RCW 90.48.260 states that the Department of Ecology is designated as the state water pollution control agency for purposes of the CWA.

and resetting the minimum flows for a season in which water quality standards were violated.

Several organizations—including the appellants—appealed Ecology's 401 Certification to the PCHB. One issue in the appeal was whether the 10/30 flows would impair the aesthetics of water flowing over the dam and the falls. Following cross motions for summary judgment, the PCHB decided that the 401 Certification provided reasonable assurance the Project would comply with applicable water quality standards regarding temperature, recreation, salmonid spawning, rearing, and migration. But, the PCHB denied summary judgment as to the issues regarding aesthetics for flows over the dam and the falls. Specifically, was there a reasonable assurance that water quality standards will not be violated regarding (1) Ecology's finding that no minimum flows are required over the dam, and (2) the adequacy of the 10/30 flows Ecology established for flows over the falls? As to the first issue, the PCHB stated that while the dam is not a natural feature, it has created an aesthetic feature on the river for many decades. And, it stated that minimum flows over the dam should be considered in determining whether the 401 Certification properly provides assurance that the operation of the Project will not violate the water quality standards regarding aesthetics. As to the second issue, the PCHB noted that there were disputed issues of material fact, because experts stated that 10/30

flows did not protect aesthetic values of either the dam or the natural falls. Consequently, the PCHB held a hearing on these issues.[3]

On August 3, 2013, the PCHB issued a final decision in the 401 Certification appeal. The PCHB found that if a gate limited the surface water flow over the dam to a 10-foot width of flow, the temperature of the water as it flows over the dam would not increase at either 10 cfs or 30 cfs. The PCHB concluded that expert opinions were not determinative of whether the 10/30 flows, which included no flows over the dam, was aesthetic. The PCHB concluded that the evidence before Ecology as to the impact on aesthetics—based on an expert's "visualization" of the flows, modeling based on aesthetic flows at 20, 40, and 80 cfs, and photo simulations of the views of the falls—was inadequate. It concluded that there was insufficient evidence to make a finding that the 10/30 flows meet the water quality standards for aesthetic values even when considering protecting the fisheries. The PCHB concluded that Ecology must develop a monitoring program of the visual effect of the different flow levels, which can be implemented as the Project commences and becomes capable of controlling flows over the dam and the falls. It mandated that the flow plan

[3] The CWA states that any applicant for a federal license or permit to conduct any activity, which may result in any discharge into navigable waters, shall provide the licensing or permitting agency a certification from the State that the activity will comply with all applicable state and federal water quality standards and any other appropriate requirement of state law. 33 U.S.C. § 1341(a)(1); 33 U.S.C. § 1341(d). The PCHB noted that the protections for aesthetics in RCW 90.54.020(a) and (3)(a)—general declaration of fundamentals for utilization and management of waters in Washington—is recognized as an "other appropriate requirement of state law" under the CWA § 401.

should include an analysis of the flows over the dam within the proposed 10-foot wide release area.

Ultimately, the PCHB affirmed the 401 Certification subject to additional conditions:

> The §401 Certification is affirmed, subject to the additional condition that 10/30 cfs minimum instream flows over the Dam and Falls for the aesthetic values shall be further monitored and evaluated by Ecology during initial operation of the Project (within three years). After Ecology obtains additional data and analysis of alternative flows over the Dam and the Falls, the 10/30 cfs flow shall either be confirmed or revised as a condition of project operation and the §401 Certification. Ecology shall develop an aesthetic flow monitoring program . . . .
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> . . . .
>
> As a result of the monitoring program, Ecology shall make a finding of the aesthetic flows that meet the water quality standards for aesthetic purposes and is consistent with this Order. At the completion of the monitoring program, the Project shall operate subject to those flows and the §401 Certification shall be conditioned to reflect such flows, either confirming the current flow regime or revising it based on Ecology's findings.

WATER RIGHTS LAW

Washington has a multistep procedure before new water rights can be acquired. Lummi Indian Nation v. Dep't of Ecology, 170 Wn.2d 247, 252, 241 P.3d 1220 (2010). Once a party has applied for a water right, Ecology determines what water, if any, is available and finds and determines to what beneficial use or uses it can be applied. RCW 90.03.290(1). If Ecology is satisfied that water is available and the proposed use is a beneficial use, it issues a permit specifying the amounts of water that can be taken and the beneficial uses to which that water may be applied to. RCW 90.03.290(3). RCW

90.03.290 establishes a four part test that Ecology applies when considering an application for a water right permit. Postema v. Pollution Control Hr'gs Bd., 142 Wn.2d 68, 79, 11 P.3d 726 (2000). Under the statute, Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare. RCW 90.03.290(3); Postema, 142 Wn.2d at 79. And, under RCW 90.03.290(1), if the application proposes to appropriate water for the purpose of power development, Ecology must 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. Where the proposed water use threatens to prove detrimental to the public interest, it shall be the duty of Ecology to reject the application and to refuse to issue the permit asked for. RCW 90.03.290(3).

A water right permit represents only an inchoate right, which does not become choate until the water right is perfected. Lummi, 170 Wn.2d at 253. Before the right is perfected, the applicant has only an incomplete appropriative right in good standing. Id. It remains in good standing so long as the requirements of law are being fulfilled, and it matures into an appropriative water right on completion of the last step provided by law. Id. RCW 90.03.330 governs water right certificates. Upon a showing satisfactory to Ecology that any appropriation has been perfected in accordance with the provisions of chapter 90.03 RCW, Ecology will issue to the applicant a certificate and it will be recorded with Ecology. RCW 90.03.330(1).

WATER RIGHT PROCEEDINGS

Shortly after the PCHB issued its final decision in the 401 Certification appeal, on August 6, 2013, Ecology issued a ROE and ordered the approval of Water Right Permit No. S4-35342.[4] The water right will authorize the PUD to withdraw an additional 600 cfs of water from the river behind the dam. The ROE noted that the only affected portion of the river would be the bypass reach with flows in the river otherwise remaining unchanged. Consequently, Ecology considered the use of the water to be non-consumptive,[5] except with regard to the bypass reach. The 10/30 minimum flows required by the 401 Certification were incorporated into the ROE:

> 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.

The ROE also stated that if the 401 Certification is modified in the future, the water right would be subject to the conditions of the revised 401 Certification.

After Ecology issued the ROE, the Center for Environmental Law and Policy, American Whitewater, North Cascades Conservation Council (collectively "CELP"), and Columbia River Bioregional Education Project, appealed to the PCHB seeking that it find the ROE invalid. The PUD filed a motion for summary judgment on all issues raised. Ecology filed a joinder in support of the PUD's

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[4] That ROE is the subject of this appeal.

[5] Water used consumptively diminishes the source and is not available for other uses. By contrast, non-consumptive water use does not diminish the source or impair future water use.

motion. On March 31, 2014, CELP filed a cross motion for summary judgment. CELP made three arguments. First, it argued that Ecology has not and cannot meet its statutory duty to make a final public interest determination under RCW 90.03.290 until it completes the aesthetic flow study mandated in the 401 Certification. Secondly, it argued that because Ecology lacked adequate information to make a public interest determination, it could only deny the water right or issue a preliminary permit. Finally, it asserted that the ROE does not condition the PUD's water right on the Similkameen's instream flows as required by WAC 173-549-020. Both parties agreed that there were no genuine issues of material fact and that the matter could be resolved on summary judgment.

On June 24, 2014, the PCHB issued an order granting summary judgment in favor of the PUD and Ecology:

> Ecology's approval of the application based on the terms and conditions of the ROE is AFFIRMED on all substantive grounds, with the exception that Ecology shall issue the permit with a condition that sets forth the protocol for the aesthetic flow study in the same language as the Board had ordered for the §401 Certification, and upon completion of the study the permit shall be amended specifying the aesthetic minimum instream flows that shall be protected if it is other than the 10/30 flows.

It concluded that a water right certificate shall not issue prior to the completion of the study and the permit amendment.

On July 24, 2014, CELP filed a petition for review[6] of the PCHB's decision in Thurston County Superior Court. It asserted that the PCHB's decision and the underlying ROE decision were arbitrary and capricious, because of their

[6] Columbia River Bioregional Education Project did not join the petition for review.

deliberate and unreasoned disregard of the facts and circumstances, including legal mandates set forth in RCW 90.03.290 and WAC 173-549-020. The superior court affirmed the PCHB's decision, reasoning that CELP failed to carry its burden of showing that the PCHB erred when it determined that it would be in the public interest to issue the ROE subject to the same criteria that additional facts be gathered as it did for the 401 Certification.

CELP filed a notice of appeal to this court, challenging the superior court's judgment upholding the PCHB's decision granting PUD and Ecology summary judgment.[7]

DISCUSSION

CELP makes three main arguments in this appeal. First, it argues that the PCHB erred in finding that PUD's water permit complied with RCW 90.03.290's public welfare requirement. It contends this is so, because Ecology improperly made this determination in the face of incomplete information: the aesthetic study required by the 401 Certification is not yet complete. Secondly, it claims that when faced with this incomplete information Ecology had the discretion only to deny the permit or issue a preliminary permit—not issue the ROE. Finally, it argues that the PCHB erred in finding that the ROE did not violate the minimum instream requirements in WAC 173-549-020.

[7] Northwest Hydroelectric Association (NHA) filed an amicus curiae brief in this case opposing CELP's appeal. CELP argues that this court should disregard NHA's brief. And, in a motion to strike, CELP asserts that the panel should strike PUD's response to NHA's brief. Because we did not rely on the information in the amicus curiae brief—or in PUD's response—in reaching our decision, we need not rule on CELP's motion to strike.

