

No. 48360-2-II

Court of Appeals, Div. II,
of the State of Washington

Esses Daman Family, LLC,

Respondent/Cross-Appellant,

v.

Washington Department of Natural Resources,

Appellant/Cross-Respondent,

Quinault Indian Nation,

Respondent,

Pollution Control Hearings Board, and Sherman Esses,

Respondents.

Brief 1: Daman Family Opening Brief

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1. Introduction

Esses Daman Family, LLC (“Daman Family”) is a small forest landowner. Members of the Esses and Daman families have lived and owned forestland in the Quinault River valley for generations. DNR approved a permit for Daman Family to harvest timber from a parcel some 600 to 1000 feet south of the river. The Quinault Indian Nation (“QIN”) appealed, claiming the parcel was within the river’s Channel Migration Zone (“CMZ”).

On appeal before the Pollution Control Hearings Board (“PCHB”), Daman Family demonstrated that its application and CMZ analysis complied with the minimum standards under law for approval. DNR did not defend the permit and instead proposed an alternate CMZ analysis that would have required additional restrictions. QIN failed to meet its burden on appeal, but the PCHB nevertheless adopted DNR’s alternate analysis and imposed additional CMZ/RMZ restrictions on Daman Family’s harvest.

The PCHB erroneously interpreted or applied the law when it imposed such restrictions even though it expressly found that Daman Family’s CMZ analysis followed the standards set forth in the Forest Practices Board Manual. Daman Family was entitled to approval of the permit because it had complied with all legal requirements. The PCHB cannot require an applicant to be “more compliant” or “more conservative” than what the law requires. In order to maintain the integrity and reliability of the standards set forth in the Forest Practices Act and Rules, the PCHB’s order must be reversed.

2. Assignments of Error

Assignments of Error

1. The Pollution Control Hearings Board erroneously interpreted or applied the law when it disapproved Daman Family's Forest Practices Application despite the PCHB's express finding that Daman Family's Channel Migration Zone analysis followed the standards set forth for that analysis in the Forest Practices Board Manual.

Issues Pertaining to Assignments of Error

1. Whether a Forest Practices Application must be approved (as to any conditions relating to Channel Migration Zones) where the applicant landowner can support the application with a CMZ analysis that complies with the minimum standards set forth in the Forest Practices Board Manual for delineating a CMZ (assignment of error #1).

2. Whether QIN failed to meet its burden of proving to the PCHB that Daman Family's forest practices application failed to comply with the Forest Practices Act, Rules, or Board Manual (assignment of error #1).

3. Statement of the Case

The Quinault Indian Nation appealed two Forest Practices Applications approved by DNR for logging operations on two adjacent parcels owned, respectively, by Esses Daman Family, LLC and Sherman Esses. CP 478. Daman Family and Sherman Esses are small forest landowners, and members of their families have lived in the Quinault River valley for generations. CP 480. The parcels are bounded on the north by the

South Shore Road and on the south by the Colonel Bob Wilderness. *Id.* The Quinault River lies 600 to 1000 feet north of the properties (north of the South Shore Road). *Id.*

3.1 Overview of the regulatory regime for approval of forest practices.

Washington's Forest Practices Act, chapter 76.09 RCW, governs forest practices, such as timber harvests. The Legislature intended the Act, and the rules promulgated thereunder, to be a statewide system of laws designed to manage and protect the State's natural resources while also ensuring a viable commercial timber industry. *N.W. Ecosystem Alliance v. Ecology*, 104 Wn. App. 901, 907, 17 P.3d 697 (2001); RCW 76.09.010 (stating, among its purposes, "Promote efficiency by permitting maximum operating freedom consistent with the other purposes and policies stated herein.").

To this end, the Forest Practices Board is tasked with the responsibility to promulgate regulations that "[e]stablish minimum standards for forest practices." RCW 76.09.040(1)(a)(i); *N.W. Ecosystem*, 104 Wn. App. at 907; WAC 222-12-010 ("These rules establish minimum standards for forest practices"). An applicant who complies with the minimum standards is entitled to approval. *See* RCW 76.09.050(5). DNR cannot disapprove an application unless it is able to notify the applicant of "the specific manner in which the application fails to comply with the provisions of this section or with the forest practices regulations." *Id.*

One of the minimum standards provided in the forest practices regulations is that no timber harvest is permitted within a Channel Migration Zone. WAC 222-30-020(13). The applicable regulations define a CMZ as:

the area where the active channel of a stream is prone to move and this results in a potential near-term loss of riparian function and associated habitat adjacent to the stream, except as modified by a permanent levee or dike. For this purpose, near-term means the time scale required to grow a mature forest. (See board manual section 2 for descriptions and illustrations of CMZs and delineation guidelines.)

