

FILED

JUL 02 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 322076

MONICA HUNT,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Ecology's attempt to recast this case in terms of protecting Manastash Creek is artificially narrow and misplaced. The issue is much broader and involves the scope of Ecology's enforcement powers under chapter 90.48 RCW. Fundamentally, it is about whether Ecology can, *ipse dixit* and without "substantial evidence", charge a landowner with polluting a natural flowing creek under RCW 90.48.080, based upon the landowner's lawful activities in and around an irrigation ditch that eventually enters the creek.

This case ultimately requires the Court to strike a reasonable balance between a landowner's right to make beneficial use of his or her irrigated agricultural property with Ecology's authority to protect waters of the state from pollution. Here, Ecology has grossly overstepped the bounds of its enforcement powers, thus intruding upon private property rights in a manner never intended by the Legislature. It cannot be overstated that, under Ecology's interpretation of RCW 90.48.080 and .020, actionable "pollution" includes causing any potential change, regardless of how minute and harmless it might be, in the properties of a return flow ditch, including the mere act of sprinkling a handful of dirt in the ditch.

II. CLARIFYING THE RECORD

To assist the Court in deciding this case, it is important to expose several misguided premises upon which Ecology's case depends. **First:** Like the

PCHB, Ecology arbitrarily limits the scope of Ms. Hunt's activities to what it considers to be "**normal maintenance**". By doing so, Ecology is able to posit the illusory argument that Ms. Hunt's activities were not "normal maintenance"; therefore, they constituted actionable pollution. The fallacy with Ecology's argument (the obvious leap of logic aside) is that Ms. Hunt's activities involved **the repair and restoration** of her severely flood-damaged pasture and ditch, not "normal maintenance."

Relying on standard dictionary definitions, Ecology claims Ms. Hunt's activities were not "normal maintenance", because she "did not return the property to its prior, pre-flood condition". Ecology then concludes:

*To the average person normal, routine, maintenance might include **picking up debris** that had washed downstream, removing broken limbs, or trimming tree branches. It would not include cutting down dozens of trees and crushing all vegetation within the riparian corridor.¹*

Ecology's argument ignores the facts in this case and what the "average person" residing in rural Kittitas County would consider a normal "response" (not "maintenance") under the circumstances. One does not remove large logs, downed trees, trees that are dead or leaning at a dangerous angle, tires, large debris piles clogging a ditch, a 20' culvert, downed fences and panel gates, and so forth, simply by *picking them up* and putting them into a

¹ See Respondent's brief at 22 (emphasis and italics added).

green recycle bin; heavy equipment of some kind is required.²

Second: Ecology attempts to bolster its "not normal maintenance" argument by overstating and overemphasizing the impact of Ms. Hunt's repair and restoration work. Ecology states Ms. Hunt's activities crushed vegetation, left visible track marks, and involved the cutting of mature trees in her riparian pasture; it tacitly suggests Ms. Hunt's activities required a "flood development permit"; and it purports that Mr. Neet observed "700 linear feet of riparian habitat had been destroyed."³ These statements are of little or no consequence. Ms. Hunt's activities all occurred away from Manastash Creek and its well-shaded banks; Ms. Hunt was not charged with working without a permit; and her activities did not require a permit.⁴ In other words, her activities were lawful, as the PCHB correctly found.⁵ And it would have been a

² Ms. Hunt's removal of some trees that were not dead, diseased, dying, or leaning over at a dangerous angle because of the flood, in order to maximize the beneficial use of her pasture, was a normal or customary activity, as Mr. Charlton opined.

