

FILED

JUN 02 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 32207-6

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

MONICA HUNT,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

**BRIEF OF RESPONDENT STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY**

ROBERT W. FERGUSON
Attorney General

DOROTHY H. JAFFE
Assistant Attorney General
WSBA #34148
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-4637

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Washington State Supreme Court**

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I. INTRODUCTION

This case is about protecting an impaired water body – Manastash Creek – which is under strict Total Maximum Daily Load Limits for both sediment and temperature in order to improve the water quality and restore critical habitat for various fish species. It is not about Ecology taking action against a property owner for performing normal or routine maintenance on an irrigation ditch, nor is it about Ecology penalizing a property owner for throwing a “dirt clod” into a creek. Ms. Hunt’s activities were not “normal” and they go well beyond throwing a “dirt clod.”

This appeal is governed by the Administrative Procedure Act (APA), RCW 34.05. Ms. Hunt appeals the Pollution Control Hearings Board (“Board”) Order on Summary Judgment (Amended after Reconsideration) issued on November 29, 2012 (“Amended Order”). The Amended Order concluded that Ms. Hunt conducted activities in a water of the state which tended to cause pollution to Manastash Creek in violation of RCW 90.48.080. The Board reduced the \$16,000 civil penalty that the Washington State Department of Ecology (Ecology) issued to \$750 concluding that it was not reasonable in light of the extenuating circumstances; and upheld Administrative Order #8990 requiring a restoration plan. However, the restoration plan was remanded to Ecology for the sole purpose of developing a revised plan in consideration of the current and future flow of Manastash Creek.

Ms. Hunt filed a petition for judicial review of the Amended Order to the Kittitas County Superior Court, which affirmed the Board.¹

Ms. Hunt's petition for review is based on the assertion that (1) her activities were exempt under RCW 90.48; (2) her activities did not have a substantial potential to cause "pollution"; (3) the Board erred when it denied Ms. Hunt's motion for summary judgment and allegedly allowed Ecology to raise new legal theories; and (4) the Amended Order was arbitrary and capricious. Ms. Hunt's arguments are tenuous at best.

Ms. Hunt's theory that her activities were nothing more than "normal maintenance" of an irrigation ditch and therefore exempt under RCW 90.48, and other federal and state statutes, is a ruse. First, there is no exemption under RCW 90.48 for the maintenance of an irrigation ditch. Second, Ecology is not, and has not, argued that Ms. Hunt is prohibited from maintaining her property or her irrigation ditch. Ecology's concern has always been about Manastash Creek – which is an impaired water body. Ms. Hunt's activities decimated the riparian corridor of Manastash Creek when she cleared vegetation and cut down mature trees along 700 feet of her property. Ms. Hunt also used an excavator with a 42-inch bucket to widen a portion of her irrigation ditch; all under the guise of "restoring her pasture" after the May 2011 flood.

Ms. Hunt's activities constituted a "discharge," which tended to cause pollution by adding temperature and sediment to an impaired water

¹ Ms. Hunt's appeal of the revised restoration plan is pending before the Board.

body - Manastash Creek. Her activities go well beyond “normal and routine,” were only tangentially related to the damage caused by the May 2011 flood, and were not exempt under any statute. The Board’s Amended Order is not arbitrary and capricious, is supported by substantial evidence in the agency record and should be upheld.

Upholding the Board’s Amended Order will not give Ecology “unbridled authority” to start regulating the agricultural community’s irrigation ditches. *See* Opening Br. at 3. That is not what this case is about – Ecology is not trying to make a statement with this case – this case has always been about Manastash Creek, Ecology could not ignore the impacts of Ms. Hunt’s activities and was forced to take action.

II. ISSUES

1. Has Ms. Hunt established that her actions were normal, customary or routine and therefore exempt under RCW 90.48?
2. Has Ms. Hunt established that the Board’s findings that Ms. Hunt’s actions had a substantial potential to cause pollution of Manastash Creek are not supported by substantial evidence?
3. Has Ms. Hunt established that the Board erred in applying the laws governing summary judgment?
4. Has Ms. Hunt established that the Board erred in failing to find that Ecology was equitably estopped from issuing a penalty and administrative order against Ms. Hunt where she relied on the instructions of another state agency?

5. Has Ms. Hunt established that the Board's Amended Order was arbitrary and capricious?

III. STATEMENT OF CASE

The following facts are established in the record and in the Amended Order.² See AR 36 Amended Order ¶¶ 1-28.³

A. Manastash Creek

Manastash Creek is a tributary to the Yakima River and has been included on Washington's Clean Water Act Section 303(d) list of impaired waters. AR 36 Amended Order ¶ 25.⁴ In 2002, Ecology finalized the Upper Yakima River Basin Suspended Sediment, Turbidity and Organochlorine Pesticide Total Maximum Daily Load report (Sediment TMDL) and a Detailed Implementation Plan for the TMDL, outlining steps that would be taken to reduce turbidity, suspended sediments and organochlorine pesticides in the Upper Yakima River Basin. *Id.* Over the last decade, Ecology has been working with local property owners and others to improve water quality in the basin, including Manastash Creek.

² On appeal to the Kittitas County Superior Court, Appellant Hunt challenged only findings of fact 24, 42 and 47. In her opening brief, Ms. Hunt makes no specific assignments of error to any of the Board's findings of fact.

³ Throughout the response brief, Ecology will cite to the agency record (AR), which was filed separately from the Clerk's Papers. Citations to the agency record will include the document number and the title of the document pursuant to the PCHB's Index to the Record. For example, AR 36 is document 36 in the agency record, the Board's Amended Order. Citations to the Clerk's Papers will appear as CP page number. Unfortunately, when the Kittitas County Superior Court submitted the Clerk's Papers, the pages for the Board's Order on Summary Judgment (As amended on reconsideration) at CP 10-55 were out of sequence. Because of this, Ecology will cite to the agency record for the Board's Amended Order.

⁴ See also AR 7 Declaration of Bryan Neet in Support of Response to Motion for Stay (Neet Decl.) ¶¶ 8-9

These efforts include landowners minimizing erosion of stream banks, which can add sediment to the stream. *Id.*

Ecology promulgated water quality standards, including temperature criteria, to protect the beneficial uses of Washington's surface waters. *See* WAC 173-201A-200(1)(c). In 2005, Ecology published the Quality Assurance Project Plan, Upper Yakima Basin Temperature Total Maximum Daily Load Study (Temperature TMDL) and finalized an update to Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution. AR 36 Amended Order ¶ 26.⁵ As stated in the Temperature TMDL Study, "[h]eat is considered a pollutant under Section 502(6) of the Clean Water Act." AR 21 Neet Second Decl. ¶ 10. The Temperature TMDL Study further concluded that "the daily maximum temperatures in a stream are strongly influenced by removal of riparian vegetation because of diurnal patterns of solar heat flux. Daily average temperatures are less affected by removal of riparian vegetation." *Id.*⁶ "Reductions in streamside shading are most likely to adversely affect water temperature." *Id.* The Brown Road Bridge, which is downstream of Ms. Hunt's property, along her property boundary, was one of the sampling points during the data collection phase of the Temperature TMDL. *Id.* In January 2011, recognizing the particular needs of salmonids in their early life stages, Ecology developed special temperature

⁵ AR 21 Second Declaration of Bryan Neet (Neet Second Decl.) ¶¶ 9-10.

⁶ *See also* AR 21 Neet Second Decl. ¶ 9

criterion for Manastash Creek of 13°C from September 15–June 15. AR 36 Amended Order ¶ 26.⁷

Manastash Creek, as a tributary to the Yakima River, is critical habitat for fish species including the Middle Columbia River Basin steelhead listed as threatened under the federal Endangered Species Act (ESA). AR 36 Amended Order ¶ 28; 64 Fed Reg. 14,517; 65 Fed. Reg. 7777-7779, 7785, Table 20. Critical habitat for salmon and steelhead in Washington is defined as the areas that consist of the water, substrate, and adjacent riparian zone of estuarine and riverine reaches in hydrologic units and counties identified in the rule. AR 36 Amended Order ¶ 28; 65 Fed. Reg. 7777, § 226.212; 65 Fed. Reg. 7785, Table 20. These defined critical habitat areas include Manastash Creek. AR 36 Amended Order ¶ 28.

B. Summary of the Undisputed Facts Involving Ms. Hunt’s November 2011 Activities

On June 13, 2011, Ms. Hunt contacted Sherry Swanson of the Kittitas County Conservation District seeking emergency assistance with damage caused by the flooding of Manastash Creek in May 2011, which could result in loss of power to her home. AR 36 Amended Order ¶ 5.⁸ That afternoon, Ms. Swanson and Mr. Brent Renfrow, a Habitat Biologist

⁷See also Waters Requiring Supplemental Spawning and Incubation Protection for Salmonid Species, Ecology Publication No. 06-10-038 (Rev. Jan. 2011) at 38. See www.ecy.wa.gov/pubs/0610038.pdf.