We review PCHB orders under the Washington Administrative Procedures Act (WAPA).[8] Port of Seattle v. Pollution Control Hr'gs Bd., 151 Wn.2d 568, 587, 90 P.3d 659 (2004). This court reviews the PCHB's action from the same position as the superior court and applies WAPA standards directly to the PCHB's record. Skagit Hill Recycling, Inc. v. Skagit County, 162 Wn. App. 308, 317-18, 253 P.3d 1135 (2011). Under WAPA, the party challenging an administrative order or agency action—here, CELP—bears the burden of demonstrating its invalidity. Port of Seattle, 151 Wn.2d at 587; RCW 34.05.570(1)(a). WAPA authorizes relief in only certain circumstances, including if the agency's order is outside the statutory authority or jurisdiction of the agency, if the agency erroneously interprets or applies the law, or if the order is arbitrary and capricious. RCW 34.05.570(3). Administrative action is arbitrary and capricious if it is willful, unreasoned, and taken without regard to the facts and circumstances. Dep't of Ecology v. Theodoratus, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998).

Where, as here, the original administrative decision was on summary judgment, the reviewing court overlays the WAPA standard of review with the summary judgment standard. Skagit Hill, 162 Wn. App. at 318. This court reviews the PCHB's ruling made on summary judgment de novo, making the same inquiry as the PCHB. Cornelius v. Dep't of Ecology, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). This court's review is limited to the record before the PCHB. Puget Soundkeeper All. v. Pollution Control Hr'gs Bd., 189 Wn. App.

[8] Chapter 34.05 RCW

127, 135, 356 P.3d 753 (2015). Accordingly, this court reviews the facts in the record in the light most favorable to the nonmoving party. Skagit Hill, 162 Wn. App. at 318. Summary judgment is appropriate only where the undisputed material facts entitle the moving party to judgment as a matter of law. Id.

Ecology's decision to issue water appropriation permits under RCW 90.03.290 is discretionary and, therefore, will not be reversed absent a clear showing of abuse.[9] Dep't of Ecology v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 767, 827 P.2d 275 (1992). A party seeking a reversal under this standard must show that the discretion was exercised in a manner which was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Id.

Here, the PCHB concluded that a water right certificate shall not issue prior to the completion of the aesthetic study. And, it affirmed Ecology's decision to issue a ROE on all substantive grounds.[10] Therefore, the ultimate issues we must decide are (1) whether Ecology had the authority to issue a ROE, ordering the approval of an inchoate water right subject to the condition that it be potentially later revised to adhere to the flows deemed sufficient by a future aesthetic study and (2) whether it abused its discretion in doing so.

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[9] CELP argues that the standard of review is de novo. It notes that this case poses purely a legal question—whether Ecology properly interpreted and applied RCW 90.03.290 to authorize a water right in the face of incomplete information. We review whether Ecology properly interpreted the law de novo. But, to the extent that the issues in the case call for this court to determine whether Ecology properly applied RCW 90.03.290 when it issued the water right, we apply the abuse of discretion standard of review.

[10] The PCHB determined that Ecology shall issue the permit with specific language referencing the protocol for the aesthetic flow study in the same language as the PCHB had ordered for the 401 Certification. CELP does not challenge the PCHB's actions, only its final decision granting summary judgment.

I. Public Interest

CELP asserts that the PCHB erroneously interpreted and applied the law by affirming Ecology's issuance of the ROE when the 401 Certification study had not yet been completed. It contends that it was contrary to law for the PCHB to assume as a matter of law that there will be no detriment to the public interest when it is undisputed that additional information is needed to make the public interest[11] determination. CELP asserts that because there is no credible evidence yet as to how the 10/30 flows will appear aesthetically over the dam and the falls, that Ecology could not make the public interest finding.

RCW 90.03.290 establishes a four part test that Ecology applies when considering an application for a water right. Postema, 142 Wn.2d at 79. Under the statute, Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare.[12] RCW 90.03.290(3); Postema, 142 Wn.2d at 79. Aesthetics is a component of the public interest analysis. See RCW

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[11] The parties somewhat interchangeably use "public interest" and "public welfare." This is likely because RCW 90.30.290 refers to both. The use of the different terms does not appear to impact the parties' arguments nor does it impact our analysis.

[12] We note that Ecology and PUD emphasize that Ecology need only make a finding that the Project would not likely prove detrimental to the public welfare. While RCW 90.03.290(1) states that if a proposed water appropriation is for the purpose of power development, Ecology's investigation should focus on finding whether the proposed development is likely to prove detrimental to the public interest, RCW 90.03.290(3) states that Ecology must enter a finding that the water will not be detrimental to the public welfare. Thus, this distinction is ultimately immaterial to determining whether Ecology had the authority to condition the water right on the flow monitoring study before it had the results of the study.

90.54.020(1). Management and utilization of Washington waters are guided by a general declaration of fundamentals in RCW 90.54.020. RCW 90.54.020(1) establishes which uses of water are deemed beneficial. Use for hydroelectric power production and preservation of environmental and aesthetic values is considered beneficial. Id. RCW 90.54.020(3)(a) states that the quality of the natural environment shall be protected and, where possible, enhanced such that perennial rivers and streams shall be retained with base flows necessary to provide for preservation of wildlife, scenic, aesthetic and other environmental values, and navigational values.

While evaluating the Project, Ecology considered the four part test outlined in RCW 90.03.290. In so doing, Ecology did not ignore the fact that aesthetics is a necessary component of the public interest finding. It squarely acknowledged the necessity of protecting aesthetics. In the 401 Certification appeal, the PCHB noted there was evidence in the record that flows could not be manipulated under existing conditions. There was testimony that collecting good data and taking accurate measurements in the bypass reach for the purpose of analyzing different flow regimes over the falls would be dangerous based on the velocity of the flows. In order to get the necessary facts to address the aesthetics issue, the Project had to proceed subject to further study.

Ecology incorporated the same study conditions that the PCHB imposed on the 401 Certification—which were based on this same statutory aesthetics

provision—to ensure that the spirit of the law was carried out.[13] As to the public welfare requirement, Ecology found:

> 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.

The PCHB addressed whether this finding could be made and should be sustained:

> This case is unique because the §401 Certification has already been approved with a condition for a study to determine the aesthetic flows. Ecology will be developing these aesthetic flows in compliance with the Water Resources Act of 1971, ch. 90.54 RCW, which requires the protection of designated beneficial uses such as aesthetics, and using the authority of the water code for issuing water rights and the CWA for issuing a §401 Certification. In their appeal of the ROE, the Appellants specify that they "do not seek additional aesthetic analysis outside of the 401 Certification Process or challenge the sufficiency of the aesthetic flow-monitoring program required in the PCHB's 401 Certification decision." Under these circumstances, Ecology properly exercised its discretion to authorize the permit and address the public interest requirements of preserving aesthetic values with similar requirements in the §401 Certification.
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> Further, unlike in Black Rock[14] or Squaxin Island[15], this is not a case in which available information shows that the applicant cannot

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[13] CELP argues that because water rights and 401 Certifications are distinct permits with different purposes that are issued pursuant to different statutory authority and standards, it was error for the PCHB to base its public interest finding on the outcome of the 401 Certification aesthetic flow test. But, the PCHB did not base its public interest finding on the outcome of that test. It made the finding subject to the condition that the ROE eventually adhere to the flows deemed acceptable in the aesthetic flow test.

> meet some aspect of the four-part test for a water right. Rather, the Board concluded that some additional assessment is needed to finalize the appropriate level of aesthetically protective flows on the Similkameen River in the area of the project.

(Internal citations omitted.) We agree with this analysis. And, the PCHB specifically added language mandating that a final water right certificate cannot issue prior to the completion of the aesthetic study and the permit amendment, if necessary.[16] On this record, Ecology's finding that the public welfare requirement was satisfied was not arbitrary and capricious. Ecology did not abuse its discretion approving the ROE with the conditions imposed.

Next, CELP maintains that because the PCHB found that additional monitoring and analysis of actual minimum flows is necessary to assess the proper protection of aesthetic values, Ecology's discretion was limited by statute to either deny the permit or issue a preliminary permit.

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[14] Black Star Ranch Neigh. Ass'n v. Dep't of Ecology, No. 87-19 (Wash. Pollution Control Hr'gs Bd. Feb. 19, 1988) (It is clear from the record that the PCHB's reference to "Black Rock" was in fact a reference to "Black Star.").

[15] Squaxin Island Tribe v. Dep't of Ecology, No. 05-137 (Wash. Pollution Control Hr'gs Bd. Nov. 20, 2006).

[16] CELP asserts that the study required by the 401 Certification may show that there is no flow level that protects both aesthetic values and the fishery resource—a higher minimum flow may result in too high of temperatures in the bypass reach. And, it asserts that it is possible that the aesthetic flow study could result in a required flow that is so high that it renders the Project uneconomical and unacceptable to PUD. We accept that this is a possibility. In fact, we acknowledge at least three possibilities: (1) The study may indicate that either the 10/30 flows or a different flow level is protective of aesthetics, the fishery resource, and would be sufficient to support the Project; (2) The study may indicate that there is no flow level that is protective of both the fishery resource and aesthetics, and Ecology may withdraw the water right permit; (3) The study may indicate that there is no flow level that is protective of both the fishery resource and aesthetics, and Ecology may still decide to issue the final water certificate. Importantly, Ecology's decision to amend or not amend the conditions after the study will be subject to challenge.