WAC 222-16-010. As noted in the rule, the standards for delineating a CMZ are provided in Section 2 of the Forest Practices Board Manual. *Id.*; WAC 222-12-090(2).

The Manual was created “to assist with implementation of the standards incorporated into the forest practices rules.” RCW 76.09.040(3)(c). It is a technical supplement to the forest practices rules. WAC 222-12-090. The rules specifically refer to the CMZ chapter as setting forth “Standards for identifying channel migration zones,” while other sections are denoted merely “Guidelines.” *Id.* The Manual sets forth detailed instructions for determining a CMZ, while allowing for some discretion on the part of the practitioner performing the delineation. *See* CP 485-86.

Both the Manual and DNR’s application form place the burden of determining a CMZ on the applicant landowner. Section 2 of the Manual describes itself as “a technical supplement to the forest practices rules to assist landowners, foresters and others in determining whether a channel migration zone (CMZ) is present in a proposed forest practice activity area

and, if so, to assist in the delineation of the CMZ.” CP 575. Question 21 of DNR’s application form requires the applicant to identify any CMZs affecting the application. *E.g.*, CP 873. Nothing in the Forest Practices Act, rules, or the Manual indicates that DNR can impose its own CMZ analysis on a landowner who has complied with the methodology in the Manual. DNR cannot disapprove an application unless the application fails to comply with the Forest Practices Act or rules. RCW 76.09.050(5).

3.2 After Daman Family obtained approval for its harvest, QIN appealed to the Pollution Control Hearings Board.

Daman Family submitted FPA 2612019. CP 853-93. Sherman Esses submitted FPA 2612020. CP 894-931. DNR approved both applications without any conditions relating to a channel migration zone (“CMZ”) or riparian management zone (“RMZ”) for the Quinault River. CP 853-55 (Daman Family FPA), 903-05 (Sherman Esses FPA).

The Quinault Indian Nation (“QIN”) appealed the approvals, contending that both parcels were located entirely within the River’s CMZ. *See* CP 504. Daman Family responded to the appeal, arguing that approval was proper because their compliant CMZ analysis left the Daman Family parcel unaffected by the CMZ or RMZ, just as provided in the FPA approved by DNR. *See, e.g.*, CP 354. DNR chose not to defend the applications it approved, instead advocating an analysis that placed the outer edge of the CMZ at the South Shore Road, resulting in an RMZ extending 140 feet into the Daman Family property. *See* CP 504.

3.3 The PCHB reversed DNR’s approval, imposing additional restrictions on Daman Family’s harvest.

The PCHB held an eight-day evidentiary hearing and a two hour site visit. CP 479. Four experts presented their analyses delineating the CMZ: Mary Ann Reinhart on behalf of QIN; Leslie Lingley on behalf of DNR; and Dr. Jon Einarsen and Stephen Toth on behalf of Daman Family. CP 489. QIN’s analysis was the only one that deviated from the approach outlined in the Manual. CP 489-90.

The PCHB expressly found that the Daman Family’s experts “followed the Manual within the bounds of discretion allotted to the practitioner in the manual.” CP 490. Nevertheless, the PCHB found DNR’s analysis “more persuasive” on the basis of different discretionary choices made by Lingley in performing the delineation. CP 491-92. The PCHB reversed the FPA approvals and remanded to DNR with instructions to condition the approval to provide for a 140-foot RMZ extending south from the north side of the South Shore Road, based on DNR’s delineation of the CMZ. CP 516-17.