⁸According to Ms. Hunt the May 2011 flood “inundated the entire pasture area, damaged the pasture fencing and panel gates, stripped away a significant amount of topsoil, and deposited a substantial quantity of rocks and both natural and man-made debris in the area. It also damaged, and made useless, a culvert in the ditch ...we had used it to cross the ditch to access the area of the pasture to the south.” AR 8 Hunt Second Decl. ¶ 3. See also AR 7 Declaration of Brent Renfrow in Support of Response to Motion for Stay (Renfrow Decl.) ¶ 2.

with the Washington Department of Fish and Wildlife (WDFW), met with Ms. Hunt at her property to assess the damage caused by the May 2011 flood. AR 36 Amended Order ¶¶ 5-6.⁹

Manastash Creek flows across the southern portion of Ms. Hunt's property. AR 7 Renfrow Decl. ¶ 3, Ex. 1 (Figs. 1-3). Attached as Appendix A is a copy of Ex. 1 Fig. 3, an aerial photograph of Ms. Hunt's property prior to the May 2011 flood. The Creek has a wide variation in flow from the spring runoff period to the fall low-flow period, with spring flow exceeding 150 cubic feet per second (cfs) and flow in the summer and fall at less than 20 cfs. AR 36 Amended Order ¶ 6.¹⁰ During Mr. Renfrow's visit in June 2011, he observed the flow in Manastash Creek to be high, flowing across the floodplain and using more than one channel. The Manastash Creek active floodplain on Ms. Hunt's property varies in width from 100 feet to 250 feet. AR 7 Renfrow Decl. ¶ 4. Mr. Renfrow observed numerous trees and shrubs at the edges and within the flows of Manastash Creek. AR 36 Amended Order. ¶ 7.¹¹

During the June 13, 2011, visit, Ms. Hunt stated that she wanted to restore the use of the floodplain riparian pasture on her property, clear the power lines, on the west end of her property, which ran through the trees to her house. AR 36 Amended Order ¶ 4.¹² Sensing from the

⁹ See also AR 3 Declaration of Monica Hunt in Support of Motion for Stay (Hunt Decl.) ¶ 6.

¹⁰ See also AR 7 Renfrow Decl. ¶¶ 3-5. The Board found that Mr. Renfrow was qualified, based on his knowledge and experience, to opine on the condition of stream flows. See AR 36 Amended Order ¶ 6.

¹¹ See also AR 3 Hunt Decl. at ¶ 7, Ex. 1; AR 7 Renfrow Decl. at ¶¶ 2-7.

¹² See also AR 3 Hunt Decl. ¶¶ 5-9; AR 7 Renfrow Decl. ¶ 6.

conversation that the clearing of power lines was her most significant concern, Mr. Renfrow advised Ms. Hunt that branches could be cut away from the lines using a bucket truck from the roadway, as opposed to being done from Manastash Creek's bed or banks. AR 7 Renfrow Decl. ¶ 6. Mr. Renfrow explained that WDFW's concern centered on Manastash Creek and the agency would need to approve any work involving placing equipment in the Creek or cutting trees from the Creek's banks to clear the power lines. AR 36 Amended Order ¶ 8.¹³

Mr. Renfrow observed a log (debris) jam, which had formed immediately upstream from Ms. Hunt's property. AR 36 Amended Order ¶ 3.¹⁴ Mr. Renfrow concluded that no significant damage was being caused by the high flow of water (which was flowing across the floodplain) and the debris jam was likewise not causing significant damage or erosion; therefore there was no imminent threat that required immediate action. AR 7 Renfrow Decl. ¶¶ 5, 7. Mr. Renfrow informed Ms. Hunt that the debris jam could be removed with WDFW approval but it would be best to wait until flows in Manastash Creek were lower and then reassess whether any stream or shoreline work was needed. AR 36 Amended Order ¶ 8.¹⁵ Ms. Hunt did not contact Mr. Renfrow again until five months later, on November 14, 2011, when she left a message stating that the project was finished. *Id* at ¶ 12. No reassessment ever took place.

¹³ See also AR 7 Renfrow Decl. ¶¶ 6-7; see also AR 3 Hunt Decl. ¶¶ 6-7.

¹⁴ See also AR 7 Renfrow Decl. at ¶ 5.

¹⁵ See also AR 7 Renfrow Decl. at ¶¶ 5-7; see also AR 3 Hunt Decl. at ¶¶ 6-7.

On November 10, 2011, Lisa Iammarino, a Code Enforcement Officer with Kittitas County Community Development Services, was contacted by Mr. William Meyer, an Area Habitat Biologist with WDFW, regarding the operation of heavy equipment within the shoreline, riparian habitat and floodplain of Manastash Creek on or near Ms. Hunt's property. AR 36 Amended Order ¶ 11.¹⁶ Ms. Iammarino went to Ms. Hunt's property and explained that she received a report regarding the work being done in the Manastash Creek shoreline and that Kittitas County Community Development Services did not have any record of a flood development permit being issued for that work. *Id.* Ms. Hunt responded that she spoke to Mr. Renfrow with WDFW and he had not informed her that she needed a Kittitas County permit. AR 7 Iammarino Decl. ¶ 3.

Ms. Iammarino explained that in addition to Kittitas County, WDFW and Ecology also have regulations governing development along the shorelines of the state, as well as within riparian habitat and the floodplain. *Id.* ¶ 4. Ms. Iammarino also explained that development was not limited to construction, but also included any man-made changes such as clearing, grading, and removal of native vegetation. *Id.* On November 10, 2011, Ms. Iammarino observed work being performed on the Hunt property within the shoreline riparian habitat and the floodplain of Manastash Creek. *Id.* With permission, Ms. Iammarino walked the

¹⁶*See also* AR 7 Declaration of Lisa Iammarino in Support of Ecology's Response to Motion for Stay (Iammarino Decl.) ¶¶ 1-2.

property to view the work that was underway and took several pictures. *Id.* ¶ 5.

Ms. Iammarino's pictures documented that the clearing performed by Ms. Hunt took place within the general area of Manastash Creek's shoreline and floodplain. *Id.* ¶ 6, Exs. 1-5. Attached as Appendix B are copies of Exs. 2, 4, and 5 (Manastash Creek is obscured by the trees in the background of the photographs). More specifically, the pictures show that heavy equipment, with visible track marks, was used in the riparian area of Manastash Creek; numerous mature trees were cut and all vegetation was crushed or otherwise removed. *Id.* ¶ 6, Exs. 2-5; *see also* App. B.

Ms. Iammarino conducted a follow-up visit on December 2, 2011, viewing the Hunt property from the adjoining landowner's property, Mr. Bachman-Rhodes, on the south side of Manastash Creek. *Id.* ¶ 7. Since her visit on November 10, 2011, more tree and shrub removal had occurred.¹⁷ *Id.*

On November 17, 2011, (after Ms. Hunt completed her work) Mr. Meyer, of WDFW, contacted Bryan Neet, an Environmental Specialist with Ecology's Water Quality Program in its Central Regional Office. AR 7 Neet Decl. ¶¶ 1-2. Later that day, Mr. Meyer and Mr. Neet

¹⁷ During Ms. Iammarino's visits in November and December 2011, it did not appear that the trees that Ms. Hunt claims were blocking the power lines had been trimmed or removed. AR 7 Iammarino Decl. ¶ 8

went to the property of Mr. Bachman-Rhodes', adjacent to the Hunt property, to make a visual inspection of the work Ms. Hunt had done. *Id.*

During his visit, Mr. Neet interviewed Mr. Bachman-Rhodes, inspected the work that was performed by Ms. Hunt and took photographs of the Hunt property. AR 7 Neet Decl. ¶ 3. Mr. Neet observed that approximately 700 linear feet of riparian habitat had been destroyed including: large trees that were cut and stacked along the hillside; numerous tree stumps; crushed shrubs, "broken debris from an obvious logging-style operation," and track hoe marks. AR 25 Second Declaration of Dorothy Jaffe (Jaffe Second Decl.), Ex. 1, Neet Deposition Transcript (Neet Dep.) at 46-48; *see also* Appendix C, copies of AR 7 Neet Decl. ¶ 4, Exs. 1-3.¹⁸ Mr. Neet also observed a channel flowing from the bluff into Manastash Creek, which Ms. Hunt described as her return flow irrigation ditch¹⁹ and which Ecology initially believed was a side channel to Manastash Creek. AR 36 Amended Order ¶ 13. Mr. Neet observed an area above the Ditch, which he believed was an "over flow channel," however, Mr. Neet did not observe water flowing in the "over-flow channel on that day."²⁰

¹⁸ *See also* AR 30 Neet Dep. Vol. II at 124.

¹⁹ Ecology will refer to the "return flow irrigation ditch" as the "Ditch" throughout this brief, since the Board concluded that the Ditch was not a secondary or side channel of Manastash Creek. AR 36 Amended Order ¶ 39.

