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

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CROWN RESOURCES CORPORATION,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent,

and

OKANOGAN HIGHLANDS ALLIANCE,

Intervenor-Respondent.

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**APPELLANT'S COMBINED REPLY BRIEF**

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## I. ARGUMENT IN REPLY

### A. Overview Of Arguments

This case is about whether the Department of Ecology's ("Ecology") imposition of overly stringent and unachievable permit terms when renewing a water quality discharge permit for the Buckhorn Mine was contrary to law, unsupported by substantial evidence, or arbitrary and capricious. The original 2007 Permit included enforcement limits that applied to discharges from the mine water treatment plant ("MWTP") which were generally based on State water quality criteria. Ecology Response Brief ("Ecology Br."), p. 6; 2007 Permit, AR 1614. Those limits were intended to ensure that discharges from the MWTP did not cause exceedances of applicable water quality criteria, which the State adopted to protect human health and the environment. The 2007 Permit had no limits that were based on pre-mining water quality, and it did not include any limits that applied at surface and ground water monitoring locations around the Mine.

The limits in the 2007 Permit were consistent with the analyses in the Final Supplemental Environmental Impact Statement ("FSEIS") that Ecology prepared in 2006 when permitting the Buckhorn Mine, and which Ecology identifies as the "foundational" environmental document for the Buckhorn Mine. Ecology Br., p. 4. The FSEIS determined that changes

in surface or ground water quality were a potential project impact and that water quality changes resulting in an exceedance of State water quality criteria would be a “significant” impact. FSEIS, AR 3128.

The FSEIS concluded that, while various components of the Mine would potentially impact water quality, with appropriate mitigation, surface and ground water in the area would continue to meet State water quality criteria and thus, no significant impact would occur.<sup>1</sup> Thus, consistent with the FSEIS, the 2007 Permit authorized discharges from the Buckhorn Mine, and included State criteria-based limits at the MWTP to ensure that no significant impacts to water quality would occur.<sup>2</sup>

During renewal of the 2007 Permit, Ecology decided to take a substantially different approach. The Modified 2014 Permit includes new final enforcement limits at several surface and ground water monitoring locations around the Mine. Instead of basing those final limits on either

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<sup>1</sup> See, e.g., FSEIS, AR 3159 – 3161 (noting that some seepage ore and rock stockpiles may remain uncaptured and that monitoring will determine if groundwater quality is being “significantly” impacted away from the mine, in which case the water management system could be enhanced); AR 3171 (“Some constituents may exceed background concentrations; however, these impacts are considered less than significant.”); AR 3173 (noting there will be water quality impacts from using magnesium and sodium chloride on roads, but the impacts will not be significant).

<sup>2</sup> Okanogan Highlands Alliance’s (“OHA”) references to the FSEIS confirm that the objective of water management activities at the Mine was to prevent significant impacts to water quality, not all potential impacts. OHA Response Brief (“OHA Br.”), p.12 (“If monitoring detects exceedances of water quality permit limits, water collection, treatment and discharge procedures will be improved to reduce impacts below the level of significance.”)

State water quality criteria or an analysis of all known, available and reasonable technologies (“AKART”), Ecology decided to “turn back the clock,” and base those limits on a statistical calculation of pre-mining background water quality provided by OHA.

It is undisputed that those final limits are stricter than the maximum pre-mining background water quality at several locations. It is also undisputed that, in setting those new final limits, Ecology did not evaluate whether those limits could be practically or reasonably attained given the previously approved activities at the Mine. Moreover, while Ecology ostensibly included interim limits in the Modified 2014 Permit and a 10-month compliance schedule as a bridge to meeting the new final limits, it is undisputed that Ecology did not conduct any evaluation of whether the compliance schedule and interim limits were practicably achievable given current conditions. Finally, Ecology included in the Modified 2014 Permit a new definition and map for a capture zone area within which all mine-impacted water is to be contained. However, Ecology admittedly based the delineation of that area on groundwater modelling that was prepared for a wholly different purpose, and had no relationship to Ecology’s new capture zone definition. Ecology’s mid-term shift in permitting approaches—changing from a permit designed to ensure that no significant water quality impacts occur outside the capture

zone, to a much stricter permit that requires there be no impacts or actual improvements to pre-mining background water quality—is at the core of the issues presented in this appeal.