³ See Respondent's brief at 2, 9-11. Mr. Neet, however, admitted the area in question was less than 700 feet; *and that he could not give any estimate of the length of the area of Ms. Hunt's work.* CP 253. The annotated aerial photographs attached at Appendix E to Ecology's brief, allegedly depicting the area of Ms. Hunt's work are also misleading. They falsely suggest that Ms. Hunt conducted work on the south bank of Manastash Creek; that her work went above where the ditch enters her property from the bluff; and that she cut all of the trees in the annotated area. The uncontroverted facts refute these suggestions. See PCHB Finding No. 13 (CP 8-9) ("Mr. Neet did not walk to the area above the ditch . . . Ms. Hunt did not conduct any activities above the Ditch"); Finding No. 33 (CP 53) (Ms. Hunt's "activities were in and along the Ditch and not the main channel of Manastash Creek"); see also, Finding Nos. 37-39 (CP 14-16).

⁴ See discussion of Washington's Shoreline Management Act ("SMA") and the federal Clean Water Act ("CWA") at pp. 25-28 of Appellant's opening brief; see also, PCHB Order at Finding No. 40 (CP 25-26), implicitly noting that Ms. Hunt's activities did not require a permit under either the SMA or the CWA; Respondent's brief at 25-26.

⁵ See PCHB Order at Finding No. 63 (CP 31); see also, Finding Nos. 40-41 (CP 16-17).

normal, routine, and lawful practice even if Ms. Hunt had dredged the entire length of her ditch in order to remove built-up silt deposits to improve its flow.⁶

Moreover, the crushed vegetation, the tracks in the mud, the cutting of some trees, and the use of heavy equipment were unavoidable consequences of Ms. Hunt's repair and restoration work. The pasture was boggy and still had standing water in places when Ms. Hunt did her work in November of 2011.⁷ As a matter of common sense, for which Ms. Hunt requests judicial notice be taken under ER 201, the use of a truck, tractor, or ATV under such conditions would also leave tracks and churn up the ground.

The bottom line is this: given the conditions on the ground, there was no way Ms. Hunt could have done any repair or restoration work without damaging the vegetation, disrupting the saturated soil, and causing sediment to flow into the ditch once the debris was removed where it was clogging the ditch. The issue, however, is not whether any sediment was discharged into the ditch, but whether there is "substantial evidence" that any discharged sediment was of sufficient quantity to create a "substantial potential" of polluting Manastash Creek itself; that is, a deposit of sediment sufficient to create a "substantial potential" of harming terrestrial or aquatic life. RCW 90.48.020;

⁶ *Id.*

⁷ *Id.* at Finding No. 9 (CP 41); CP 138-39.

Lemire v. State Dep't of Ecology, 178 Wn.2d 227, 234, 309 P.3d 295 (2013).

Such evidence does not exist in this case.⁸

Third: Ecology's reliance on TMDL and related studies of Manastash Creek, including those for sediment and temperature, is a ruse. Because Ecology has no observable, "substantial evidence" that harmful sediment or temperature increases occurred in the creek itself (as opposed to the ditch), the TMDL studies are, standing alone, of no consequence in this case.⁹

Fourth: Ecology's argument - the legal theory of its case against Ms. Hunt never changed, but simply "evolved" over time - is a clever play on words; in politics, it is known as "plausible deniability." Ecology claims its case against Ms. Hunt was always based upon the allegation that "the pollution created by ditching, filling, and *altering* of the creek is a violation of RCW 90.48.080."¹⁰ By spinning the word "altering", Ecology is able to maintain the colorable, though disingenuous, argument that the theory of its case never changed. This is because any minute change in the properties of

⁸ Ecology also overstates the record by implying Ms. Hunt conducted massive excavation work along her ditch. The uncontroverted facts, however, are that Ms. Hunt removed debris from only four places where it clogged the ditch. See CP 138-39.

⁹ Ecology admits that temperature and sediment TMDL standards exist for Manastash Creek. Indeed, the Brown Road bridge, at the easterly boundary of Ms. Hunt's property below where her ditch entered the creek, "was one of the sampling points during the data collection phase of the Temperature TMDL" for Manastash Creek. See Respondent's brief at 13-14 (italics added). This begs the question: since Ecology had a base temperature to operate from *before* Ms. Hunt's repair and restoration activities, why did it fail (or refuse) to take temperature measurements *after* she completed her work? Doing so would have provided objective evidence of any potentially harmful temperature increase.

