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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 286941

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

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METHOW VALLEY IRRIGATION DISTRICT,

Petitioner/Appellant,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent,

and

OKANOGAN WILDERNESS LEAGUE,

Intervenor.

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PETITIONER/APPELLANT MVID'S REPLY BRIEF

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To Reply to Ecology, and it's second bite at the apple by way of Intervenor OWL parroting much of Ecology's Answer, requires one to face the disconnect between Ecology's First Order DE 3950 (CP 234-235) approving MVID's combined diversions of 53 cfs and Ecology's Second Order DE 5904 (CP 276-279) limiting MVID to a combined diversions of 31 cfs, actually only 19 cfs due to the limit of 8 cfs beyond the Mill Hill Spill Drop, on the East Canal.

The First Order and ensuing PCHB hearing centered on the centurion history of MVID's past maintenance and operation, including some canal delivery improvements, i.e., 90 cfs historically reduced to 60 cfs, and attempted, but failed, rehabilitation improvement efforts. Based on that history, and on the MVID's existing delivery system in 2002, Ecology determined that a combined 53 cfs diversion limit was not wasteful. The PCHB affirmed that Order:

“Ecology's Order DE 02WRCCR-3950 issued to MVID is fully affirmed....”

Ecology has previously argued that the facts in PCHB No. 1 are *Res Judicata* and indeed they are as to Ecology's First Order. In that regard, Ecology, and in particular OWL, relies on the findings of inadequate maintenance in the First PCHB Order as support for Ecology's Second Order. The problem with that is that the facts leading to Ecology's First

Order were subsumed in that First Order and were subsumed in the PCHB Order affirming Ecology's combined 53 cfs diversion as being non-wasteful.

Ecology's Second Order, the one in question, while regurgitating the facts supporting the First Order based on MVID's history of operation and maintenance over the past century, lead MVID to believe it dealt with MVID's existing earthen canal delivery system. In truth, the Second Order was based on an entirely new paradigm (AR Ex. R-1) requiring major alteration of MVID's delivery system in order to meet Ecology's (Mr. Haller's) newly devised efficiency standard based on piped irrigation conveyance systems (AR Ex. R-33).

Ecology and OWL continue to reassert the facts, found to support Ecology's First Order and entirely ignore MVID's efforts both financially and cooperatively to do everything it can to improve its delivery efficiency (Appellant's Opening Brief, pp. 47-48; and p. 57). Respondent's continual reliance on facts giving rise to the First Order is either an attempt to prejudice the Court against MVID or to provide cover for the fact that the Second Order was void *Ab initio* in that it issued without Ecology complying with the statutory requirements, prerequisite to issuance of the Order.

Ecology correctly notes at pages 20 and 21 of its Response Brief that the facts of this case are confined to the administrative tribunal record and

that the application of law to a particular set of facts is reviewed *de novo*. While Ecology and OWL continue to rely on matters fully addressed in Ecology's and the PCHB First Orders, MVID will focus on the material facts relating to Ecology's Violation Notice DE 5904, based solely on Ecology's AR Ex. R-1, and whether it properly issued in accordance with the law both common and statutory, and passes constitutional muster.

## I. FACTS

### A. Material Facts

To resolve the question of whether Ecology's order properly issued the material facts in the record portend against its validity.

Ecology asserts at page 15 of its brief that Mr. Haller evaluated "local custom" by looking at 14 irrigation districts in the Methow Basin and "...over a dozen other irrigation districts in Central Washington..." in devising a new, first time, conveyance efficiency standard which MVID must meet to avoid wasting water.

**FACT:** Mr. Haller may have looked at the 14 irrigation districts in the Methow Basin, but he did not utilize their conveyance efficiency in coming up with his new required delivery efficiency figure. Doing so would have supported MVID's diversion as being non-wasteful in that MVID had the lowest seepage (conveyance) rate per mile of any earthen canal delivery system in the Methow Valley. Instead Mr.

Haller utilized only piped irrigation “Districts” in North Central Washington rather than the customary earthen canal delivery systems utilized in the Methow Valley and elsewhere in the State where open earthen canal delivery systems are utilized (A.R. Vol. I, p. 175-187) (CP 553-554 FOF 41) (AR Vol. III, p. 745, ll. 8-25; p. 746, ll. 1-22; AR Ex. 33). MVID objected to the admission of AR Ex. 33 (see AR Vol. I, pp. 125-127).

