

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,

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

Respondents.

**BRIEF 6: QUINALT INDIAN NATION'S
REPLY IN SUPPORT OF THE QUINALT INDIAN NATION'S
OPENING BRIEF**

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TABLE OF CONTENTS

I. Introduction.....1

II. Standard of Review.....3

III. Argument5

 A. The PCHB’s Interpretation of the Board Manual Was Erroneous Because It Contradicts the Manual’s Plain Text6

 B. The PCHB’s Determination That the Board Manual Is Ambiguous Constitutes Legal Error15

 C. The PCHB Erred in Deferring to One Person’s Recollection of a Stakeholder’s Intent to Determine Meaning17

 D. The PCHB Erred By Deferring to a Novel and Inconsistent Agency Interpretation First Offered in Litigation.....19

 E. The PCHB’s Determination That Jefferson County Will Transform the South Shore Road into a Permanent Dike or Levee Was Arbitrary and Capricious and Lacked Substantial Evidence21

 F. Judicial Estoppel Does Not Apply.....24

IV. Conclusion25

TABLE OF AUTHORITIES

Cases

<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wn.2d 535 (2007).....	25
<i>Baker v. City of SeaTac</i> , 994 F. Supp. 2d 1148 (W.D. Wash. 2014).....	9
<i>Berger v. Sonneland</i> , 144 Wn.2d 91 (2001).....	16
<i>Blanchette v. Connecticut Gen. Ins. Corps.</i> , 419 U.S. 102 (1974).....	18
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	18
<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wn.2d 38 (1998).....	4
<i>Cnty. of Washington v. Gunther</i> , 452 U.S. 161 (1981).....	19
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801 (1992).....	19, 21
<i>Dix v. ICT Grp., Inc.</i> , 160 Wn.2d 826 (2007).....	5
<i>Escher v. Decision One Mortg. Co., LLC</i> , 417 B.R. 245 (E.D. Pa. 2009).....	9
<i>Esses Daman Family, LLC v. PCHB</i> , No. 14-2-00078-1 (Super. Ct. Jefferson Cnty., June 3, 2015).....	25
<i>Esses Daman Family, LLC v. DNR</i> , No. 48360-2-II (Wash. Ct. App., Apr. 18, 2016).....	25

<i>Friends of the Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd.</i> , 129 Wn. App. 35 (2005)	19, 21
<i>In re Larson's Estate</i> , 71 Wn.2d 349 (1967)	9
<i>Knack v. Dep't of Ret. Sys. of State of Wash.</i> , 54 Wn. App. 654, 776 P.2d 687 (1989)	8
<i>Ladum v. Util. Cartage, Inc.</i> , 68 Wn.2d 109 (1966)	16
<i>Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)	4
<i>Mt. Graham Red Squirrel v. Madigan</i> , 954 F.2d 1441 (9th Cir. 1992)	18
<i>Muckleshoot Indian Tribe v. Washington Dep't of Ecology</i> , 112 Wn. App. 712 (2002)	15
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568 (2004)	3, 19, 21
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68 (2000)	4
<i>Puget Soundkeeper Alliance v. Pollution Control Hearings Bd.</i> , 189 Wn. App. 127 (2015)	9
<i>QIN v. DNR</i> , No. 12-118c (PCHB, Jan. 6, 2014)	25
<i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994)	16, 17
<i>Shaw v. Clallam Cnty.</i> , 176 Wn. App. 925 (2013)	15

<i>State ex rel. Humiston v. Meyers</i> , 61 Wn.2d 772 (1963).....	8
<i>Stewart v. Chevron Chem. Co.</i> , 111 Wn.2d 609 (1988).....	9
<i>United States v. Hornbuckle</i> , 784 F.3d 548 (9th Cir. 2015)	9
<i>United States v. Washington</i> , No. 13-35474, 2016 WL 3517884 (9th Cir. June 27, 2016).....	22
<i>Whatcom Cnty. v. Growth Mgmt. Hearings Bd.</i> , 186 Wn. App. 32 (2015)	4
<i>Woodson v. State</i> , 95 Wn.2d 257 (1980).....	18

Statutes

RCW 34.05.570(1)(c)	3, 4
RCW 35.04.570(3).....	3, 4
RCW 76.09.030	17
RCW 76.09.040(3)(c)	2, 10
RCW 76.09.370	7
RCW 76.09.370(1).....	11
RCW 77.85.005	5
RCW 77.85.190	5, 7

