

No. 48360-2-II

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

ESSES DAMAN FAMILY, LLC,

Respondent/Cross-Appellant,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Appellant/Cross-Respondent,

QUINAULT INDIAN NATION, POLLUTION CONTROL HEARINGS
BOARD, and SHERMAN ESSES,

Respondents.

**BRIEF 2: QUINAULT INDIAN NATION'S
COMBINED OPENING BRIEF AND RESPONSE TO THE
DAMAN FAMILY OPENING BRIEF**

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I. Introduction

The Quinault Indian Nation respectfully requests that the Division II Court of Appeals uphold the Jefferson County Superior Court's decision that the Pollution Control Hearings Board ("PCHB") violated the Administrative Procedure Act in determining that South Shore Road constitutes a "permanent dike or levee" under the Forest Practices Rules.

The PCHB made its determination that the South Shore Road is a "permanent dike or levee" based almost exclusively on a legally erroneous interpretation of the Forest Practices Board Manual. The Board Manual specifically explains when a road is a "permanent dike or levee," and immediately thereafter explains under what conditions a road "is not considered a permanent dike or levee." The PCHB held that the paragraph setting forth what "is not considered a permanent dike or levee" is not an exception as the text would indicate, but rather raises a "separate thought" unrelated to dikes or levees. The PCHB held the "not considered a permanent dike or levee" language, which is in the section of the Board Manual titled in part "Channel Migration Zones," on the page devoted to when a structure is a "permanent dike or levee," has nothing to do with determining channel migration zones or permanent dikes or levees.

The PCHB's tortured reading violated numerous legal principles of textual interpretation, and the PCHB repeatedly misapplied legal

precedent. For example, the PCHB deferred to an agency interpretation put forward for the first time late in litigation, even though that interpretation contradicted the agency's own expert report in the case. The PCHB's deference violated the clear directive set forth in *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992) and ensuing cases, which requires that in order to gain deference, "it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy." *Id.* Indeed, the Court in *Cowiche Canyon* specifically found that deference should not be given to an agency interpretation of a text in this precise situation, where:

The evidence establishes that the application and "interpretation" here was nothing more than an isolated action by the Department....Instead, it attempts to bootstrap a legal argument into the place of agency interpretation.

id. at 814-15. The PCHB's deference to the Department of Natural Resources constitutes legal error.

In addition to erring in its interpretation of the Board Manual, the PCHB's ultimate conclusion violated the APA. The South Shore Road is a dirt road built on an erodible clay surface. Culverts large enough to walk through pass underneath it. At high water, flows from the Quinault River pass under the road. Salmon from the Quinault River regularly swim under the road to seek refuge in the calm backwaters on the other

side. Every party conceded that the road as constructed would wash away if it contacted the Quinault River. And a report from the Washington Department of Transportation and Jefferson County Department of Public Works, the agencies responsible for the road, concludes that “repetitive damage to this road segment is inevitable, and complete loss of the infrastructure is highly likely.” Yet the PCHB relied on skimpy anecdotal evidence to determine that approximately a century from now Jefferson County would gain access to emergency funds and transform it into a “permanent dike or levee.” The PCHB’s determination that the South Shore Road is a barrier to channel migration was arbitrary and capricious and lacked substantial evidence.

The term “permanent dike or levee” has legal import and an on-the-ground impact because the Forest Practices Rules protect forests in areas where a river will likely move over time. Those protections provide long-term habitat for culturally and biologically valuable salmon. If a road is determined to be a “permanent dike or levee,” it is deemed to block river movement, which removes habitat protections and allows logging.

The superior court was correct to hold that the PCHB violated the APA. The superior court was rightly concerned that the PCHB’s adoption of an interpretation in conflict with the plain text of a guidance manual, based on deference to agency revelations of previously undisclosed

meaning, gives the Department of Natural Resources unfettered discretion to rewrite rules and policy with no transparency or accountability.

Citizens should be able to rely on agency guidance to mean what it says.

The Quinault Indian Nation urges this Court to uphold the superior court's orders in all respects.

II. Assignments of Error

A. Assignments of Error to Superior Court—RAP 10.3(a)(4)

1. Based upon thorough consideration of extensive briefing, the administrative record, and two oral hearings, the superior court ruled correctly in all respects.

B. Quinault Indian Nation's Assignments of Error to the Pollution Control Hearings Board—RAP 10.3(h)

1. The PCHB's finding and conclusion that the South Shore Road is a "permanent dike or levee" that will block migration of the Quinault River violates the Administrative Procedure Act because it is contrary to law, not based on substantial evidence, and is arbitrary and capricious.
2. The PCHB's deference to the DNR's interpretation of the Forest Practices Board Manual violates the Administrative Procedure Act because it was contrary to law, not based on substantial evidence, and was arbitrary and capricious.
3. The PCHB's finding and conclusion that the channel migration zone of the Quinault River extends only to the north side of the South Shore Road violates the Administrative Procedure Act because it is not based on substantial evidence, is arbitrary and capricious, and is contrary to law.

C. Issues Pertaining to Quinault Indian Nation's Assignments of Error

1. Whether the PCHB's Interpretation of the Board Manual Constitutes Legal Error Because It Contradicts the Manual's Plain Text.
2. Whether the PCHB's Determination That the Board Manual is Ambiguous, and Resulting Decision to Defer to DNR's Interpretation, Constitutes Legal Error.
3. Whether the PCHB's Deference to One Person's Recollection of a Stakeholder's Intent to Determine Meaning Constitutes Legal Error.
4. Whether the PCHB Erred By Deferring to a Novel and Inconsistent Agency Interpretation First Offered in Litigation.
5. Whether the PCHB's Determination That Jefferson County Will Transform the South Shore Road Into a River Barrier in the Future was Arbitrary and Capricious and Lacks Substantial Evidence.

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2. Whether the Daman Family, LLC exhausted administrative remedies by raising its argument on appeal before the PCHB.
3. Whether the Daman Family, LLC waived its appeal by failing to allege error by the superior court, as is required by RAP 10.3(h).
4. Whether the PCHB had jurisdiction to consider and apply evidence submitted by a respondent as a basis for invalidating a forest practices permit.

IV. Legal Framework

Three main tiers of authority govern logging in Washington—statutory, regulatory, and the Forest Practices Board Manual guidance. The Forest Practices Act, RCW 76.09.010 *et seq.*, and the Salmon Recovery Act of 1999, RCW 76.09.370(1), are the governing statutory authorities. The Forest Practices Act seeks to provide protections for natural resources, including fisheries and water quality, while also allowing for a viable timber industry. RCW 76.09.010.

The Forest Practices Act delegates the authority to promulgate regulations to an independent state agency named the Forest Practices Board. RCW 76.09.040; WAC 222-16-010 *et seq.* The Salmon Recovery Act, an amendment to the Forest Practices Act, specifically directs the Forest Practices Board to promulgate rules pursuant to the “Forests and Fish Report,” a set of policy recommendations negotiated by stakeholder groups including treaty Indian tribes. The Forests and Fish Report arose from the listing of many of Washington’s salmon runs as threatened under the Federal Endangered Species Act, and provides methods to reduce the impacts of logging on fisheries in the State. The Forests and Fish Report’s science-based recommendations are the genesis of the current protections for channel migration zones.

The Forest Practices Board promulgates a comprehensive set of regulations known as the Forest Practices Rules, WAC 222-16-010 *et seq.*. The Forest Practices Board is an independent thirteen-member legislative body, made up of designees from the DNR, the Department of Ecology, the Department of Agriculture, the Department of Commerce, the Department of Fish and Wildlife, the counties, a timber products union, and six public positions appointed by the Governor. RCW 76.09.030. Often those six public representatives include representatives from the tribes and the environmental community.

Many of the Forest Practices Rules are technical and require explanation to ensure consistent application. As a result, the Forest Practices Board promulgated a regulation directing the development and approval of the Forest Practices Board Manual. WAC 222-12-090. The Board Manual is an “advisory technical supplement[s],” authorized and published by the Forest Practices Board, designed to flesh out and explain the Forest Practices Rules. *Id.* The Forest Practices Board is the legislative body that promulgates the Board Manual. *Id.* In 2012, the Legislature confirmed that the power to adopt the Board Manual rests with the Forest Practices Board. RCW 76.09.040(3)(c).

The basic principle underlying the legal framework is that forests adjacent to streams protect water quality and provide biological benefits to

fish. These forests are known as “riparian buffers.” Riparian buffers provide shade to protect cool water, food and plant nutrients such as leaf litter, erosion control, bank stability, and input of large woody debris that makes log jams and pools. Logging in those areas diminishes protections for fish and degrades water quality. Accordingly, one goal of the Forest Practices Rules is “to protect aquatic resources and related habitat to achieve restoration of riparian function; and the maintenance of these resources once they are restored.” WAC 222-30-010(2).