**FACT:** MVID had the lowest and best conveyance delivery efficiency, per mile, according to the accepted engineering analysis utilized by Ecology and MVID experts, of any of the other 13 irrigation delivery systems reviewed in the valley (AR Ex. R-1, Table 1, 3, and 4; CP 384, 386, and 387), which systems along with MVID comprise the “local custom.” (AR Vol. III p. 583, ll. 11-16; p. 584, ll. 2-25; and p. 585, ll. 1-2)

**FACT:** Had Mr. Haller utilized conveyance efficiency figures for the other open ditch conveyance purveyors in the Methow Valley, those figures would have and in fact did support MVID’s compliance with Ecology’s First Order limitations as being non-wasteful.

**FACT:** Mr. Haller did look at over a dozen other irrigation “districts” in Central Washington; however, Mr. Haller had no

knowledge of any relationship between the characteristics of these conveyance systems to MVID's system (AR Vol. I, p. 185-187). All of the "districts" relied upon by Mr. Haller to devise his new conveyance efficiency standard were piped conveyance delivery systems (AR Vol. III p. 745, ll. 8-23; pp. 746-7), which were not customary in the Methow Valley, nor consistent with other earthen canal deliver systems around the State (AR Vol. III p. 748; p. 479, ll. 1-4).

**FACT:** Mr. Haller did utilize those piped conveyance systems to establish a new conveyance efficiency figure having no relationship to the lawful, open-ditch conveyance system operated by MVID. (AR Vol. I, p. 185-187)

**FACT:** Ecology's Second Order DE 5904 was entirely based on an undisclosed, to MVID, professional engineering analysis of a revamped West Canal conveyance system costing more than MVID could afford (CP 546, FOF 27) (AR Vol. II, p. 461, ll. 3-18; p. 464, ll. 23-25; p. 465, ll. 1-2; p. 466)

**FACT:** Ecology did not supply this information to MVID in advance of the Second Order issuing nor was it provided with the Second Order. AR Ex. R-1 and AR Ex. R-33, but not AR Ex. 15,

were supplied to MVID's attorney, as part of litigation related to a Motion for Stay four months after the fact.

**FACT:** Robert Barwin, manager for the central region of Ecology at the time, who signed the Order in question, testified that the Order issued in accordance with RCW 90.03.605 (AR Vol. III, p. 617-619, ll. 10-16).

**FACT:** The plain language of the statute imposes a mandatory duty on Ecology, that before issuing a violation order, "...the Department **shall** offer information and technical assistance to the person in writing identifying one or more means to accomplish the person's purposes within the framework of the law," (RCW 90.03.605).

**FACT:** Ecology did not provide a copy of Mr. Haller's AR Ex. R-1 Report nor his methodology of (RCW 90.03.605) calculating a new conveyance efficiency standard (AR Ex. R-33 or AR Ex. R-13) to MVID in advance of issuance of the Second Order.

**FACT:** Ecology did not provide "in writing" information and technical assistance in advance of the order issuing to allow for MVID to voluntarily attempt compliance.

**FACT:** The Order in question was based entirely on a completely new paradigm unrelated to MVID's existing West Canal delivery

system and unrelated to the facts giving rise to Ecology's First Order with which MVID was complying.

**FACT:** The new paradigm was created solely by a single individual at the Department of Ecology who, after devising an efficiency standard based on piped delivery systems, "targeted" an expensive computer generated alternative rehabilitation project, construction of which was essential in order for MVID to achieve the new diversion and usage limitations specified in the Second Order (CP 546, FOF 26).

**FACT:** Regardless of Ecology's undisclosed engineering analysis and computations utilized to justify the severely limited water diversion and usage amounts, MVID could not deliver its constitutionally protected water rights without construction of a major and expensive rehabilitation project (CP 546, FOF 26).