Regulations

WAC 222-12-090.....	14
WAC 222-16-010.....	passim

WAC 222-16-050(1)(d)(i)2
WAC 222-30-020(8).....2
WAC 222-30-020(13).....5

Other Guidance and Authority

Section 2, Forest Practices Board Manual.....passim
Forests and Fish Report7, 8, 19

I. Introduction

The Quinault Indian Nation respectfully requests that this Court affirm the Jefferson County Superior Court's decision that the Pollution Control Hearings Board's "Findings of Fact, Conclusions of Law and Order (Corrected)" is contrary to law, arbitrary and capricious, and lacking substantial evidence.

The Forest Practices Rules dictate that a channel migration zone is limited by a "permanent dike or levee." WAC 222-16-010. The Forest Practices Board Manual defines the term "permanent dike or levee," and explains that a road "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 text sets forth a logical exception: if a road allows water and fish from a river to pass under and behind it, the road does not constrain flows and therefore is not a permanent dike or levee.

The Pollution Control Hearings Board erred by misreading the plain text of the Board Manual, deciding that the "not considered a permanent dike or levee" language had no effect whatsoever. To reach that decision the PCHB abandoned its prior reading and deferred to one of several conflicting interpretations provided by DNR staff at hearing. The

PCHB's determination that the South Shore Road is a permanent dike or levee is also arbitrary and capricious and lacks substantial evidence. The road has culverts big enough to walk through, and allows water and salmon from the Quinault River to pass under and behind it. CP 569; CP 657-60. Under any rational understanding the road does not limit floodwaters or otherwise serve as a permanent dike or levee.

DNR and the Daman Family argue that the PCHB's order consists solely of findings of fact, and that the Board Manual has no legal effect. That argument is unmoored from the Forest Practices Act, the Forest Practices Rules, and the underlying decision. The Act directs that the Board Manual "assist with implementation of the standards incorporated into the forest practices rules." RCW 76.09.040(3)(c). The Forest Practices Board has chosen to promulgate terse rules that expressly delegate the details of implementation to the Board Manual. *See, e.g.*, WAC 222-16-010; WAC 222-16-050(1)(d)(i); WAC 222-30-020(8). The PCHB used the Board Manual text as a dispositive decision making tool, and the PCHB's plain errors in interpreting the Board Manual require correction from this Court.

The PCHB's flawed interpretation of the Board Manual's plain terms undermines the implementation of the Forest Practices Act and the Quinault Indian Nation's deep cultural and economic interest in restoring

the Quinault River and its salmon. The Quinault Indian Nation urges this Court to affirm the superior court's orders in all respects.

II. Standard of Review

The Quinault argue that the PCHB's self-described "Conclusions of Law" are subject to review for error of law and arbitrary and capricious decision making, and that the PCHB's "Findings of Fact" are subject to review for lack of substantial evidence. RCW 34.05.570(3). DNR argues that the Court should evaluate the end result of the PCHB's analysis for substantial evidence as a purely factual finding.¹

However, under the Administrative Procedure Act, an adjudicative agency's error at any stage of analysis requires the reviewing court to set aside the agency decision. RCW 34.05.570(1)(c); RCW 34.05.570(3)(a)-(i) (listing standards of review separated by "or"). For example, in *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 584-86 (2004), the court considered a permit certification issued by the Department of Ecology and independently reviewed each stage of the PCHB's analysis approving the certification under the appropriate standard of review.

DNR also repeatedly argues that because the underlying document, the Forest Practices Board Manual, is not itself enforceable law, the

¹ DNR and the Daman Family make largely the same arguments. For simplicity, the Quinault respond to the collective arguments as articulated by DNR and separately responds to the judicial estoppel argument raised by the Daman Family.

PCHB's interpretation of that document is a finding of fact. The DNR mistakenly conflates the standard of review with the classification of the underlying document. The PCHB erred by misapplying legal precedent and tools of construction to the Manual, which is an independent legal error under the APA regardless of the Board Manual's status. RCW 34.05.570(3)(c), (d). For example, in *Whatcom Cnty. v. Growth Mgmt. Hearings Bd.*, 186 Wn. App. 32 , 55-56 (2015), the court reviewed the GMHB's interpretation and application of *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 79 (2000) as applied to a letter and related rule. The Court found independent legal error because "the Board erroneously interpreted and applied *Postema*."

