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NO. 93844-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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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.

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**AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS'  
ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

Amicus Curiae Northwest Hydroelectric Association ("NWAHA") opposes Center for Environmental Law & Policy, American Whitewater and North Cascades Conservation Council's (collectively "Appellants") petition for review of the October 17, 2016 decision by the Court of Appeals to affirm the Pollution Control Hearings Board's Orders on Motions for Summary Judgment in *CELP, et al. v. Ecology, et al.*, PCHBG 13-117 (June 24, 2014) ("Decision").

The Court of Appeals correctly concluded as a matter of law that the Washington Department of Ecology ("Ecology") satisfied all statutory and regulatory requirements in issuing a Report of Examination ("ROE") authorizing Public Utility District No. 1 of Okanogan County, Washington (the "District") to use additional water at the Enloe Dam Hydroelectric Project ("Project"). NWAHA respectfully offers the following arguments regarding the public interests involved in hydroelectric projects, the consideration of the public interest under regulations governing the approval of hydroelectric projects, and instream flows applicable to hydroelectric projects in the state of Washington.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

NWHA is a non-profit trade association that represents and advocates on behalf of Federal Energy Regulatory Commission ("FERC") licensed hydroelectric project owners and operators from the State of Washington and the Northwest region, as well as others who rely on such projects that may be affected by the Court of Appeals' decision in this case. NWHA is dedicated to the promotion of the Pacific Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region. NWHA members have a direct interest in the interpretation and administration of the Water. NWHA's Motion to File an Amicus Curiae Brief sets forth the identity and interest of the NWHA and is incorporated here by reference.

## **III. RESTATEMENT OF THE CASE**

NWHA adopts the Restatement of the Case set forth in Respondents' Answer to Petition for Review.

## **IV. ARGUMENT**

NWHA joins in and adopts the arguments set forth in Section IV of Respondent's Answer (Reasons Why Review Should Be Denied). NWHA also incorporates by reference the arguments it made in the November 30, 2015 amicus brief it submitted to the Court of Appeals.

**A. The Decision Does Not Conflict With Case Law or Four-Part Test and Ecology's Public Interest Determination Was Based on an Extensive Record**

Despite Appellants' claims, the Decision does not conflict with established case law or the four-part test under RCW 90.03.290. Ecology was well within its authority and complied fully with existing case law and the requirements of RCW 90.03.290 when it issued the ROE to the District.

Further, the Decision does not allow Ecology to make decisions without adequate information. In fact, Ecology had before it an extensive record of the public interest considerations associated with the Enloe Dam hydroelectric project. The licensing of our nation's non-federal hydroelectric power is under the jurisdiction of FERC under the Federal Power Act ("FPA"). 16 U.S.C. §§ 791 a-825r. The FPA requires that a license be in the public interest. It also requires FERC to consider all beneficial public uses and to give equal consideration to, and balance, various resource interests-including aesthetics-before licensing a project. *Id.* § 803(a). Determining whether the project like Enloe Dam will be in the public interest under the FPA requires that the determination "be made only after an exploration of all issues relevant to the 'public interest.'" *Udall v. Fed. Power Comm 'n*, 387 U.S. 428, 450 (1967). FERC also requires as part of its licensing process that the Project comply with

numerous other federal laws, including the National Environmental Policy Act (i.e., NEPA), 42 U.S.C. §§ 4321-4370h, and the Clean Water Act, 33 U.S.C. §§ 1251-1387.

Ecology used this information to adequately consider and protect the public interest when making its water right decision. Ecology also recognized that hydroelectric projects like Enloe Dam greatly benefit the public interest, serving a crucial role in providing clean and affordable energy in the United States and the Northwest region, in particular, and providing numerous other benefits to the communities where they are located, such as municipal and industrial water supply, navigation, flood control, irrigation, recreation, and fish and wildlife habitat. Hydroelectric projects are the United States' greatest source of renewable energy, accounting for approximately six to seven percent of national electric production each year and over 52 percent of renewable energy production in the United States and displace the equivalent of over 500 million barrels of oil each year. U.S. ENERGY INFO. ADMIN., *Frequently Asked Questions, What is US. Electricity Generation by Energy Source?* <http://www.eia.gov/tools/faqs/faq.cfm?id=427&t=3> (last updated Mar. 31, 2015); U.S. GEOLOGICAL SURVEY, *Hydroelectric Power Water Use*, <http://water.usgs.gov/edu/wuhy.html> (last visited Nov. 11, 2015).

Ecology rightly concluded that the Enloe Dam project will heavily benefit the public interest by providing clean, reliable, and affordable energy.

**B. Ecology's Decision Complies With the Instream Flow Rule**

Appellants also argue that the Court of Appeals erred by not conditioning compliance with WAC 173-549, the Similkameen River Instream Flow Rule. The Instream Flow Rule expressly authorizes Ecology to establish specific minimum flows in situations like this one involving a bypass reach. This is a commonly accepted practice used to accommodate hydroelectric projects.

**C. The Decision Will Not Have Catastrophic Consequences or Change Ecology's Water Right Process**


Lastly, Appellants argue that the Decision, if upheld, would have catastrophic consequences because it allows Ecology to make water rights decisions without having sufficient information. This could not be farther from the truth. Ecology is required by law to make findings specific to each part of the four-part test, and nothing in the Decision changes that requirement or makes it less strict. In fact, if nothing else, Ecology's handling of the public interest determination in this case makes it clear that the agency gives serious consideration to each aspect of the four-part test.

## V. CONCLUSION

For the foregoing reasons, NWA respectfully requests that the Supreme Court deny Appellants' Petition for Review.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of January, 2017.

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Association

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**DECLARATION OF SERVICE**

I, Victoria White, hereby declare that on this day I caused the AMICUS CURIAE BRIEF OF NORTHWEST HYDROELECTRIC ASSOCIATION to be served on the parties, with a copy to amicus, via electronic mail in accordance with the parties' electronic service agreements.

Executed at Bellevue, Washington this 17<sup>th</sup> day of January, 2017.

  
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Victoria White