Channel migration zones are essentially the future riparian buffers for a river as the river channel shifts over time. WAC 222-30-021 (requiring riparian buffer to start from edge of channel migration zone); WAC 222-16-010 (requiring CMZ to protect riparian function). The protection of channel migration zones not only ensures riparian protections for rivers over time, it also helps to gradually restore rivers in Washington to a more complex flow structure with forested islands, protected side-channels, and pools. CP 1167-68. Historically, before channelization by roads and other manmade influences, rivers in broad valleys spread out in an interconnecting pattern of channels and islands. CP 768-71. This sort of complex habitat is essential for adult salmon migration and juvenile salmon rearing.

WAC 222-30-020(13) prohibits any logging within the channel migration zone, and WAC 222-16-010 defines the channel migration zone 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.)

The regulation does not define “permanent levee or dike.” It does, however, refer to the Forest Practices Board Manual for guidelines.

Section 2 of the Forest Practices Board Manual provides detailed guidance on how to recognize and delineate a CMZ. WAC 222-16-010. It sets forth methods to identify different types of channel migration, and methods by which a practitioner may determine rates of channel migration. While the Board Manual is a technical document, it is designed as a handbook for a scientist, forester, or landowner to be able to apply in most circumstances.

Of particular relevance to this case, the Board Manual defines the term “permanent dike or levee” and separately defines “dike or levee.” CP 599. There is specific guidance on whether a road constitutes a “permanent levee or dike” that constitutes a barrier to channel migration. The Board Manual first sets out what is considered a permanent dike or

levee, which includes a permanently maintained public right of way such as a road. On page M2-30, the Board Manual states that there is an exception under which dikes or levees do NOT constitute a barrier to channel migration, which is that:

A dike or levee is not considered a “permanent dike or levee” if the channel limiting structure is perforated by pipes, culverts, or other drainage structures that allow for the passage of any life stage of anadromous fish and the area behind the dike or levee is below the 100-year flood level.¹

The PCHB relied heavily on the interpretation of the “not considered a permanent dike or levee” language as the basis of its determination of whether the South Shore Road is a permanent dike or levee, and the meaning of that language is therefore central to this appeal.

V. Restatement of the Case

This case takes place in the upper Quinault River valley, in-between the Quinault Indian Reservation and the Olympic National Park. CP 639 (Satellite photo with logging units highlighted in red). The Quinault Indian Nation is a sovereign Indian tribe with treaty fishing rights in the Quinault River. CP 501. The Quinault people have lived, hunted, and fished in the Upper Quinault valley since time immemorial.

¹ Anadromous fish are fish such as salmon that hatch and rear in freshwater, migrate to saltwater to spend adult years, and then return to freshwater to reproduce. The “100-year flood level” is any area that would be inundated as a result of a flood that has a one percent chance of occurring.

CP 685-86. The Quinault people continue to rely heavily on salmon, particularly the Blueback sockeye which is unique to the Quinault River, as the economic and cultural lifeblood of the Nation. CP 1006. As logging and other land development has intensified in the valley, salmon stocks have plummeted. CP 693-94.

The focus of proceedings below has been on the location of the channel migration zone of the Quinault River, and whether proposed logging operations are unlawfully situated within the channel migration zone. The QIN generally seeks to restore the aquatic ecosystem of the Quinault River to address longstanding habitat degradation and reverse the decline of salmon runs. CP 696-97. One method the Quinault uses to protect and restore salmon habitat is to ensure that forest practices applications (FPAs) are fully compliant with the Forest Practices Rules. The QIN is also investing millions of dollars over a decades-long program to complete habitat restoration projects on the Quinault River using local contractors. CP 687-89. The Quinault's Salmon Habitat Restoration Plan is a thorough and detailed scientific report prepared by a team of geomorphologists, and is part of the record below. CP 678.

The logging permits at issue are proposed clearcuts on two adjacent forty-acre parcels near the Quinault River. CP 480. The Daman Esses Family, LLC owns one parcel, and Sherman Esses (unless necessary

to differentiate, collectively referred to herein as the “Esses”) owns the other. The Quinault River runs downstream from the Olympic Mountains in the east to the Pacific Ocean in the west. The South Shore Road runs parallel to the Quinault River, in-between the river and the Esses’ properties. *See generally* CP 639.

Two hundred years ago, the Quinault River was dominated by mature rainforest, and consisted of narrow channels running through wooded banks, with complex networks of side channels spreading through forested islands across the Quinault River valley. CP 685. Development and logging removed the trees, creating a consolidated single channel that can migrate quickly over an unsecured and erodible valley. CP 686. Over the last century, the Quinault River has been migrating steadily south, closer and closer to the Esses’ properties. CP 1473-76 at page 40 line 13 to page 43 line 21 (testimony of Ms. Reinhart, expert for Quinault).² In recent decades that approach has quickened to a quite rapid rate of more than 10 feet per year. CP 845. Logging and farming operations on the rivers’ banks have removed root structure that would otherwise slow channel migration. CP 1474-77 at 40:13-44:4; CP 685-86.

² Hereinafter the Quinault cite transcripts as “CP ____ at page ____ : line ____ ”

The slightly elevated terrace above the river is composed of highly erodible clay materials that provide little resistance to water. CP 671. A historic barn across the road from the Esses' properties that ten years ago was standing is now almost entirely in the Quinault River. CP 672. The river has already bumped up against the South Shore Road in places, causing catastrophic failure of the road structure. CP 845-46 (Department of Transportation Report). "Large areas of historically stable floodplain terraces, such as the one occupied by the South Shore Road, have been lost." CP 845. Sometimes the county has been able to repair the road in place, in other instances the county has been forced to move the road away from the river. CP 1254. Forward-looking plans such as reports published by the Bureau of Reclamation and the Quinault Indian Nation recognize that the road has sometimes been a barrier to the river in the past, but predict future instability and call for the road to be abandoned or relocated to allow for habitat restoration. CP 711, CP 1079.

In the summer of 2012, the Esses submitted forest practices applications to the DNR for approval. Because the Quinault is a treaty tribe in the area, a representative of the Quinault attended an on-site stakeholder meeting to review the applications. The Quinault provided DNR's lead channel migration zone expert, Charles Chesney, with extensive mapping, data, and expert analysis from the Quinault's ongoing

salmon restoration project. CP 961. The Quinault's analysis indicated that the properties are within the channel migration zone.

Despite these warnings, DNR failed to complete any analysis of the channel migration zone. CP 504; CP 2019 at 70:14-70:24 (testimony of DNR's Sue Casey). According to emails from the Daman Family's contracted forester, the director of the DNR regional office, Rod Stallman, encouraged the landowners to submit their applications when water was low, in order to minimize questions from stakeholders and facilitate permit approval. CP 1874-75 at 55:12-56:6. DNR approved the permits without the required CMZ analysis and with riparian buffers on the streams on the property that were far smaller than the standard rules require. CP 504.

Logging commenced. The Quinault Indian Nation appealed and secured a temporary suspension of logging pending hearing based on expert testimony from Mary Ann Reinhart, a specialist in geomorphology and channel migration zones. CP 213. In briefing on the temporary suspension (akin to a preliminary injunction), the Daman Family argued that the South Shore Road constitutes a "permanent dike or levee" and thus a barrier to channel migration. The PCHB rejected that argument based on the Quinault's expert's declaration and the plain text of the Board Manual. CP 208. The PCHB quoted the Board Manual language and held that the South Shore Road is not a permanent dike or levee "on

the basis that the road is perforated, and that the area to the south of the road is within the 100 year flood plain.” CP 208.

The case proceeded to hearing. In the prehearing brief, the Quinault argued that under the plain language of the Board Manual, the South Shore Road is not a permanent dike or levee because it meets the criteria of the “not considered a permanent dike or levee” exception, and because the road is not built to withstand the river. CP 418.

At hearing, the Quinault’s expert, Mary Ann Reinhart, explained that the Quinault River is rapidly migrating at an accelerating rate to the south, toward the Esses’ properties, and projected channel migration on detailed maps. CP 545; CP 641; CP 649; CP 850; CP 1517-20 at 84:23-87:7. Ms. Reinhart is a regional leading expert in channel migration zones, who has delineated CMZs for many counties and local governments and authored the most recent Department of Ecology guidance on channel migration zones. CP 524-533.