The PCHB's misreading of the Board Manual's plain text and misapplication of legal precedent is also arbitrary and capricious, because that erroneous interpretation of the Manual's plain text provides "an explanation for its decision that runs counter to the evidence before the agency" and is "willful and unreasoning action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46-47 (1998). If a "ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it

necessarily abuses its discretion.” *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 832-34 (2007).

III. Argument

Large rivers in Washington are dynamic forces that migrate across valleys over time, creating complex networks of forested islands and protected backwaters in which salmon thrive. CP 980-84. Past forestry and land use practices have degraded habitat by removing nearly all of the trees in valley floors, which has led to rapid erosion. CP 685-86. As part of an effort to compensate for past harm and recover salmon habitat over time, the Forest Practices Rules prohibit logging in the area where a river is likely to move, referred to as the “channel migration zone.” WAC 222-30-020(13). It is a visionary and important protection that requires learning from past mistakes and making hard choices to restore ecosystems in the future. Part of the reason for the protection of channel migration zones was recognition that past forest practices had harmed Indian tribes’ treaty rights to harvest salmon, and that the State has an obligation to help restore river ecosystems. *See* RCW 77.85.005; RCW 77.85.190. The Quinault have fished the Quinault River since time immemorial, and restoration of the upper Quinault River valley is fundamental to the long-term health of the Nation. Accordingly, the

Quinault has invested millions of dollars in implementing a restoration plan that works in concert with the Forest Practices Rules. CP 687-701.

This matter involves logging of large, old hemlock trees within the channel migration zone of the Quinault River—exactly the kind of habitat the Forest Practices Rules are designed to protect. The portion of this case on appeal focuses on whether the South Shore Road constitutes a permanent dike or levee, because that determination dramatically impacts the scope of protection and restoration afforded by the Rules. The PCHB committed repeated legal errors in its interpretation of the Board Manual text regarding when a road is a permanent dike or levee. The PCHB’s determination that a dirt road that allows flood waters to flow over, under, and behind it, and salmon to swim through it, constitutes a “permanent dike or levee” is arbitrary and capricious and lacks substantial evidence.

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

The PCHB erred by determining that the paragraph in the Board Manual explicitly setting forth what “is not considered a permanent dike or levee” has no relevance to channel migration zones or permanent dikes or levees. CP 508-509.

The regulation states that a channel migration zone is limited by a “permanent dike or levee.” WAC 222-16-010. The Board Manual then

specifically references that term to define when a road “is not considered a permanent dike or levee.” CP 599. As succinctly stated by the Superior Court in reversing the PCHB: “The plain language on page M2-30 is clear and is not ambiguous in the least. The paragraphs define a ‘permanent dike or levee’ and then identify a ‘dike or levee’ that would not be considered a ‘permanent dike or levee.’ This Court cannot read M2-30 any other way no matter how hard it tries.” Opinion at 8-9; CP 2802-06.

The Board Manual provides an unambiguous interpretation of the term “permanent dike or levee” and so legislative history is not necessary. But even so, the history of the Forests Practices Act and Salmon Restoration Act confirms the Board Manual’s plain language. As explained in the Quinault’s opening brief, the Legislature directed that the Forest Practices Board promulgate the rules and Board Manual based upon the content of the “Forests and Fish Report.” RCW 76.09.370; RCW 77.85.190. The Report is an exhaustively negotiated document with the support of the Indian tribes, DNR, the Department of Ecology, and various federal agencies. The section of the Forests and Fish Report defining channel migration zone terminology stated the following in 1999:

The Forest Practices Board Manual will provide further guidance for the delineation of channel migration zones on the ground...

Levees. The channel migration zone of any stream determined pursuant to the preceding subparagraphs may

be further limited to exclude the area behind a permanent dike or levee provided such permanent dike or levee was constructed pursuant to appropriate federal, State, and local requirements. As used in this subparagraph, a permanent dike or levee is a channel limiting structure that either (1) is a continuous structure from valley wall or other geomorphic structure that acts as an 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) is a structure that supports a public right-of-way or conveyance route and receives regular maintenance sufficient to maintain structural integrity; provided, however, a dike or levee shall not be 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.

Forests and Fish Report, Appendix A-definitions (emphasis in original).²

The Report emphasizes that a road is not a “permanent dike or levee” if the exception criteria exist. The Forest Practices Rules and Board Manual mirror that exception.