RCW 90.03.290(2)(a) states that if a water appropriation application does not contain and the applicant does not promptly furnish sufficient information on which to base findings that the proposed development is not likely to prove detrimental to the public interest, Ecology may issue a preliminary permit. The permit may be valid for up to three years while requiring the applicant to complete investigations or studies. RCW 90.03.290(2)(a). CELP recognizes that the language of this statute is clearly discretionary.

CELP also agrees Ecology has the inherent authority in its discretion to impose conditions on any permit it issues. See Theodoratus, 135 Wn.2d at 597 (stating that generally, an agency which has authority to issue or deny permits has authority to condition them); State v. Crown Zellerbach Corp., 92 Wn.2d 894, 899-900, 602 P.2d 1172 (1979) ("[T]he power to disapprove [a permit] necessarily implies the power to condition an approval."). However, it asserts that when the information to make one of the four required findings under the statute is lacking, a preliminary permit is the only mechanism for the permit application to move forward.

The PCHB responded to this argument by noting:

> The Board finds [RCW 90.03.290(2)(a)] to be unambiguous. See State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001) ("The courts do not engage in statutory interpretation of a statute that is not ambiguous[.]"). Rather than limiting Ecology's authority to issue a permanent new water right, the plain language of the statute provides Ecology with authority to issue a different kind of permit (a "preliminary permit") that ensures the application can remain in good standing while the applicant undertakes "such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary." RCW 90.03.290(2)(a). The decision whether to issue a preliminary permit in lieu of a

> permanent new water right, when information is incomplete on an aspect of the four-part test, is still a choice that remains within Ecology's discretion.

We agree. The statute is not ambiguous and does not require construction. Nothing in RCW 90.03.290(2) limits Ecology's authority to impose conditions on permits that are not issued pursuant to that section. Therefore, we reject CELP's argument that Ecology had the authority to issue only a preliminary permit or to deny the permit.

We conclude that Ecology had authority to issue a ROE, and water permit, which was subject to a condition to ascertain information that was not available prior to proceeding with the Project. Ecology did not abuse its discretion in determining that the PUD's water permit should issue subject to the stated conditions. We hold that the PCHB properly granted respondents' motion for summary judgment on these issues.

II. Minimum Instream Flow Rule

Next CELP argues that the PCHB erred when it found that the ROE did not violate the minimum flow requirements in WAC 173-549-020. WAC 173-549-020(2) establishes a minimum instream flow for the Similkameen River—between 400 cfs and 3,400 cfs depending upon the month. WAC 173-549-020(5), however, states that projects that would reduce the flow in a portion of the stream's length (such as a hydroelectric project that bypasses a portion of the stream) will be subject to instream flows as specified by Ecology. The 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).

The PCHB found that WAC 173-549-020(5) explicitly excludes those projects that reduce the flow in only a portion of a stream's length from compliance with the minimum instream flows established by WAC 173-549-020(2). As a result, it found that the minimum instream flows for the Similkameen River in WAC 173-549-020(2) do not apply to the Project unless Ecology decides to apply those flows in its discretion.

This court shows deference to an agency's interpretation of its own regulations. Puget Soundkeeper, 189 Wn. App. at 136. Nonetheless, the agency's interpretation is not binding and deference to an agency is inappropriate where the agency's interpretation conflicts with a statutory mandate. Id. To interpret agency regulations, this court applies the same principles used to interpret statutes. Id.

CELP argues that the ROE improperly invoked the exception in WAC 173-549-020(5) and does not condition PUD's water right on the minimum instream flows as required by law. CELP notes that the general rule for instream flows is outlined in RCW 90.03.247 ("Whenever an application for a permit to make beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to protect the levels or flows."). CELP notes that there is only one statutory exception to the general rule—RCW 90.54.020(3)(a). RCW 90.54.020(3)(a) states that withdrawals of

water which conflict with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values shall be authorized in only those situations where it is clear that overriding considerations of the public interest (OCPI) shall be served.

CELP maintains that even if the regulatory exception outlined in WAC 173-549-020(5) applies, all water right applications must first satisfy the OCPI exception in RCW 90.54.020(3)(a). CELP asserts there was no such finding here. CELP cites to Swinomish Indian Tribal Community. v. Department of Ecology, 178 Wn.2d 571, 311 P.3d 6 (2013), to support its assertion. In Swinomish, Ecology issued an amended instream rule. Id. at 577-78. That rule authorized appropriations of water that would impair the minimum instream flows based on Ecology's finding that the uses of the water were for "overriding considerations of the public interest" pursuant to RCW 90.54.020(3). 178 Wn.2d at 576. The Swinomish court held that the OCPI exception does not permit Ecology to reallocate water that is needed to maintain the instream flows through reservations of water for future beneficial uses. Id. at 602.

CELP also cites to Foster v. Department of Ecology, 184 Wn.2d 465, 362 P.3d 959 (2015) to support its assertion. Foster involved a challenge to a water right permit issued by Ecology to a city. Id. at 468-69. The city's application was for a municipal water permit to meet the water needs of the city's growing population. Id. at 469. Because the appropriation would impair the minimum flows of two waterways, the city created a mitigation plan and Ecology approved the permit conditioned on the mitigation plan. Id. at 469. Citing to Swinomish,

the Foster court held that Ecology exceeded its authority by approving the city's water permit under the narrow OCPI exception, because the exception permits only temporary impairment of minimum flows—not the permanent impairment of minimum flows. Id. at 474-75. CELP argues that likewise, here, the water right would permanently impair the instream flows adopted in the minimum instream flow rule. It argues that permanent impairment of an instream flow under the guise of an exception that is not compliant with RCW 90.54.020 is precisely what Foster forbids.

Unlike in Swinomish and Foster, Ecology did not approve the water right under the OCPI exception. And, this was not because Ecology erroneously skipped over the OCPI exception step. Instead, Ecology did not need to invoke that exception, because it invoked the regulatory exception in WAC 173-549-020(5)—a rule promulgated under chapters 90.22 RCW and 90.54 RCW.[17] RCW 90.22.010 grants Ecology express authority to establish minimum water flows. And, RCW 90.54.040 provides that Ecology is directed, through the adoption of rules, to insure that the waters of the state are utilized in the best interest of the people. WAC 173-549-020(1) establishes the minimum instream flows for the Similkameen River. And, WAC 173-549-020(5) provides a minimum instream flow exception for hydroelectric projects such as the PUD's that are consumptive for only a portion of the stream's length. Chapter 90.22 RCW and 90.54 RCW authorized the adoption of WAC 173-549-020, and it went through the

[17] RCW 90.03.247 also establishes that Ecology has the exclusive authority to establish minimum flows and levels.

rulemaking process. Therefore, whether Ecology can decrease the minimum instream flow via a regulatory exception has been resolved. Notably, CELP does not challenge the validity of WAC 173-549-020. The plain language of WAC 173-549-020(5) is clear, and it carves out a regulatory exception to WAC 173-549-020(1) and (2)'s minimum flows notwithstanding the statutory OCPI exception in RCW 90.54.020(3)(a).

Still, CELP contends that when Ecology invokes the exception set forth in WAC 173-549-020(5), which authorizes a deviation from the instream flows set by rule, it must do so in a manner that complies with the requirements of RCW 90.54.020(3)(a). CELP argues that, in this case, Ecology failed to comply with RCW 90.54.020 by "specifically tailoring" flows for the Project as is required under WAC 173-549-020(5). CELP maintains that "specifically tailor" implies that there must be some basis to justify the alternative flow. And, that Ecology's exclusive reliance on flows that have been deemed in need of further study by the PCHB was not a "specific tailoring" to the Project and stream reach.

But, the aesthetic flow testing required by the 401 Certification and incorporated into the ROE is plainly designed to result in instream flows that are specifically tailored to the particular circumstances of the Project. CELP provides no support for its implicit assertion that the flows specifically tailored to the Project need be definitively determined before issuance of the ROE. The flow study required by the 401 Certification may confirm that the 10/30 flows are protective of aesthetic values, in which case the flows need not change, or it may trigger amendment of the flows in the 401 Certification and the ROE. In other

words, the flows will be specifically tailored. CELP did not carry its burden of demonstrating that the ROE violates the minimum instream flow rule. Consequently, we hold that the PCHB did not err when it granted summary judgment on this issue.[18]

We affirm.

WE CONCUR:

[18] Because CELP is not the prevailing party, its request that this court award it attorney fees and costs pursuant to RCW 4.84.350 is moot.

APPENDIX B

Center for Environmental Law & Policy, American Whitewater, Columbia River Bioregional Education Project, and North Cascades Conservation Council v. State of Washington Dep't of Ecology and Public Utility Dist. of Okanogan County, PCHB No. 13-117. Order on Motions for Summary Judgment.

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN WHITEWATER, COLUMBIA RIVER BIOREGIONAL EDUCATION PROJECT, and NORTH CASCADES CONSERVATION COUNCIL, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and PUBLIC UTILITY DISTRICT OF OKANOGAN COUNTY, WASHINGTON, Respondents.	PCHB No. 13-117 ORDER ON MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

Appellants Center for Environmental Law & Policy, American Whitewater, Columbia River Bioregional Education Project, and North Cascades Conservation Council (collectively, CELP) filed this appeal with the Pollution Control Hearings Board (Board) challenging the Report of Examination issued by the Department of Ecology (Ecology) approving water right application No. S4-35342[1] (ROE). The ROE was issued to Public Utility District No. 1 of Okanogan County (PUD) for operation of the Enloe Dam Hydroelectric Project (Enloe Dam Project or Project) on the Similkameen River near Oroville, Washington.