¹⁰ See Respondent's brief at 13-14 (italics added).

water can be construed as an alteration. It is uncontroverted, however, that Ecology charged Ms. Hunt with polluting Manastash Creek based upon its false belief that she had excavated the creek itself and cut trees along its banks. Ecology's own statements confirm this fact.

Shortly after it filed its charges against Ms. Hunt, Ecology issued a news release accusing her of "causing extensive damage to the shoreline and creek bed"; repositioning the creek "approximately 25 feet to the south without proper permits"; and removing "700 feet of [trees and other vegetation] of the shoreline".¹¹ And both Ecology's administrative and penalty orders allege "*[t]he excavation work* completed by Monica Hunt violated RCW 90.48.080".¹² Ms. Hunt was also ordered to undertake a massive restoration plan in order to "*[r]estore the functions of Manastash Creek*", including placing "riparian buffers" "30 feet (*on both sides of the stream*) measured from the top of the ordinary high water mark."¹³

Thus, Ecology's charge against Ms. Hunt changed from directly polluting Manastash Creek itself, by excavating the creek and clear-cutting both of its banks, to "polluting" the ditch which in turn tended to pollute the creek. The PCHB itself acknowledged Ecology's changed theory of liability.¹⁴

¹¹ CP 120. *See*, also, Appendix 1 hereto.

¹² *See* CP 125 and 132 (emphasis added).

¹³ CP 126-27, 133 (emphasis added).

¹⁴ PCHB Order at Finding No. 61 (CP 29-30).

III. ARGUMENT

A. Ecology Implicitly Concedes the PCHB Erred in Granting Summary Judgment in its Favor.

Citing *Verizon N.W., Inc. v. Emp't Sec. Dep't.*, 164 Wn.2d 909, 916, n. 4, 194 P.3d 255 (2008), Ecology correctly states: "The propriety of summary judgment is a question of law, and therefore the substantial evidence standard used for other factual findings is not appropriate."¹⁵ In ruling on a summary judgment motion, all reasonable inferences must be resolved in favor of the non-moving party; and "if reasonable men might reach different conclusions, the motion should be denied." *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

Ecology presented *no affidavits* to rebut Mr. Charlton's and Ms. Hunt's sworn statements that her work was a normal or customary response to her flood-damaged property. And Mr. Neet's contradictory deposition testimony and affidavits regarding the location and scope of Ms. Hunt's work created genuine issues of material fact regarding his credibility. Thus, drawing all reasonable inferences in favor of Ms. Hunt, the PCHB erred in granting Ecology's motion for summary judgment.¹⁶

¹⁵ See Respondent's brief at 16.

¹⁶ Although Mr. Neet's contradictory statements create a credibility issue *for Ecology* sufficient to defeat its motion for summary judgment, they do not raise a credibility issue, or a genuine issue of material fact, sufficient to defeat Ms. Hunt's summary judgment motion. See *Balise*, 62 Wn.2d at 200.

B. The Court Can and Should Consider the Legislative History Underlying Chapter 90.48 RCW.

Ecology argues that the term "waters of the state" is unambiguous and includes "irrigation ditches"; therefore, the Court should not look to the legislative history surrounding RCW 90.48. Ecology's argument is misplaced. The examples of "waters of the state" identified in RCW 90.48.020 *do not* include irrigation ditches. This is why the Water Pollution Control Commission asked the Attorney General for an opinion as to whether "waters of the state" include waters found in irrigation drainage systems.¹⁷

Moreover, the real issue is not whether the term "waters of the state" is ambiguous, but whether the Legislature intended to exclude customary practices like Ms. Hunt's from supporting a charge of pollution under chapter 90.48 RCW; and the legislative history establishes that it did.¹⁸ Since Ms. Hunt's activities along her ditch are exempt from causing actionable pollution, it naturally follows that she cannot be liable for polluting Manastash Creek merely because the ditch flows into the creek.¹⁹

¹⁷ See Appellant's opening brief at 21, n. 34.