In response briefing, DNR first addresses the standard of review and attempts to distinguish sentencing guideline cases for a variety of reasons, DNR Br. 4 at 26-28, yet provides no contrary authority. While no

² The Forests and Fish Report is available at http://file.dnr.wa.gov/publications/fp_rules_forestsandfish.pdf. The Quinault seek judicial notice of the Forests and Fish Report for this Court’s reference in reviewing the history of the Forest Practices Act, Rules, and Board Manual. ER 201(b)(2); *see State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779 (1963) (easily verifiable reports subject to judicial notice); *Knack v. Dep’t of Ret. Sys. of State of Wash.*, 54 Wn. App. 654, 665, 776 P.2d 687, 693 (1989) (judicial notice appropriate for legislative history).

case specifically references the Board Manual, as a general rule “[t]he interpretation of a writing is a question of law for the court.” *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613 (1988). When the court interprets the meaning of a writing, it does so de novo, whether it be in the context of employee handbooks, *Baker v. City of SeaTac*, 994 F. Supp. 2d 1148, 1156 (W.D. Wash. 2014), sentencing guidelines, *United States v. Hornbuckle*, 784 F.3d 548, 553 (9th Cir. 2015), insurance rate manuals, *Escher v. Decision One Mortg. Co., LLC*, 417 B.R. 245 (E.D. Pa. 2009), or a note on the back of a check, *In re Larson's Estate*, 71 Wn.2d 349 (1967). A deferential standard of review is not appropriate or necessary, because “this court is in as good a position as the trial court to interpret [a writing’s] meaning.” *In re Larson's Estate*, 71 Wn.2d at 354.

DNR also claims that the Court is poorly situated to understand the Board Manual given its technical nature. That argument is unavailing, because the Board Manual is written for a layperson, and moreover this Court has recently shown comfort in applying technical agency guidance manual text to resolve legal disputes. *See, e.g., Puget Soundkeeper Alliance v. Pollution Control Hearings Bd.*, 189 Wn. App. 127, 150-51 (2015).

DNR then offers a flurry of rationales to justify readings deviating from the Board Manual's plain text. DNR Br. at 28-34. We address those arguments in turn.

First, DNR argues that the Quinault argument fails because "it never introduced any testimony to explain why [the Quinault's] interpretation makes any sense." DNR Br. at 28. That argument wrongly assumes that a party must explain why the text of a given law, regulation, or guidance is sound policy, when the very purpose of the Board Manual is to "assist with implementation of the standards incorporated into the forest practices rules" and provide "best management practices and standard techniques to ensure fish protection." RCW 76.09.040(3)(c). Under the Legislature's direction, the Forest Practices Board has already established technically sound implementation of the Forest Practices Rules. CP 506; *see also* CP 507-09. In proceedings where the Board Manual is at issue the parties do not have to reestablish the rationale.³

In any event, the Quinault did explain why the Board Manual's plain language exception makes sense and applies. The Quinault thoroughly demonstrated with both field observation and modeling that

³ Indeed, at the beginning of this litigation, DNR wrote that "[t]he Board Manual was written and developed to assist landowners, foresters, and others in a practical yet effective methodology...If landowners implement forest management practices as set forth in the Board Manual, they will meet the standards of the rules." DNR Prehearing Br. at 7; CP 370.

flood flows already pass under, over, and behind the South Shore Road, and will do so in the future. CP 569; CP 1701-05; CP 1525-33. The Quinault's lead expert explained that best professional practice in the industry is to not treat such structures as barriers because they do not block water, and it would be irresponsible to assume that environmentally destructive riprapping and filling will occur in the future. CP 1525-33. Anadromous fish, those such as salmon and steelhead that migrate between fresh and salt water, have heightened importance because they provide the main regulatory driver of environmental protections in Washington. RCW 76.09.370(1). The Quinault introduced a peer-reviewed Bureau of Reclamation report which explains that governments should not armor roads, due to the harm caused to sockeye and other salmon habitat. CP 1068; CP 1071-80. If a road allows anadromous fish to pass under it, then it makes sense to protect the areas behind the road given their heightened habitat importance.