Ms. Reinhart testified that the South Shore Road is not a permanent dike or levee. *See generally* CP 1522-36 at 89:2-103:5. Ms. Reinhart testified that the road meets the criteria of the “not considered a permanent dike or levee” exception in the Board Manual. Ms. Reinhart testified that the road has large culverts under it, and so cannot restrain advancing water, that those culverts allow passage of anadromous fish,

and that areas behind the road are under the 100-year flood level. She provided testimony based on her site visit that at times of high water, a large volume of water flows from the Quinault River under the South Shore Road onto the Esses' properties. Ms. Reinhart made the straightforward observation that in her professional opinion, a structure that allows water to pass under it regularly in significant quantities cannot be considered a permanent dike or levee under any technical or lay understanding of the term.

Ms. Reinhart also testified that the South Shore Road is not constructed to withstand the Quinault River in the likely event that the two collide. She pointed out that it is built on the same highly erodible terrace that has given way nearby, such as under the adjacent barn. CP 671-72 (photos of barn). She provided testimony that she had recently worked as an expert for the Washington State Department of Transportation and Jefferson County on the South Shore Road, and had witnessed the inability of the road to withstand the Quinault River. She has seen the road fail in nearby locations when it encounters the Quinault River, and has also seen repairs fail. She was the only expert to testify at hearing with any experience working on the South Shore Road.

The Quinault also provided testimony and modeling from an expert hydrologist, Leif Embertson. *See* CP 488 (summarizing

testimony); *see generally* CP 1689-1710 at 147:11-168:15. Mr. Embertson created a map, based on data from a Bureau of Reclamation Report, showing exactly where the predicted 100-year flood levels are relative to the Esses' properties. CP 569. The map shows many areas within the proposed logging units as below the 100-year flood level. *Id.* The map also shows that the 100-year flood level passes overtop the South Shore area in multiple areas adjacent to the Esses' logging parcels. *Id.* No other party was able to provide evidence of the extent of the 100-year flood level or to undermine Mr. Embertson's analysis. Ms. Reinhart relied upon Mr. Embertson's analysis in part to explain her conclusion that the South Shore Road is not a permanent dike or levee.

Finally, the Quinault put forth testimony by Dr. Tim Abbe. Dr. Abbe helped draft the Board Manual and published many of the studies relied upon in it. CP 633. He is a leading expert on channel migration zones, and in particular, the role of forested islands and large woody debris within channel migration zones in restoring salmon habitat. He has worked on the Olympic Peninsula studying river movement for over 25 years. CP 1733 at 191:15 to 191:25. Dr. Abbe testified that the South Shore Road is not a "permanent dike or levee," because it is not engineered to withstand flows from the Quinault and has washed out and been relocated at least once. CP 1750-1752 at 208:9 to 210:8. He further

testified that he is aware of several other closely analogous examples on the Olympic Peninsula in which roads following major rivers and leading to National Park areas have been washed out and either relocated or abandoned, including the Hoh River, Dosewallips River, and the Queets River. *Id.*

DNR provided testimony from three individuals regarding the South Shore Road and the Board Manual. As explained in the argument section below, those individuals' opinions differed greatly. As the final witness, DNR employee Marc Engel testified as to his beliefs regarding the meaning of the "permanent dike or levee" text. *See* CP 493-94 (summarizing testimony).

Mr. Engel first testified that page M2-30 does not apply to this case at all, because there are no roads in the areas where the river has moved in the past (the "historic channel migration area"). CP 2397 at 7:2-7:11; CP 2422-23 at 32:5-33:12. He then reversed course and explained that his recollection was that when the Board Manual was drafted, a representative from an Indian tribe wanted the "not considered a permanent dike or levee" language inserted to clarify that streams that flow under a "permanent dike or levee" are fish bearing. CP 2426 at 36:1-36:7; CP 2441-43 at 51:20-53:25. Mr. Engel provided no explanation for why this confirmation would be necessary, why the qualifiers of

“anadromous fish” or “below the 100-year flood level” would have any bearing on whether or not a stream is fish bearing, or why such a distinction would be included in the channel migration section of the Board Manual when there is separate guidance relating to making fish determinations. There is no written evidence of such an interpretation ever existing before Mr. Engel’s testimony. DNR provided no minutes, previous FPAs, notes to the Forest Practices Board, or any evidence demonstrating that the Forest Practices Board or DNR had ever had the intent expressed by Mr. Engel.

The PCHB, in its Final Order, adopted the interpretation put forth by Mr. Engel. The Quinault moved for reconsideration, which the PCHB denied. CP 475-76. The Daman Family and Quinault then both appealed, resulting in a consolidated appeal to the Jefferson County Superior Court.

After briefing and argument in the Superior Court, Judge Harper ruled for the Quinault Indian Nation on all grounds. He reversed and remanded to the PCHB to delineate the channel migration zone absent the South Shore Road as a “permanent dike or levee.”

Judge Harper also ruled against the Daman Family, granting the Department of Natural Resources’ motion for summary judgment based on the determination that the Daman Family had failed to raise its arguments in the proceedings below and thus failed to exhaust

administrative remedies. Judge Harper further denied the Daman Family's motion for summary judgment, commenting that it had no basis in law whatsoever. The Daman Family sought interlocutory review. After briefing and argument Commissioner Bearse denied the motion on the basis that the Daman Family had failed to demonstrate obvious or probable error. The Daman Family then sought review from this Court, which affirmed Commissioner Bearse's decision.

The Daman Family, LLC appealed all of Judge Harper's decisions. The Department of Natural Resources appealed the order granting the Quinault Indian Nation's requested relief.

VI. Standard of Review

The Pollution Control Hearings Board is a quasi-judicial agency focused on review of agency environmental permitting decisions. RCW 43.21B.110. As a quasi-judicial agency, it performs a function "comparable to the ordinary business of courts." *Yaw v. Walla Walla Sch. Dist. No. 140*, 106 Wn.2d 408, 414, 722 P.2d 803, 807 (1986) (citing *Francisco v. Board of Directors*, 85 Wn.2d 575, 578–79, 537 P.2d 789 (1975)).

The Administrative Procedure Act ("APA") governs the appeal of a PCHB order. RCW 43.21B.180. Under the APA, appellants bear the burden of proving the invalidity of the agency action. RCW

35.04.570(1)(a). The Court of Appeals reviews the PCHB's action from the same position as the superior court and applies APA standards directly to the PCHB's record. *Skagit Cty. v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 317-18, 253 P.3d 1135, 1140 (2011).

The APA distinguishes between adjudicative agency decisions, such as a PCHB order, and discretionary agency decisions by placing additional focus on the legal procedures carried out by an adjudicative agency. *Compare* RCW 34.05.570(3) *with* RCW 34.05.570(4). An adjudicative agency action is invalid if the agency engaged in an unlawful procedure or decision-making process or erroneously interpreted or applied the law. RCW 34.05.570(3)(c); (d).

The Quinault Indian Nation's allegations of error specifically challenge the PCHB's Conclusions of Law Nos. 10, 11, and 12, and Findings of Fact Nos. 30 and 31.

Under the "error of law" standards, the court engages in a *de novo* review of the PCHB's legal analysis and conclusions. RCW 34.05.570(3)(c), (d); *Skagit Hill Recycling, Inc.*, 162 Wn. App. at 318. The PCHB's application of legal principles and precedent to interpret the Board Manual is subject to *de novo* review for legal error. *Id.*; *Whatcom Cty. v. Western Washington Growth Mgt. Hearings Board*, 186 Wn. App.

32, 55, 344 P. 3d 1256 (2015) (holding that the Growth Management Hearings Board's misapplication of case law violated the APA).

Where the PCHB interprets and applies administrative guidance, it follows a three-step process. First, the PCHB must determine the meaning of the guidance. That is a legal determination subject to *de novo* review for legal error. RCW 34.05.570(3)(c), (d). Second, the PCHB must make findings of fact relating to the guidance. The findings of fact are subject for review under the "substantial evidence" standard. RCW 34.05.570(3)(e). Third, the PCHB must decide how to apply the guidance and whether to deviate from it. Those are discretionary determinations subject to arbitrary and capricious review. RCW 34.05.570(3)(i).

While no published case has specifically considered the standard of review of interpretations of the Forest Practices Board Manual, the U.S. Sentencing Guidelines provide an analogous circumstance in that they are non-binding guidelines that shape legal outcomes. It is well settled that the interpretation of the text of the Sentencing Guidelines is reviewed *de novo*. See, e.g., *United States v. Flores*, 729 F.3d 910, 913 (9th Cir. 2013). In other analogous circumstances, such as review of a manual from an insurance rating bureau, *Escher v. Decision One Mortg. Co., LLC*, 417 B.R. 245 (E.D. Pa. 2009), courts have also applied *de novo* review.