**FACT:** MVID, although assessing its members to the maximum (MVID's Opening Brief pp. 55-60) and seeking diligently for rehab funding (AR Vol. III, pp. 757-763), did not have access to the funds necessary to construct the "targeted" rehabilitation project (AR Vol. II, p. 461, ll. 3-18; p. 464, ll. 18-25; p. 465, ll. 1-2; p. 466). Ecology recognized that the project would have to be "fully government funded." (AR Vol. II, p. 318, ll. 12-17)

**FACT:** Mr. Haller under projected the cost of the targeted rehab necessary to achieve the limitation of the 2003 Order limitation, due to his sole reliance on 1990 and year 2000 reports (AR Vol. I, p. 132) rather than 2003 prices, by such a wide margin that there was no “availability” of funding for MVID to have constructed any of one Mr. Haller’s alternatives, let alone the targeted rehab project. (CP 143-146, Greg Nordang Declaration dated October 30, 2009)

**FACT:** The PCHB relied on Mr. Haller’s out of date \$800-\$850,000 cost projection as being available to MVID to implement Mr. Haller’s targeted No. 5 construction alternative. Neither the \$800,000 nor the \$2.4 million, ultimately spent by Ecology in administering the rehab project was available to MVID. (AR Vol. II, p. 457, ll. 24-25; p. 458) The PCHB’s reliance on Mr. Haller’s admitted use of outdated engineering cost projections renders its decision arbitrary and capricious.

**FACT:** For whatever reason, Ecology’s administration of the legislatures \$1.3 million allocation to Ecology for lining/piping of the lower seven miles of the West Canal was not constructed as designed to enable MVID to operate at the 2003 ordered limitations and still deliver its member’s constitutionally protected water rights (CP 72-142 Motion for Reconsideration).

**FACT:** Ecology acknowledges that the lining project achieved at most a lessening by 4 cfs of the diversion amount previously determined to be non-wasteful in Ecology's First Order of 29 cfs diversion for the West Canal and 25 cfs diversion for the East Canal. (CP 626-637 Ecology's Response to Motion for Reconsideration)

**FACT:** Ecology's First Order determining that 29 cfs was a non-wasteful diversion quantity for the West Canal means that even if Ecology is correct that the rehab project, as constructed, lessened the West Canal diversion by 4 cfs that still requires 25 cfs as a non-wasteful diversion amount to meet the member's constitutionally protected water rights.

**FACT:** Ecology's exercise of its "prosecutorial discretion" currently authorizing MVID to divert 17 cfs into the West Canal is an acknowledgement that the targeted improvement, whether by design or construction or both, did not allow and does not allow MVID to meet Ecology's Order of 11 cfs and still deliver water to all of its users.

**FACT:** Had Ecology, after Mr. Haller's design for a different conveyance system, provided that information to MVID as required by RCW 90.03.605, and worked with MVID to enable MVID to attempt voluntarily compliance with Mr. Haller's new system, none

of the administrative appeals and court litigation would have been necessary.

B. MVID's Facts Cited From The Record (Reconsideration Motion Supported By Record) (Ecology Brief pp. 37-39)

Ecology's assertion that MVID attempts to rely on evidence not in the record is belied by the reference throughout MVID's opening brief to the record. Ecology's assertion that MVID abandoned its arguments, advanced in its Motion for Reconsideration, is not accurate. The initial declaration of the current MVID President, Greg Nordang, was never stricken and remains a material part of the record. It is Mr. Nordang's declaration dated October 30, 2009 (CP 143-146, attached as the final pages of CP 72-146) supporting MVID's Motion for Reconsideration that established that the targeted improvement necessary to achieve the 11 cfs diversion was not successful. That being the fact, the original 29 cfs of Ecology's First Order is still operative as being non-wasteful.

Although MVID did designate two excluded declarations as part of the Clerks Papers that was done in connection with MVID's appeal of the Court's rejection of its Motion for Reconsideration. MVID, however, does not rely on those declarations in its arguments on appeal. MVID's position is fully supported by the Declaration of Greg Nordang dated October 30, 2009 (CP 143-146). Furthermore, reference to the

Declaration of Chris Johnson at pages 4 and 5 of Appellant's Opening Brief is appropriate as Mr. Johnson's Declaration (CP 37-41) was never stricken and is fully part of the record. MVID's reference to its Motion for Reconsideration on pages 20 and 35-36 continues to incorporate the Declaration of Greg Nordang dated October 30, 2009 (CP 143-146), which was neither stricken nor withdrawn. MVID's Motion for Reconsideration established that targeted Alternative No. 5, which the PCHB found necessary to achieve the 11 cfs diversion limitation, as constructed, failed to allow MVID to reduce its West Side diversion below the 29 cfs found to be non-wasteful in the First Order. MVID's citation to Clerk's Papers 38 references information properly part of the record. Importantly, the Superior Court in denying MVID's Motion for Reconsideration refused to acknowledge that it had previously held, in its own Memorandum Opinion (CP 30, ll. 17-19), affirming the Second PCHB Order that,

"The evidence establishes that replacement of the lower 7 miles of canal of the west canal system will probably achieve compliance with Ecology's order reducing MVID's diversion amounts."