DNR next argues that the plain text interpretation advanced by the Quinault leads to an absurd result, based on its uncited assertion that "all roads along a major river with a channel migration zone will have some culverts." DNR Br. at 29-31. The DNR, like the PCHB, badly misconstrues the Quinault's argument. The Quinault argue that the text of the Forest Practices Board Manual provides an exception only when three

specific criteria are met in the affected road area: a road has culverts or other drainage structures under it, those culverts pass anadromous fish, and the area behind the road is under the 100-year flood level. Not all roads meet those criteria. For instance, many roads run along the valley wall and do not have flood areas behind them, and many areas in Washington lack anadromous fish (anadromous fish are those such as salmon and steelhead that spend life phases in both salt and fresh water). To the extent DNR disagrees with the policy implications of the Board Manual, DNR must raise the issue with the Forest Practices Board who will duly consider amendments with public input. The DNR cannot, however, use a new interpretation to rewrite the Board Manual and regulatory text to accommodate its new policy concerns.

Third, DNR argues that the last paragraph in the section, which directs the reader to consult with the “Washington Department of Fish and Wildlife (WDFW) and the Indian tribes,” suggests that the exception paragraph has another purpose. DNR Br. at 31. According to the PCHB and DNR, that paragraph works with the exception paragraph to raise a “separate thought” wholly unrelated to channel migration zones. DNR Br. at 18. DNR’s argument is misplaced. The exception paragraph lists three criteria. The next paragraph then directs the reader on where to find the information relating to those three criteria. It sensibly directs the reader to

consult with the entities with the best knowledge of fish presence in Washington, which are the responsible State agency and the tribes that have coexisted with salmon in Washington since time immemorial.

Fourth, DNR cites the glossary definition of “dike or levee” and points out that the definition lacks exception criteria. This argument fails because DNR ignores the word “permanent” in the term “permanent dike or levee.” The regulation and the Board Manual specifically define a permanent dike or levee as a separate feature distinct from a non-permanent, regular “dike or levee.” Only a “permanent dike or levee” blocks channel migration. WAC 222-16-010. The Board Manual exception paragraph references the regulation by using quotation marks around the term “permanent dike or levee” as a term of art. CP 599.

Fifth, DNR argues that the indentation of numbered points “1” and “2” suggests separation from the paragraphs below. According to DNR, those two paragraphs actually pertain to identification of fish-bearing streams and pertain to Board Manual Section 13, which is not in the record or at issue in this case. DNR’s argument is implausible and unsupported. There is no basis to believe that two paragraphs in the middle of a Board Manual section devoted to channel migration zones, on a page devoted to what is a “permanent dike or levee,” actually relates to a separate thought undisclosed for a decade. Moreover, the exception specifically employs

the term “permanent dike or levee” in quotations, linking it to the preceding text and to the regulatory definition of channel migration zone, WAC 222-16-010.

Finally, DNR argues that this Court should consider whether the PCHB’s interpretation of the term “permanent dike or levee” complies with the regulatory definition of channel migration zone found in WAC 222-16-010. DNR Br. at 33-34. Because the regulation does not define “permanent dike or levee,” DNR consults Webster’s Dictionary for a definition of the term “dike.”

A dictionary is not necessary to resolve this matter. The regulations specifically reference the Forest Practices Board Manual as the practical handbook that provides guidelines. WAC 222-16-010; WAC 222-12-090. Even so, the dictionary works against DNR when each of the operative terms in the phrase “permanent dike or levee,” is considered. “Permanent” means “continuing or enduring without fundamental or marked change.”⁴ Dike means “a bank usually of earth constructed to control or confine water,” with the first synonym listed as “levee.”⁵ Levee means “an embankment for preventing flooding” or “a continuous dike or ridge (as of earth) for confining the irrigation areas of land to be

⁴ <http://www.merriam-webster.com/dictionary/permanent>.

⁵ <http://www.merriam-webster.com/dictionary/dike>.

flooded.”⁶ According to DNR’s dictionary of choice, “permanent levee or dike” is a structure that continuously serves to confine flood waters. That definition accords with the Quinault’s plain language reading of the Board Manual exception criteria. If this Court follows DNR’s invitation and considers this case focused on the rule language, the PCHB’s interpretation of “permanent dike or levee” violates WAC 222-16-010, because a road that periodically allows water to flow under it, fish to swim under it, and flood levels to rise behind it, is not a structure that continuously confines water and prevents flooding.

The PCHB’s and DNR’s efforts to contort the plain text of the Board Manual fail. The PCHB’s misreading of the plain text of the Board Manual constitutes legal error requiring reversal. The PCHB’s analysis was also arbitrary and capricious, because the conclusions drawn from the Board Manual are unreasonable.