To take advantage of what they argue should be a highly deferential standard of review, Ecology and OHA (collectively, “Respondents”) suggest that Crown Resources Corporation (“Crown”) is bringing a “primarily factual challenge” and is attempting to re-try its “entire factual case” on appeal, rather than challenging any specific findings of the Pollution Control Hearings Board (“PCHB”). Ecology Br., pp. 1, 18; OHA Br., pp. 2, 20-21. That is incorrect. Much of the testimony and other evidence presented at the seven-day PCHB Hearing was directed at establishing the factors that Ecology did and did not consider when adopting the new Modified 2014 Permit terms. Crown is not attempting to reargue what facts or evaluations formed the basis for Ecology’s permit decision. The basis for Ecology’s decision is now undisputed.<sup>3</sup> Instead, Crown argues that, based on those facts established at the PCHB Hearing, Ecology’s decision to include the challenged new

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<sup>3</sup> For example, Crown’s appeal is not based on a challenge to the credibility of Ecology’s witness, contrary to Respondents’ suggestion. Crown is not disputing whether Ecology’s permit writer, Sanjay Barik, did what he said he did when preparing the Modified 2014 Permit. The record before the PCHB clearly establishes the limited analyses he undertook, and that is not disputed. Nevertheless, Mr. Barik’s lack of experience in mine permitting and lack of training in hydrology may help explain why he did not undertake the required analyses. Crown Br., p. 11.

terms in the Modified 2014 Permit, and PCHB's decision upholding those terms, are either (i) contrary to law, because Ecology failed to consider matters that its regulations and guidance require, or (ii) not supported by substantial evidence and arbitrary and capricious, because the analyses Ecology admittedly undertook failed to consider factors necessary for a reasoned decision.<sup>4</sup>

This Court's review of those questions is not as toothless as Respondents suggest. *See* Crown Opening Brief ("Crown Br."), pp. 13-14. In reviewing questions of law or questions concerning the application of law to facts, the reviewing court conducts a *de novo* review, and a court need not give deference to an agency interpretation offered in litigation where, as in this case, it is inconsistent with the plain language or with the agency's prior administrative practice. *Skamania County v. Columbia*

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<sup>4</sup> Ecology's suggestion that Crown's Opening Brief does not comport with RAP 10.3(g) is erroneous. Ecology Br., p. 19. Crown's appeal is generally based on undisputed facts, and Ecology and PCHB's failure to properly consider those facts and applicable legal requirements. Rather than challenging specific factual findings by PCHB, several of Crown's appeal issues are based on PCHB's failure to make relevant factual findings addressing the evidence and applicable legal requirements. For instance, with respect to the final limits, PCHB failed to make any factual findings addressing whether Ecology complied with AKART requirements or otherwise evaluated whether the final limits were practical. *See infra* at Section I.B. Similarly, with respect to the newly defined capture zone, PCHB failed to make any factual findings with respect to the limited scope of the historic modeling relied on by Ecology. *See infra* at Section I.D. Crown's Opening Brief specifically identifies each of the permit terms that are being appealed and the grounds upon which its appeal is based. Where the nature of the challenge is clear, as it is here, an appellate court will consider the merits of the appeal. *See Green River Community College Dist. No. 10 v. Higher Educ. Personnel Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653, 655 (1986).

*River Gorge Comm'n.*, 144 Wash. 2d 30, 42, 26 P.3d 241, 248 (2001).

Under the substantial evidence standard, an agency must support its factual determinations not just with some evidence, but with substantial evidence. *May v. Robertson*, 153 Wn. App. 57, 74, 218 P.3d 211, 219 (2009). Respondents' request that this court simply rubber-stamp the PCHB decision, which did not thoroughly address many of the undisputed facts and arguments presented by Crown at the hearing, is inappropriate.<sup>5</sup>

**B. The Final Limits Are Contrary To Law, Not Supported By Substantial Evidence, And Are Arbitrary And Capricious**

**1. Ecology and OHA's Responses Confirm that Ecology Failed to Comply with its Regulations and Guidance when Setting the Final Limits**

Respondents acknowledge that Ecology based the new final surface and groundwater limits in the Modified 2014 Permit on a statistical calculation of pre-mining water quality prepared by OHA's consultant. Ecology Br., p. 46. It is undisputed that Ecology did not evaluate AKART in setting the final limits and did not otherwise consider whether the final limits could practically be met at the new surface and groundwater compliance locations given existing water quality conditions and previously approved operations. Those undisputed facts establish that

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<sup>5</sup> Ecology's Restatement of the Issues, Ecology Br., p. 2, mischaracterizes the issues raised by Crown in this appeal by invoking incorrect standards of review and inaccurately limiting the scope of Ecology's errors that are at issue.

Ecology did violate its regulations governing the establishment of water quality permit limits.