The PCHB's findings of fact are invalid if not based on substantial evidence. RCW 34.05.570(3)(e). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter. *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

The PCHB's application of facts to administrative guidance or rules is unlawful if it is arbitrary and capricious. RCW 34.05.570(3)(i). An agency decision is arbitrary and capricious if there "lacks a rational connection between the facts found and the conclusions made" or the agency's reasoning "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

VII. Argument

The PCHB committed repeated procedural legal errors in its interpretation of the Board Manual text regarding when a road is a permanent dike or levee. These errors require invalidation of the PCHB's Final Order.

The PCHB also made substantive errors. The PCHB's ultimate determination that the South Shore Road is a barrier to channel migration was arbitrary and capricious and lacked substantial evidence because it relied heavily on the misreading of the Board Manual, because there is no reason in the record to deviate from the application of facts to the presumptive guidance of the correctly read Board Manual, and because the PCHB made speculative predictions about what Jefferson County public works will do 100 years from now.

A. The PCHB's Interpretation of the Board Manual Was Erroneous Because It Contradicts the Manual's Plain Text.

It is a fundamental rule of jurisprudence that courts must first look to the plain language when determining the meaning of a statute or regulation. The same rule applies when courts construe the language in guidance documents and manuals. *Flores*, 729 F.3d at 913 (sentencing guidelines); *Escher*, 417 B.R. 245 (E.D. Pa. 2009) (insurance rate manual). In reviewing the plain text, courts must consider "the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013); *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). If the language is clear, the reviewing court must apply the text as written and assume that the

legislative body or agency meant exactly what it is written. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d at 281, 242 P.3d 810 (2010); *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–12, 43 P.3d 4 (2002).

The fundamental plain language rule of interpretation is particularly appropriate in the context of the Forest Practices Board Manual, because it is a multi-stakeholder document pieced together by various groups with varying views. The only universally available and understood meaning is therefore the one on paper, in plain text. For fairness and consistency, it is important that the public be able to rely on that language. The Board Manual is designed as a functional, everyday handbook to be applied by foresters, landowners, and scientists. Those individuals cannot be expected to intuit hidden meanings based on unexpressed legislative intent.

The Board Manual text at issue in this case directly links to the definition of channel migration found at WAC 222-16-010. The Forest Practices Rules state that a CMZ is limited by a “permanent levee or dike,” and direct the reader to consult the Forest Practices Board Manual for additional guidance. WAC 222-16-010. “Permanent dike or levee” is the operative term, and the Forest Practices Board Manual pages M2-30

sets forth the guidance for determining whether or not a road constitutes a “permanent dike or levee.” CP 599. While many portions of the Board Manual are complex and technical, this section is exceedingly clear in defining whether a road constitutes a permanent dike or levee. The Manual states in pertinent part that:

The CMZ of any stream can be limited to exclude the area behind a permanent dike or levee provided these structures were constructed according to appropriate federal, state, and local requirements. As used here, a permanent dike or levee is a channel limiting structure that is either:

1. A continuous structure from valley wall or other geomorphic structure that acts as a historic or ultimate limit to lateral channel movements to valley wall or other such geomorphic structure and is constructed to a continuous elevation exceeding the 100-year flood stage (1% exceedence flow); or
2. A structure that supports a public right-of-way or conveyance route and receives regular maintenance sufficient to maintain structural integrity (Figure 19).

A dike or levee is not considered a “permanent dike or levee” if the channel limiting structure is perforated by pipes, culverts, or other drainage structures that allow for the passage of any life stage of anadromous fish and the area behind the dike or levee is below the 100-year flood level.

The Washington Department of Fish and Wildlife (WDFW) and the Indian tribes can often provide assistance in evaluating the potential for seasonal fish passage and use of the floodplain, as well as details on dike permitting. Applicants should also contact local, state, federal, and tribal entities to make sure that there are no plans to remove the structure.

CP 599. The language first explains what is generally considered a permanent dike or levee, then sets forth an exception, and then provides the user with direction on where to gather the relevant information to determine if the definition or exception apply.

At hearing, the Quinault argued that the numbered points “1” and “2” set forth what is generally considered to be a “permanent dike or levee,” and the paragraph following point “2,” starting with “[a] dike or levee is not considered a permanent dike or levee” sets forth an exception for when such structures are “not considered a permanent dike or levee.” That interpretation is buttressed by the glossary, which defines a regular “dike or levee” as:

A continuous structure from valley wall to valley wall or other geomorphic feature that acts as an historic or ultimate limit to lateral channel movements and is constructed to a continuous elevation exceeding the 100-year flood stage (1% exceedence flow); or a structure that supports a public right-of-way or conveyance route and receives regular maintenance sufficient to maintain structural integrity.

CP 440.

If the reader inputs the glossary definition into the exception language, it reads in part “a structure that supports a public right of way or conveyance route and receives regular maintenance sufficient to maintain structural integrity is not considered a permanent dike or levee if...” and

then sets forth criteria. The glossary definition therefore makes abundantly clear that the “not considered a permanent dike or levee” language is an exception describing when a structure that would otherwise block a river “is not considered a permanent dike or levee.”

Rather than follow the plain text, the PCHB interpreted the paragraph starting with “not considered a permanent dike or levee” to have no effect whatsoever on determining whether or not a road is considered a permanent dike or levee. CP 509. The PCHB interpreted the “not considered a permanent dike or levee” language to apply an issue wholly outside of channel migration zones or the Forest Practices Board Manual. *Id.* The PCHB believed the exception paragraph pertained to whether or not streams should be categorized as fish-bearing, even though the PCHB considered no evidence of how or why the language would function in that context. *Id.*, line 8. The PCHB’s misreading of the plain text of the Board Manual constitutes legal error requiring reversal. *See Flores*, 729 F.3d at 913.

To arrive at its incorrect reading, the PCHB also misapplied legal precedent. Specifically, the PCHB applied *Muckleshoot Indian Tribe v. Washington Dep’t of Ecology*, 112 Wn. App. 712, 720, 50 P.3d 668 (2002), *review denied* 150 Wn.2d 1016, 79 P.3d 446 (2003). CP 508. *Muckleshoot Tribe* requires that when a reviewing court determines the

meaning of a text that all language “must be given effect so that no portion is rendered meaningless or superfluous,” “provisions of an act will be harmonized to ensure proper construction of each provision,” and “the meaning of a specific term will be taken from the context in which it is employed.” Here, the PCHB made at least three errors when applying legal principles and precedent set forth in *Muckleshoot Tribe*.³ Each of the PCHB’s errors requires invalidation of the agency action. *Whatcom Cty.*, 186 Wn. App. at 55; RCW 34.05.570(3)(c), (d).

First, the PCHB reasoned that nearly all roads have culverts under them, and so if the “not considered a permanent dike or levee” language constituted an exception, that exception would eliminate all roads from the possibility of being a permanent dike or levee and swallow the rule. CP 508. The PCHB’s analysis ignores the text of the Board Manual, which plainly states that a structure is “not considered a permanent dike or levee” only if three specific conditions apply: 1) there are culverts under the road, 2) those culverts “allow for the passage of any life stage of anadromous fish,” and 3) “the area behind the dike or levee is below the 100-year flood level.” It does not matter if “most roads have culverts,” CP

³ *Muckleshoot Tribe* applies to interpretation of ambiguous text, and as noted in the following argument, the text here is unambiguous. However, the PCHB still erred in applying the common rules of textual construction set forth in *Muckleshoot Tribe*, and those errors shaped the PCHB’s ultimate analysis.

508, because the exception is far more nuanced than just culverts. There must be culverts that allow passage of anadromous fish, to an area behind the road that is below the 100-year flood level. Clearly those are conditions that do not apply to most roads, but rather a limited subset, as makes sense for an exception.

Second, the PCHB erred in its highly speculative analysis of the picture on page M2-30 of the Board Manual. CP 508 (referencing CP 599). The PCHB reasoned that the picture shows a road limiting a CMZ, and that “there is no reason to think that the road in the Figure, like most roads, would not have culverts,” so therefore roads with culverts must be able to limit CMZs. *Id.* Again, that analysis does not stand up to any scrutiny. The picture contains zero information about whether there are culverts or not. It simply shows an example of a road that has obviously been constructed to withstand a river, because it is currently doing so. *See* CP 1789-90 at 29:1 to 30:24 (Abbe testimony); CP 2434-36 at 44:13 to 46:7 (Engel testimony). The PCHB erred by making a series of deductions where it had almost no information, and again by focusing exclusively on culverts and ignoring the remainder of the “not considered a permanent dike or levee” paragraph. CP 599. In accordance with the text, the picture on M2-30 can be easily harmonized with the text to show an example of a road that does not meet the exception language, either

because there are no culverts, anadromous fish cannot pass under it, or the area behind it is not below the 100-year flood level.