²⁰ It is undisputed that Ms. Hunt did not conduct any activities above the Ditch or in this over-flow channel. AR 36 Amended Order ¶ 13; *see also* AR 7 Neet Decl. at ¶¶ 4-7; AR 25 Jaffe Second Decl., Ex. 1, Neet Depo. at 49-50; AR 30 Declaration of Counsel (Nicholson Decl.), Ex. A, Neet Depo., Vol. II, 182-88, 191-98.

Based on Mr. Neet's observations on November 17, 2011,²¹ he determined that Ms. Hunt had conducted activities in and along Manastash Creek, including the excavation of a channel and the construction of a berm²² in the Creek. AR 36 Amended Order ¶ 14.²³ On February 7, 2012, Ecology issued Order #8990 and a \$16,000 civil penalty for violations of RCW 90.48.080. AR 36 Amended Order ¶¶ 14-15.²⁴ In both Order #8990 and the Penalty, Ecology concluded that "the Pollution created by ditching, filling and altering the creek is a violation of RCW 90.48.080." AR 36 Amended Order ¶ 15; Order #8990 at 2. Order #8990 required Ms. Hunt to "restore the functions of Manastash Creek" by submitting and implementing a restoration plan. AR 36 Amended Order ¶ 16.²⁵ The \$16,000 penalty (\$4,000 per day) was issued based on violations that occurred on November 11, 12, and 13 (the days Ms. Hunt conducted her activities) and November 17, 2011 (the day Mr. Neet visited the property). AR 36 Amended Order ¶ 17.

Three months later, on February 22, 2012, the Westside canal was breached, flooding Ms. Hunt's riparian pasture and significantly changing the flow of Manastash Creek by creating multiple side channels through the pasture, stemming from the log jam. AR 36 Amended Order ¶ 20.²⁶

²¹ See AR 7 Neet Decl. ¶ 6, Exs. 4-5.

²² Mr. Neet, during his deposition, admitted that a berm had not been created by Ms. Hunt during her activities in November 2011; and that the conclusion about the berm was that of Mr. Meyers of WDFW. See AR 25 Neet Depo. at 72-79.

²³ See also AR 7 Neet Decl. at ¶¶ 4-7.

²⁴ See also AR 7 Neet Decl. at ¶ 14.

²⁵ See also AR 25 Neet Depo. at 93-95.

²⁶ See also AR 8 Hunt Second Decl. ¶¶ 8-14.

Mr. Neet then visited Ms. Hunt's property again on February 23, 2012, to observe and photograph its condition. AR 7 Neet Decl. ¶ 7.

It is undisputed that as a result of the breach of the Westside canal, the Ditch, as it flowed through Ms. Hunt's pasture, was engulfed and subsumed by a new side channel, which flows off the main channel of Manastash Creek (at the log jam) and reenters the main channel through the riparian corridor and further downstream. AR 36 Amended Order ¶ 21.²⁷

C. Ecology's Alleged "Changing Legal Theories"

Ms. Hunt's allegations that Ecology changed legal theories stems from her belief that Ecology (1) initially charged her with relocating Manastash Creek 25 feet, clearing 700 feet of trees and vegetation from the shoreline of Manastash Creek, and causing extensive damage to the shoreline and creek bed; (2) then changed its theory to Ms. Hunt working in a side channel of Manastash Creek, which caused pollution to Manastash Creek; (3) then changed a third time to claim that Ms. Hunt's activities caused "polluting sediment discharges and temperature increases to the creek itself" because the Ditch flows into Manastash Creek. *Id.* at 17-18. *See* Opening Br. at 15-18.

Ecology's legal theory of this case has never changed. Ecology's Order #8990 and Penalty #8991 did not conclude that Ms. Hunt relocated Manastash Creek; that was an allegation by a complainant. AR 1 Order

²⁷ *See also* AR 30 Neet Depo., Vol. II, 183-84.

#8990 at 2. Unfortunately, that allegation was referenced in Ecology's press release, but it was not included in the actual language of Order #8990. AR 30 Neet Dep. Tr. Vol. II, 212-213. The *allegation* that Ms. Hunt relocated Manastash Creek was included in both Order #8990 and Penalty #8991 purely as the basis for Ecology to conduct its initial investigation. See AR 1 Order #8990 at 2; Penalty #8991 at 2.

After receiving the initial complaint, Mr. Neet went out to the complainant's property to investigate the allegation. AR 36 Amended Order ¶¶ 13-14.²⁸ The factual description of the alleged violation in the Order was that Ms. Hunt "removed vegetation, excavated, and moved material *in the riparian area of Manastash Creek.*" (emphasis added) AR 1 Order #8990 at 1. Both Order #8990 and #8991 Penalty alleged that "the pollution created by ditching, filling, and altering of the creek is a violation of RCW 90.48.080." AR 36 Amended Order ¶ 15.²⁹

Throughout this case, Ecology has consistently stated that Ms. Hunt's activities were conducted in the *riparian area* of Manastash Creek and that those activities altered Manastash Creek. What has been clarified is that (1) no berm was created;³⁰ and (2) that it was the activities Ms. Hunt conducted in the riparian area and in her Ditch, which feeds directly into Manastash Creek, that caused or tended to cause pollution to Manastash Creek. Neither Order #8990 nor Penalty #8991 specifically

²⁸ See also AR 7 Neet Decl. at ¶¶ 4-7.

²⁹ See also AR 1 Order #8990 at 2; Penalty #8991 at 2.

³⁰ See AR 25 Neet Depo. at 72-79.

stated that Ms. Hunt's activities were in "the main channel" of Manastash Creek or within the Ditch, which flowed into Manastash Creek. *See* AR 1 Order #8990; Penalty #8991. The allegation has always been that Ms. Hunt altered Manastash Creek. It does not matter if her actions were in the Ditch or in the main channel – the end result is the same – causing or tending to cause pollution to Manastash Creek.

The Board recognized that Ecology's factual understanding of the basis for the violation had "evolved," however, since the Board reviews the orders de novo, the Board concluded that it would be coming to its own legal conclusions based on the evidence before it. *See* AR 36 Amended Order ¶¶ 19, 29, 32. The Board also took this "evolution" into consideration when it decreased the penalty by 95 percent. *Id.* at ¶¶ 61, 66, 70.

IV. STANDARD OF REVIEW

Final agency orders are reviewed by the court under the APA. RCW 34.05.534. The appellate court sits in the same position as the superior court, applying the APA to the record before the administrative agency. *Lemire v. Dep't of Ecology*, 178 Wn.2d 227, 232, 303 P.3d 395, (2013). The party challenging the agency's action carries the burden of proof. RCW 34.05.570(1)(a).

"[W]here the original administrative decision was on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard." *Verizon Nw., Inc. v. Emp't Sec.*

Dep't, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). The decision is reviewed directly, based on the record before the Board. *Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.* 102 Wn. App. 1, 14, 979 P.2d 929 (2000). The propriety of summary judgment is a question of law, and therefore the substantial evidence standard used for other factual findings is not appropriate. *Verizon*, 164 Wn.2d at 916 n.4. The facts in the agency record are reviewed in the light most favorable to the nonmoving party.³¹ *Verizon*, 164 Wn.2d at 916.

The agency's conclusions of law are reviewed de novo. RCW 34.05.570(3)(a) and (d). *Franklin Cnty. Sheriff's Office v. Sellers*, 97 Wn. 2d 317, 325, 646 P.2d 113 (1982), *cert denied*, 459 U.S. 1106 (1983). Notwithstanding de novo review, substantial weight must be accorded an agency's interpretation of the law when the subject matter falls within the agency's special area of expertise. *Towle v. Dep't of Fish & Wildlife*, 94 Wn. App. 196, 204, 971 P.2d 591 (1999). Since the implementation and enforcement of the Water Pollution Control Act (RCW 90.48) in Washington State is within Ecology's special area of expertise, Ecology's interpretation of these statutes and the administrative rules that implement them is entitled to substantial weight.

³¹ Petitioner, Ms. Hunt, was the moving party for summary judgment, therefore the facts should be construed in the light most favorable to Ecology.

V. ARGUMENT

Ms. Hunt generally does not deny the actions that took place on her property. *See* Opening Br. at 10-14.³² Rather, she asserts that the Board's conclusions were erroneous and/or arbitrary and capricious because (1) her removal of "debris" from the Ditch was exempt from RCW 90.48 as normal and routine maintenance and (2) there is no substantial evidence that Ms. Hunt discharged anything into Manastash Creek that had a substantial potential to cause pollution of Manastash Creek. *See Opening Br.* at 18-19. As explained below, Ms. Hunt does not meet her burden of proof to show that the Board erroneously interpreted or applied the law. Therefore, the Board's Amended Order should be upheld in its entirety.

A. Ms. Hunt's Activities Were Not Exempt Under Any Statute

1. "Waters of the State" is not ambiguous.

Ms. Hunt makes a fleeting argument that because the term "waters of the state" does not include "irrigation ditches" it must be ambiguous and triggers the need to look to the legislative history surrounding RCW 90.48. *See* Opening Br. at 20-28. The court will look to legislative history only if a term is deemed to be "ambiguous." *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). "Waters of the state" is not ambiguous.