[1] There was some confusion in the briefing in regard to the document under appeal. CELP appealed Ecology's decision to approve the application and issue a water right permit based on the findings and conclusions in the ROE. The CELP appeal was filed prior to Ecology issuing a water right permit. Because of the appeal, a permit was not issued. The ROE is the document being challenged.

The parties agreed to the following three legal issues which were set out in the Pre-hearing Order that governs the case:

1. Did Ecology violate the state water code and other applicable law by determining that public interest and public welfare requirements set forth in RCW 90.03.290 were met by incorporating the instream flow requirements in the District's 401 water quality certification?
2. Did Ecology violate the state water code and other applicable law by failing to condition the water right on the instream flow requirements in accordance with WAC 173-549-020(2)?
3. Did Ecology violate the state water code and other applicable law by determining that the water right should be issued as a permanent water right as opposed to being denied or issued as a temporary or preliminary water right?

See Pre-Hearing Order (Sept. 27, 2013).

On March 3, 2014, the PUD filed a motion for summary judgment on all three issues in the case. Ecology joined in the motion. CELP opposed the motion and filed a cross-motion for summary judgment on all issues.

The Board hearing this matter was comprised of Chair Tom McDonald, and Members Kathleen D. Mix and Joan M. Marchioro. Administrative Appeals Judge Kristie C. Elliott presided. Attorneys Craig Gannett, David Ubaldi, and Ame Wellman Lewis represented the PUD. Assistant Attorney General Robin G. McPherson represented Ecology. Attorneys Andrea K. Rodgers Harris, Suzanne Skinner, and Kristen J. Larson represented CELP. The Board reviewed the following materials in deliberating on this motion:

1. Motion for Summary Judgment of Respondent Okanogan Public Utility District No. 1 (PUD Motion)
   a. Declaration of David Ubaldi with Exs. A-J (Ubaldi Decl.);
2. Respondent Department of Ecology's Joinder in Public Utility District No. 1's Motion for Summary Judgment (Ecology Joinder);

3. Appellant's Cross-Motion for Summary Judgment and Combined Memorandum in Support of Summary Judgment and in Response to Respondent's Motion for Summary Judgment (CELP Cross-Motion);
   a. Declaration of Andrea K. Rodgers Harris with Exs. 1-5 (Rodgers Harris Decl.);
   b. Declaration of Jere Gillespie with Exs. A-B (Gillespie Decl.);
   c. Declaration of Karl Forsgaard (Forsgaard Decl.);
   d. Declaration of Thomas O'Keefe (O'Keefe Decl.);
4. Respondent Department of Ecology's Response in Opposition to Center for Environmental Law & Policy's Cross Motion for Summary Judgment (Ecology Response);
   a. Declaration of Kelsey S. Collins (Collins Decl.);
5. Respondent Okanogan Public Utility District No. 1's Reply and Response to Appellants' Cross Motion for Summary Judgment (PUD Response);
   a. Second Declaration of David Ubaldi with Exs. 1-2 (Ubaldi Second Decl.);
6. Appellants' Reply to Department of Ecology's and PUD's Responses in Opposition to Appellants' Cross Motion for Summary Judgment (CELP Reply).

Based on the evidence and record before the Board on the motions, the Board enters the following decision:

FACTS

The Enloe Dam (Enloe Dam or Dam) is a 315-foot long, 54-foot high concrete gravity arch structure, located on the Similkameen River near the town of Oroville in Okanogan County, Washington. The Dam was operated to produce hydroelectric power from 1922 to 1958. Since that time, the river has flowed naturally over the Dam to produce an aesthetically pleasing waterfall effect. A natural waterfall known as Similkameen Falls (the Falls) also exists approximately 350 feet downstream of the Dam. Ubaldi Decl., Ex. B at 5, 9; *see also Center for Environmental Law & Policy v. Ecology*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law and Final Order (As Amended Upon Reconsideration), Aug. 3, 2013) (§401 Final Order) at FF 1-2, pp. 4-5; FF 19, p. 11.

The natural flow of the Similkameen River over the Dam ranges from a monthly median of 500 to 7,000 cubic feet per second (cfs). Median flows are highest in spring (May – June) and can reach in excess of 6,000 cfs, with lower median flows in summer (July – October) that range from 514 to 764 cfs. The Falls below Enloe Dam are believed to be a natural barrier to fish passage upstream, except for Pacific lamprey. Native fish species below the Falls include summer-run Chinook salmon, sockeye salmon, Upper Columbia River steelhead, suckers and other species. Native species above the Dam include suckers, whitefish, and various other species. A small number of fish exist in the pool between the Dam and the Falls, probably by virtue of being swept over the Dam during high flows. Steelhead, summer Chinook, and sockeye salmon use the Similkameen River as thermal refuge until the Okanogan River cools to a level that allows the salmon to swim upstream to spawn. Temperature and dissolved oxygen levels in the river are water quality parameters of concern and present limiting factors for fish in the river, with temperature being the primary concern. Ubaldi Decl., Ex. C at 4-5; *see also* §401 Final Order at FF 2, 4, 5, pp. 4-6.

The PUD seeks to resume hydropower operations at the Dam under the Enloe Dam Project. The Project includes construction of a new powerhouse for hydropower generation that will be situated on the left (east) bank of the river, 460 feet upstream of the existing powerhouse, thereby considerably shortening the length of the river that would be dewatered by diversion of water into the powerhouse under historic operations. The height of the existing Dam will be raised by five feet, and the size of the reservoir behind the Dam will be increased to 88.3 acres. The Project will withdraw up to 1,600 cfs of water from the reservoir behind the Dam, diverting

the water around the Dam and through the new powerhouse. The diverted water will be returned to the river 370 feet downstream of the Dam, directly below the Falls. This 370-foot stretch of the river impacted by the diversion is referred to as "the bypass reach." The PUD will provide mitigation downstream of the Project to address potential impacts to aquatic life resulting from the project. Mitigation includes gravel augmentation to make up for lost sediment transport and the use of cooler groundwater to hydrate a side channel in summer months to address temperature concerns downstream of the Project. Ubaldi Decl., Ex. B at 5-9, Ex. C at 1-2; *see also* §401 Final Order at FF 12, 37, pp. 8, 19-20; FF 39, p. 21.

The PUD has received various federal and state permits or approvals for the Enloe Dam Project. The Federal Regulatory Energy Commission (FERC) granted a final license for the Enloe Dam Project (FERC No. 12569) under the Federal Power Act[2] on July 9, 2013. Ecology granted a Section 401 Water Quality Certification (§401 Certification) for the Project under authority of the federal Clean Water Act (CWA)[3] on July 13, 2012. At approximately the same time, Ecology approved four water right applications for the Project. Application No. S4-35342 was approved pursuant to the ROE that is the subject of this appeal. Ubaldi Decl., Ex. B at 5, Ex. C at 1.

The same parties appealing the ROE in this case were also among the appellants in the appeal of the §401 Certification (§401 appeal) issued by Ecology.[4] In that case, the appellants challenged whether the §401 Certification provided reasonable assurance that the Project would

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[2] 16 U.S.C. §791-828(c).
[3] 33 U.S.C. §§ 1313, 1341.
[4] The Sierra Club also appealed the § 401 Certification but is not an appellant in the present case.

comply with water quality standards and other appropriate requirements of state law regarding temperature, aesthetics, recreation, and salmonid spawning, rearing and migration. *See* §401 Summary Judgment Order at 1. The facts giving rise to that appeal and the Board's decisions, which include both an Order on Summary Judgment (§401 Summary Judgment Order) and later Findings of Fact, Conclusions of Law and Order (As Amended Upon Reconsideration) (§401 Final Order), are relevant to this appeal.

When it issued the §401 Certification in July 2012, Ecology found there was reasonable assurance the Project would not violate applicable water quality standards, subject to certain conditions.[5] One condition was that the Project would be required to maintain a minimum flow in the bypass reach of 10 cfs year-round and 30 cfs from mid-July to mid-September (the 10/30 flows). §401 Final Order at FF 36-37, pp. 19-20. Ecology initially developed the 10/30 flows for protection of fish species other than listed anadromous fish, in the bypass reach, but not for preservation of aesthetic values. Given continuing concern regarding the effects on aquatic life from temperature and dissolved oxygen, Ecology required a monitoring program for the period of the license, with a five-year adaptive management approach that required increasing and resetting the minimum flows for any season in which water quality standards were violated. Collectively, the 10/30 flows, monitoring and adaptive management approach required by the

[5] Section 401 of the CWA provides that any applicant for a federal license or permit to conduct an activity that may result in a discharge into navigable waters must obtain a certification from the state that the activity will comply with all applicable state and federal water quality standards and any other appropriate requirement of state law. 33 U.S.C. §1341(a)(1) and (d). As the designated agency for Washington State to issue the certification, Ecology must find there is "reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards." 40 C.F.R. §121.2(a)(3).

§401 Certification are referred to as the 10/30 flow regime. Ubaldi Decl., Ex. C; *see, e.g.,* §401 Final Order at FF 27, pp. 14-15 (use of term).