¹⁸ The argument supporting this position has already been fully set forth at pp. 20-28 of Appellant Hunt's opening brief, and will not be reiterated here.

¹⁹ Ms. Hunt is not claiming that all activities in or around return flow irrigation ditches are *per se* exempt from enforcement under chapter 90.48 RCW; nor is this what the Legislature intended. The exemption is limited to ordinary agricultural and irrigation practices. Certainly, depositing a 50 gallon drum of pesticides, fuel, or other hazardous substances directly into an irrigation ditch would constitute an act of "pollution", in violation of RCW 90.48.080. But that is nowhere close to the situation here.

C. The PCHB Erred in Not Applying Mr. Charlton's Opinion to Ms. Hunt's Repair and Restoration Activities.

Neither Ecology nor the PCHB is qualified to opine on what a similarly situated rural landowner would do when faced with the same conditions. By contrast, Ms. Hunt and Mr. Charlton are qualified to, and did, opine on what activities are normal, customary, or routine practices in Kittitas County. Ms. Hunt's activities fit the bill; and there is no controverting evidence.²⁰

Ecology argues: "Mr. Charlton was never qualified as an expert"; "[t]herefore, Ms. Hunt's references to Evidence Rule 702 are inapplicable."²¹ Ecology's argument is misplaced, for at least three reasons. First: Mr. Charlton's declaration sets forth facts qualifying him as an expert under ER 702.²² Second: The PCHB accepted Mr. Charlton as an expert on the matters on which he opined.²³ Third: Ecology did not object to Mr. Charlton's testimony on the ground that he was not qualified as an expert; therefore, Ecology cannot raise the issue for the first time on appeal. *Boyd v. Kulczyk*, 115 Wn. App. 411, 416-17, 63 P.3d 156 (2003); RAP 2.5.

The PCHB's error is that, after admitting Mr. Charlton's opinion, which is the only evidence of customary or normal practices in Kittitas Coun-

²⁰ PCHB Order at Finding No. 41 (CP 17) ("Ecology does not refute Mr. Charlton's opinion on the definition of normal or routine practices").

²¹ See Respondent's brief at 24.

²² Index to the PCHB Record File 3, #22 at 808.

²³ See PCHB Order at Finding Nos. 40-41 (CP 16-18).

ty (other than Ms. Hunt's corroborating declaration), it failed to apply his opinion to Ms. Hunt's activities. Because Ecology failed to produce any evidence to refute Mr. Charlton's opinion, the PCHB should have granted Ms. Hunt's motion for summary judgment and denied Ecology's motion.

D. Ecology's Argument - "[t]here is no exemption in RCW 90.48 for Agricultural Activities" - is Illusory.

Ms. Hunt is not arguing that chapter 90.48 RCW contains an express exemption for agricultural activities. Instead, her argument is that the Legislature never intended that customary, normal, routine or otherwise lawful agricultural and irrigation practices could support actionable pollution under chapter 90.48 RCW.²⁴ As with Washington's Shoreline Management Act and the federal Clean Water Act, in enacting and revising chapter 90.48 RCW, the Legislature intended to strike a balance between protecting waters of the state and the private property rights of agricultural landowners and irrigationists to make beneficial use of their land.

Indeed, the legislative history and related statutes indicate that the Legislature intended to give activities involving return flow ditches a heightened degree of protection from being a source of pollution than similar activities involving naturally flowing waters of the state. For example, "return flows from irrigated agriculture" are expressly exempt as a "point source" of

²⁴ See Appellant's opening brief at 22-25.

pollution for purposes of requiring a NPDES permit. *See* WAC 173-220-030(18). As such, agricultural property owners with return flow irrigation ditches should be view similarly to dairy farmers, whose activities likewise inherently involve the discharge of certain chemicals into waters of the state, but who are exempt from a charge of "pollution" under chapter 90.48 RCW ***unless the discharge exceeds a certain minimum threshold.*** *Dep't of Ecology v. Douma*, 147 Wn. App. 143, 155, 193 P.3d 1102 (2008).