Through enactment of the Water Pollution Control Act, chapter 90.48 RCW, the legislature authorized Ecology to protect the quality of all

³² *See also* AR 3 Hunt Decl. ¶¶ 8-10, and AR 8 Hunt Second Decl. ¶¶ 2, 7.

waters of the state. The term “waters of the state” is broadly defined in RCW 90.48.020 and “shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.” *See Pacific Topsoils, Inc. v. Dep’t of Ecology*, 157 Wn. App 629, 642, 238 P.3d 1201 (2010). A 1969 Attorney General Opinion concluded that waters in canals, drains, wasteways and reservoirs of irrigation and drainage systems are also waters of the state. *See AR 20 Declaration of Counsel (Nicholson Decl.)*, Exhibit 2 “AGO 1969 No. 4 (1969).”

Manastash Creek is a water of the state—as are “the flows in the Ditch, which includes both stormwater and irrigation return flow.” AR 36 Amended Order ¶ 34.³³ The phrase “waters of the state” is not ambiguous; it is merely all encompassing.³⁴

2. Ms. Hunt’s activities were not exempt under RCW 90.48.

Neither RCW 90.48 nor its implementing regulations provide blanket exemptions for “return flow irrigation ditches.” *See generally*, RCW 90.48 and WAC 173-201A. RCW 90.48 was broadly written to encompass any discharge causing harm to any water of the state,

³³ *See AR 3 Hunt Decl.*, ¶ 4 for the premise that the Ditch undisputedly flows into Manastash Creek.

³⁴ Even if the term “water of the state” was ambiguous, the legislative history that Ms. Hunt cites in her opening brief appears to be in reference to a legislative discussion regarding “pollution” not the definition of “waters of the state.” *See Opening Brief* at 23-24.

regardless of the purpose of the discharge or the materials discharged. Ecology is not prohibiting Ms. Hunt from maintaining or cleaning her Ditch. Ecology is trying to protect Manastash Creek – an impaired water body – from increases in temperature and sediment. AR 30 Neet Depo. Tr. Vol. II at 128. But what Ms. Hunt did to her Ditch was not normal and it was not maintenance. It was a decimation of the Manastash Creek riparian corridor which *tended to cause* pollution.

Ms. Hunt argues that the legislative history behind RCW 90.48 clearly intended to exempt her “return flow irrigation ditch” from the statute. *See* Opening Br. at 20-28. Ms. Hunt asserts that the legislative history demonstrates that the activities she conducted in the Ditch were not intended to be included in the definition of “pollution,” and were merely “customary, normal or routine” for an irrigation ditch. *See* Opening Br. at 20-28. Ms. Hunt provides no support in the law for this assertion.

First, a statute needs to be ambiguous before a court will look to the legislative history behind the statute, and Ms. Hunt provides no legal argument that the statute in its entirety is ambiguous. “An unambiguous statute is not subject to judicial construction, and [the court shall] not add language to an unambiguous statute even if [it] believe[s] the legislature intended something else but did not adequately express it.” *Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d at 518. Here, RCW 90.48 is not ambiguous. There is no exemption for return flow irrigation ditches from the statute as a whole, nor is there an exemption for return flow irrigation ditches from

the definition of “waters of the state” or “pollution.” RCW 90.48.080 is clear that it is unlawful to cause pollution to waters of the state. Had the Legislature intended to exempt irrigation ditches, it would have done so expressly. It chose not to and the Court should not add language to an unambiguous statute.

Second, even if RCW 90.48 is ambiguous, Ms. Hunt misconstrues the legislative history when she cites to a provision in the 1967 Journal of the House:

...we recognize that normal irrigation return flows may cause some changes in the physical or chemical characteristics of the waters of an irrigation canal....We do not intend that these practices be prohibited. We do intend that these operations be subject to the control of the commission in order that it may regulate practices which are detrimental to the public interest...

....

It cannot be denied that under certain conditions there could exist minute but measurable variations in the turbidity or salinity of the return flow of water from an irrigation system. These variations have not yet been deemed to constitute “pollution” as interpreted by the Pollution Control Commission in our state. Nor should they be so regarded in the future.

(Emphasis from original removed) House Journal, 40th Leg., Sess., at 531 (Wash. 1967). Ms. Hunt reads this provision to say that all irrigation return flow ditches and any maintenance done to them are exempt from RCW 90.48. *See* Opening Br. at 24. However, this provision is actually referring to the flows in the irrigation ditch itself, not the maintenance done on an irrigation return flow ditch. The legislature did not intend that

every “minute” variation in the “flow” (or the “water”) in the irrigation return flow ditch should be automatically categorized as “pollution.” *Id.* Ecology is not alleging that the water that is typically in Ms. Hunt’s Ditch is causing pollution to Manastash Creek. Ecology is alleging that the work Ms. Hunt did in November 2011 *tended to cause* pollution to Manastash Creek through the addition of sediment and the increased likelihood of temperature increases.

In addition, there is no actual or implied legislative intent (in the above cited language) to exempt all irrigation return flow ditches from RCW 90.48 regulation nor does this language exempt normal, routine maintenance on a ditch from regulation under RCW 90.48. Even if it did, Ms. Hunt used heavy equipment to crush vegetation, remove trees and widen her Ditch, this was not “normal, routine maintenance.”

3. Ms. Hunt’s activities were not normal, routine, customary or maintenance.

Contrary to Ms. Hunt’s assertions, her activities were not “normal,” “routine,” “customary,” or “maintenance.” She was not merely clearing debris or maintaining her Ditch. The common definition of “maintain” is “to preserve or keep in a given existing condition, as of efficiency or good repair.” Webster’s II New Riverside University Dictionary, 717 (1988). In addition, “routine” is defined as

a prescribed and detailed course of action to be followed regularly. Standard procedure. A set of customary and often mechanically performed procedures or activities.

Id. at 1022. “Normal” is defined as conforming, adhering to or constituting a typical or usual standard, pattern, level or type.” *Id.* at 803. 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. There was nothing “normal” or “routine” about Ms. Hunt’s activities.³⁵ *See* App. A (photograph of area prior to Ms. Hunt’s activities), App. B (photographs of the work being conducted by Ms. Hunt), and App. C (photographs taken the day after Ms. Hunt’s work was completed).³⁶ Ms. Hunt removed mature trees along her Ditch that were clearly there prior to the May 2011 flood; there was nothing routine or normal about that. She did not return her property to its prior, pre-flood condition, but instead significantly altered it through the removal of numerous riparian trees and substantial vegetation over a wide area.

The devastation caused by Ms. Hunt is evident in numerous photographs. *See* App. A-C.³⁷ Ms. Hunt’s activities “resulted in

³⁵ In addition, as the Board correctly pointed out, there was no evidence offered by Ms. Hunt that she “routinely” maintained her Ditch. Nor was there evidence that it was a routine practice to remove mature trees for the purpose of maintaining and preserving the status quo of the Ditch. AR 36 Amended Order ¶¶ 42-43.

³⁶ Appendix C, Exhibit 1 shows the stumps of numerous trees that were cut down by Ms. Hunt. Appendix C, Exhibit 2 shows the Ditch which was excavated and widened by Ms. Hunt. Appendix C, Exhibit 3 shows water in the foreground (in the Ditch), which discharges directly to Manastash Creek. Manastash Creek is flowing to the right of where the photograph was taken.

³⁷ AR 7 Neet Decl., Exs 1-9; AR 7 Iammarino Decl., Exs. 1-5; AR 7 Renfrow Decl., Exs. 2-5; AR 8 Hunt Second Decl., Ex 3; AR 20 Nicholson Decl. Ex. 1 – sub Exs. 9-10; AR 25 Neet Depo., Exs. 9-10; AR 21 Neet Second Decl., Exs. 6-8; AR 22 Hunt Third Decl., Ex. 4.

significant impacts on the riparian pasture,” and “were clearly beyond the action reasonably necessary to remove the debris and preserve the Ditch.” AR 36 Amended Order ¶ 42.

Ms. Hunt also argues that the Board’s focus was misplaced when it concluded that “normal, customary and reasonable . . . should not be an expansion from what previously existed.” Since the damage to her property did not exist before the flood – she argues that her activities could not be an expansion from what previously existed. AR 36 Amended Order ¶ 41; Opening Br. at 32. However, Ms. Hunt’s activities in November 2011 were an expansion from what previously existed. Ms. Hunt widened a portion of her Ditch when she used heavy equipment with a 42-inch bucket to “clear debris;” she destroyed and crushed all of the riparian vegetation in and around the Ditch and she cut down numerous mature trees. *See* App. B-C.³⁸ This is not what the area looked like before the May 2011 flood, nor was this destruction caused by the flood. *See* App. A. It is a drastic “expansion” of the status quo before the flood that goes well beyond normal, routine and customary.