3.4 Daman Family and QIN petitioned for judicial review.

Daman Family petitioned for judicial review in Jefferson County Superior Court, arguing the original permit that DNR approved, and the evidence in favor of upholding that permit as to the CMZ, complied with all legal standards required of the landowner by statute, rule, or the Manual. CP 85-89; CP 173-77 (amended petition). QIN also petitioned for review,

initially in Thurston County, arguing that the South Shore Road is not a barrier to channel migration and therefore the CMZ extends southward into the parcels. CP 1-9. QIN's petition was transferred to Jefferson County and consolidated with the Daman Family petition. CP 83-84, 178-81.

The superior court dismissed Daman Family's petition on summary judgment, holding 1) that Daman Family had failed to demonstrate the PCHB erroneously interpreted or applied the law; and 2) that the PCHB had not decided the issue presented by Daman Family's petition. CP 2630-32. After briefing on the merits of QIN's petition, the superior court entered a Memorandum Opinion and Order reversing the PCHB's determination that the South Shore Road is a permanent dike or levee. CP 2761-74. After entry of final judgment (CP 2795-97), DNR appealed the superior court's decision on QIN's petition (CP 2819), and Daman Family cross-appealed the superior court's decisions on both petitions (CP 2846-47). Sherman Esses and the PCHB are not directly participating in the appeal.

4. Argument

4.1 The PCHB erroneously interpreted or applied the law when it disapproved Daman Family's FPA despite the PCHB's express finding that Daman Family's CMZ analysis followed the standards of the Board Manual.

This appeal is a judicial review proceeding under the Administrative Procedure Act, chapter 34.05 RCW. The standard of review for errors of law is provided in the APA. Under that standard, the PCHB erroneously

interpreted or applied the law when it disapproved and ordered additional CMZ/RMZ restrictions on Daman Family's FPA. Under the Forest Practices Act, an application can only be disapproved if it has failed to comply in some specific way with the standards set forth in the Forest Practices Act or Rules. The PCHB expressly found that Daman Family's CMZ analysis followed the required standards. Because QIN, as appellant on this issue before the PCHB, failed to meet its burden of proving that Daman Family's FPA failed to comply with the Forest Practices Act or Rules, the PCHB could not reverse DNR's approval of Daman Family's FPA. This Court should reverse the PCHB and remand for approval of the FPA without any CMZ/RMZ restrictions.

4.1.1 Under the APA, this Court reviews errors of law de novo.

Judicial review of the Pollution Control Hearings Board is governed by the Administrative Procedure Act, chapter 34.05 RCW. *Fort v. Dep't of Ecology*, 133 Wn. App. 90, 95, 135 P.3d 515 (2006). Judicial review is confined to the administrative record that was before the PCHB. RCW 34.05.558. This Court sits in the same position as the superior court and reviews the PCHB's decision by applying the standards of review in RCW 34.05.570 directly to the agency record. *Fort*, 133 Wn. App. at 95. The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a). Daman Family asserts that the PCHB erroneously interpreted or applied the law in reaching its decision reversing DNR's approval of Daman Family's FPA.

This Court should reverse the PCHB's decision if the PCHB has erroneously interpreted or applied the law. *See* RCW 34.05.570(3)(d). Under this “error of law” standard, the Court engages in a de novo review of the agency’s legal conclusions. *Fort*, 133 Wn. App. at 95.

4.1.2 A Forest Practices Application must be approved unless it fails to comply with the Forest Practices Act or Rules.

As noted above, the Forest Practices Act, chapter 76.09 RCW, governs forest practices such as timber harvests in Washington. The Legislature intended the Act, and the rules promulgated thereunder, to protect the State’s natural resources while also promoting the commercial timber industry. *N.W. Ecosystem Alliance v. Ecology*, 104 Wn. App. 901, 907, 17 P.3d 697 (2001). The Act itself states, among its primary purposes, “Promote efficiency by permitting **maximum operating freedom** consistent with the other purposes and policies stated herein.” RCW 76.09.010 (emphasis added).

To this end, the Act entrusts the Forest Practices Board with the responsibility to promulgate regulations that “[e]stablish **minimum standards** for forest practices.” RCW 76.09.040(1)(a)(i) (emphasis added); *N.W. Ecosystem*, 104 Wn. App. at 907. The Forest Practices Rules echo this statutory mandate: “These rules establish **minimum standards** for forest practices.” WAC 222-12-010 (emphasis added).