In the §401 Certification, Ecology did not require that any minimum flow be maintained over the Dam face for aesthetic purposes, but conditioned the Certification to require the 10/30 flow regime through the bypass reach and over the Falls to protect aesthetic values. Ecology concluded that maintaining greater flows for aesthetic purposes over the face of the Dam would increase water temperatures and impair fish habitat, because water flowing over the Dam increases in temperature during lower flows in summer months. Water diverted and discharged at the base of the Falls would not increase in temperature in this manner. No formal aesthetic-flow study was conducted for the bypass reach, based on the assumption that flow releases would be driven primarily by the biological needs of the listed fish species. Although Ecology conducted some analysis of the aesthetics of flows through the bypass reach, the agency lacked credible evidence of how the 10/30 flow would appear aesthetically through the bypass reach. Ubaldi Decl., Ex. C. at 9, 19; §401 Final Order at FF 13, p. 8; FF 28, p.15. *Center for Environmental Law & Policy v. Ecology*, PCHB No. 12-082 (Order on Motions for Summary Judgment, April 12, 2013) (§401 Summary Judgment Order) at 18.

On cross-motions for summary judgment in the §401 appeal, the Board decided that the §401 Certification provided reasonable assurance the Project would comply with applicable water quality standards regarding temperature, recreation, and salmonid spawning, rearing and migration. *Id.* at 20-25. Regarding aesthetics, the Board recognized that the river's natural flow over the Enloe Dam had for decades created an aesthetic feature that required consideration in

the §401 Certification process, as did the amount of flow through the bypass reach and over the Falls below the dam. *Id.* at 16-18. The Board recognized Ecology's authority to impose minimum flows in a §401 certification, and that this authority encompasses the protections afforded aesthetic values under both the state's Water Pollution Control Act, ch. 90.58 RCW, and Water Resources Act of 1971, ch. 90.54 RCW. *Id.* at 12-14. However, the Board found there were disputed issues of fact as to the need for and impact of aesthetic flows over the dam, and whether the 10/30 flows provided reasonable assurance of compliance with applicable water quality standards regarding aesthetic values. *Id.* at 18, 20. These issues became the subject of a six-day hearing in the spring of 2013.

The Board issued a final decision in the §401 appeal on August 3, 2013. The Board found that Ecology lacked sufficient evidence to determine that the 10/30 flows will protect aesthetic values in the Similkameen River, even when balancing aesthetic values with those directed at protecting fisheries. §401 Final Order at COL 17, p. 31-32. The 10/30 flows were developed and accepted by Ecology prior to any analysis of the aesthetic values. The Board concluded:

> Because aesthetic values of the flows over the Dam and Falls was not raised until late in the FERC and §401 application process, the evidence shows that the 10/30 cfs flows over the Falls with no flow over the Dam was initially selected as a minimum flow without first completing an analysis of whether the flows met the water quality standards for the aquatic and aesthetics designated uses. Ecology was simply pleased to have an instream flow in the bypass reach when the initial proposal was no flows. Caldwell Testimony. The 10/30 flow regime was thereafter modeled for temperature, DO, and TDG which showed that it is expected to meet water quality standards for the aquatic resources. *See* §401 Certification, p. 13, ¶ 5.2(9); p. 9, ¶ 4.5; p. 19, ¶ 5.8, *Ex. R-92.* As a result, any analysis of minimum flows for aesthetics was already defined and limited by the 10/30

cfs flow regime established for aquatic resources and failed to consider Project impacts on aesthetics of the river flows based on existing conditions.[5]

> [5]The existing conditions are, as Ecology states, the decades of natural flows over the Dam. As this Board found in its Order on Motions for Summary Judgment, the river has been flowing naturally over the Dam at the current rate since 1958, creating an aesthetic feature on the River for many decades while there was no diversion and power generation, and the aesthetic values of these flows should be considered as a designated and beneficial use under the §401 Certification. To the extent the impacts from the pre-1958 operations are relevant, the Project will at a minimum have a new impact of an additional 600 cfs diversion and loss of water through the bypass reach when natural flows exceed 1,000 cfs.

§401 Final Order at COL 9, p. 26.

Modeling had been performed to assess the distribution of aesthetic flows at 20, 40, and 80 cfs, but the accuracy of this analysis was questionable on technical grounds. *Id.* at FF 23, pp. 12-13. Photo simulations of the views of the Falls from a newly developed trail had also been provided, but these did not simulate the 10/30 flows. No analysis of actual flows had been performed, because flows could not be manipulated under existing conditions. *Id.* at FF 24, p. 13. Other evidence did not assess the aesthetic value of the flows. *See, e.g., id.* at FF 25, p. 14 (assessing aesthetics of the Project facilities); FF 27-28, pp. 14-16 (assessing recreational aspects of flows, but not how they appear aesthetically).

The Board affirmed Ecology's conclusion that increasing flows up to an unknown level above 30 cfs, or maintaining a 30 cfs flow over the Dam, would increase water temperature and impair salmonid fish habitat. However, Ecology had used the 10/30 flows as a baseline for this assessment, resulting in a limited opportunity to review alternative flows and project impacts.

The Board held that aesthetic flows must be determined independently of the operation of the Project (rather than considering the effect of aesthetic flows on the operation of the project), and thereafter be integrated with the needs of fish and other beneficial values. *Id.* at COL 10, p. 27.

The Board recognized that there was uncertainty as to both the correct aesthetic flow regime and those flows needed to protect the fishery resources. While Ecology had conditioned the §401 Certification to require an adaptive management and monitoring approach to address the fisheries resource protection issues, it had not done so with respect to aesthetic flows. Accordingly, the Board found that the aesthetic flow analysis "was not sufficiently completed" and concluded by saying: "The evidence is not sufficient to make a finding as to the flows that would protect aesthetic values without impairing the quality of the water for the fishery resource, which the Board finds would occur if the Project caused shallow flows over the bedrock shelves." *Id.* at COL 19, 20, p. 32-33. Although the Board concluded the aesthetic flow analysis had shortcomings, the Board relied on its authority to add conditions to the §401 Certification in order to bring the Certification into the realm of reasonable assurance.[6] The Board affirmed the §401 Certification, with added conditions as follows:

> The §401 Certification is affirmed, subject to the additional condition that 10/30 cfs minimum instream flows over the Dam and Falls for the aesthetic values shall be further monitored and evaluated by Ecology during initial operation of the Project (within three years). After Ecology obtains additional data and analysis of alternative flows over the Dam and the Falls, the 10/30 cfs flow shall either be confirmed or revised as a condition of project operation and the §401 Certification. Ecology shall develop an aesthetic flow monitoring program under the following guidelines:

[6] The Board has authority to add conditions to a §401 certification on appeal in order to bring the certification into the realm of reasonable assurance. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 601, 90 P.3d 659 (2004).

1. The program shall provide for management and control of alternative flows in the bypass reach that will provide opportunities for review, monitoring and analysis of either actual minimum flows or development and review of simulated flows.

2. Flows for aesthetic purposes as a condition of the §401 Certification shall not cause an increase in water temperature above the conditions that currently exist prior to operation of the Project that would violate water quality standards at any location in the Project area. A shallow flow across the bedrock shelves that would cause increases in the temperature should be avoided, and under no circumstance should the flows cause a violation of the water quality standards for salmonid spawning, rearing, and migration.

3. Ecology and the PUD may utilize a focus group and shall consult with the Fish Advisory Work Group to assist and provide advice regarding the proper balance between aesthetic flows and protection of water quality of the river for the fishery resource.

4. The program shall be for a period of time that provides Ecology with sufficient data and information to review actual flow levels or simulated flows. However, the program must be completed within three years from the commencement of the operation of the Project.

As a result of the monitoring program, Ecology shall make a finding of the aesthetic flows that meet the water quality standards for aesthetic purposes and is consistent with this Order. At the completion of the monitoring program, the Project shall operate subject to those flows and the §401 Certification shall be conditioned to reflect such flows, either confirming the current flow regime or revising it based on Ecology's findings.

Id. at pp. 33-34.

Shortly after the Board issued its final decision in the §401 appeal, Ecology issued the ROE and ordered the approval of Water Right Permit No. S4-35342 (Water Right). The Water Right will authorize the withdrawal of an additional 600 cfs from the Similkameen River behind Enloe Dam. In the ROE, Ecology confirmed that the only affected reach in the river would be the bypass reach, with flows in the river otherwise remaining unchanged. Ubaldi Decl., Ex. B at

14. Ecology thus considered the use of water to be non-consumptive, except with regard to the bypass reach. *Id.* at 11.

In support of 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. Ecology concluded that the §401 Certification conditions addressed protection for both aesthetic values and the fishery resource. *Id.* at 15, 17. Ecology noted that its "Water Resources and Water Quality Programs had worked collaboratively to determine the flows that will be required throughout the year in the bypass reach in order to operate the hydropower facility." *Id.* at 6-7. The ROE required that "the minimum flows set forth in the 401 Water Quality Certification must be maintained in the bypass reach." These numeric flows were incorporated into a table (Table 2) in the ROE, which further stated that:

> OKPUD will need to meet the bypass flows under the 401 Water Quality Certification, which are currently identified in Table 2, or as the bypass flow requirement in the 401 Water Quality Certification may be amended in the future.

Id. at 6-7 and Table 2.

The ROE stated that "should the Water Quality Certification be modified in the future, this water right will be subject to the terms and conditions of the revised Water Quality Certification." *Id.*

To date, the aesthetic flow study required by the Board in the §401 appeal has not been performed. CELP Cross-Motion at 11; Rodgers Harris Decl., Ex. 4 at 5.