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

The PCHB erroneously determined that the Board Manual language concerning when a road is “not considered a permanent dike or levee” is ambiguous. CP 476 (applying *Shaw v. Clallam Cnty.*, 176 Wn. App. 925, 933, (2013)); CP 508 (applying *Muckleshoot Indian Tribe v.*

⁶ <http://www.merriam-webster.com/dictionary/levee>.

Washington Dep't of Ecology, 112 Wn. App. 712, 720 (2002)). “[T]he determination of whether a written instrument is ambiguous is a question of law for the court.” *Ladum v. Util. Cartage, Inc.*, 68 Wn.2d 109, 115, (1966) (citation omitted). DNR’s response is a statement that “[t]he PCHB believed that the Board Manual’s permanent dike or levee language was ambiguous because either DNR’s or QIN’s construction could be facially plausible.” DNR Br. at 33. Even as described by DNR, the PCHB’s analysis erred. Language “is not ambiguous simply because different interpretations are conceivable.” *Berger v. Sonneland*, 144 Wn.2d 91, 105 (2001).

The PCHB further erred by relying on witness testimony about the drafter’s intent 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”).

In response, DNR argues that the testimony in question was admitted as evidence and therefore the PCHB’s reliance on the testimony was proper. DNR’s response confuses rules of evidence with principles of textual interpretation. The PCHB erred not in admitting the testimony regarding the history of the Board Manual, but in the manner in which it used that information. Using historical evidence to glean alleged intent is

an unlawful means of making the determination that a text is ambiguous. *Ratzlaf*, 510 U.S. at 147–148. The public must be able to rely on the Board Manual to mean what it says. If not, DNR may create ambiguity and effectively rewrite the Board Manual and rules for litigation.

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

The PCHB relied on DNR’s testimony regarding the supposed intent of Indian tribes in 2004 to determine the meaning of Board Manual text. The PCHB erred by conflating DNR testimony regarding the intent of a stakeholder group with the legislative intent of the actual promulgating authority, the independent Forest Practices Board. The Forest Practices Board functions as a legislature rather than a traditional executive agency: It is an independent, 13-member representative body that promulgates rules and the Board Manual based on majority vote. RCW 76.09.030. Even if one or more stakeholders had a certain idea about what Board Manual text means, that intent does reflect legislative intent unless it is considered by the Forest Practices Board at the time of promulgation. By conflating the alleged intent of DNR with the intent of the Forest Practices Board, the PCHB misunderstood the forest practices regulatory structure in a manner closely analogous to a court misconstruing the intent of a stakeholder group with the intent of a

legislative body. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).⁷

The error is especially egregious because the PCHB prioritized DNR's recollection of Indian tribes' intent over the plain language interpretation of the Quinault Indian Nation.

In response DNR argues that the testimony provided by its staff person is not technically legislative history because the Board Manual is not legislation and, "[g]iven its advisory nature, the PCHB, appropriately considered testimony about how the Board Manual was written." DNR Br. 4 at 19-20. But the "advisory nature" of the Board Manual does not change principles of determining legislative intent, because the PCHB chose to apply rules of statutory construction as an analytical tool. The PCHB's incorrect analysis under that framework and misunderstanding of the Board Manual's promulgation constitutes error.

The PCHB's error not only violates the APA, it creates dangerous precedent in allowing DNR to functionally re-write another agency's document. That risks replacing the intent of the promulgating body with a litigation position. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d

⁷ *See also Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974) ("[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. Such statements 'represent only the personal views of these legislators, since the statements were [made] after passage of the Act."); *Woodson v. State*, 95 Wn.2d 257 (1980) ("Legislative intent in passing a statute cannot be shown by depositions and affidavits of individual state legislators, however.").

1441, 1457 (9th Cir. 1992); *Cnty. of Washington v. Gunther*, 452 U.S. 161, 176 n. 16 (1981) (citation omitted). Here, DNR’s position is that the “not considered a permanent dike or levee” text was added as an afterthought shortly before Board Manual approval in 2004, and therefore has no impact on channel migration zones or permanent dikes or levees. DNR Br. at 18; CP 509. The 1999 Forests and Fish Report contains the exact same exception when defining a permanent dike or levee, strongly suggesting that DNR’s recollection of legislative history is wrong.