The Court refused to acknowledge that the replacement, as constructed, and as admitted by Ecology, failed to allow the diversion reductions established in Ecology's Second Order.

Ecology's concern about the record memorializing facts supporting MVID's Motion for Reconsideration is curious. Ecology acknowledges the targeted alternative, necessary to make the 11 cfs limitation operative, was not constructed as contemplated even though the construction was administered by Ecology. Further, Ecology's acknowledgement that the constructed improvement does not allow MVID to reduce its diversions in the West Canal to 11 cfs and still meet its members constitutionally protected water rights support the invalidity of Order DE 5904 and the error of the Superior Court in not granting reconsideration.

**II. APPLICATION OF LAW TO FACTS ESTABLISHES  
ECOLOGY'S CONTRAVENTION OF APPLICABLE  
STATUTORY MANDATORY DIRECTIVE AND VIOLATION  
OF MVID'S CONSTITUTIONAL PROTECTIONS**

- A. Ecology Providing Haller's Report (AR Ex. R-1) Four Months After Order De 5904 Issued Failed To Comply With The Explicit Statutory Mandatory Directive Specified In RCW 90.03.605. (Ecology Brief pp. 27-37) (OWL's Brief pp. 17-28)

Ecology argues that because the PCHB directed Ecology to reexamine MVID's system with the goal of "...issuing a supplemental order..." that it need not comply with RCW 90.03.605.

The fallacy in Ecology's argument is that Mr. Barwin, the Ecology official who signed the Second Order in question testified that the Order issued specifically pursuant to RCW 90.03.605 (AR Vol. III, p. 619, ll. 10-16). The Order in question did not issue as a supplemental Order. It was a

brand new Order with its own designated DE number as a complete and separate Order from the 2002 Order. The reason Ecology issued an entirely new Order is that it was based on a complete new paradigm, not previously addressed in any regard as part of the First 2002 Order and subsequent PCHB hearing. The new Second Order was based on the opinions of a single Ecology employee, Mr. Dan Haller. Mr. Haller personally devised a new, never before communicated or formally established required minimum conveyance efficiency standard of 54% to be achieved by MVID. However, in order for MVID to achieve the new efficiency standard, MVID would have to construct a new-targeted rehabilitation project costing more than MVID could afford. According to Mr. Haller, the cost of his targeted rehab computer-generated model No. 5 would have to be totally government funded (AR Vol. II p. 318, ll. 12-17).

Before the completely new Order could issue, Ecology was required, in accordance with RCW 90.03.605, to **first** attempt to achieve voluntary compliance. In that regard, Ecology's first response to Mr. Haller's new report and targeted efficiency standard and rehab alternative was to offer information and technical assistance to MVID in writing identifying one or more means to accomplish completion of a project that would allow MVID to limit its West Canal diversion to 11 cfs. RCW 90.03.605(1)(b) utilizes the term "**shall**" twice. The term "shall" is mandatory. It imposes

a mandatory duty on Ecology to engage in the voluntary compliance effort before a Violation Order can issue. *Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 907-908, 949 P.2d 1291 (1997). See also *Weight Management of Seattle, Inc., v. Utilities and Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994); *Cascade Vista Convalescent Center, Inc., v. DSHS*, 61 Wn.App. 630, 638, 812 P.2d 104 (1991).

Not only did Ecology fail to work with MVID to obtain voluntary compliance based on Mr. Haller's entirely new paradigm, but Mr. Haller's report was not included as the "facts" supporting the new Second Order. Instead, Ecology merely parroted the facts of its First Order as being the support for the Second Order.

Ecology's assertion that MVID received the Haller report four months after the Order issued, but seven months prior to the PCHB hearing as part of litigation pleadings, as constituting compliance with its duty to work with MVID to achieve voluntary compliance in accordance with RCW 90.03.605 is nonsensical and proof that Ecology failed to supply the information in accordance with the statute. The whole point of RCW 90.03.605(1)(b) is to avoid litigation by allowing the citizen to attempt voluntary compliance. Without complying with the mandatory directive of RCW 90.03.605(1)(b), Ecology's Second Order is void *Ab initio*.