In reconciling chapters 90.64 RCW (governing dairy farm operations) and chapter 90.48 RCW (Washington's Clean Water Act), the *Douma* Court stated, "A dairy that is not determined ***to be a significant contributor of pollution*** is not subject to chapter 90.48 RCW penalties." *Id.* at 155 (emphasis added). The *Douma* Court thus struck a reasonable balance between subjecting dairy farm operations to the enforcement provisions of chapter 90.48 RCW, while at the same time exempting such operations from incurring the wrath of Ecology for the mere potential of causing pollution. *Id.*

To charge a dairy operation based upon the potential to cause pollution would virtually shut down all such operations. The same is true regarding irrigated agriculture. Thus, Ecology should be required to produce "substantial evidence" that the landowner's activities involving return flow irrigation systems are "a substantial contributor" of pollution before they can support a charge of violating RCW 90.48.080.

E. Ecology's Attempt to Distinguish *Lemire* is Not Persuasive.

Ecology asserts that the "substantial evidence" of a "substantial potential" to pollute standard established in *Lemire* does not apply in this case. To support its position, Ecology advances the following argument: "The *Lemire* case involved the issuance of an administrative order, under RCW 90.48.120, whereas this case involved the issuance of both an administrative order under RCW 90.48.120 and a civil penalty under RCW 90.48.144."²⁵ On its face, this is a distinction without meaning. As with the case at hand, *Lemire* was decided based upon whether the activities in question constituted "pollution" in violation of 90.48.080, as the term "pollution" is defined under RCW 90.48.020, thus justifying Ecology's administrative order.

Under Ecology's reasoning, *Lemire* stands for the following absurd proposition: to support an administrative order under RCW 90.48.120, which requires a landowner to take corrective action for violating RCW 90.48.080 but imposes no penalty, Ecology must meet a heightened burden of proof ("substantial evidence" of a "substantial potential" to pollute); whereas if Ecology imposes *both* a corrective order under RCW 90.48.120 and a substantial civil penalty under RCW 90.48.144, then it only needs to show that the landowner's activities "tended to cause" pollution in violation of RCW

²⁵ See Respondent's brief at 27.

90.48.080. In other words, Ecology's burden of proof decreases as the severity of the consequences to the landowner increases.

Ecology offers a second baseless argument to distinguish *Lemire*: "In *Lemire* the Court concluded that Lemire's actions had the substantial potential to violate RCW 90.48.080", [whereas] "[i]n this case, the Board did not conclude that Ms. Hunt's activities had a `substantial potential' to violate RCW 90.48.080"; instead, "the Board concluded that her activities caused sediment to discharge into Manastash Creek which tended to cause pollution in violation of 90.48.080."²⁶ From this specious logic, Ecology concludes: "The Board clearly articulated the standard in this case: `whether there were activities that would *tend to cause* pollution of Manastash Creek.'"²⁷

In other words, Ecology argues that *Lemire's* standard of a "substantial potential" to violate RCW 90.48.080 is inapplicable simply because the PCHB chose not to apply it. Instead, because the PCHB found that Mr. Hunt's activities "tended to cause" pollution, this *per se* becomes the standard for finding a violation of RCW 90.48.080 in this case. Having thus lowered Ecology's burden of proof, Ecology nakedly concludes that this artificially lowered burden is supported by substantial evidence in the record. The premise is fatally flawed and the conclusion is factually unsupported.

²⁶ *Id.* at 27-28 (underscoring and italics original).

²⁷ *Id.* at 28 (quoting PCHB Order at Finding No. 51 (CP 36) (italics added)).