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

Based on the erroneous determination that the Board Manual is ambiguous, the PCHB then deferred to DNR’s interpretation as provided by Mr. Engel. CP 509. The PCHB’s deference to Mr. Engel was unlawful because that testimony was inconsistent with all prior DNR evidence and testimony. 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, (1992); *Friends of Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47 (2005). The PCHB’s decision to extend deference to an agency is legal error. For example, in *Port of Seattle v. PCHB*, 151 Wn.2d 568 (2004), the court held that the

PCHB committed legal error by misapplying case law in determining whether to afford deference to a Department of Ecology interpretation.

Here, DNR offered at least two dramatically different interpretations during a two-week hearing. DNR's own expert report, like the Quinault Indian Nation, treats the Board Manual's "not considered a permanent dike or levee" as an exception to take into consideration when determining whether the South Shore Road is a permanent dike or levee. *See* CP 948. DNR's "rules guru," Sue Casey, testified that she understood the Board Manual text in the same manner as the Quinault, as did a majority of DNR staff informally polled. CP 2022-24.⁸ Mr. Engel initially also described the exception paragraph as a "qualification," CP 2423, then stated that it relates to where to start riparian buffer protections for channel migration zones, CP 2427, and also stated that the paragraph is a "separate thought" with no relationship to channel migration zones. CP 2426. The PCHB nonetheless ultimately deferred to Mr. Engel's opinion that the text at issue was a "separate thought" with no impact at all on the determination of whether a road is a "permanent dike or levee." CP 509.

⁸ Please see Casey testimony regarding an email with illustrative picture, at CP 2023. "Q. Okay. So the premise is of Question 2 is that the dike has drainage structures through it that allow fish passage, correct? A. Correct. Q. And I heard you just testify that when you sent this e-mail, you believed the answer was 4, correct? A. Correct. Q. Location 4, answer B. Okay. And in that instance, if water passes through the dike, then the CMZ is delineated beyond the dike, correct? A. Correct. Because typically dikes -- yes."

DNR argues that *Cowiche Canyon* and progeny do not apply because the Board Manual is not a law or ordinance. DNR's attempted distinction fails because the PCHB itself specifically relied upon *Friends of Columbia Gorge* for the legal principle that the PCHB was bound to defer to DNR's interpretation of the Board Manual because "this is the interpretation advocated by DNR, the agency charged by the Legislature with enforcement of the Forest Practices Act and rules." CP 509. The PCHB incorrectly applied *Friends of Columbia Gorge* by ignoring its command that to earn deference "it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy." *Friends of Columbia Gorge*, 129 Wn. App. at 47.

DNR also relies heavily on *Port of Seattle* for the principle that an agency's interpretation of its own rules is entitled to "great weight." DNR Br. 4 at 37. DNR then extends that principle of administrative law to agency interpretations of guidance documents. However, *Port of Seattle* is inapt because it does not involve an inconsistent agency interpretation.

E. The PCHB's Determination That Jefferson County Will Transform the South Shore Road into a Permanent Dike or Levee Was Arbitrary and Capricious and Lacked Substantial Evidence.

The PCHB's speculation about maintenance actions decades from now transforming the South Shore Road into a permanent dike or levee is

arbitrary and capricious and lacks substantial evidence. The PCHB found that all of the conditions of the “not considered a permanent dike or levee” exception 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 482-85. There is no basis 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 845.⁹ There is also no basis to determine that someday Jefferson County will transform the existing South Shore Road into a permanent dike or levee.¹⁰

DNR offers an internally contradictory response. On the one hand, DNR is adamant that all culverts must always allow passage of water and fish. DNR Br. at 30. That is correct—indeed the Ninth Circuit Court of Appeals recently affirmed that building and maintaining barriers to fish passage violates Indian tribes’ treaty rights. *United States v.*

⁹ Daman Family for the first time argues that the last sentence on page M2-30 of the Board Manual creates a presumption that a road is a barrier absent evidence of permits to remove it. Daman Br. 5 at 17. That sentence only demonstrates that the evaluation should be made based on current conditions absent concrete plans to the contrary.

¹⁰ DNR correctly notes that QIN identified Finding of Fact 30 in the opening brief, but should have also identified Findings of Fact 29 and 31. The Quinault challenges Findings of Fact 29, 30, and 31, as it did in the briefing before the Superior Court.

Washington, No. 13-35474, 2016 WL 3517884 (9th Cir. June 27, 2016).