CELP timely filed this appeal to challenge Ecology's issuance of the ROE.

ANALYSIS

A. Summary Judgment Standard

The summary judgment procedure is designed to eliminate trial when only questions of law remain for resolution, and the facts relevant to the legal determinations at issue are not contested by either party. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991). The party moving for summary judgment bears the initial burden to show there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). The inquiry then shifts to the party with the burden of proof at hearing. The appellant must make a showing sufficient to establish that a triable issue of fact exists. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). All facts and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

The parties to this case agree that no genuine issues of material fact exist and this matter can be resolved on summary judgment. The Board concurs and concludes that all issues may be fully resolved on summary judgment.

B. Ecology Properly Exercised its Authority and Discretion to Issue a Permanent New Water Right for the Enloe Dam Project Conditioned on the 10/30 Flow Regime from the Project's §401 Certification (Issues No. 1 and 3)

CELP questions Ecology's authority to issue a new water right that is conditioned on the 10/30 flows from the §401 Certification, prior to completion of the study required to determine

whether those flows protect aesthetic values in the Similkameen River (Issue No. 1). Without this information, CELP contends Ecology could only deny the application for a permanent new water right, or issue a preliminary or temporary permit (Issue No. 3). Ecology and the PUD argue there is no precedent for requiring that definitive numeric aesthetic flows first be determined through study before a permanent new water right can issue, and that the condition to meet the 10/30 flows as they may be modified is analogous to conditions placed on other permanent water rights, previously upheld by the Board.

Ecology is authorized to issue permits for the appropriation of public water from rivers and streams under the state Water Code, ch. 90.03 RCW. Before a permit is issued, "Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare." *Postema v. Pollution Control Hearings Board*, 142 Wn. 2d 68, 79, 11 P.3d 726 (2000); RCW 90.03.290(3). When a proposed new water right relates to power development, Ecology is specifically directed to "hav[e] in mind the highest feasible use of the waters belonging to the public" in determining "whether the proposed development is likely to prove detrimental to the public interest." RCW 90.03.290(1).

Ecology's decision to issue a new water right under RCW 90.03.290 is a discretionary act, and in exercising that discretion the agency has the authority to condition a permit to satisfy public interest concerns provided it complies with all relevant statutes. *Ecology v. Theodoratus*, 135 Wn.2d 582, 597, 957 P.2d 1241 (1998); *Schuh v. Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64

(1983); *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.").

In the Water Resources Act of 1971, the legislature declared that the preservation of aesthetic values is a declared beneficial use of water and as a matter of public policy must be considered in the allocation and management of the waters of the state. RCW 90.54.020(1), (3). Specifically, the legislature directed that minimum flows be maintained in rivers and streams in order to protect aesthetics, among other values:

> Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

RCW 90.54.020(3)(a) (emphasis added).

Where an application for a permanent new water right "does not contain, and the applicant does not furnish sufficient information on which to base such findings, the department may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary." RCW 90.03.290(2)(a). Ecology may issue a temporary permit that authorizes water to be put to beneficial use in the interim. RCW 90.03.250.

The PUD and Ecology correctly note that the Board has previously upheld the issuance of permanent new water rights that were conditioned on further monitoring, adaptive management, and/or potential corrective action. In the examples cited, however, information was available to

support Ecology in making an affirmative public interest determination and issuing the water rights in question.[7] In the §401 appeal, the Board found that additional monitoring and analysis of actual minimum flows or review of simulated flows is necessary to assess the proper protection of aesthetic values, as balanced against the quality of the water for the fishery resource. Thus, as argued by CELP, Ecology still needs additional information to make a public interest determination in relation to the PUD Water Right. §401 Final Order at COL 19, p. 32.

No case cited by the parties is directly on point, although *Black Star Ranch Neighborhood Ass'n v. Ecology*, PCHB No. 87-19 (Final Findings of Fact, Conclusions of Law and Order, Feb. 19, 1988) (Black Star Ranch) is instructive. The Board framed the issue on appeal there similar to that presented here, *i.e.* "what to do when incomplete information prevents answering" any part of the four-part test. *Id.* at COL V. CELP cites *Black Star Ranch* for the Board's recognition that "RCW 90.03.290 requires the issuance of a permit only if [Ecology] can answer affirmatively concerning all the statutory criteria." *See id.*; CELP Cross-Motion at 19. The Board went on to clarify, however, that Ecology's "duty to reject an

[7] *See, e.g., Bucklin Hill Neighborhood Ass'n v. Ecology*, PCHB No. 88-177 (Final Findings of Fact, Conclusions of Law and Order, June 26, 1989) (groundwater withdrawal permit that was affirmed by the Board contained a condition for monitoring that provided a mechanism for detection and correction of sea water intrusion, though available data indicated no problem with sea water intrusion); *Citizens for a Sensible Development v. Ecology*, PCHB No, 90-134 (Final Findings of Fact, Conclusions of Law and Order, May 22, 1991) (same); *Wilbert v. Ecology*, PCHB No. 82-193 (Final Findings of Fact, Conclusions of Law and Order, Aug. 4, 1983) (groundwater withdrawal permit conditioned on pumping limitations to prevent sea water intrusion was remanded by the Board for incorporation of additional monitoring and other conditions as a preventative measure, but the Board affirmed that available information showed the withdrawal would not cause or tend to cause sea water intrusion.).

application appears to arise upon answering about any of these same criteria in the *negative*." *Black Star Ranch* at COL V (emphasis added).[8]

The Board in *Black Star Ranch* affirmed Ecology's denial of a new permit because the available information had shown the risk of impairment was high. *Id.* Importantly, the Board considered the decision whether to issue a new water right when information is incomplete on an aspect of the four-part test, to be a matter of discretion for Ecology. As the Board explained:

> The water codes are designed to prevent new appropriators from buying into this kind of trouble. Otherwise the permit system would have no function. All uses could simply be regulated on the basis of priority. Where there wasn't enough water to go around, those who guessed wrong would just have to suffer the consequences. The permit system is intended, to the extent possible, to head off such problems before they occur. In large measure, the state water agency's function is prevention, not enforcement.
>
> [Ecology's] task invariably involves a degree of prediction using data that is not totally complete. It is a delicate task to determine when there is enough information to allow decisions which minimize perceived risks. The choice essentially is a matter of discretion. We see nothing inappropriate in the agency's exercise of discretion here. See, Schuh v. Department of Ecology, 100 Wn.2d 180, 667 P .2d 64 (1983).

Id. at COL VI.

Squaxin Island Tribe v. Ecology, PCHB No. 05-137, also cited by CELP, is consistent with the determination that this is a discretionary decision for Ecology.[9] In *Squaxin Island*, the

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[8] *See also Hubbard v. Ecology*, 86 Wn. App. 119, 124, 936 P.2d 27 (1997) (similarly noting that "Ecology must reject an application and refuse to issue a permit if there is no unappropriated water available, withdrawal will conflict with existing rights, or withdrawal will detrimentally affect public welfare.").

[9] CELP cited the Board's initial decision in *Squaxin Island* that vacated and remanded the permits to Ecology for issuance of preliminary permits, in which the Board had stated that "[i]t is preferable to find answers to these questions before the withdrawals for the development are allowed to proceed, rather than attempt to find solutions to problems that emerge after-the-fact." *See* CELP Cross-Motion at 19, 21, *citing Squaxin Island*, PCHB No. 05-137 (Findings of Fact, Conclusions of Law, and Order, October 16, 2006). The Board subsequently modified its decision to instead vacate (but not remand) the permits, and deleted the language to which CELP cites. *See Squaxin Island*, PCHB No. 05-137 (Modified Findings of Fact, Conclusions of Law, and Order, November 20, 2006) at p. 56-57, COL 127. The Board had weighed "widely divergent results" produced by the experts' groundwater models to also reach the conclusion that water was unavailable for appropriation, which left open the possibility that actual

evidence showed that the four-part test (including the public interest portion) was not met, and the Board held that Ecology erred in finding otherwise. *Id.* at COL 112, p. 49; COL 124, p. 55. In particular, the Board found that the proposed withdrawals would "likely lower the stream flow" of certain creeks and negatively impact salmon. On this basis, the Board explicitly concluded that "[t]he proposed withdrawals violate the public interest portion of the four-part test in RCW 90.03.290." *Id.* at p. 49, COL 112.

Relying on its interpretation of RCW 90.03.290, CELP argues this is a question of Ecology's authority to act in the face of incomplete information. According to CELP, use of the term 'may' in RCW 90.03.290(2)(a) regarding preliminary permits means Ecology lacks authority to issue a permanent new water right when information necessary to answer any part of the four-part test is incomplete. Under those circumstances, Ecology may only issue a preliminary permit. *See* CELP Cross-Motion at 25-27. The Board finds this provision to be unambiguous. *See State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001) ("The courts do not engage in statutory interpretation of a statute that is not ambiguous"). Rather than limiting Ecology's authority to issue a permanent new water right, the plain language of the statute provides Ecology with authority to issue a different kind of permit (a "preliminary permit") that ensures the application can remain in good standing while the applicant undertakes "such surveys, investigations, studies, and progress reports, as in the opinion of the department may be

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data could prove otherwise. In its modified decision, the Board merely noted this conclusion would not preclude Ecology from issuing a preliminary permit under RCW 90.03.290(2)(a) and allowing the applicant to resubmit an application at a later time based on evidence that assessed "the actual affect" of groundwater withdrawals on the surface waters in question. *Id.* All references above to the *Squaxin Island* case are to the Board's final modified decision in that case.

necessary." RCW 90.03.390(2)(a). The decision whether to issue a preliminary permit in lieu of a permanent new water right, when information is incomplete on an aspect of the four-part test, is still a choice that remains within Ecology's discretion.