4. The Board did not disregard Mr. Charlton’s Declaration.

Ms. Hunt alleges that while the Board correctly found that irrigation ditches are routinely maintained, which could include the

³⁸ AR 7 Neet Decl., Exs 1-9; AR 7 Iammarino Decl., Exs. 1-5; AR 7 Renfrow Decl., Exs. 2-5; AR 8 Hunt Second Decl., Ex 3; AR 20 Nicholson Decl. Ex. 1 – sub Exs. 9-10; AR 25 Neet Depo., Exs. 9-10; AR 21 Neet Second Decl., Exs. 6-8; AR 22 Hunt Third Decl., Ex. 4

clearing of debris and the cutting of vegetation and trees, the Board nonetheless failed to properly consider Mr. Charlton's declaration and erred when it failed to conclude that Ms. Hunt's activities in the Ditch were routine maintenance. *See* Opening Br. at 28-32.

The Board properly considered Mr. Charlton's declaration; however, Mr. Charlton was never qualified as an expert. At no time did Ms. Hunt offer Mr. Charlton's statements as those of an expert in the field of what constitutes routine maintenance of a ditch. Therefore, Ms. Hunt's references to Evidence Rule 702 are inapplicable. However, even if Mr. Charlton had been qualified as an expert, the Board considered his declaration and adopted some of his statements and findings of fact:

Irrigation ditches including return flow channels are routinely maintained. . . .The clearing of debris clogging the ditches and the cutting of vegetation and trees along the edges of a ditch in order to maximize the beneficial use of agricultural property, including the area of crop plantings, are customary, normal and routine agricultural practices.

AR 36 Amended Order ¶ 40. The Board properly took into consideration the "knowledge" and "opinion" of Mr. Charlton (and therefore Mr. Charlton's opinions "assisted" the Board), applied them to the facts of the case (the activities conducted by Ms. Hunt) and came to the conclusion that Ms. Hunt's activities did not qualify as "routine maintenance." AR 36 Amended Order ¶ 42. There was no error by the Board; Ms. Hunt simply disagrees with the Board's conclusions.

5. Other state and federal statutes do not exempt Ms. Hunt's activities from regulation.

Lastly, Ms. Hunt alleges that because both the federal Clean Water Act and the Shoreline Management Act (SMA) exempt certain types of repair and maintenance activities on return flow irrigation ditches, that there must also be an exemption under RCW 90.48 for irrigation ditches. *See* Opening Br. at 24-27. Not only are these statutes inapplicable but Ecology is not attempting, through its Order, to interfere with Ms. Hunt's ability to maintain her Ditch. This case has always been about discharges that *tend to cause* pollution to Manastash Creek – an impaired water body. AR 30 Neet Depo. Tr. Vol. II at 211.

Ms. Hunt cites to 33 USC §1344(f)(1)(C) for the proposition that her removal of debris clogging the Ditch is exempt from regulation under RCW 90.48. However, 33 USC §1344(f)(1)(C) is the federal Clean Water Act's provision regarding permits for dredged or filled material into navigable waters. 33 USC §1344(f)(1)(C) may exempt certain maintenance activities on irrigation return flow ditches from needing a dredge and fill permit, but Ms. Hunt is not being charged with failure to have a discharge permit. Rather, Ms. Hunt was charged with causing or tending to cause pollution to Manastash Creek under RCW 90.48.080, a water quality violation.

Ms. Hunt also argues that because irrigation ditch maintenance is exempt under the SMA, RCW 90.58.030(3), that her November 2011 activities should somehow be exempt under RCW 90.48. *See* Opening

Br. at 27-28. This is nonsensical. Ms. Hunt was not charged with violating the SMA, nor is it alleged that she needed a substantial development permit for her activities, under RCW 90.58.140. She was charged with violating RCW 90.48.080, the discharge of a pollutant into waters of the state.

Since Ecology's order only alleges violations of RCW 90.48, water quality, RCW 90.58 and 33 USC §1344(f)(1)(C) are inapplicable. Ms. Hunt's numerous references in her brief to agricultural activities are misguided. There is no exemption in RCW 90.48 for agricultural activities. Also, she presented no evidence to establish that the extensive digging, clearing and tree removal she engaged in, at the scale and in the manner she undertook them, were normal agricultural activities. The Board properly concluded that Ms. Hunt's activities were not subject to any exemption. AR 36 Amended Order ¶¶ 40-43.

B. The Board Properly Concluded that Ms. Hunt's Actions Tended to Cause Pollution

Ms. Hunt's activities go well beyond the throwing of a "dirt clod" into Manastash Creek. The Board recognized this when it concluded that Ms. Hunt's activities *tended to cause* pollution when Ms. Hunt used an excavator in and around the Ditch which "clearly disturbed the soils and would cause sediment to drain and discharge into and be suspended within the flow of the Ditch." See AR 36 Amended Order ¶ 47. The Board found a violation of RCW 90.48.080 justifying the imposition of both a

civil penalty and an administrative order. See AR 36 Amended Order at 45-46. The evidence relied on by the Board in this case (personal observations of site conditions, photographs) supported the Board's finding that Ms. Hunt's activities *tended to cause* pollution, the legal standard applicable to Ecology's penalty action. See 90.48.080. AR 36 Amended Order ¶¶ 51-52.

Hunt relies on the *Lemire* case when she argues that the Board's Amended Order failed to apply the "substantial potential" to violate standard. See Opening Br. at 33. Hunt's sole reliance on *Lemire* is misplaced for two reasons. First, *Lemire* is not entirely on point; however, the reasoning in *Lemire* supports the Board's Amended Order. The *Lemire* case involved the issuance of an administrative order,³⁹ 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 90.48.144.⁴⁰ See AR 1 Order #8990 and Penalty #8991. Second, in *Lemire* the Court concluded that Lemire's actions had the substantial potential to violate RCW 90.48.080. *Lemire*, 178 Wn.2d at 237. In this

³⁹ *Lemire*, 178 Wn.2d at 230-31.

⁴⁰ This distinction is important because the legal standard for each administrative action is different. Under RCW 90.48.120, if a person violates or creates the "substantial potential to violate" RCW 90.48, Ecology can issue an order or directive. In contrast, under RCW 90.48.144(3), if a person "violates" RCW 90.48 he shall incur a civil penalty. In this case, the Board concluded that Ms. Hunt's activities discharged sediment into the Ditch, which drains directly into Manastash Creek, justifying not only the administrative order to implement a restoration plan, but also a civil penalty because a discharge of sediment "tends to cause pollution" in violation of RCW 90.48.080. AR 36 Amended Order ¶¶ 47, 51. Because the issue in *Lemire* was "substantial potential" to pollute, *Lemire* provides precedent when considering the Board's decision affirming the administrative order, but not for considering the Board's decision on the penalty. *Lemire*, 178 Wn.2d at 234-37.

case, the Board did not conclude that Ms. Hunt's activities had a "substantial potential" to violate RCW 90.48.080, the Board concluded that her activities caused sediment to discharge into Manastash Creek which *tended to cause* pollution in violation of RCW 90.48.080. AR 36 Amended Order ¶¶ 47, 51. The Board clearly articulated the standard in this case: "whether there were activities that would tend to cause pollution of Manastash Creek." AR 36 Amended Order ¶ 51. The Board's Amended Order is supported by substantial evidence in the agency record and should be upheld.

1. Quantitative evidence is not required.

Ms. Hunt argues that since there is no quantitative evidence proving that sediment entered the main channel of Manastash Creek or that the temperature in Manasatash Creek rose, there is no substantial evidence to uphold the Board's Amended Order. Opening Br. at 34. Quantitative evidence is not required under RCW 90.48. By complaining about the absence of one particular type of evidence, Ms. Hunt ignores the actual compelling evidence received by the Board in this case. Testimony of personal observations and photographs of site conditions provided the basis for the Board's conclusions. *See* AR 36 Amended Order ¶¶ 50-54.

It is undisputed that Ecology did not take temperature readings or offer other quantitative evidence regarding temperature or sediment. AR 30 Neet Dep. Tr. Vol. II at 173. As the Board correctly held, since RCW 90.48.080 is a strict liability statute, the

failure to have quantitative evidence...does not absolve one from liability.... Actual tests and measurements are not necessary if the evidence otherwise shows that the activities caused or allowed material to flow into the Ditch that would *tend to cause* pollution of the Creek.

AR 36 Amended Order ¶ 51 (emphasis in original).

Ecology has broad authority under RCW 90.48 to protect waters of the state, to “control and prevent pollution,” and to issue orders and civil penalties whenever a person violates RCW 90.48 or creates a substantial potential to violate RCW 90.48. RCW 90.48.010, .030, .120(1), .144(3). RCW 90.48.080 does not require Ecology to prove causation. *See Lemire*, 178 Wn.2d at 237. The Washington Supreme Court in *Lemire* recently addressed this issue.