This statutory and regulatory language is significant. An applicant for a forest practice permit is free to exceed the **minimum standards**—that is, to be more protective of natural resources—but the State cannot **require** the

applicant to do so. An applicant who complies with the minimum standards is entitled to approval. *See* RCW 76.09.050(5). DNR cannot disapprove an application unless it is able to notify the applicant of “the specific manner in which the application **fails to comply** with the provisions of this section or with the forest practices regulations.” RCW 76.09.050(5) (emphasis added).

One of the minimum standards provided in the forest practices regulations is that no timber harvest is permitted within a Channel Migration Zone. WAC 222-30-020(13). The applicable regulations define a CMZ as:

the area where the active channel of a stream is prone to move and this results in a potential near-term loss of riparian function and associated habitat adjacent to the stream, except as modified by a permanent levee or dike. For this purpose, near-term means the time scale required to grow a mature forest. (See board manual section 2 for descriptions and illustrations of CMZs and delineation guidelines.)

WAC 222-16-010. As noted in the rule, the standards for delineating a CMZ are provided in Section 2 of the Forest Practices Board Manual. *Id.*; WAC 222-12-090(2) (stating that the Manual includes “**Standards**” for identifying CMZs). The Forest Practices Rules incorporate the Manual into the **minimum standards** for approval of an FPA.

Under this regulatory regime, DNR does not determine or dictate the location of a CMZ. Both the Manual and DNR’s FPA application form place the burden of determining whether a CMZ affects the proposed forest practice activities upon the applicant landowner. CP 575 (the Manual), 873 (application form). Because the Forest Practices Rules refer to the Manual, the Manual is the only source to which the applicant landowner can look to

find the **standards** that apply to making that determination. The Manual itself states that it is “a technical supplement to the forest practices rules **to assist landowners, foresters and others** in determining whether a channel migration zone (CMZ) is present in a proposed forest practice activity area and, if so, to assist in the delineation of the CMZ.” CP 575 (emphasis added). The Legislature has acknowledged that the Manual was created “to assist with implementation of the **standards** incorporated into the forest practices rules.” RCW 76.09.040(3)(c) (emphasis added).

The Forest Practices Rules specifically refer to the CMZ section of the Manual as setting forth “**Standards** for identifying channel migration zones,” while other sections are denoted merely “Guidelines.” *Id.* (emphasis added). The Manual sets forth detailed instructions for determining a CMZ, while allowing for some discretion on the part of the practitioner performing the delineation. *See* CP 485-86.

By complying with the standards and the methodology in the Manual, within the range of discretion allowed by the Manual, a landowner should be entitled to approval of their FPA (at least as to CMZ issues). DNR’s prehearing brief to the PCHB agreed that an applicant who complies with the Manual’s methodology **will meet the minimum standards for approval** under the rules:

Forest Practices Board Manual Section 2 provides guidance for determining whether a CMZ exists, and if so, where to delineate it. The Board Manual was written and developed “to assist landowners, foresters, and others” in a practical yet effective methodology to accomplish this task.

If landowners implement forest management practices as set forth in the Board Manual, they will meet the standards of the rules.

CP 370 (emphasis added). DNR's review of this portion of an application is limited to "Review of a landowner's implementation of the Manual's guidance." CP 370. Neither DNR nor the PCHB should be allowed to substitute its own CMZ analysis for a landowner's analysis when the landowner's analysis complies with the **minimum standards** set forth in the Manual.

Neither DNR nor the PCHB may disapprove an application unless the application **fails to comply** with the standards in the Forest Practices Act or Rules. RCW 76.09.050(5). The minimum standards of the Rules include, by reference, the standards for delineating a CMZ as set forth in the Manual. The applicant landowner, who is responsible for applying the standards and determining whether a CMZ is present, should be entitled to rely on the standards and methods set forth in the Manual to prepare a compliant application and obtain approval.

4.1.3 The PCHB expressly found that Daman Family's CMZ analysis followed the standards set forth in the Forest Practices Board Manual.