F. Ecology Misrepresents Ms. Hunt's Argument Regarding Ecology's Burden of Proof.

Ecology incorrectly states: "Ms. Hunt argues that since there is no quantitative evidence proving that sediment entered the main channel of Manastash Creek or that the temperature of Manastash Creek rose, there is no substantial evidence to uphold the Board's Amended Order."²⁸ Ms. Hunt, however, made no such argument. On the contrary, her argument is basically two-fold: under *Lemire*, in order to sustain its charge of pollution, Ecology must at least produce "substantial evidence" that Ms. Hunt's activities had a "substantial potential" to pollute (i.e., harmfully "alter") the waters of Manastash Creek; and, although actual tests or measurements are not necessary to find pollution under *Lemire*, there must still be *objective, observable evidence* that the activities in question have a "substantial potential" to cause pollution; a mere potential to pollute alone will not suffice.

Lemire involved cattle with unfettered access to an already polluted creek, with the cattle actually observed, over an extended period of time, wallowing and defecating directly in the creek, overgrazing the riparian corridor, trampling down and eroding the creek banks, and so forth. *Lemire*, 178 Wn.2d at 234. There was thus observable, "substantial evidence" of cattle causing a "substantial potential" to further directly pollute the creek itself. By

²⁸ *Id.* at 28.

contrast, Ms. Hunt's activities all occurred in or along a man-made irrigation ditch, not in a natural flowing creek. And there was no observable, "substantial evidence" that Ms. Hunt's activities had a "substantial potential" to directly pollute Manastash Creek itself.²⁹

Indeed, Ms. Hunt's activities were conducted during the cold days of November; the irrigation ditch was only a few inches deep and approximately one foot wide; it flowed only seasonally; and Mr. Neet admits he is only speculating that sediment from Ms. Hunt's work was actually deposited into Manastash Creek, let alone deposited to such an extent as to cause "pollution" as defined under RCW 90.48.020.³⁰ Mr. Neet also admitted Ecology does "not know one way or the other if there was *any likelihood* that anything was damaged" as a result of Ms. Hunt's activities.³¹

G. The Doctrine of Estoppel Applies in This Case.

"[W]hen the doctrine of estoppel is asserted against the government, it must be necessary to prevent a manifest injustice and applying estoppel must not impair the exercise of government functions." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 20, 43 P.3d 4 (2002). The doctrine is necessary here to prevent a manifest injustice, and Ecology has not shown that applying the doctrine would impair the exercise of its functions.

²⁹ See PCHB Order at Finding No. 50 (CP 23-24); Appellant's opening brief at 7.

³⁰ See Appellant's opening brief at 10, 34-37 and citations to the record contained therein.

³¹ CP 75.

Ecology acknowledges the PCHB "took into consideration the fact that Ms. Hunt attempted to do the right thing by contacting [the Kittitas Conservation District and WDFW]"; and the PCHB "even went so far as to reduce the civil penalty by almost 95% partly because of Ms. Hunt's 'good faith reliance' on the words of [KCCD's] Ms. Swanson and [WDFW's] Mr. Renfrow."³² Neither Ms. Swanson nor Mr. Renfrow advised Ms. Hunt to speak with Ecology; and Ms. Hunt carefully complied with the instructions of Mr. Renfrow, making sure no equipment went into Manastash Creek and that nothing was disturbed along the creek's banks.³³ As a matter of equity, it would be manifestly unjust for one state agency to punish Ms. Hunt for following the instructions of another state agency.

Citing no supporting authority, Ecology argues that the representations of one state agency cannot bind the acts of another state agency. Common sense dictates otherwise. All state agencies are part and parcel of the same state government. Moreover, a lay person like Ms. Hunt, who seeks the government's advice regarding repairing and restoring her flood-damaged property, cannot reasonably be expected to know which among the myriad agencies she should consult.

³²See Respondent's brief at 39-40; PCHB Finding Nos. 60-68 (CP 29-32).

³³See PCHB Order at Finding Nos. 3-10 (CP 39-41) and at Finding No. 62 (CP 30).