The third error the PCHB made was in its reference to the definition of “dike or levee” in the glossary of the Forest Practices Board Manual. The PCHB reasoned that because the definition of “dike or levee” did not contain an exception, then there must not be an exception in the main text defining permanent dike or levee. This was plain error because the critical question is whether or not a road constitutes a dike or levee, but rather whether it constitutes a “permanent dike or levee.” Permanence is absolutely critical because the question is whether a dike or levee will hold back water for 140 years, the duration of channel migration zone analysis. The governing regulation references a “permanent levee or dike,” WAC 222-16-010, the Forest Practices Board Manual explicitly states that a CMZ is only limited by a “permanent dike or levee,” CP 599, and the glossary to the Board Manual defines disconnected migration area as “[t]he portion of the CMZ behind a permanently maintained dike or levee.” CP 631. The PCHB erred by ignoring the paramount importance of the word “permanent” in determining whether a road is a “permanent dike or levee.” Contrary to the PCHB’s interpretation, the glossary definition of “dike or levee” fits perfectly into the “not considered a permanent dike or levee” text. Inputting the definition from the glossary

makes the text read exactly as the entire text on page M2-30 of the Board Manual reads, first detailing what constitutes a dike or levee, and then setting forth the exception.

In sum, the PCHB misread the text of the Board Manual, which constitutes legal error, *Flores*, 729 F.3d at 913, and disregarded the plain language, in violation of the familiar statutory construction principles set forth in *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d at 281, 242 P.3d 810 (2010). The PCHB also failed to read the “permanent dike or levee” in the context of the surrounding language and regulatory structure, in violation of *Muckleshoot Indian Tribe*. 112 Wn. App. at 720.

While “error of law” is the governing standard, the PCHB’s analysis was also arbitrary and capricious, and the PCHB’s supposition about road conditions and illustrations lacked substantial evidence. At a minimum, the PCHB’s error necessitates remand for the PCHB to apply the facts of the case to the correct, plain language reading of the Board Manual.

B. The PCHB’s Determination That the Board Manual is Ambiguous Constitutes Legal Error.

The PCHB’s interpretation rested in large part on its determination that the Board Manual is ambiguous, and resulting deference to DNR. The PCHB erred in determining that the Board Manual language

concerning when a road is “not considered a permanent dike or levee” is ambiguous, because, as explained above, the language is exceedingly clear. The basis of the PCHB’s determination was also unlawful. The PCHB found ambiguity based not on the actual text but rather on witness testimony relating to possible legislative history.

Language is ambiguous when its text is “susceptible to more than one reasonable meaning.” *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 12. The word “reasonable” is an important modifier—language “is not ambiguous simply because different interpretations are conceivable.” *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). “Just because a skillful advocate is able to concoct an argument that pulls an event within a conceivable description does not mean that a term is ambiguous in the legal sense.” *Ososki v. St. Paul Surplus Lines Ins. Co.*, 162 F. Supp. 2d 714, (E.D. Mich. 2001). As the United States Supreme Court noted when examining statutory language, “[t]here is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms would be a nice question, [but] because we are condemned to the use of words, we can never expect mathematical certainty from our language.” *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (internal quotes and citations omitted). That is why ambiguity exists only when a term is

susceptible to two or more reasonable interpretations. *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 12.

In the Final Order, the PCHB wrote that the structure of the “permanent dike or levee” language appeared to support the Quinault’s interpretation, but found the language to be unclear and thus ambiguous. CP 508. In the Order Denying Reconsideration, the PCHB reversed course and said that the language of the section is clear, but that the “placement of this language is what makes it ambiguous.” CP 476-77. The PCHB’s ultimate explanation, set forth in a footnote of the Order Denying Reconsideration, was that the paragraph concerning what “is not considered a permanent dike or levee” is ambiguous because it is not clear whether it applies as an exception to what is considered a permanent dike or levee, or should be read as “raising a separate thought.” CP 476 (n. 1).

The PCHB’s determination was legal error because any text—whether it be a statute, regulation, or contract—must be read according to its plain text, in the context of the surrounding language. *Evans*, 177 Wn.2d at 192. There is no reasonable basis to believe from the text of the Board Manual that a paragraph describing what is “not considered a permanent dike or levee” actually has nothing to do with what is not considered a permanent dike or levee, and instead raises a “separate thought” concerning an issue not relating to channel migration zones. The

only reasonable interpretation is the one evident from the plain text and its context: that the Board Manual first explains what is a permanent dike or levee, and then explains what is not.

The PCHB's error is evident from the change in its ruling between the Order on Temporary Suspension and the Final Order. The PCHB first read the text of the Board Manual with no trouble as the Quinault do. CP 208. It was only after hearing post-hoc testimony from DNR concerning the intent of some stakeholders that the PCHB determined that the text was ambiguous. But legislative history, or in this case stakeholder recollection, is an unlawful basis on which to determine ambiguity. If such information comes into play, it is only after a determination of ambiguity based on the text itself. *See Ratzlaf v. United States*, 510 U.S. 135, 147–148 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear”).

C. The PCHB Erred in Deferring to One Person's Recollection of a Stakeholder's Intent to Determine Meaning.

The PCHB concluded that “DNR's interpretation of this ambiguous section of the Board Manual is entitled to deference,” citing *Friends of the Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd.*, 129 Wn. App. 35, 56, 118 P.3d 354, 364 (2005). This deference was error because DNR provided no evidence at all about what

the promulgating authority, the Forest Practices Board, intended, but rather speculation about one of the many stakeholder groups preparing a draft version of the text intended.

To understand the PCHB's error, it is important to understand how Section 2 of the Board Manual was developed and authorized. The Forest Practices Board functions as an independent state agency tasked with the job of developing and updating Forest Practices Rules. RCW 76.09.030. The Forest Practices Board requested that a group of stakeholder representatives—individuals from tribes, environmental groups, agencies, and industry—create a consensus draft document. Section 2 of the Board Manual is drafted by at least 12 stakeholders who are variously present and have differing levels of involvement according to funding and availability. CP 2477 at 166:1 to 171:11. Once the draft was complete, the stakeholders submitted it to the Forest Practices Board's 13-person membership. The independent Board was not part of the drafting, but read and approved the document "as is," according to its text. The Board Manual has no written drafting history, notes, or additional explanation from the Forest Practices Board that provides evidence of its intent outside of the plain text. *See* CP 2271 at 80:5 to 80:8 (Lingley testimony); CP 2024 at 75:11 to 75:17 (Casey testimony). The purpose of the Board Manual is to provide a common framework that people in the field can

read and understand and apply according to its plain terms. CP 2283 at 92:1 to 94:17 (Lingley testimony).

The PCHB erred by conflating the supposed intent of a stakeholder group with the legislative intent of the actual issuing authority, the Forest Practices Board. Even if one or more stakeholders had a certain idea about what text means, that intent does not matter unless it is conveyed to and approved by the actual legislative body, the Forest Practices Board.

A United States Supreme Court case, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), provides a very helpful analysis of a closely analogous circumstance. In *Circuit City*, the respondents argued that the Court should rely on legislative history indicating that a certain portion of text was added at the request of the Seamen’s Union of America, and therefore had a corresponding meaning. The Court soundly rejected such analysis, writing

Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation.

Circuit City, 532 U.S. at 121 (citing *Kelly v. Robinson*, 479 U.S. 36, 51, n. 13 (1986) (“[N]one of those statements was made by a Member of Congress, nor were they included in the official Senate and House

Reports. We decline to accord any significance to these statements”). The exact same principles apply here. Unsubstantiated recollection of an interest group’s intention is not legislative intent, and it is legal error to consider it such.

The Forest Practices Board is an independent state agency. The text that matters is what the Forest Practices Board read and authorized, which was the plain text of the Forest Practices Board Manual. It has to be this way for purposes of public accountability and transparency, or the meaning of the Board Manual devolves to a “he said she said” recollection of a small cast of people in a private meeting room over ten years ago, and the average person has no means of ascertaining or relying upon what the text actually means.

