IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 93844-0

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

Appellants,

vs.

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

Respondents

APPELLANTS' ANSWER TO NORTHWEST HYDROELECTRIC ASSOCIATION'S AMICUS BRIEF

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I. INTRODUCTION

Pursuant to Washington Rule of Appellate Procedure ("RAP") 10.1(e), Appellants hereby submit their Answer to the Northwest Hydroelectric Association's ("NWHA's") *amicus curiae* brief submitted in this case. NWHA's *amicus* brief is not helpful to the Court in resolving any of the issues presented because it (1) cites only to documents and material outside of the administrative record that contradict undisputed facts contained in the record; and (2) improperly repeats Respondent Public Utility District No. 1 of Okanogan County's ("PUD's") arguments on the Similkameen River Instream Flow Rule.

II. ARGUMENT

A. Any Citation To Material not in the Administrative Record is Improper and Should be Disregarded by This Court.

This case is an administrative appeal of a water right that was issued by the Washington Department of Ecology ("Ecology") to the PUD for operation of the Enloe Hydroelectric Project brought under the Washington Administrative Procedures Act, RCW 34.05. Therefore, the record in this case is confined to the administrative record. RCW 34.05.558 ("Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional

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evidence taken pursuant to this chapter."); *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 64, 202 P.3d 334 (2009). Washington Rule of Appellate Procedure 9.1(a) also provides that the record on appeal in this case should be composed of the report of proceedings and clerk's papers.[1] No party, including *amici* NWHA, has moved this Court to accept new evidence pursuant to RCW 34.05.562. Therefore, the factual evidence submitted by NWHA is outside of the record and should be disregarded by this Court. RCW 34.05.558.

Courts in Washington need not consider new issues or evidence raised by *amici*. *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 749, 218 P.3d 196 (2009) (declining to address "new issues argued only by amici" and citing RAP 9.12 in support of statement that "when reviewing an order granting or denying summary judgment the appellate court will consider only evidence and issues called to the trial court's attention."); *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 303 n.4, 103 P.3d 753 (2004). "[T]he purpose of an amicus brief is to help the court with points of law and not to reargue the facts" and "[a]micus should not be permitted to litigate a factual matter prohibited to a party." *Pleas v. City of Seattle*, 49 Wn. App. 825, 827 n.1, 746 P.2d 823 (1987), *rev'd on other grounds by Pleas v. City of Seattle*, 112 Wn.2d 794,

[1] There are no pertinent exhibits or certified record of administrative proceedings applicable to this appeal.

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774 P.2d 1158 (1989). Here, the parties are constrained to arguments based upon facts contained in the administrative record, and amici should be subject to that same constraint.[2] RCW 34.05.558.

In its brief, NWHA references two documents from the U.S. Energy Administration and the U.S. Geological Survey, both of which are outside of the administrative record in this case, and makes numerous assertions regarding the alleged benefits of hydropower generally. The new documents provided by NWHA, and any argument stemming from them, should be disregarded in their entirety. Not only did Ecology not review this information in forming their decision on the Report of Examination, the question before Ecology at the time the decision as made was not whether hydropower can be beneficial as a general matter. That is simply not part of the four-part test to issue a water right. RCW 90.03.290(3). Rather, Ecology looks to the specific benefits of the proposed project that will use public water in order to operate. No party has argued that hydropower in general is not in the public interest. What *is* before the Court is whether Ecology improperly issued the PUD its water right for this particular project without making the findings required by statute - whether hydropower in the abstract might benefit the public

[2] The facts introduced by NWHA that are outside of the record also do not meet the criteria for judicial notice. ER 201. Nor do the facts qualify for judicial notice as legislative facts, which include "scholarly works, scientific studies, and social facts." *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980).

has no bearing on that question. Even taking NWHA's assertions regarding the benefits of hydropower at face value,[3] they provide nothing to demonstrate that Ecology has done what the statute requires *in this case*: making the factual determinations required by RCW 90.03.290(3) based on complete information. Therefore, NWHA's claims about the benefits of hydropower are of no import in this case.

NWHA also goes much further than the two documents cited in its amicus brief, seeking to "incorporate by reference" its brief filed at the Court of Appeals. The prior brief improperly contained numerous citations to other documents and evidence, all outside the record, that purportedly demonstrated the importance of hydropower to the public interest. This was improper at the Court of Appeals, for the reasons stated in CELP's Response to Amicus Curiae Brief of Northwest Hydroelectric Association, filed January 19, 2016, and it is equally improper now.

[3] In fact, studies reveal that reservoirs created behind hydroelectric dams emit significant amounts of methane, a highly potent greenhouse gas that contributes to climate change. *See, e.g.*, Beaulieu, et al., High Methane Emissions from a Midlatitude Reservoir Draining An Agricultural Watershed, 48 Envtl. Science & Technology, 11100-11108 (2014), *at* http://pubs.acs.org/doi/pdf/10.1021/es501871g (last visited Feb. 15, 2017); Science Magazine, "Hundreds of New Dams Could Mean Trouble for Our Climate," (Sept. 28, 2016) *at* http://www.sciencemag.org/news/2016/09/hundreds-new-dams-could-mean-trouble-our-climate (last visited Feb. 15, 2017) ("Reservoirs already contribute roughly 1.3% of the world's annual human-caused greenhouse gas emissions, the study finds – about as much as the entire nation of Canada. It also suggests future reservoirs will have a bigger impact than expected, largely because they emit much more methane, a potent warming gas, than once believed.").