The Board finds that Ecology was not required to issue a preliminary or temporary permit. This case is unique because the §401 Certification has already been approved with a condition for a study to determine the aesthetic flows. *CELP v. PUD and Ecology,* PCHB No. 12-082 (Final Order). Ecology will be developing these aesthetic flows in compliance with the Water Resources Act of 1971, ch. 90.54 RCW, which requires the protection of designated beneficial uses such as aesthetics, and using the authority of the water code for issuing water rights and the CWA for issuing a §401 Certification. *CELP v. PUD and Ecology,* PCHB No. 12-082 (Order on Summary Judgments) at 13. In their appeal of the ROE, the Appellants specify that they "do not seek additional aesthetic analysis outside of the 401 Certification Process or challenge the sufficiency of the aesthetic flow-monitoring program required in the PCHB's 401 Certification decision." CELP Reply at 2. Under these circumstances, Ecology properly exercised its discretion to authorize the permit and address the public interest requirements of preserving aesthetic values with similar requirements in the §401 Certification.

Further, unlike *Black Rock* or *Squaxin Island,* this is not a case in which available information shows that the applicant cannot meet some aspect of the four-part test for a water right. Rather, the Board concluded that some additional assessment is needed to finalize the appropriate level of aesthetically protective flows on the Similkameen River in the area of the project. However, in approving and conditioning the §401 Certification, the Board also provided

Ecology a basis upon which to conclude that there was no "detriment to public welfare" as required by the four-part test of RCW 90.03.290.

The aesthetic flow study may well confirm that the 10/30 flows are protective of aesthetic values in the Similkameen River. Even if proven unprotective, the 10/30 flows may not be subject to change based solely on aesthetic values. Aesthetic flows "are not necessarily a priority of use when competing with flows for other beneficial uses of water..." §401 Final Order at FF 30, p. 16. Higher flows for aesthetic purposes may conflict with flows necessary to protect the fishery resource in the Similkameen River. The Board focused the inquiry for the required aesthetic flow study on what flows "would protect aesthetic values without impairing the quality of the water for the fishery resource..." *See* §401 Final Order at COL 19, pg. 32. In light of these circumstances, the Board gives deference to the discretionary decision made by Ecology to approve the application.

The Board finds that Ecology properly exercised its authority and discretion under RCW 90.03.290 to issue the approval of the application under the ROE conditioned on the 10/30 flow study protocol in the Project's §401 Certification, and grants summary judgment to the PUD and Ecology on Issues No. 1 and 3. The Board does not, however, agree with the decision by Ecology to not require that the water right permit be amended, as is required for the §401 Certification, when Ecology makes a final determination of the aesthetic flows based on the aesthetic flow study. Mere reference to the §401 Certification is not sufficient. Ecology is directed to place in the permit when issued the same protocol for the study that is in the §401 Certification, and upon completion of the aesthetic flow study, the permit shall be amended to

incorporate any changes to the 10/30 flow regime prescribed by the study. This ensures that any change to the 10/30 flow regime becomes an enforceable provision of the PUD's permit. The Board orders Ecology to issue the permit with the specific language that requires the PUD to complete the aesthetic flow study, specifying the same protocol as in the §401 Certification, and upon completion of the aesthetic flow study, to amend the permit to incorporate as a condition any prescribed change to the 10/30 flow.

C. Ecology Acted Consistent with its Authority and Discretion under WAC 173-549-020 to Apply Site-Specific Flows to the Enloe Dam Project (Issue No. 2)

The Minimum Water Flows and Levels Act of 1967, ch. 90.22 RCW, authorizes Ecology to establish minimum instream flows for rivers or other public waters "for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." RCW 90.22.010. As explained by the Washington State Supreme Court, "a minimum flow set by rule is an existing water right that may not be impaired by subsequent withdrawal or diversion of water from a river or stream." *Swinomish Indian Tribal Community v. Dep't of Ecology*, 178 Wn.2d 571, 585, 311 P.3d 6 (2013) (*Swinomish*).

Ecology established minimum instream flows in 1976 for the Similkameen River and the mainstem Okanogan River under ch. 173-549 WAC (Okanogan Instream Flow Rule or Rule). The minimum flows established for the Similkameen River vary numerically by month with a low of 400 cfs in winter, increasing to a high of 3,400 cfs in summer. WAC 173-549-020(2). The Rule specifies that future consumptive water rights are to be conditioned on these flows.

WAC 173-549-020(4). The Rule also contains the following provision regarding future projects that would reduce the flow in a portion of a stream's length:

> Projects that would reduce the flow in a portion of a stream's length (e.g. hydroelectric projects that bypass a portion of a stream) will be considered consumptive only with respect to the affected portion of the stream. Such 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. When studies are required to determine such reach- and project-specific flow requirements, the department may require the project proponent to conduct such studies.

WAC 173-549-020(5).

The parties disagree on the interpretation of the Okanogan Instream Flow Rule. CELP contends that Ecology abrogated the Rule and exceeded its authority by approving the application without conditions to protect the minimum flows established for the Similkameen River in WAC 173-549-020(2). According to CELP, until the aesthetic flow study is complete, "the minimum instream flow levels set by rule for the Similkameen River remain in full effect." CELP Cross-Motion at 12; Reply at 22-23. The PUD and Ecology contend that WAC 173-549-020(5) exempts the Project from application of the minimum instream flows set by WAC 173-549-020(2), which otherwise apply to limit future consumptive rights under the rule.[10]

The Board finds the Okanogan Instream Flow Rule is subject to only one reasonable interpretation. *See Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 599 (2007) (as with a statute, where a regulation is unambiguous a court will not look beyond its plain language). WAC 173-549-020(5) explicitly excludes those projects that reduce

[10] The PUD also contends that the imposition of different instream flows in a state water right would be federally preempted. *See* PUD Motion at 12-13. Because the Board decides this case on other grounds, the Board does not reach the question of federal preemption.

the flow in only a portion of a stream's length, including hydroelectric projects that bypass a portion of a stream, from compliance with the minimum instream flows established by WAC 173-549-020(2). Such projects are considered consumptive only in that portion of the stream in which the flow is reduced. The Rule provides Ecology the authority to tailor flows for a portion of a stream's length specifically for hydroelectric projects, as was done in this case. As a result, the minimum instream flows established for the Similkameen River in WAC 173-549-020(2) do not apply to the Enloe Dam Project, unless Ecology decides in its discretion to apply those flows under WAC 173-549-020(5).[11]

The Board does not consider *Swinomish*, as argued by CELP, to be instructive on this point or to counsel for a different interpretation. In *Swinomish*, appellants challenged an amendment to an existing instream flow rule, through which Ecology created several reservations of water for future year-round consumptive uses. The reservations authorized the appropriations of water that would impair the minimum instream flows based on Ecology's finding that the uses of the water from the reservations were "overriding considerations of the public interest" (OCPI) under RCW 90.54.020(3). The Washington Supreme Court held that Ecology's determination of OCPI was significantly flawed and the rule amendment was inconsistent with RCW 90.54.020(3)(a), which provides for maintenance of protective base flows, and with "the statutory context and entire statutory scheme" governing water use and management in Washington. 178 Wn.2d at 585, 602. This appeal does not raise the question of whether Ecology may amend an existing rule in a manner that exempts uses of water that might

[11] *See* §401 Final Order at FF 3, p. 5 (consistent interpretation of the Rule that "hydro projects will be subject to only those minimum flows specified by Ecology," though interpretation of the Rule was not directly at issue).

impair senior minimum flows previously established by rule. The issue, instead, is whether the Okanogan Instream Flow Rule both sets minimum flows and contains an exception from their application for hydroelectric projects with limited in-stream impact. The Board finds that it does.

The Board also does not read the language in WAC 173-549-020(5) that addresses "[w]hen studies are required" to constrain Ecology's authority to apply site-specific flows if further study is necessary. This language simply provides Ecology with authority to require that a project proponent complete any studies determined to be necessary. Here, the flow study required by the Board in the §401 appeal may confirm that the 10/30 flows are protective of aesthetic values in addition to the fishery resource, in which case the flows need not change, or it may trigger amendment of the flows in the §401 Certification and the PUD permit. Applying the same flow regime to the Project through both §401 Certification and the PUD permit ensures consistency in how the Project is regulated under both state water quality and water resource laws.

The Board finds Ecology acted consistent with its authority and discretion under WAC 173-549-020 to apply the 10/30 flows as site-specific flows to the Enloe Dam Project, and grants summary judgment to the PUD and Ecology on Issue No. 2.

ORDER

Summary Judgment is GRANTED to the PUD and Ecology on all legal issues in this case. Ecology's approval of the application based on the terms and conditions of the ROE is AFFIRMED on all substantive grounds, with the exception that Ecology shall issue the permit

with a condition that sets forth the protocol for the aesthetic flow study in the same language as the Board had ordered for the §401 Certification, and upon completion of the study the permit shall be amended specifying the aesthetic minimum instream flows that shall be protected if it is other than the 10/30 flows. A water right certificate shall not issue prior to the completion of the study and the permit amendment.