Ecology simply turns its statutory obligation to provide MVID with information in “writing” in advance in order that MVID can voluntarily comply with what Ecology deems necessary to avoid wasteful practices on its head. Without Mr. Haller’s report first being provided to MVID and Ecology providing information and technical assistance, including support and recommendations for funding, to allow MVID to voluntarily comply with Mr. Haller’s entirely new project and instead merely issue a new Order, MVID was forced into an expensive administrative process, and now legal process, to which it should not have been subjected. The idea that MVID should have to submit to a public records request to learn of Mr. Haller’s new waste standard or to engage in an expensive discovery fishing expedition to try to find undisclosed computer-engineered alternative rehabilitation project designs required to achieve Ecology’s Second Order limitations is not only an imperious attitude, but not lawful. This is the same attitude that motivated Ecology to try an experiment of charging MVID’s diversions as violating Washington pollution statutes in its First Order (CP 234-235). Ecology apparently hoped that with a financially beleaguered irrigation district in the far rural reaches of the state of Washington would not have the horsepower to put up a viable defense and it could thereby extend the agency’s power to regulate irrigators’ withdrawal of their otherwise constitutionally protected water

rights . The pollution violation was eliminated from the Second Order further evidencing that the Second Order was a new stand alone Order.

Ecology's reference in F.N. 11 of its Answer at page 29 illuminates its belief that withholding information, which serves as the underpinning for the order in question, is fair play in terms of "trial strategy." Whether or not "...MVID may now regret its trial preparation strategy...." which it does not, is not the question. Whether or not Ecology can hide or fail to disclose, in any regard, the report, which serves as the basis for the new lower diversion limitations, as part of its trial strategy, does not obviate Ecology's duty to provide the report prior to the Order in question even issuing. Ecology's statement in footnote 11 that MVID can cite no statutory or constitutional requirement obligating Ecology to provide Mr. Haller's report with the 2003 Order is belied by the common law duty cited in *Shafer v. State*, 83 Wn.2d 618, 624, 521 P.2d 736 (1974) and due process cited in both this Reply Brief and MVID's Opening Brief. Ecology was required to work with MVID in advance of issuance of the Second Order, pursuant to the statutory mandatory directive, including providing the essential information (AR Ex. R-1), which was the underpinning for achieving a new undisclosed efficiency standard.

B. Ecology Required To Comply With RCW 90.03.605

Apart from Ecology's common law duty to deal scrupulously with Washington Citizens, it is under a statutory duty to work with citizens prior to issuance of the order in question. Ecology as a State agency is supposed to work with citizens to assist them in complying with the laws. Ecology should not be allowed to become a prosecutorial agency engaged in entrapping and punishing those citizens it decides are not worthy of its cooperation.

MVID's challenge to Ecology's failure to comply with a mandatory statutory duty was necessarily raised by the identified issue before the PCHB as to "whether Ecology's Order reducing the diversions properly implements the requirement to minimize water..." specifically noted and argued in the PCHB hearing (AR 55). Therefore, it was and is preserved for appeal. Ecology's reference to trial court arguments does not apply here. The Appellate Court reviews and rules based on the PCHB record, not the trial court decision, except as to MVID's appeal of denial of the Motion for Reconsideration.

C. Ecology's Failure To Comply With RCW 90.03.605 Properly And Timely Asserted

Ecology claims MVID did not address the issue of Ecology's failure to comply with RCW 90.03.605 until the last day of the three-day PCHB

hearing. That claim is a misrepresentation of the record. MVID addressed the issue of Ecology's non-compliance with RCW 90.03.605 in its opening statement to the Board. AR Vol. I, p. 24-25. It was raised again by MVID in connection with Ecology's first witness. AR Vol. I, p. 50-55. MVID established and was granted a continuing objection throughout the hearing to Ecology's introduction of and the PCHB's admission into evidence of AR Exhibit R-1 based on Ecology's failure to comply with 90.03.605 (AR Vol. I, p. 55).

Ecology specifically acknowledged, at the commencement of the PCHB hearing, that MVID's challenge to the validity of the order in question, based on Ecology's failure to comply with RCW 90.03.605, was a legal argument properly before the Board.

“As to whether there's some alleged duty to have provided it as an attachment to the order, that goes to the legal argument as to whether the order that the Board is reviewing should be affirmed or referred.”

(AR Vol. I, p. 53, ll. 25 & p. 54, ll. 1-4)

The burden of proof was on Ecology to establish the legality of the order in question. Inherent in the Board's order requiring proof that Ecology properly exercised its duty to minimize waste is whether or not Ecology complied with the statutory mandate that it first seek voluntary compliance by MVID to achieve a new conveyance efficiency standard before issuing a violation order (RCW 90.03.605(1)(b)).