Daman Family's FPA indicated that the proposed harvest was not affected by any CMZ. *See* CP 873. Daman Family's CMZ analyses complied with the standards and methods set forth in the rules and in the Manual, within the range of discretion allowed to the practitioner by the Manual, and demonstrated that the CMZ of the Quinault River did not impact the

proposed harvest. CP 490, 1317-19 (“the Site lies beyond the Average Erosion Setback”). The PCHB expressly found that Daman Family’s CMZ analyses “followed the Manual within the bounds of discretion allotted to the practitioner in the manual.” CP 490. In doing so, Daman Family met the minimum standards and was entitled to approval of its FPA.

However, despite the PCHB’s express finding, its final decision reversed DNR’s approval and imposed additional restrictions on the FPA. CP 516-17. The PCHB based this decision on DNR’s CMZ analysis, which the PCHB found “more persuasive,” in part because it was “more conservative,” meaning more protective of natural resources. CP 491-92.

In doing so, the PCHB erroneously interpreted and applied the law. It imposed a higher standard than that provided in the Forest Practices Act, Rules, and in the Manual. The PCHB expressly found that Daman Family’s analysis was fully compliant, “within the bounds of discretion allotted to the practitioner in the manual,” yet it substituted DNR’s analysis, which it apparently believed complied “better,” based on different, discretionary choices made by DNR’s expert. As DNR itself explained in its pre-hearing brief, that is not how the regulatory regime works. *See* CP 370.

The State cannot require a permit applicant to exceed the minimum standards established by law. An FPA can only be disapproved if it fails to comply in some articulable way with the minimum standards. RCW 76.09.050(5). Daman Family’s application and CMZ analysis did not fail to comply with the minimum standards. There was no legal basis for the PCHB’s reversal and imposition of additional CMZ/RMZ conditions.

The parties had informed the PCHB that the Manual set forth the standards for approval of the FPA. Daman Family's Hearing Brief discussed the role of the Manual in establishing minimum standards for delineating a forest practices CMZ:

Because the extent of a CMZ will directly and substantially restrict the property rights of a landowner, it is essential that CMZs be delineated following a standard methodology that produces predictable and easily reproducible results. ... The Board Manual methodology is to be uniformly applied by the agencies, tribes, and interested parties to delineate CMZs in the context of forest practices applications. While there may be other scientifically valid methods for delineating CMZs in other contexts, forest practices applications are governed by the definitions and methodologies set forth in the forest practices rules and the Board Manual.

CP 354-55. Although QIN's Pre-hearing Brief initially described the Manual as "a general guide" (CP 402), the remainder of QIN's arguments made it clear that QIN recognized that compliance with the Manual was mandatory, asserting that Daman Family and DNR omitted essential portions of the Manual's methodology (CP 413-15) and that its own analysis complied (CP 415-17). As noted above, DNR told the PCHB that if a landowner followed the Manual, "they will meet the standards of the rules." CP 370.

Despite this discussion by the parties, the PCHB treated the CMZ as a scientific fact to be discovered rather than what it truly is: a regulatory conclusion to be reached through application of law and policy to the underlying scientific facts. The regulatory scheme places the initial burden on the landowner to comply with minimum standards and the methodology of

the Manual; the burden then shifts to DNR or an appellant (here, QIN) to show some specific manner in which the application fails to comply. All parties agreed that Daman Family's CMZ analysis followed the methodology of the Manual. The PCHB agreed. That is all that DNR or the PCHB can require. Daman Family was entitled to approval of the FPA.

The PCHB's decision creates an absurd precedent. If the Manual is nothing more than guidance for the PCHB in determining which of multiple, compliant analyses it should adopt as the "true" or "best" CMZ in each case, there would be no certainty or predictability in the regulatory framework. The Forest Practices Rules would become standardless regulations. It would become impossible for the landowner to know whether they have complied with the standards until after costly litigation before the PCHB to determine whether their compliant CMZ analysis was "best," even though the statutes and rules only require a landowner to meet a minimum standard. The regulations would become impermissibly vague and subject to arbitrary enforcement at the whims of DNR and the PCHB.

The PCHB erroneously interpreted and applied the law when it imposed additional restrictions on Daman Family's FPA even though Daman Family's application and CMZ analysis complied with the minimum standards set forth in the law for approval of the permit. This Court should reverse the PCHB's final order and reinstate the originally approved FPA.

4.1.4 QIN failed to meet its burden of proving that Daman Family's FPA failed to comply with the Forest Practices Act or Rules.