Although the application of equitable estoppel to the state government is disfavored, with each element requiring proof by clear, cogent and convincing evidence, it is equally true that: "The conduct of government should always be scrupulously just in dealing with its citizens; thus, where a state official, acting within his authority and with knowledge of the pertinent facts, makes a representation to a private citizen upon which the citizen reasonably relies, the government should be equitably estopped from changing positions to the citizens' detriment." *Shafer v. State*, 83 Wn.2d 618, 624, 521 P.2d 736 (1974); *Bd. of Regence v. Seattle*, 108 Wn.2d 545, 551-52, 741 P.2d 11 (1987). Given Ms. Hunt's good faith reliance on the representations of WDFW's Mr. Renfrow during his site visit, the doctrine of equitable estoppel should apply here.³⁴

H. The PCHB's Amended Order Was Arbitrary or Capricious.

The PCHB's order denying Ms. Hunt's summary judgment motion and granting Ecology's summary judgment motion was "willful and unreasoning and taken without regard to the attending facts or circumstances"; therefore, it was either arbitrary or capricious. *Port of Seattle v. Pollution Control Hear-*

³⁴ See also, PCHB Order at Finding No. 68 (CP 33), where the PCHB found: "Ms. Hunt ceased her activities well prior to the issuance of Order #8990. The evidence shows that Ms. Hunt attempted to cooperate prior to the issuance of Order #8990. Ms. Hunt visited the Kittitas County Community Development Services to file a flood development permit application as recommended by Ms. Iammarino. . . . Ms. Hunt also showed a desire to work with Ms. Iammarino for resolution of the matter prior to receiving Order #8990 and the Penalty from Ecology, who apparently *never contacted* or visited Ms. Hunt before issuing the Order and the Penalty." (Emphasis added.)

ings Bd., 151 Wn.2d 568, 589, 90 P.3d 659 (2004) (internal quotes and citations omitted). The PCHB acted arbitrarily or capriciously in admitting Mr. Charlton's expert opinion but then not applying it to Ms. Hunt's activities, contrary to the law governing expert witness testimony under ER 702. *See Orion Corp. v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985).

The PCHB's Order granting Ecology's motion for summary judgment was also arbitrary or capricious, because Ecology presented no evidence, just the argument of its counsel, regarding what activities are customary, normal or routine under the circumstances. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986) ("[i]ssues of material fact cannot be raised by merely claiming contrary facts").

I. Ms. Hunt is Entitled to Award of Attorney Fees on Appeal.

Ecology argues that Ms. Hunt is not entitled to fees under RCW 4.84.350, because Ecology's actions in charging and prosecuting her were "substantially justified." The argument is without merit. Ecology charged Ms. Hunt with "excavating" in Manastash Creek, based upon its mistaken belief that she had repositioned the creek some 25 feet south of its original location and clear-cut some 700 lineal feet of the banks of the creek. And when this was proven to be false, instead of doing the right thing and drop-

ping its charges against Ms. Hunt, Ecology argued that her ditch was actually a "side channel" of Manastash Creek.

Making matters even worse, to support this new theory, Ecology hired a plane to take aerial photographs of Ms. Hunt's property, then "doctored" the photographs with annotations depicting the newly forming channel, caused by the manmade breach of the Westside Canal, as being what Ms. Hunt purportedly called her ditch.³⁵ This stratagem caused the PCHB to initially deny the parties' respective motions for summary judgment, because it could not determine whether Ms. Hunt's activities were in a ditch or a side channel of the creek.³⁶ Ecology's conduct also caused Ms. Hunt's counsel to have to depose Ecology's enforcement officer, Mr. Neet, a second time, wherein he contradicted and/or recanted his prior sworn statements. This finally forced Ecology to concede that all of Ms. Hunt's activities were conducted away from Manastash Creek, in her pasture.³⁷

Ecology's conduct was an unwarranted abuse of the legal process that violated its duty, as a state agency, to act in a scrupulously just manner in dealing with its citizens. *Shafer*, 83 Wn.2d at 624; *Bd. of Regence*, 108 Wn.2d at 551-52. Accordingly, Ms. Hunt should also be awarded fees under

³⁵ See Appellant's opening brief at 15-18.