D. The PCHB Erred By Deferring to a Novel and Inconsistent Agency Interpretation First Offered in Litigation.

The PCHB’s deference to DNR’s interpretation is also error because DNR put forth zero evidence that it has ever applied such an interpretation as a matter of policy, or ever before at all. Every relevant document in the record indicates that DNR has previously read the text in the same manner as the Quinault, and only proffered their later interpretation in the advanced stages of litigation.

Well-settled Washington administrative law requires an agency to prove that it has a consistent interpretation prior to litigation in order to gain judicial deference to that interpretation. For over twenty years, Washington courts have held that in order to gain deference, “it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

In *Cowiche Canyon*, the court found that an agency’s use of trial testimony to explain its legal interpretation constitutes persuasive evidence that an agency lacks a consistent policy, and concluded that the agency failed to meet its deference burden:

Nothing here establishes such an agency policy, and nothing shows any uniformly applied interpretation. The evidence establishes that the application and “interpretation” here was nothing more than an isolated action by the Department....Instead, it attempts to bootstrap a legal argument into the place of agency interpretation.

Id. at 814-15 (emphasis added).

In *Sleasman v. City of Lacey*, the court reiterated the analysis of *Cowiche Canyon* and held that a court should not afford deference to an agency interpretation where the “claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation.” 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007). And in the case cited by the

PCHB, *Friends of Columbia Gorge*, the Division II Court of Appeals explicitly stated that, in order to receive deference, an agency must prove that “it has adopted and applied such interpretation as a matter of agency policy.” *Friends of Columbia Gorge*, 129 Wn. App. at 46 (citing *Cowiche Canyon Conservancy*, 118 Wn.2d at 815).

In *White v. Salvation Army*, the court deferred to an agency interpretation of its own administrative policy, but only where that agency made clear that it had a long history of interpreting and enforcing the law in a consistent manner. The court stated that “we may give weight to an administrative policy, if the policy reflects that it has been thoroughly considered and supported by valid reasoning.” *White v. Salvation Army*, 118 Wn. App. 272, 283, 75 P.3d 990 (2003) (emphasis added). In reaching that conclusion, the court cited *Othello Cmty. Hosp. v. Employment Sec. Dep't of State of Wash.*, where this Court held “[d]eference is appropriate only when the agency's action has a sound basis. No deference is to be accorded a policy that is wrong.” *See Othello Cmty. Hosp. v. Employment Sec. Dep't of State of Wash.*, 52 Wn. App. 592, 596, 762 P.2d 1149, 1151 (1988) (citations omitted). Washington courts’ repeated emphasis on an agency’s consistent interpretation and reasoning as a prerequisite for judicial deference supports the limits set forth in *Cowiche Canyon Conservancy*.

Each of the cited cases applies here and dictates that the PCHB's deference was error. The fact that Mr. Engel had to testify at all, despite the fact that he did not do any analysis in the case and is not a scientist, reveals that DNR has no established policy to rely upon. *Cowiche Canyon Conservancy*, 118 Wn.2d at 814. Testimony of DNR staff members confirmed that Mr. Engel's interpretation is new, even within the agency itself. Sue Casey, the self-professed "rules guru" of DNR, testified that the "not considered a permanent dike or levee" language is an exception, as it reads, and further that a majority of regional foresters read it the same way. CP 2023 at 74:18 to 74:21. Ms. Lingley's expert report construed the text as an exception, and she testified that she only changed her opinion after being instructed to do so. CP 2270-71 at 79:5 to 80:10.

In sum, DNR put forward zero proof to demonstrate that its interpretation merits deference, and the testimony at trial showed conclusively that DNR lacks any consistent policy. As in *Cowiche Canyon*, "[t]he evidence establishes that the application and 'interpretation' here was nothing more than an isolated action by the Department," 118 Wn.2d at 815, and therefore it was legal error for the PCHB to afford DNR's interpretation deference.

Declining to extend deference to DNR for its interpretation of the Board Manual in this instance is grounded in sound public policy.

Deference to a public, consistently applied interpretation of authority perpetuates predictable rule of law. When an agency has a consistent interpretation set forth in public, the agency gains experience applying the law in a particular way. The public has an opportunity to know the law before it is applied, and to challenge any incorrect assertions. In contrast, providing deference to interpretations first advanced in litigation allows agencies to interpret law as is convenient in a given case. The facts in the present case demonstrate the power that such deference grants to one individual. While Mr. Engel was present when the Board Manual was written, the Board Manual was drafted and finalized by nearly a dozen representatives of divergent stakeholders with often differing viewpoints. CP 486. The only thing that we can know for certain is that the representatives agreed to the final text of the Board Manual. Deference to one person's understanding of others' intentions effectively allows that person to write the rules after the fact. It even allows Mr. Engel to definitively say what Indian tribes intended, over the objections of an actual Indian tribe that is a party in the case. That absurd outcome violates Washington administrative law.

E. The PCHB's Determination That Jefferson County Will Transform the South Shore Road Into a River Barrier in the Future was Arbitrary and Capricious and Lacked Substantial Evidence.

While the PCHB primarily relied upon the Board Manual in determining that the South Shore Road is a "permanent dike or levee," it also determined that Jefferson County is likely to transform the current South Shore Road into a barrier to channel migration in the future. CP 510. The PCHB's finding was arbitrary and capricious because County actions 100 years from now are entirely speculative. The PCHB lacked substantial evidence for its findings of fact that FEMA repair money is always available, and that the road will be transformed into a permanent dike or levee. CP 494. The PCHB ignored evidence from the most relevant authority, the Washington State Department of Transportation on behalf of Jefferson County, stating that the road will inevitably fail.

The plain uncontested fact is that right now, the South Shore Road does not block the passage of fish or water, and moreover is not constructed to withstand a river. *See* CP 2255 at 64:13 to 64:19 (DNR expert conceding that road is not currently a barrier). While the PCHB relied on evidence that the road has been maintained in the past and services Olympic National Park, CP 510, nobody knows what Jefferson County public works will be doing in 2115 and beyond. CP 1837-44.

Budgets, politics, and public policy are fickle. The repairs that Jefferson County has put in the road thus far are already failing, CP 1600 at 58:1 to 58:16, repair is very expensive due to both construction costs and the need to mitigate for damage to salmon habitat, CP 844-49, Jefferson County and the Department of Transportation have seriously considered relocation, CP 849, and both the Quinault Restoration Plan and the Bureau of Reclamation Report call for the road to be moved or abandoned. CP 711; CP 1079.

It is for this reason that sound science requires a geomorphologist to take man-made structures as they are now, and not project future changes upon them. CP 1526-27 at 93:21 to 94:19 (Reinhart testimony). DNR's experts agreed: according to DNR expert Leslie Lingley, future changes to man-made structures are "hypothetical," and including them in channel migration zone analysis is "not good science." CP 2245 at 54:9 to 54:15; 54:22 to 55:14. Before changing his testimony at trial, DNR's Marc Engel succinctly stated in deposition:

You don't look at the potential for the future. I mean, that would be things like the county getting their budget cut and they stop maintaining the road. So we're not asked to look at that. That is very subjective. We just look at what it is.

CP 2415 at 25:15 to 25:19. The channel migration zone is supposed to take into account man-made structures as they are, not as they someday

might be. And everyone agrees that the South Shore Road is currently not a permanent dike or levee.

Even if it were appropriate to look forward to potential changes in a road, the PCHB was sorely lacking in actual evidence. The sole evidence put forth by DNR concerning what might happen to the road in the future consisted of a 15 to 20 minute hearsay conversation with a public works employee. CP 2255-57 at 64:24 to 66:22 (Lingley testimony). DNR did not know if that employee had any capacity to control maintenance, and did not consider that such an employee is highly unlikely to be around in 100 years, but the PCHB relied on that assessment anyway. CP 2264 at 73:12 to 73:23.

The PCHB's speculation about future maintenance actions transforming the South Shore Road one-hundred years from now lacked substantial evidence and was arbitrary and capricious. The PCHB found that all of the conditions of the "not considered a permanent dike or levee" text were met. The road is perforated by culverts, water flows through those culverts, anadromous fish swim under the road, and areas behind the road are under the 100 year flood level. See CP 482-84 (Findings of Fact Nos. 6-12, 21). There is no basis in the record to deviate from the plain language guidance of the Board Manual, particularly given that Jefferson County and the Department of Transportation concluded that "repetitive

damage to this road segment is inevitable, and complete loss of the infrastructure is highly likely.” CP 845. The PCHB should have, based on its findings of fact and a correct interpretation of the Board Manual, ruled that the South Shore Road is not a “permanent dike or levee.” Its failure to do so was arbitrary and capricious.