QIN, not Daman Family, appealed the CMZ issue. On appeal, an approved application is presumed valid, placing the burden of proof on the appellant, QIN, to demonstrate that the approval was invalid. *See* WAC 371-08-485(3); CP 503. This burden is met by showing some failure to meet the minimum standards for approval. *See* RCW 76.09.050(5) (an application can only be disapproved if it fails to comply with the forest practices regulations in a specific manner). This would have required QIN to demonstrate that Daman Family's CMZ analyses failed to follow the standards in the Manual. *See* CP 370 (DNR only reviews the CMZ analysis for compliance, not to substitute its own judgment).

This burden of proof flows directly from the fact that the forest practices regulations are **minimum standards**. Just as DNR cannot disapprove an application without articulating a specific failure to comply with the regulations, RCW 76.09.050(5), the PCHB cannot reverse an approved application unless the appellant proves, and the PCHB finds and articulates in its order, a specific failure to comply. The PCHB's jurisdiction is limited to "questions of the application of rules and regulations in a particular case." *Inland Foundry v. Air Pollution Auth.*, 98 Wn. App. 121, 124, 989 P.2d 102 (1999); RCW 43.21B.110. In this appellate capacity, the PCHB must apply the same minimum standards that DNR was bound to apply in the first instance. The PCHB may not, as it did here, impose on an applicant

a “more conservative” standard than the minimum standards provided in the Forest Practices Act and Rules.

QIN recognized the burden it bore. QIN’s Pre-hearing Brief assigned to itself the burden of proving “that DNR came to the wrong conclusion [in initially approving the FPA], either because of failure to consider an important aspect of the delineation or because of a substantive error in DNR’s delineation.” CP 410-11. QIN recognized, and informed the PCHB, that its burden was to prove that Daman Family’s CMZ analysis failed to comply with the minimum standards: “The QIN will prove as part of this appeal that the Respondents rely on deficient analyses, which at a minimum necessitates invalidation and remand of the permits at issue.” CP 413.

Daman Family’s Hearing Brief also acknowledged this fundamental principle that an approved FPA cannot be reversed unless the appellant proves some failure to comply with the forest practices regulations. “The Board Manual provides the proper methodology for delineating the CMZ. [Daman Family’s] experts have followed that methodology. QIN’s experts have not. QIN has failed to meet its burden of proof on appeal. The Board should affirm the FPAs on the CMZ issue.” CP 359.

Daman Family, as respondent before the PCHB on the CMZ issue, had no burden of proof. Daman Family’s role was to support the approved FPA, which it did by presenting two CMZ analyses, which followed the standards of the Manual and demonstrated that the CMZ did not impact the proposed forest practices. DNR, as a respondent, also had no burden of

proof. As a respondent, DNR was also not entitled to any affirmative relief from the PCHB. The PCHB erred in adopting DNR's analysis.

QIN failed to meet its burden of proof. The PCHB found QIN's analysis failed to follow the standards in the Manual. The PCHB found Daman Family's analyses **did** follow the standards in the Manual. Because QIN failed to demonstrate that Daman Family's analysis failed to comply with the standards of the Forest Practices Act, Rules, and the Manual, there were no valid grounds upon which the PCHB could reverse DNR's approval of the FPA (as to CMZ issues). The PCHB erroneously interpreted or applied the law. This Court should reverse the PCHB and remand for approval of the FPA without any CMZ/RMZ restrictions.

5. Conclusion

The PCHB erroneously interpreted or applied the law when it disapproved Daman Family's FPA and ordered that additional CMZ/RMZ restrictions be imposed. The PCHB expressly found that Daman Family's CMZ analysis followed the required standards. QIN, the appellant on this issue, failed to meet its burden of proof. Without proof of some failure to comply with the Forest Practices Act, Rules, or the Manual, the PCHB could not reverse DNR's approval of Daman Family's FPA. This Court should reverse the PCHB and remand for approval of the FPA without any CMZ/RMZ restrictions.

Respectfully submitted this 17th day of March, 2016.

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CERTIFICATE OF SERVICE

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Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: Brief 1 - Daman Family Opening Brief

Comments:

No Comments were entered.

Sender Name: Rhonda Davidson - Email: rdavidson@cushmanlaw.com