In *Lemire*, the Court looked at Ecology’s declarations, which provided evidence that (1) the creek at issue was polluted, based on prior studies; (2) that the conditions at Mr. Lemire’s property were recognized causes of discharges (in that case, fecal matter and sediment); and (3) that fecal matter and sediment *tend to cause* pollution. *Id.* The Court in *Lemire* held that “the causation contemplated by the statutes is the likelihood that organic or inorganic matter will cause or tend to cause pollution.” *Id.* Ecology need not have direct evidence, or testing, showing actual pollution. The Court did not require an actual showing of proximate cause. *Id.*

This case is similar to *Lemire*. The agency record provides substantial evidence that (1) Manastash Creek is polluted and is under

strict temperature and sediment criteria;⁴¹ (2) Ms. Hunt's actions – the crushing of vegetation, removing of trees and using an excavator in the Ditch caused the discharge of soil/sediment directly into Manastash Creek;⁴² and (3) that sediment and temperature tend to cause pollution. AR 21 Neet Second Decl. ¶¶ 9-11. Ecology did not need to take actual samples of Manastash Creek on the day the activities occurred to find Ms. Hunt liable under RCW 90.48.080.⁴³ When the facts are viewed in the light most favorable to Ecology, and reviewing the Amended Order as a whole, there is substantial evidence that Ms. Hunt conducted activities that resulted in a discharge of sediment and heated water to Manastash Creek that tended to cause pollution in violation of RCW 90.48.080.

Ms. Hunt also argues that since Ecology (Mr. Neet) was not there to witness sediment actually discharging into Manastash Creek – that the allegations were based on sheer speculation and conjecture. *See* Opening Br. at 34. While Mr. Neet was not at Ms. Hunt's property on November 10, 2011, when some of the activities took place, Ms. Iammarino was. *See* AR 7 Iammarino Decl. ¶¶ 2-5; *see also* App. B. Ms. Iammarino took photographs of the excavator, the removed trees, the

⁴¹ It is considered "polluted" since it is on the Washington's Clean Water Act Section 303(d) list of impaired waters. AR 7 Neet Decl. ¶¶ 8-9; AR 21 Neet Second Decl. ¶¶ 9-10.

⁴² *See* AR 7 Neet Decl. ¶ 11; AR 30 Neet Dep. Tr. Vol. II at 170-171, 176-177 196-197, and 199-200; AR 36 Amended Order ¶¶ 46-47; AR 21 Neet Second Decl., Exs. 1-5

⁴³ As the Board pointed out, requiring an actual sample would result in the discharge of pollution without any liability if the discharge was not discovered until after the pollution occurred and after it dissipated into the waters of the state. AR 36 Amended Order ¶ 53.

crushed vegetation, the standing water and the visible track marks through the riparian corridor. *See Id.* ¶ 6, Exs. 2-5 *see also* App. B. These photographs demonstrate that soils were disturbed in and around the Ditch. Couple this with the undisputed fact that the Ditch drains directly into Manastash Creek; and any reasonable person would conclude that sediments were discharged to Manastash Creek; which tended to cause pollution. Attached as Appendix D is a copy of AR 3 Nicholson Decl., Ex. 10 p.1, a photograph of the Ditch entering Manastash Creek.⁴⁴ Ecology’s allegations did not rest on “sheer speculation and conjecture.”

2. Discharge of sediment *tended to cause* pollution to Manastash Creek.

Under RCW 90.48.080:

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

(Emphasis added). RCW 90.48.080 prohibits the discharge of “pollution” into waters of the state. “Pollution” is broadly defined as:

alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, . . . or such discharge of any . . . solid, . . . or other substance into any waters of the state as will or is likely to create a nuisance or render such waters

⁴⁴ The Ditch is in the center of the photograph and Manastash Creek is in the foreground of the photograph, running perpendicular to the Ditch.

harmful, detrimental or injurious to . . . other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

(Emphasis added). RCW 90.48.020. Compliance with RCW 90.48.080 is a matter of strict liability. *See Dep't of Ecology v. Lundgren*, 94 Wn. App. 236, 244-45, 971 P.2d 948 (1999). In addition, “discharge” is defined as the addition of a pollutant. WAC 173-220-030(5). The Board’s Amended Order should be upheld if the facts in the agency record, when viewed in the light most favorable to Ecology, show that Ms. Hunt conducted activities that resulted in a discharge that tended to cause pollution to Manastash Creek in violation of RCW 90.48.080. Ms. Hunt’s activities met this legal test.

Ms. Hunt used an excavator to crush vegetation, remove trees and widen the Ditch in the riparian corridor of Manastash Creek (activities Ms. Hunt does not deny) – she did not merely throw a “dirt clod” into water, as she implies.⁴⁵ *See* App. B.⁴⁶ Ms. Hunt removed (or crushed) ground cover, mature trees and shrubs in and around the Ditch. AR 7 Neet Decl. ¶ 11; as clarified by AR 30 Neet Dep. Tr. Vol. II at 170-171. “[D]riving a track hoe into a wet area is going to stir up turbidity.” AR 30 Neet Dep. Tr. Vol. II at 164. These actions “would cause” exposed soils to be eroded and then drained or discharged (added) to the Ditch, which then drains/discharges directly into Manastash Creek. AR 36 Amended

⁴⁵ *See* Opening Br. at 2-3.

⁴⁶ *See also* AR 8 Hunt Second Decl. at ¶¶ 2, 22, 32; AR 30 Neet Depo. Vol II at 122, 203-205; AR 3 Hunt Decl. at ¶ 5; AR 33 Hunt Fourth Decl. at ¶ 24; AR 7 Renfrow Decl. at ¶¶ 3-6.

Order ¶¶ 46-47.⁴⁷ The discharge of sediments caused by the removal of vegetation and trees within the riparian area of Manastash Creek undermines the ongoing efforts being pursued in Manastash Creek to address erosion and sedimentation. *See* AR 30 Neet Dep. Tr. Vol. II at 170-171, 176-177 196-197, and 199-200. It was found and described in the Detailed Implementation Plan that “damaged riparian areas can start self-perpetuating erosive process for streambank[s] . . . and insufficient riparian vegetation exists to hold soils in place.” AR 21 Neet Second Decl. ¶ 11.

The Board correctly concluded that the TMDL plans and studies supported a finding that due to impacts of the loss of vegetation and the use of an excavator in and around the Ditch, sediment “would likely, if not directly and immediately, discharge into Manastash Creek.” AR 36 Amended Order ¶ 54. Therefore, the evidence in the agency record, when viewed in the light most favorable to Ecology, demonstrates that Ms. Hunt’s activities discharged sediment which *tended to cause* pollution to Manastash Creek. The Board’s Amended Order is supported by substantial evidence and should be upheld. AR 36 Amended Order ¶¶ 45-49, 55.

3. Removal of site potential shading tends to cause pollution through increased temperature.

Ms. Hunt argues that since her activities took place in November 2011, and since the Westside canal was breached in February 2012, that

⁴⁷ *See also* AR 7 Neet Decl. ¶ 11; AR 30 Neet Dep. Tr. Vol. II at 177.

she should not be held responsible for the unforeseen change in the riparian area of Manastash Creek.⁴⁸ Ms. Hunt's argument ignores the holdings in *Lemire* and ignores the importance of site potential shading.

Ms. Hunt does not refute that temperature is a pollutant.⁴⁹ RCW 90.48.020. Special temperature criteria for spawning and incubation of salmonids apply to this portion of Manastash Creek (13°C September 15–June 15) under the state's water quality standards. AR 7 Neet Decl. ¶ 9. This includes the Ditch since it feeds directly into Manastash Creek. See AR 30 Neet Dep. Tr. Vol. II. at 177. The loss of the mature canopy significantly increases the likelihood that temperatures in this reach will exceed 13°C this year. Reductions in streamside shading are most likely to adversely affect water temperature, since the canopy provides shade to cool the stream. See AR 21 Neet Second Decl. ¶¶ 9-10. The loss of shading is prevalent in the aerial photographs taken of Ms. Hunt's property. See Appendix E, copies of AR 21 Neet Second Decl. Ex. 1-2.⁵⁰ These aerial photos show a massive loss of the canopy cover in the riparian area. See *id.* The erosion of soils, widening of the channel, lack of riparian vegetation and trees (for canopy cover), and discharges of sediment are clear indicators of factors contributing to

⁴⁸ It is unclear from Ms. Hunt's opening brief how the breaching of the canal plays any role in whether her specific activities *tended to cause pollution* through the removal of site potential shading.

⁴⁹ See also AR 21 Neet Second Decl. ¶¶ 10-11; Sediment TMDL DIP, at 3-5

⁵⁰ Appendix E, Ex. 1 is an aerial photograph taken of Ms. Hunt's property and Manastash Creek during the May 2011 flood event. Appendix E, Ex. 2 is an aerial photograph taken on July 5, 2012 of Ms. Hunt's property and Manastash Creek. See AR 21 Neet Second Decl. ¶¶ 3-4.

stream temperature increases. *See id.* These water quality concerns are directly implicated by Ms. Hunt's extensive actions in the riparian corridor of Manastash Creek. *See* AR 25 Neet Dep. Tr. at 90-97.