The Board's conclusion of law (CP 561-62, ll. 3) ignores the statutory requirement mandating definitive affirmative action on the part of Ecology before the order in question could validly issue. Ecology and the PCHB, attempt to convert a prerequisite mandatory administrative duty RCW 90.03.605(1)(b) to a trial strategy in order to avoid the illegality of the Order in Question.

The argument throughout the hearing as to Ecology's failure to comply with RCW 90.03.605 raised neither a new legal issue nor new theory. It quite literally went to the heart of the question posed by the Board as to whether the order in question validly issued in the first instance.

D. OWL's Attempt To Cast The Validity Of Order 5904 As Necessary To Correct MVID's Failure To Act (RCW 90.03.605(1)(c)) As An Emergency Order (RCW 90.03.605(2)) Is Belied By The Evidence (OWL's Brief pp. 21-28)

Ecology waited six plus years; and almost three years following the Superior Court Ruling to enforce Order 5904. Even today Ecology has not attempted to fully enforce the 11 cfs limitation. The reasons for Ecology's specific decision not to enforce Order 5904 are many:

1. The First Order 3950 already addressed Ecology and OWL's claims that MVID had not acted expeditiously in attempting to minimize waste.

2. The First Order subsumed MVID's past conduct.

3. By not pursuing an appeal and complying with the First Order, MVID was not wasting water.

4. The Second Order could not have issued pursuant to RCW 90.03.605(1)(c), because MVID could not have failed to act on Mr. Haller's, at the time, undisclosed new engineering plan.

5. Ecology knew MVID could not be accused of waste under the First Order until MVID had a reasonable opportunity, money, and time to seek implementation of a new modified delivery system.

OWL's attempt to go behind the Second Order and attempt to regurgitate facts, which gave rise to the First Order to support the Second Order, which is based on construction of a different delivery system necessarily fails.

OWL's citing of excerpts from Judge Burchard's decision in the MVID I appeal should be stricken. Only the record before the PCHB regarding the Second Order is before the Court.

More importantly, however, the First Order 3950 was issued to address and correct the facts recited in Judge Burchard's decision. By not pursuing an appeal and complying with Ecology's First Order, the facts giving rise to the First Order were fully addressed. Ecology recognized that, which is why Ecology directed Mr. Haller to come up with an

entirely new program for MVID to follow because MVID, by operating within the limits of its First Order, was not wasting water.

OWL's repeated attempts to focus on the facts giving rise to Ecology's First Order undercuts its arguments in support of the Second Order.

E. Issue Of MVID Being Denied Due Process Properly Before The Court (OWL Brief pp. 28-33)

Ecology cited the same facts in the First Order as the basis for the Second Order. As such, MVID believed the PCHB appeal of the Second Order would be a replay of the First PCHB hearing. Ecology's approach to the issuance of the Second Order and its conduct before the PCHB places the issue of denial of MVID's due process squarely before the Court.

Neither Ecology nor OWL cite a bright line determination as to what constitutes sufficient articulation of an issue for purposes of appeal. However, Ecology misses the point. Due Process is always timely whenever raised, in particular if it is an issue of manifest importance, which when dealing with constitutionally protected water rights, it is. *Sheep Mountain. Cattle Co. v. DOE*, 45 Wn.App. 427, 430-31, 726 P.3d 55 (1986)

Ecology sees AR Ex. R-1 and its duty to produce it to MVID in the context of “trial strategy.” (Ecology’s brief, p. 29, F.N. 11) In fact, AR Ex. R-1 was the core ingredient supporting initiation of the administrative process whereby Ecology was attempting to enforce piped conveyance efficiency standards onto a district operating a lawful open earthen canal conveyance system.