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B. NWHA's Claims of "Extensive Evidence" Supporting Ecology's Public Interest Finding are Contradicted by the Record.

Again referencing only information outside of the administrative record, NWHA contends "Ecology has an extensive record of the public interest considerations impacted by hydroelectric projects." NWHA's Amicus Br. at 3. However, undisputed facts in the administrative record show that Ecology lacked evidence regarding the aspect of the public interest determination that is at issue here; specifically, information regarding the aesthetic and recreational impacts of the Project. *See, e.g.*, Appellants' Op. Br. at 5 (citing the PCHB's 401 Certification Decision) ("the aesthetic flow analysis was not sufficiently completed to make a final determination of the flows that will b e protective of the aesthetic values."); *id*. ("[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 protection of the fisheries."). No party has argued (nor can they) that Ecology or the PUD has undertaken the aesthetic flow study required as part of the 401 Certification. Therefore, it is disingenuous for NWHA to portray this case as one in which Ecology "evaluated a wealth of information" and "adequately consider[ed] and protect[ed] the public interest when making its water right decision."

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NWHA's Amicus Br. at 4. The facts in the record simply belie that proposition.

NWHA also incorrectly states that "Ecology used [information developed in the FERC licensing process] when making its water right decision." NWHA's Amicus Br. at 4. This, too, misstates the facts. In its 401 Certification decision, the Board held that the studies and documents prepared by the PUD during the FERC licensing process "did not address the aesthetics of the flow of the River over the Dam or the Falls," which are undisputed components of the public interest inquiry Ecology must do under the Water Code. Appellants' Op. Br. at 7-8. It should go without saying that Ecology *could not have* relied on information which was not contained in the documents from the FERC process.

C. FERC's Decision to Issue a License for the Project is not a Substitute for the Public Interest Determination Required by RCW 90.03.290(1).

NWHA's novel suggestion that FERC's decision to issue a license for the Project, and the public interest determination made under the Federal Power Act, somehow substitutes for the public interest determination that the Water Code requires Ecology to make is legally inaccurate. NHWA's Amicus Br. at 3-4. First, neither Ecology nor the PUD has ever made this argument, so *amici* may not raise the issue now. *See* Section II.A, *supra; Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d

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173 (1984) ("This argument is raised only by amici, therefore, we need not consider it.").

Second, the requirements for consideration of the public interest in the FERC licensing process are legally distinct from the public interest inquiry established under the Water Code.[4] And the supporting information at issue here, regarding the aesthetic impacts of the Project caused by the dewatering of the bypass reach, does not exist because the aesthetic study has not been done. Simply put, FERC could not have considered information that it did not have regarding this aspect of the project.

D. NWHA Repeats the PUD's Arguments on the Hydropower Exception to the Instream Flow Rule.

Under RAP 10.3(e), amicus briefs must "avoid repetition of matters in other briefs." Washington courts routinely strike those portions of amicus briefs that fail to comply with court rules. *United States v.*

[4] A licensing determination by FERC requires that the project adopted be "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title." 16 U.S.C. 803(a). A FERC license also requires that the state issue a certification under section 401 of the Clean Water Act, which must include a certification shall include "(3) 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 CFR 121.2(a). In contrast, RCW 90.03.290(3) requires that Ecology make written findings of fact, including a finding that the proposed use of water "will not . . . be detrimental to the public welfare."

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Hoffman, 154 Wn.2d 730, 735 n.3, 116 P.3d 999 (2005). Without providing any authority on the point, NHWA repeats Ecology's assertion that the Instream Flow Rule authorizes Ecology to set different instream flows in the bypass reach of a hydro project. Further, NWHA "incorporates by reference" its previous amicus brief, which reiterates numerous arguments made by Ecology. This Court should disregard all such material as improper repetition of Ecology's arguments.

NWHA also makes the unsupported assertion that establishing specific minimum flows in a bypass reach is "a commonly accepted practice used to accommodate hydroelectric projects." NWHA's Br. at 5. But whether or not such flows have been established in other cases is not the point, and "accommodat[ing] hydroelectric projects" is not the purpose of an Instream Flow Rule, nor is it required by law. Under Washington law, where there is an Instream Flow Rule in place that predates the proposed hydropower water right and mandates a certain flow for the reach in which the project is proposed, Ecology would be unable to "tailor" a different flow. *See Swinomish Indian Tribal Cmty v. WA Dept. of Ecology*, 178 Wn.2d 571, 593, 311 P.3d 6 (2013) ("[A] minimum flow or level cannot impair existing water rights and a later application for a water permit cannot be approved if the water right sought would impair the minimum flow or level.").

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III. CONCLUSION

NWHA concedes that Ecology is required by law to make findings specific to each part of the four part test. And that is exactly what Ecology has not done here. The NWHA's citation to documents outside of the administrative record and duplicative arguments do not demonstrate otherwise. For the reasons set forth above, Appellants respectfully request that the Court disregard the amicus brief of the Northwest Hydroelectric Association as irrelevant, duplicative of the PUD's arguments, and not helpful to the Court.

RESPECTFULLY SUBMITTED this 15th day of February, 2017,

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DECLARATION OF SERVICE

I, Dan Von Seggern, hereby declare that on this day I caused this Response to Northwest Hydroelectric Association's Amicus Curiae Brief to be served on all parties via electronic mail in accordance with the parties' electronic service agreement as well as filed with the court by first class U.S. mail.

Stated under oath this 15th day of February, 2017, in Seattle Washington.

s/ Dan Von Seggern
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