VIII. The Quinault Indian Nation’s Response to the Daman Family, LLC’s Appeal

The Daman Family asserts that the Forest Practices Board Manual provides legal standards and that the PCHB must, as a matter of law, adopt the smallest channel migration zone delineation that follows those legal standards. At first blush, this may seem similar to the Quinault’s argument. However, the Quinault recognize that the Forest Practices Board Manual is a guidance document, and argue that the PCHB’s misinterpretation of the Forest Practices Board Manual based on legal principles and precedent is subject to *de novo* review for legal error. That approach follows the Administrative Procedure Act and complies with the definition of the Board Manual in statute, regulation, and the Board Manual itself.

In contrast, the Daman Family argues that the Board Manual is itself law that sets forth substantive and binding legal standards. The

Daman’s argument is wrong because the Board Manual is by definition an “advisory technical supplement,” WAC 222-12-090, that provides “technical guidance,” RCW 76.09.040(3)(c) rather than legal standards.

Aside from lacking legal basis, the Daman Family’s argument is improperly presented. The Daman Family both failed to raise its argument in the first instance before the PCHB, and further failed to argue that the trial judge committed error in its appellate brief.

Finally, the Daman Family asserts that the Quinault Indian Nation failed to meet its burden of proof before the PCHB, and therefore the challenged permit must stand on its original terms. Again, the Daman Family misconstrues the basic legal framework. The appellant has the burden of proof, WAC 371-08-485(3), but the PCHB considers challenges *de novo*. WAC 371-08-485(1). That means that once an appeal is filed the PCHB may direct an outcome based on all of the evidence presented, and is not constrained to simply upholding or invalidating and remanding a permit.

A. Because the Board Manual is an “Advisory Technical Supplement,” Adherence to Its Guidance Does Not Constitute Compliance with the Forest Practices Rules.

The core of the Daman’s argument is on page 13 of their brief, which reads “[t]he 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.” That argument is premised on the belief that the “Forest Practices Rules incorporate the Manual into the **minimum standards** for approval of an FPA.” Daman Br. at 10 (emphasis in original).

The Daman Family’s argument is wrong because the Board Manual is not law and does not set legal standards. The Forest Practices Board’s regulations plainly state that “the manual serves as an advisory technical supplement to these forest practices rules.” WAC 222-12-090. By definition, the Board Manual is “advisory.” *Id.*; RCW 76.09.040(3)(c). It serves as a valuable starting place to guide presumptive interpretation of the rules, but is not itself the governing legal standard. The governing legal requirement is the prohibition on logging in the channel migration zone set forth in the forest practices rules. WAC 222-30-020(13); WAC 222-16-010 (defining channel migration zone).

The Daman Family attempts to distinguish section 2 of the Board Manual from the other sections, and argues that the regulation’s use of the word “standards” as opposed to “guidelines” when referring to section 2 of the Board Manual dictates that section 2 of the Board Manual alone provides legal standards. *Compare* WAC 222-12-090(2) with WAC 222-12-090(1)-(26).

The fatal flaw in the Daman Family’s reading is that the Board Manual is actually one document consisting of multiple sections. The entire Board Manual is defined as an “advisory technical supplement.” WAC 222-12-090. The term “advisory” therefore applies as a modifier to each section of the larger document, regardless of whether they are referred to as “standards,” “guidelines,” “a method,” or “the standard methodology.” WAC 222-12-090(1)-(26). Furthermore, the regulatory definition of “channel migration zone” references section 2 of the Board Manual, and describes section 2 as providing “descriptions and illustrations of CMZs and delineation guidelines.” WAC 222-16-010. In short, the Forest Practices Rules use the terms “guidelines” and “standards” interchangeably when referencing the Forest Practices Board Manual, without legal effect.

In addition to both the statute and regulations referencing the Board Manual as guidance, section 2 of the Board Manual itself explains that it is not a legal standard. The opening pages of section 2 state that:

The following guidelines and delineation scenarios contain technical recommendations for CMZ delineation. It may be reasonable to deviate from these recommendations based on carefully developed technical analysis of the historical channel and watershed processes that control channel migration.

CP 590. Section 2 further states that it is a “technical supplement” to the rules, and explains that “CMZ delineation is a relatively recent concept, and no one method of analysis has been adopted or prescribed.” CP 610.

In sum, the Daman Family’s argument that the PCHB must, as a matter of law, adopt the smallest CMZ that adheres to the Board Manual guidance is wrong because it relies entirely on the incorrect premise that the Board Manual sets forth legal standards. It does not. RCW 76.09.040(3)(c); WAC 222-12-090; CP 590; CP 610.

Finally, the Daman Family argues as a matter of policy that the Board Manual should be more than guidance, because if it is truly advisory then “there would be no certainty or predictability in the regulatory framework,” and that landowners would be subject to “arbitrary enforcement at the whims of DNR and the PCHB.” *See* Daman Br. at 15.

The Quinault agree that predictability is a desirable outcome, and that DNR should not have unfettered discretion. The lawful means of achieving consistency, however, is not to attempt to convert the vast and complex Board Manuals to legal standards.⁴ Rather, the legal and correct

⁴ If this Court adopted the Daman Family’s argument that section 2 of the Board Manual is enforceable law it would implicitly invalidate the Board Manual, because that document did not go through notice and comment rulemaking. *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wash. 2d 640, 649, 835 P.2d 1030, 1035 (1992); RCW 34.05.570(2)(c).

means is for the plain text of Board Manuals to constitute the presumptive means of interpreting and applying the Forest Practices Rules. Anyone reading the text will understand the starting point of analysis. The various stakeholders will be able to compare analyses within a common framework. In some instances the Board Manual will not necessarily reach the correct result in a given landscape, in which case stakeholders can provide a reasoned and transparent basis to depart from the guidance. Accountability is achieved because DNR and the PCHB may only deviate from the plain text of the guidelines with reasoned basis. The existing model can work. The frustrations here are not caused by the legal structure surrounding Board Manuals, but rather by DNR's failure to initially do the required analysis, improper approval of deficient permits, and multiple revisions of positions and policy.

B. The Jefferson County Superior Court Correctly Dismissed the Daman Family, LLC's 'Legal Standards' Argument for Failure to Exhaust Administrative Remedies.

Under the APA, a party may gain judicial review of a decision “only after exhausting all administrative remedies available within the agency whose action is being challenged,” with limited exceptions that do not apply here. RCW 34.05.534. While there is no precise litmus test to determine whether a party has properly raised an issue before the PCHB, a

passing or implied reference to an issue in a quasi-judicial hearing is insufficient to preserve an issue for appeal. *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 597, 13 P.3d 1076 (2000); *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Bd.*, 160 Wn. App. 250, 272-72, 255 P.3d 696; (2011); *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d648, 668, 860 P.2d 1024 (1993).

The exhaustion requirement exists to provide for a more efficient process to protect the agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208, 1211 (1997) (citing *McKart v. United States*, 395 U.S. 185, 193-94 (1969)).

The proceedings before the PCHB were at all times a classic “battle of the experts.” Each party approached adherence to the Board Manual as an important indicator of reliability, not a legal standard. The Daman Family's own expert recognized that the Board Manual allows practitioners to exercise great discretion based on their judgment of local conditions, and that different experts may all follow the Board Manual guidance and reach different results. CP 2130 at 90:1 to90:16; CP 1920 at

101:12-101:19.⁵ Despite this acknowledgement, the Daman Family never once addressed the question of how to distinguish between multiple, differing analyses that all follow the guidance of the Board Manual. Critically, the Daman Family never once asserted that the PCHB must adopt the "minimum" channel migration zone, or that DNR's analysis was incorrect as a matter of law.

The Daman Family's expert report drives home how much their argument changed between the PCHB proceedings and superior court. That report presented their delineations as a range of potential CMZs, separated by more than 800 feet. *See* CP 1317 (Scenarios A and B). Their expert testified that both scenarios were prepared in accordance with the Board Manual. CP 1319 (report); CP 1906 (testimony). Of those scenarios, Daman Family ultimately presented its largest channel migration zone, based on the professional judgment of its leading expert, who deemed the larger CMZ the most reasonable. CP 1920. In short, the Daman Family witnesses did exactly what the Daman Family now faults the PCHB for doing: the witnesses presented several different CMZ's, and ultimately selected one of the largest options because they deemed it

⁵ Counsel to Daman Family expert Dr. Jon Einarsen: "it's possible you could maybe not directly conflict with the Board Manual but have a wrong CMZ?" Dr. Einarsen: "I think it's definitely possible. I think that this method to calculate the CMZ is fraught with uncertainty."

most reasonable and credible. Having treated the Board Manual as guidance at hearing, the Daman Family cannot now, for the first time on appeal, challenge the PCHB for doing the same. RCW 34.05.554(1).