To withhold that information until four months into the administrative process and withholding the method whereby Ecology devised a new “required” efficiency standard, solely for MVID, until the PCHB hearing does not comport with the law requiring that MVID be afforded due process of law. *Wenatchee Reclamation Dist. v. Mustell*, 102 Wn.2d 721, 728, 684 P.2d 1275 (1984)

F. Common Law Duty Breached

DE 5904 as a new Order based on entirely new engineering data undisclosed to MVID prior to issuance of the Order fails the common law standard for the State to deal scrupulously with its citizens. Ecology’s conduct deprived MVID of due process of law in the sense that it was deprived of an opportunity to adequately prepare for the PCHB hearing. *Shafer v. State, Id.*

### III. CONCLUSION

PCHB FOF 26 (CP 546) established that without implementation of targeted template No. 5, MVID could not achieve the new West Canal diversion and usage limitations of Ecology's Second Order. Based on the rehab's failure to allow MVID to reduce its West Canal diversions to 11 cfs and still deliver to its members their constitutionally protected water rights renders Ecology's Second Order of no force and effect. Until Ecology complies with the law, Ecology's First Order remains in full force and effect.

Equally applicable here is the State Supreme Court's analysis of the vagueness doctrine in *State v. Sanchez Valencia*, 169 Wn.2d 782 (Sept. 2010). Ecology's acting in its enforcement and prosecutorial role with authority to control citizens' activities and issue fines and penalties must adhere to constitutional protection afforded those citizens. In this regard, the Fourteenth Amendment and Article I, Section 3 of the State Constitution requires that citizens have fair warning of proscribed conduct:

"This assures that ordinary people can understand what is and is not allowed and are protected against arbitrary enforcement of the laws."

*Sanchez Valencia*, Id. at 791.

Ecology's issuance of the Second Order without first providing MVID with information regarding newly developed efficiency standards, for just MVID, constitutes arbitrary enforcement of the laws.

With the failure of the targeted improvement to achieve the limitations provided in the Order in question, Ecology does not get to pick and choose some interim number between the First Order and the Second Order and dictate to MVID what that interim number should be. Neither is the East Canal Second Order limitation valid until Ecology first complies with RCW 90.03.605(1)(b).

Any way this case is approached, whether because Ecology failed to comply with the statutory mandatory directives, of RCW 90.03.605(1)(b) or because of Ecology's failure to provide MVID with due process of law or because the attempted targeted improvement was unsuccessful, the result is the same, invalidation of the Second Order.

Until Ecology complies with the law, statutory and constitutional, Ecology's First Order remains in full force and effect with which MVID is complying and will comply while currently working with Ecology and public agencies for design and funding to continue to improve its delivery conveyance efficiency.

It was, after all, MVID that, once it was determined, after appeals, that a modified delivery system should allow it to deliver water more

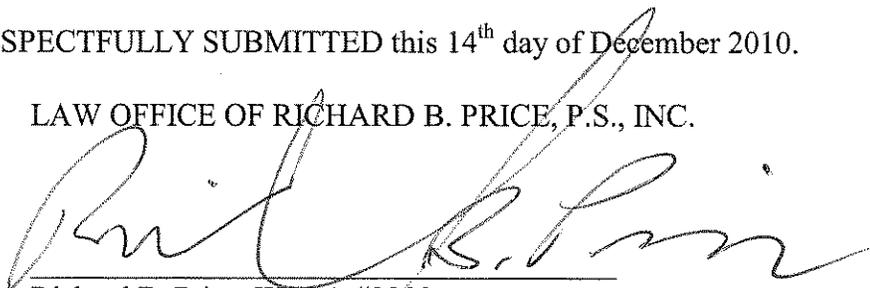
efficiently, worked diligently, without OWL, and initially, without Ecology's support, to obtain funding ultimately, through the Washington State Legislature to obtain the necessary funding. Whatever the old evidence in the First PCHB FOF and Order as to lack of maintenance, it cannot be used to support the Order in question.

Had Ecology provided Mr. Haller's report up front and worked with MVID to allow it the opportunity to achieve voluntary compliance, as required by the law, statutory and constitutional, the parties would have worked toward a rational resolution, without the costly appeals detracting from conservation efforts to achieve greater conveyance efficiency.

MVID is entitled to move forward in that regard under Ecology's First Order.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of December 2010.

LAW OFFICE OF RICHARD B. PRICE, P.S., INC.

A handwritten signature in cursive script, appearing to read "Richard B. Price", is written over a horizontal line.

Richard B. Price, WSBA #3203  
Attorney for Petitioner/Appellant

MVID#3.coa.reply.12/14/2010.sl

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the state of Washington that I mailed a copy of Petitioner/Appellant MVID's Reply Brief to the undersigned by placing the same in a postage prepaid envelope and depositing in the U.S. Mail to:

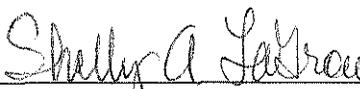
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