Yet DNR also argues that that the South Shore Road will be armored in the future such that it will constitute a “permanent dike or levee” and prevent movement of the Quinault River. DNR Br. at 22.

The reality is that the South Shore Road contains culverts big enough to walk through, the Quinault River flows under the road, there are no plans to change the road, it would be unlawful to prevent fish passage, and best permitting practice is to take man-made features as they currently exist. To the extent the PCHB wished to project what might happen to the road in the future, the evidence overwhelmingly indicates that the road will continue to pass water and fish or be relocated. The amount of water passing under it will only increase as the Quinault River gets rapidly closer over time. CP 485.

While DNR and the PCHB mistakenly rely on an out of context paragraph from the Nation’s restoration plan to support an assertion that the road limits the channel migration zone, that plan and a thorough report by the Bureau of Reclamation actually describe the road as vulnerable, CP 710-11 and CP 1068, depict a channel migration zone that extends past the road, CP 771 and CP 1186, and call for road relocation. CP 720 and 1079-

80.¹¹ The PCHB’s conclusion that the road will become a “permanent dike or levee” is arbitrary and capricious and lacks substantial evidence.

F. Judicial Estoppel Does Not Apply.

The Daman Family argues that the Quinault should be judicially estopped from seeking review of the PCHB’s interpretation of the Forest Practices Board Manual. *See* Daman Family Br. 5 at 6. The Daman Family claims “QIN treats the Manual as law...at the same time...QIN argues unequivocally that the Manual is not law.” *Id.* at 9. The Daman Family characterizes this position as “schizophrenic,” a word apparently meant to signify two-facedness, and argues that it should be estopped as an inconsistent and unfair position on the part of the Quinault. *Id.* at 6.

“Three core factors guide a trial court’s determination of whether to apply the judicial estoppel doctrine: (1) whether ‘a party’s later position’ is ‘clearly inconsistent’ with its earlier position;’ (2) whether ‘judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled;’; and (3) ‘whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing

¹¹ DNR relies on testimony from Russ Esses to claim that the road will be armored. He is a party’s (Sherman Esses’) son, works in a different county, and acknowledged that he has no knowledge of or control over maintenance plans decades from now.

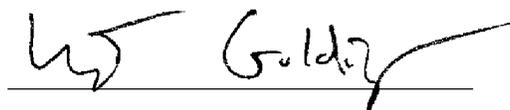
party if not estopped.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-539 (2007) (citation omitted).

Because none of the three core factors of judicial estoppel are present, the doctrine of judicial estoppel does not apply. The Quinault’s position is and always has been that the Manual is a persuasive guidance document, and that the error of law was the PCHB’s misapplication of legal precedent and canons of construction to interpret the meaning of the text of the Manual.¹² The Quinault has not misled any court as to any question of fact or law, perpetrated a fraud, or otherwise unfairly deprived the Daman Family of its ability to assert its rights. Judicial estoppel does not apply.

IX. Conclusion

The Quinault Indian Nation requests that this Court set aside the PCHB’s final order and affirm the Jefferson County Superior Court’s orders in all respects.

Respectfully submitted this 20th day of July, 2016.

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

Wyatt Golding, WSBA #44412
Attorney for the Quinault Indian Nation

¹² See, e.g., QIN Prehearing Br. at 5, *QIN v. DNR*, No. 12-118c (PCHB, Jan. 6, 2014) CP 402; QIN Opening Br. at 13–25, *Esses Daman Family, LLC v. PCHB*, No. 14-2-00078-1 (Super. Ct. Jefferson Cnty., June 3, 2015) CP 2643-2660; QIN Opening Br. 2 at 24–42, *Esses Daman Family, LLC v. DNR*, No. 48360-2-II (Wash. Ct. App., Apr. 18, 2016).

CERTIFICATE OF SERVICE

I certify that on the 20th day of July, 2016, I caused a true and correct copy of BRIEF 6: QUINAULT INDIAN NATION’S REPLY IN SUPPORT OF THE QUINAULT INDIAN NATION’S OPENING BRIEF and this CERTIFICATE OF SERVICE to be served upon the parties herein, as indicated below:

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Tina K. Kaps

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RESPONDENT QUINAULT INDIAN NATION'S REPLY IN SUPPORT OF THE QUINAULT INDIAN NATION'S OPENING BRIEF

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