C. The Daman Family Failed to Assign Error to the Superior Court Decision and Therefore Waived Its Appeal.

The Jefferson County Superior Court's April 3, 2015 Order dismissed the Daman Family's appeal as failing to exhaust administrative remedies as required by RCW 34.05.554(1), ruling that the "only issue raised in the superior court appeal was one not presented to or decided by the Pollution Control Hearings Board, the agency whose order is being reviewed by this Court; hence the appeal is barred by the statute's terms." In its brief before this Court, the Daman Family did not allege that the superior court's ruling was error and did not provide any argument on the issue.

Rule of Appellate Procedure 10.3(h) requires the appellant challenging an administrative adjudicative order, such as a final order of the PCHB, to set forth both the alleged errors committed by the adjudicative agency and those committed by the superior court. "As a general rule, unchallenged findings of the trial court will be treated by this court as verities on appeal." *Fuller v. Employment Sec. Dep't of State of Wash.*, 52 Wn. App. 603, 605, 762 P.2d 367, 369 (1988). In addition to properly alleging error, an appellant's brief must present "argument in

support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6); *see* RAP 10.3(b). Unsubstantiated assignments of error are deemed abandoned. *Kittitas Cty. v. Kittitas Cty. Conservation*, 176 Wn. App. 38, 54, 308 P.3d 745, 752 (2013), as amended (Sept. 5, 2013) (citing *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991)).

The reason that “proper assignments of error are indeed *mandatory* in briefs” is that clear identification and argument is necessary to “assist counsel and the appellate courts to focus the issues for decision.” *State v. Olson*, 126 Wn.2d 315, 324, 893 P.2d 629, 633 (1995) (Talmudge, J., concurring) (emphasis in original). At the same time, RAP 1.2 permits liberal interpretation of the civil rules and allows appellate review in spite of technical violations. *Fuller*, 52 Wn. App. at 605.

Here, the Daman Family clearly violated RAP 10.3(h), as their brief neither alleges nor explains any error by the superior court. See Daman Br. at 2. The Daman Family’s failure to allege error and provide any argument on the failure to exhaust issue is prejudicial to the Quinault Indian Nation because QIN is left guessing as to what argument to respond to. QIN must assume that the Daman Family is challenging the superior court’s ruling, but the basis for that challenge is unknown. If the Daman

Family explains further on reply, the Quinault will be left without an opportunity to fully respond.

The Court has wide discretion in balancing the competing directives of RAP 10.3 and RAP 1.2. *State v. Olson*, 126 Wn.2d 315, 324, 893 P.2d 629, 633 (1995). Here, waiver of argument on issue number one in the Daman Family's appeal, *see* Daman Br. at 2, is the appropriate remedy because the Daman Family both failed to allege error and failed to brief its argument. As a result, the mistake is not just a technicality, it prejudices the respondents and potentially complicates the proceedings.

The Daman Family's waiver of its opportunity to appeal the superior court's decision on failure to exhaust administrative remedies necessitates upholding the superior court's grant of DNR's motion for summary judgment seeking to dismiss the Daman Family appeal for failure to exhaust administrative remedies. That is the legally correct result. It is also not unduly harsh in this instance because the Daman Family has already had opportunity to pursue interlocutory appeal, and this Court has already determined that the superior court did not make an "obvious or probable error."

D. The PCHB Correctly Exercised Its Jurisdiction to Invalidate the Originally Issued Forest Practices Permits.

In the final pages of its brief, the Daman Family asserts that the PCHB lacks jurisdiction to do anything other than grant the appellant's

requested relief or uphold the challenged permit, because only the appellant bears the burden of proof. Daman Br. at 16. The Daman Family believes that “[a]s a respondent, DNR was also not entitled to any affirmative relief from the PCHB.” Daman Br. at 18.⁶

The Daman Family’s argument again lacks any basis in legal authority. The one case cited, *Inland Foundry v. Air Pollution Auth.*, 98 Wn. App. 121, 124, 989 P.2d 102 (1999), stands for the proposition that the “PCHB can only review questions of the application of rules and regulations in a particular case. The PCHB does not have jurisdiction to review the rule-making process.” *Inland Foundry Co. v. Spokane Cty. Air Pollution Control Auth.*, 98 Wn. App. 121, 124, 989 P.2d 102, 104 (1999). There is no challenge to the rule-making process in this case. Rather, just as described in *Inland Foundry Co.*, the PCHB reviewed the question of how WAC 222-30-020(13), which bans logging in channel migration zones, applies to the admitted evidence.

The Daman Family’s argument that the PCHB could not grant relief to the DNR also entirely lacks supporting authority. The PCHB has a de novo standard of review. WAC 371-08-485. That means that the

⁶ Because this iteration of the Daman Family argument is arguably jurisdictional, it may not be subject to the exhaustion requirement. “[W]hen an agency acts outside its statutory powers, it is acting without jurisdiction over the subject matter, and subject matter jurisdiction may be raised at any time.” *Boise Cascade Corp. v. Washington Toxics Coal.*, 68 Wash. App. 447, 452, 843 P.2d 1092, 1094 (1993).

permitting agency can change positions and offer new evidence at any time. The requirement that the appealing party bear the standard of proof simply means that a permit or order is valid unless sufficient evidence demonstrates otherwise. WAC 371-08-485(3). The ultimate requirement is that a PCHB determination be based on a preponderance of the evidence and correct legal conclusions. WAC 371-08-345(2). The PCHB can even gather, present, and admit its own evidence. WAC 371-08-480. After the hearing is complete, the PCHB must choose among all of the evidence in the manner it deems to best follow the relevant laws and regulations.

In this case, the Quinault Indian Nation presented evidence and expert testimony attacking the validity of the challenged permit as originally issued. After the Quinault Indian Nation appealed and secured a temporary injunction, the DNR supported a draft revised permit which supported many but not all of the QIN's positions. While the QIN did not convince the PCHB to adopt its channel migration zone, QIN did present evidence that contributed to the PCHB's decision that the originally issued permits were invalid. CP 515 ("The Board has now concluded its proceedings, and determined that based on the findings and conclusions above, DNR improperly approved FP 2612019 and FP 2612020.").

DNR ultimately prevailed in its modified position. While the Quinault Indian Nation strongly disagrees with aspects of the PCHB's

final determinations and adoption of the revised permit terms, the PCHB correctly considered the evidence before it, presented by both the Quinault and DNR, to invalidate the originally issued permits.

IX. Conclusion

The Department of Natural Resources approved a deficient permit application without conducting the correct review or analysis, despite receiving pertinent information from the Quinault Indian Nation. DNR then repeatedly changed positions relating to the channel migration zone of the Quinault River and the role of the South Shore Road, all the way up to its final interpretation of the Forest Practices Board Manual at trial. DNR, then the PCHB, contorted the plain language the Board Manual to read a paragraph explaining what “is not considered a permanent dike or levee” to not relate to permanent dikes or levees. The PCHB violated core principles of textual interpretation, repeatedly misapplied case law, and reached arbitrary conclusions without substantial evidence.

The Quinault Indian Nation requests that this Court uphold the Jefferson County Superior Court’s rulings in all respects, including entry of an order and mandate reversing the PCHB’s order and remanding with instructions to read the Forest Practices Board Manual according to its plain text, to determine the South Shore Road to not constitute a

permanent dike or levee, and to evaluate the extent of the channel migration zone absent the South Shore Road as a barrier.

Respectfully submitted this 18th day of April, 2016.

WASHINGTON FOREST LAW CENTER

A handwritten signature in black ink, appearing to read "WJ Golding". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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CERTIFICATE OF SERVICE

I certify that on the 18th day of April, 2016, I caused a true and correct copy of BRIEF 2: QUINAULT INDIAN NATION’S COMBINED OPENING BRIEF AND RESPONSE TO THE DAMAN FAMILY OPENING BRIEF and this CERTIFICATE OF SERVICE to be served upon the parties herein, as indicated below:

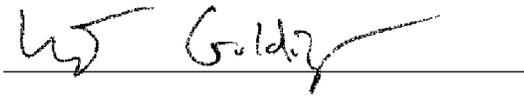
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DATED this 18th day of April, 2016.

WASHINGTON FOREST LAW CENTER

A handwritten signature in black ink, appearing to read "Wyatt Golding", is written over a horizontal line.

Wyatt Golding

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April 18, 2016 - 4:18 PM

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