In *Lemire*, the Court recognized that "erosion in turn introduces sediment that changes the shape and course of the stream, making it shallower and more susceptible to solar heating and raised temperatures . . . increased temperatures have a significant negative impact on aquatic life." *Lemire*, 178 Wn.2d at 235.

Therefore, Ms. Hunt's actions *tended to cause* pollution when she removed the trees and vegetation in the riparian corridor of Manastash Creek, which allowed the water in the Ditch to be influenced by solar warming, which then directly discharged into Manastash Creek, which is under a strict temperature TMDL. *See* AR 36 Amended Order ¶¶ 48-49, 52. The Board's Amended Order should be upheld.

C. The Board did not Misapply the Laws Governing Motions for Summary Judgment

Ms. Hunt appears to be alleging that since the Board did not find her activities exempt as "normal, customary and routine," but found the facts uncontroverted, it therefore misapplied the law. *See* Opening Br. at 37-39. The Board did not misapply the law; it just came to a different legal conclusion than Ms. Hunt sought.

It is undisputed that there were no material facts in dispute; therefore the case was properly decided on summary judgment. AR 36 Amended Order ¶ 31. The issues before the Board were purely legal:

(1) Is the Ditch a water of the state for purposes of RCW 90.48? (2) Did Ms. Hunt's activities cause or tend to cause pollution to Manastash Creek in violation of RCW 90.48.080? These are legal disputes, not factual disputes, and they were properly resolved on summary judgment. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990).

Ms. Hunt first alleges that since Ecology had no quantitative evidence, its allegations that Ms. Hunt's actions *tended to cause* pollution to Manasatash Creek must have been based on speculation. *See* Opening Br. at 38-39. As stated above, RCW 90.48 is a strict liability statute, and does not require quantitative evidence of a water quality violation. *See supra*, 28-31. In addition, the Supreme Court in *Lemire* held that quantitative evidence (or proof of proximate cause) is not required. *Lemire*, 178 Wn.2d at 237.

Second, Ms. Hunt alleges that the Board improperly allowed Ecology to raise "new legal theories and issues." Opening Br. at 39. As previously stated, Ecology did not raise new theories or issues. *See supra*, 13-15.

WAC 371-08-435(2) states:

The issues which the prehearing order identifies for the hearing shall control the subsequent course of the appeal, and shall be the only issues to be tried at the hearing, unless modified for good cause by subsequent order of the board or the presiding officer.

The issue before the Board was “[d]id Monica Hunt cause ‘pollution’ of Manastash Creek by ditching, filling, and altering the creek in violation of RCW 90.48.080...” The Board recognized that Ecology’s factual understanding of the case had “evolved” since the Administrative Order was issued. Ecology was not alleging that Ms. Hunt did work in the main channel of Manastash Creek, but that the violation itself occurred when Ms. Hunt was working in the Ditch (which Ecology initially believed was a side channel), which is a water of state, and which in turn *tended to cause* pollution to the main channel of Manastash Creek. AR 36 Amended Order ¶ 32. Regardless of Ecology’s “evolving” factual understanding, the legal issue remained the same; did Ms. Hunt cause or tend to cause pollution to Manastash Creek? The Board concluded, yes, Ms. Hunt’s activities conducted in the Ditch in November 2011, tended to cause pollution to Manastash Creek.⁵¹

The Board committed no error. Even if it had, Ms. Hunt failed to state with any specificity how this alleged error substantially prejudiced her under RCW 34.05.570(1)(d). *See* Opening Br. at 39. Ms. Hunt’s motion for summary judgment cited multiple reasons why the Board should conclude that Ms. Hunt did not violate RCW 90.48.080, this was just one, and would not have affected the outcome of the Board’s decision since the Board reviews Ecology’s Orders de novo. WAC 371-08-485(1);

⁵¹ The Board took into consideration all the facts and reduced the civil penalty substantially to reflect all of the extenuating circumstances, including what Ms. Hunt calls “Ecology’s changing legal theories.” AR 36 Amended Order ¶¶ 60-70.

see AR 20. The Board looked at the facts before it and concluded that Ms. Hunt's activities violated RCW 90.48.080 by tending to cause pollution to Manastash Creek.⁵² AR 36 Amended Order ¶ 55.

D. The Doctrine of Estoppel is Not Applicable

Ms. Hunt argues that since she sought the assistance of the Kittitas County Conservation District and the WDFW, that somehow Ecology should be estopped from charging Ms. Hunt with a water quality violation under RCW 90.48. Ms. Hunt is misapplying the doctrine of estoppel.

“Equitable estoppel may apply where there has been an admission, statement or act which has been justifiably relied upon to the detriment of another party. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002). Estoppel requires proof of:

(1) an admission, act or statement inconsistent with a later claim; (2) another party's reasonable reliance on the admission, act or statement; and (3) injury to the other party which would result if the first party is allowed to contradict or repudiate the earlier admission, act or statement.

Id. at 20 (citing *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599-600, 957 P.2d 1241 (1998)). Equitable estoppel against the government is not favored. If it 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.” *Id.*

⁵² The Board specifically stated “The Board limits its review to Ecology's stated basis for Order #8990, which as described above is for violating RCW 90.48.080 by causing or tending to cause pollution in the main channel of Manastash Creek.” AR 36 Amended Order ¶ 46.

First, there was no admission, act or statement by Ecology that Ms. Hunt detrimentally relied on. The statements she relied upon, albeit erroneously, were those of Kittitas County Conservation District and WDFW.⁵³ *See generally* AR 7 Renfrow Decl. Simply because Ms. Hunt talked to a different state agency does not mean that Ecology should be estopped from alleging a water quality violation. Ms. Hunt's reliance on the words of someone other than Ecology does not mean she gets a free pass to commit water quality violations. The Kittitas County Conservation District and WDFW have different purposes, goals and authority than Ecology. There may be some overlap, but one agency cannot bind another, especially when those two agencies enforce different laws and may be opining outside the scope of their authority. Ms. Hunt cannot prove the first element of the doctrine of equitable estoppel and the doctrine has not been extended to apply to the statements of a third party. Therefore, the court's analysis should stop there.

Irrespective of this, the Board took into consideration the fact that Ms. Hunt attempted to do the right thing by contacting some local and state agencies (although there is no evidence in the record that she ever contacted Ecology). AR 36 Amended Order ¶ 62. The Board even went so far as to reduce the civil penalty by almost 95% partly because of

⁵³ Mr. Renfrow believed that Ms. Hunt understood that what he was saying during his June 13, 2011, visit were with respect to WDFW's interest, area of jurisdiction and the work that would require a permit. *See* AR 7 Renfrow Decl. ¶ 6.

Ms. Hunt's "good faith reliance" on the words of Ms. Swanson and Mr. Renfrow. AR 36 Amended Order ¶¶ 60-70.

E. The Board's Amended Order Was Not Arbitrary and Capricious

As stated above in Sections IV (Standard of Review – Error of Law Standard) and V (Argument), the correct standard of review for an APA case, which was decided on summary judgment, is the error of law standard. *Verizon*, 164 Wn.2d at 916. However, even if the arbitrary and capricious standard were appropriate, the Board's Amended Order was not arbitrary and capricious.

An action will be found arbitrary and capricious under RCW 34.05.570(3)(e) when it is found to be "willful and unreasoning action, without consideration and in disregard of facts and circumstances." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1996). "The scope of court review should be very narrow, however, and one who seeks to demonstrate that action is arbitrary and capricious must carry a heavy burden." *Pierce Cnty. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Importantly, "[w]here there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached." *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994). The mere existence of contrary evidence does not render the Board's findings of fact arbitrary and

capricious. *Motley-Motely, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 80, 110 P.3d 812 (2005).

Ms. Hunt provides no legal analysis for her allegation that the Board's Amended Order was arbitrary and capricious. *See* Opening Br. at 41-42. Instead, she merely states that since the Board did not find in her favor, all of its decisions must somehow be arbitrary and capricious. Ms. Hunt has not met her burden. Just because the Board disagreed with Ms. Hunt does not render its decision arbitrary and capricious. *See Buechel*, 125 Wn.2d at 202. The Board considered all of the evidence before it, and based on that evidence (with agreement from the parties that there were no material facts in dispute), the Board properly concluded that Ms. Hunt violated RCW 90.48.080. *See* AR 36 Amended Order ¶¶ 45-46. AR 36 Amended Order ¶¶ 60-70.

F. Ms. Hunt is Not Entitled to Attorneys' Fees

Without providing any legal analysis, Ms. Hunt claims that she is entitled to attorney fees under RCW 90.14.190 (water resources). First, the only applicable statute for purposes of recovering attorney fees in a petition for judicial review is RCW 4.84.350. Second, Ms. Hunt has not prevailed, and therefore is not entitled to costs and attorneys fees.