³⁶ PCHB Order at Finding No. 2 (CP 51-52).

³⁷ *Id.*; see also, Appellant's opening brief at 15-18.

RCW 4.84.185, as requested in her opening brief.³⁸

Regarding fees under RCW 90.14.190, Ecology cites no case authority to support its argument that the statute does not apply in this case. However, the Supreme Court's decision in *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 910 P.2d 462 (1996), strongly suggests that it does, since Ecology's orders deprived Ms. Hunt of the right to make beneficial use of her irrigation ditch. *Id.* at 516-518.

IV. CONCLUSION

The PCHB's orders should be reversed, summary judgment should be granted in favor of Ms. Hunt, and she should be awarded attorney's fees.

DATED this 1st day of July, 2014.

Respectfully submitted,

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP

By: 
Douglas W. Nicholson, WSBA #24854
Attorney for Appellant Monica Hunt

³⁸ RCW 4.84.185 allows for an award of attorney's fees in petitions for judicial review of administrative law proceedings where the proceeding was wholly frivolous. *In re Marriage of MacGibbon*, 139 Wn. App. 496, 505, 161 P.3d 441 (2007).

CERTIFICATE OF SERVICE

I certify that on the 1st day of July, 2014, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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Kimberly Bailes

Appendix 1

From: [Redfield-Wilder, Jove \(ECY\)](#)
To: [ECY DL CRO WQ](#)
Subject: FW: KIMA posts Manastash Creek penalty
Date: Thursday, February 09, 2012 2:23:32 PM

2/9/2012 – KIMA-TV online posting
Damage to Manastash Creek results in \$16K penalty
[Share](#)

By WA Dept. of Ecology & Action News Team

- [Story](#)

[Print](#)

Summary

A Kittitas County resident has been fined for changing the channel of Manastash Creek and causing extensive damage to the shoreline and creek bed on property northwest of the creek at Brown Road.

Story Published: Feb 9, 2012 at 11:30 AM PST



Photo from Washington Department of Ecology shows destruction and disturbance in Manastash Creek in Kittitas County.

[Comments \(0\)](#)

WA DEPT. OF ECOLOGY NEWS RELEASE -- A Kittitas County resident has been fined for changing the channel of Manastash Creek and causing extensive damage to the shoreline and creek bed on property northwest of the creek at Brown Road.

Trees and other vegetation were removed from 700 feet of the shoreline, and the course of the

creek was repositioned approximately 25 feet to the south without proper permits from county, state and federal jurisdictions.

Monica Hunt of Ellensburg was fined \$16,000 by the Washington Department of Ecology (Ecology) for changing the course and characteristics of the creek, in violation of the Clean Water Act. Manastash Creek is listed as an impaired water body for turbidity and pesticide contamination.

For the past decade, local property owners have been working with Ecology to improve water quality in the watershed as required under federal law. Riparian disturbance and creek bed destruction contribute to water pollution, increase the damage from flooding and can undermine recovery efforts.

Ms. Hunt has been ordered to restore the functions of Manastash Creek by restoring riparian buffers, making native riparian plantings and seeking approval for the restoration work from appropriate agencies. She will be required to prepare a restoration plan and obtain appropriate permits to work in the floodplain.

The enforcement action followed numerous interactions and site visits with Ms. Hunt since June 2011, including technical assistance by Kittitas County code enforcement, Washington Department of Fish and Wildlife (WDFW) and Ecology.

Investigators noticed Ms. Hunt's project became far greater than she first described it. The scope of the project as conducted lacked a county flood plain development permit, hydraulic project approval from WDFW and approval from the U.S. Army Corps of Engineers.

Ms. Hunt has 30 days to pay the penalty or may file an appeal with the state Pollution Control Hearings Board.

<http://www.kimatv.com/news/Ecology-139033899.html>

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