SO ORDERED this 24th day of June, 2014

POLLUTION CONTROL HEARINGS BOARD

TOM MCDONALD, Chair

KATHLEEN D. MIX, Member

JOAN M. MARCHIORO, Member

Kristie C. Elliott, Presiding
Administrative Appeals Judge

APPENDIX C

RCW 90.03.290

RCW 90.54.020

WAC 173-549-020

RCW 90.03.290

Appropriation procedure—Department to investigate—Preliminary permit—Findings and action on application.

(1) When an application complying with the provisions of this chapter and with the rules of the department has been filed, the same shall be placed on record with the department, and it shall be its duty to investigate the application, and determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied. If it is proposed to appropriate water for irrigation purposes, the department shall investigate, determine and find what lands are capable of irrigation by means of water found available for appropriation. If it is proposed to appropriate water for the purpose of power development, the department shall 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.

(2)(a) If the application does not contain, and the applicant does not promptly furnish sufficient information on which to base such findings, the department may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary. If the applicant fails to comply with the conditions of the preliminary permit, it and the application or applications on which it is based shall be automatically canceled and the applicant so notified. If the holder of a preliminary permit shall, before its expiration, file with the department a verified report of expenditures made and work done under the preliminary permit, which, in the opinion of the department, establishes the good faith, intent, and ability of the applicant to carry on the proposed development, the preliminary permit may, with the approval of the governor, be extended, but not to exceed a maximum period of five years from the date of the issuance of the preliminary permit.

(b) For any application for which a preliminary permit was issued and for which the availability of water was directly affected by a moratorium on further diversions from the Columbia river during the years from 1990 to 1998, the preliminary permit is extended through June 30, 2002. If such an application and preliminary permit were canceled during the moratorium, the application and preliminary permit shall be reinstated until June 30, 2002, if the application and permit: (i) Are for providing regional water supplies in more than one urban growth area designated under chapter **36.70A** RCW and in one or more areas near such urban growth areas, or the application and permit are modified for providing such supplies, and (ii) provide or are modified to provide such regional supplies through the use of existing intake or diversion structures. The authority to modify such a canceled application and permit to accomplish the objectives of (b)(i) and (ii) of this subsection is hereby granted.

(3) The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied: PROVIDED, That where the water applied for is to be used for irrigation purposes, it shall become appurtenant only to such land as may be reclaimed thereby to the full extent of the soil for agricultural purposes. But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or 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, it shall be duty of the department to reject such application and to refuse to issue the permit asked for.

(4) If the permit is refused because of conflict with existing rights and such applicant shall acquire same by purchase or condemnation under RCW **90.03.040**, the department may thereupon grant such permit. Any application may be approved for a less amount of water than that applied for, if there

exists substantial reason therefor, and in any event shall not be approved for more water than can be applied to beneficial use for the purposes named in the application. In determining whether or not a permit shall issue upon any application, it shall be the duty of the department to investigate all facts relevant and material to the application. After the department approves said application in whole or in part and before any permit shall be issued thereon to the applicant, such applicant shall pay the fee provided in RCW **90.03.470**: PROVIDED FURTHER, That in the event a permit is issued by the department upon any application, it shall be its duty to notify the director of fish and wildlife of such issuance.

[**2001 c 239 § 1; 1994 c 264 § 84; 1988 c 36 § 66; 1987 c 109 § 86; 1947 c 133 § 1; 1939 c 127 § 2; 1929 c 122 § 4; 1917 c 117 § 31**; Rem. Supp. 1947 § 7382. Formerly RCW **90.20.050** and **90.20.060**.]

NOTES:

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW **43.21B.001**.

*Inapplicability of section to RCW **90.03.290**: RCW **90.14.200**.*

RCW 90.54.020

General declaration of fundamentals for utilization and management of waters of the state.

Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

(2) Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. Technology-based effluent limitations or standards for discharges for municipal water treatment plants located on the Chehalis, Columbia, Cowlitz, Lewis, or Skagit river shall be adjusted to reflect credit for substances removed from the plant intake water if:

(i) The municipality demonstrates that the intake water is drawn from the same body of water into which the discharge is made; and

(ii) The municipality demonstrates that no violation of receiving water quality standards or appreciable environmental degradation will result.

(4) The development of multipurpose water storage facilities shall be a high priority for programs of water allocation, planning, management, and efficiency. The department, other state agencies, local governments, and planning units formed under *section 107 or 108 of this act shall evaluate the potential for the development of new storage projects and the benefits and effects of storage in reducing damage to stream banks and property, increasing the use of land, providing water for municipal, industrial, agricultural, power generation, and other beneficial uses, and improving streamflow regimes for fisheries and other instream uses.

(5) Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.

(6) Multiple-purpose impoundment structures are to be preferred over single-purpose structures. Due regard shall be given to means and methods for protection of fishery resources in the planning for and construction of water impoundment structures and other artificial obstructions.

(7) Federal, state, and local governments, individuals, corporations, groups and other entities shall be encouraged to carry out practices of conservation as they relate to the use of the waters of the state. In addition to traditional development approaches, improved water use efficiency, conservation, and use of reclaimed water shall be emphasized in the management of the state's water resources and in some cases will be a potential new source of water with which to meet future

needs throughout the state. Use of reclaimed water shall be encouraged through state and local planning and programs with incentives for state financial assistance recognizing programs and plans that encourage the use of conservation and reclaimed water use, and state agencies shall continue to review and reduce regulatory barriers and streamline permitting for the use of reclaimed water where appropriate.

(8) Development of water supply systems, whether publicly or privately owned, which provide water to the public generally in regional areas within the state shall be encouraged. Development of water supply systems for multiple domestic use which will not serve the public generally shall be discouraged where water supplies are available from water systems serving the public.

(9) Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and groundwaters.

(10) Expressions of the public interest will be sought at all stages of water planning and allocation discussions.

(11) Water management programs, including but not limited to, water quality, flood control, drainage, erosion control and storm runoff are deemed to be in the public interest.

[2007 c 445 § 8; 1997 c 442 § 201; 1989 c 348 § 1; 1987 c 399 § 2; 1971 ex.s. c 225 § 2.]

NOTES:

***Reviser's note:** Sections 107 and 108 of this act were vetoed by the governor.

Findings—Intent—2007 c 445: See note following RCW **90.46.005**.

Severability—1989 c 348: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1989 c 348 § 13.**]

Rights not impaired—1989 c 348: See RCW **90.54.920**.

WAC 173-549-020

Establishment of minimum instream flows.

(1) Minimum instream flows are established for stream management units with monitoring to take place at certain control points as follows:

Stream Management Unit Information

Stream Management Unit Name, Control Station Name and Number	Control Station Location by River Mile, Section, Township, Range	Affected Stream Reach
Lower Okanogan		
Okanogan R. at Malott (12447200)	17.0, 9-32-25E	Okanogan River confluence with Wells Pool to confluence of Chewiliken Cr.
Middle Okanogan		
Okanogan R. nr. Tonasket (12445000)	50.8, 8-36-27E	Okanogan River confluence of Chewiliken Creek to confluence Similkameen River
Upper Okanogan		
Okanogan R. at Oroville (12439500)	77.3, 27-40-27E	Okanogan River confluence of Similkameen River to Osoyoos Lake
Similkameen		
Similkameen R. at Nighthawk (12442500)	15.8, 7-40-26E	Similkameen River confluence with Okanogan River to Canadian Border

(2) Minimum instream flows established for the stream management units in WAC 173-549-020(1) are as follows:

Minimum Instream Flows in the
Okanogan River
(All Figures in Cubic Feet Per Second)

Month	Day	Lower Okanogan 12447200	Middle Okanogan 1244500	Upper Okanogan 124426000	Similkameen 12439500
Jan.	1	860	800	320	400
	15	830	800	320	400
Feb.	1	820	800	320	400
	15	850	800	320	400
Mar.	1	880	800	320	425
	15	900	800	320	450
Apr.	1	925	910	330	510
	15	1,100	1,070	340	640
May	1	1,750	1,200	350	1,100
	15	3,800	3,800	500	3,400
Jun.	1	3,800	3,800	500	3,400
	15	3,800	3,800	500	3,400
Jul.	1	2,100	2,150	420	1,900
	15	1,200	1,200	350	1,070
Aug.	1	800	840	320	690
	15	600	600	300	440
Sept.	1	620	600	300	400
	15	700	600	300	400
Oct.	1	750	730	330	450
	15	960	900	370	500
Nov.	1	950	900	370	500
	15	950	900	320	500
Dec.	1	930	900	320	500
	15	900	850	320	450

(3) Minimum instream flow hydrographs, as represented in WAC **173-549-900**, shall be used for definition of minimum instream flows on those days not specifically identified in WAC 173-549-020(2).

(4) Future consumptive water right permits hereafter issued for diversion of surface water from the mainstem Okanogan River and the Similkameen River shall be expressly subject to minimum instream flows established in WAC 173-549-020 (1) through (3) except those described in WAC **173-549-070**.

(5) Projects that would reduce the flow in a portion of a stream's length (e.g. hydroelectric projects that bypass a portion of a stream) will be considered consumptive only with respect to the affected portion of the stream. Such 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. When studies are required to determine such reach- and project-specific flow requirements, the department may require the project proponent to conduct such studies.

[Statutory Authority: Chapters **90.54** and **90.22** RCW. WSR 84-13-076 (Order DE 84-15), § 173-549-020, filed 6/20/84; Order DE 76-25, § 173-549-020, filed 7/14/76.]