1. Attorney fees are available only under RCW 4.84.350, the Equal Access to Justice Act.

RCW 4.84.350(1) states:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial

review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought

RCW 4.84.350(2) limits the award of reasonable attorney's fees and costs to \$25,000. RCW 4.84.350 provides a statutory cap on attorney fees for each level of judicial review of an agency action. *Costanich v. Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 934, 194 P.3d 988 (2008).

Ms. Hunt would be entitled to attorney's fees only if (1) she is a prevailing party on a significant issue; and (2) the court finds that Ecology's actions were not substantially justified. But even if the court were to reverse the Board's Amended Order and if Ms. Hunt were a prevailing party on a significant issue, Ecology's actions were substantially justified and Ms. Hunt would not be entitled to attorney's fees. "Substantially justified" means justified to a degree that would satisfy a reasonable person. *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 832, 306 P.3d 920 (2013) (citing *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007)). The State must show that its position has a reasonable basis in law and fact. *Id.* (citing *Aponte v. Dep't of Soc. & Health Servs.*, 92 Wn. App. 604, 623, 965 P.2d 626 (1998)). "It need not be correct, only reasonable." *Id.* (citing *Pierce v. Underwood*, 487 U.S. 552, 566 n. 2, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)).

The relevant factors in determining whether the Department was substantially justified are, therefore, the strength of the factual and legal basis for the action, not the manner of the investigation and the underlying legal decisions.

Silverstreak, Inc. 159 Wn.2d at 892.

On the other end of the spectrum, RCW 4.84.350(1) contemplates that an agency action may be substantially justified, even when the agency's action is ultimately determined to be unfounded. This may occur, for example, when the agency's determination, though ultimately unsupported by the evidence, was made on the best available evidence at the time of the decision.

Raven, 177 Wn.2d at 832-833, (citing *Kettle Range Conservation Grp. v. Dep't of Natural Res.*, 120 Wn. App. 434, 469-70, 85 P.3d 894 (2003)).

Ecology's actions were reasonable. Ecology acted on a complaint concerning activities being done in the riparian area of Manastash Creek (even if the allegations in the original complaint turned out to be exaggerations). Second, Ecology has an obligation to protect water quality. Third, Ecology believed the Ditch was a "water of the state" subject to RCW 90.48. Fourth, due to the strict temperature requirements on Manastash Creek, in an effort to restore salmon habitat, Ecology could not ignore the devastation that Ms. Hunt caused through her removal of mature trees and crushing of vegetation in the riparian corridor, which tended to cause a discharge to Manastash Creek. Lastly, even though Ecology's factual understanding of the extent of the violation evolved over the course of a few months, it was still substantially justified in issuing Ms. Hunt a civil penalty and an order to implement a restoration plan. *See*

Silverstreak, Inc., 159 Wn.2d at 892-93 (“[E]ven though the Department changed its interpretation of the regulation, the Department was ‘substantially justified,’ as that term is used in RCW 4.84.350(1), in bringing and prosecuting this action”). Therefore, Ms. Hunt, even if she prevails, should not be awarded attorney’s fees.

2. Attorney fees Under RCW 90.14.190 are not applicable.

Ms. Hunt alleges, without any legal analysis, that she is entitled to attorneys’ fees under RCW 90.14.190. This statute is inapplicable. RCW 90.14.190 awards attorneys fees to a person who has been aggrieved by a “water resource decision” of Ecology. This is not a water resources case under RCW 90.14⁵⁴; it is a water quality case brought under RCW 90.48. The appropriate statute for the award of attorney fees in a judicial review of agency action is RCW 4.84.350, the Equal Access to Justice Act.

VI. CONCLUSION

Based on the foregoing, Ecology respectfully requests that the Court of Appeals affirm the decisions of the Board and the trial court and uphold the finding that Ms. Hunt violated RCW 90.48, as well as the

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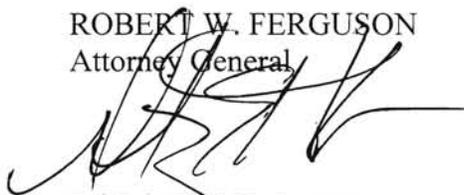
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⁵⁴ Water resource decisions include, for example, the right to withdraw or divert water, the relinquishment of water, a determination of beneficial use of water, or an exemption to relinquishment. *See generally* RCW 90.14.

imposition of the \$750 civil penalty and the implementation of a restoration plan.

RESPECTFULLY SUBMITTED this 27th day of May, 2014.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read 'Dorothy H. Jaffe', is written over the printed name and title of the Assistant Attorney General.

DOROTHY H. JAFFE
Assistant Attorney General
WSBA #34148
2425 Bristol Court SW
PO Box 40117
Olympia, WA 98504-0117
(360) 586-4637

APPENDIX A



Figure #3. Hunt Property- 2011 air photo from Google Maps web site

APPENDIX B



Exhibit 2





Exhibit 5

APPENDIX C



Exhibit 1

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Exhibit 2



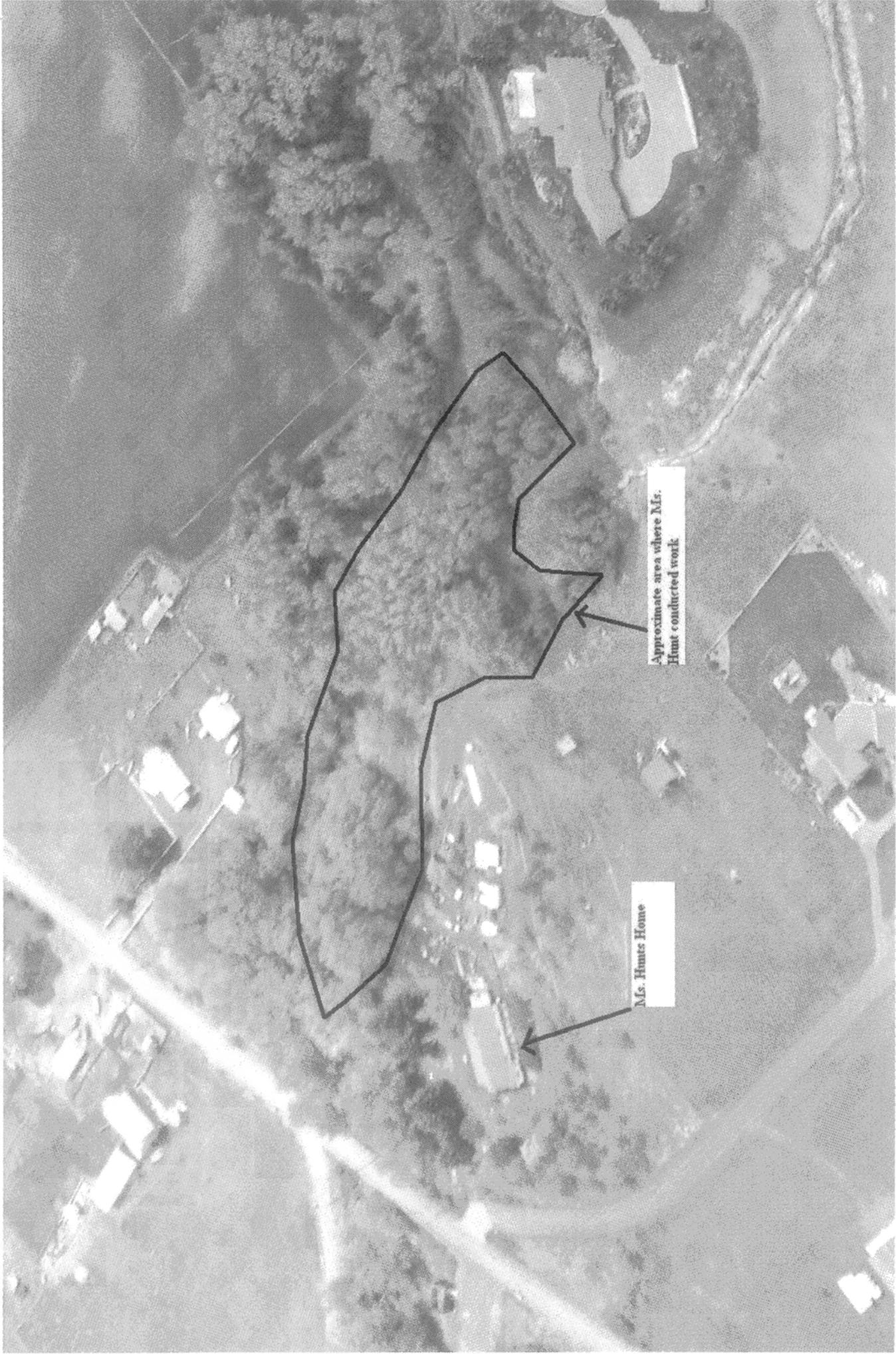
Exhibit 3

APPENDIX D



Ditch as it enters Manastash Creek

APPENDIX E



Approximate area where Ms. Hunt conducted work

Ms. Hunt's Home



Area where Ms. Hunt conducted work.

Ms. Hunt's Home