Ecology and OHA agree that the applicable regulations require Ecology to set the final limits “as near as practical” to the natural water quality. Ecology Br., pp. 40-41; OHA Br., p. 23. However, Ecology asserts that this requirement means that Ecology must set limits “as close to background as possible” subject only to “practical limitations” on Ecology’s ability to characterize what the background levels were due to limited data, and that Ecology has no obligation to consider what permit limits can be practically or reasonably achieved. Ecology Br., p. 41. Ecology’s contorted interpretation is contrary to the plain language of the regulations and its own long-standing published interpretations of those regulations. See Ecology, Implementation Guidance for the Ground Water Quality Standards (Oct. 2005), AR 2747 (“Implementation Guidance”).<sup>6</sup>

The plain language of Ecology’s regulations requires that permit enforcement limits be set “as near the natural groundwater quality as

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<sup>6</sup> OHA’s interpretation is even more flawed. Without any supporting authority or further explanation, OHA argues that these regulations require Ecology to set limits as close to natural water quality “as it can.” OHA Br., p. 23. However, OHA goes on to acknowledge that Ecology is required to consider AKART when setting enforcement limits. *Id.* at 24. OHA also cites caselaw stating that discharge limits must implement state water quality standards regardless of technical practicability. *Id.* OHA’s legal summary is consistent with Crown’s position that when setting the final limits for constituents with background levels below the criteria, Ecology was required to evaluate AKART and set the limits at a level *between* background and the state criteria based on the levels that could be reasonably achieved.

practical.” WAC 173-200-050(3)(a)(ii). That regulation does not state that in evaluating what is practical, Ecology is to consider only the extent to which pre-disturbance water quality data is available. If that was the intent, the regulation could easily have been drafted to reference the availability of such data. Instead, the regulation broadly states that Ecology must consider what is practical when setting permit enforcement limits. That includes considering whether the permitted activity could practically meet the limits given available pollution control technologies.

Consistent with that plain-language interpretation, Ecology’s regulations governing both surface and groundwater quality permit limits expressly require Ecology to consider AKART when setting permit enforcement limits. WAC 173-200-050(3) (groundwater); 173-220-130(1)(a) (surface waters). AKART analyses are intended to evaluate what methods can be “reasonably required” for preventing, controlling or abating the pollutants associated with a discharge. WAC 173-201A-020.

Ecology’s Implementation Guidance, which sets forth the agency’s formal interpretation of its water quality permit regulations, repeatedly emphasizes that Ecology must consider the extent to which a proposed permit limit can be practically achieved when setting limits that are stricter

than the applicable State criteria.<sup>7</sup> As the Implementation Guidance states: The purpose of the State’s criteria “is not to allow degradation of ground water up to the criteria, but rather it is intended to protect background water quality to the extent practical.” Implementation Guidance, AR 2747. *See also* AR 2795 (The goal of water quality standards “is to minimize the impact to background water quality by promoting the most effective and reasonable treatment and reduction of wastewater discharges.”).

As discussed in Crown’s Opening Brief, and as illustrated in Figure 6.1 of the Implementation Guidance, Ecology is to follow a two-step process when establishing water quality limits in situations where the background quality is better than the applicable State criteria, whereby it first establishes the appropriate background level and then sets the limit between background and the applicable criteria based on what limit can be practically achieved. Implementation Guidance, AR 2793; Crown Br., pp.16-19. Applying an AKART analysis is the primary method by which Ecology is to determine what levels can be practically achieved.

Implementation Guidance, AR 2793 (Figure 6.1). *See also*

Implementation Guidance, Figure 6.2, AR 2796 (“The treatment

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<sup>7</sup> Ecology recognizes that the interpretations set forth in the Implementation Guidance should be given deference. Ecology Br., p. 44.

technology alternative that best protects background water quality and is considered reasonable should be advocated.”). Although Ecology now argues that it need only consider the availability of background data when determining what limits are “practical,” that argument contradicts the plain language of the regulations and Ecology’s own interpretation set forth in the Implementation Guidance.

**2. Ecology’s Further Attempts to Side-Step its Regulations and Guidance Have No Merit**

Ecology acknowledges that the State’s antidegradation policy required Ecology to set the final limits “as near as practical to the background water quality,” but attempts to nullify that requirement by asserting that, where background water quality exceeds the State criteria, the background quality becomes the standard that must be met, with no consideration of what is practical. Ecology Br., pp. 40-41. Again, that argument is directly contradicted by the Implementation Guidance, which recognizes that “[t]he goal of the Antidegradation Policy is to protect background water quality to the extent practical.” Implementation Guidance, AR 2794. *See also id.* at 2755 (The antidegradation policy “is not a nondegradation policy. Nondegradation is different than antidegradation in that it prohibits any increase in contaminant concentrations in ground water.”). Accordingly, the final limits in the

Modified 2014 Permit should have been set at a level between background and the State criteria based on an evaluation of what is practical given the permitted Mine activities and the available and reasonable methods for preventing, controlling or abating pollution (using AKART). Even OHA acknowledges that Washington's antidegradation policy does not prohibit all impacts to water quality, provided that State criteria adopted to protect beneficial uses are met. OHA Br., p. 7 ("No degradation may be allowed that would interfere with or become injurious to existing or designated beneficial uses, except as provided for in this chapter.")

Ecology's failure to consider what limits could be practically achieved is especially unjustified here since Ecology applied the new final limits to an existing mine operation for which it had previously approved more relaxed limits. The 2007 Permit contained numeric water quality limits solely for end-of-pipe discharges from the MWTP, and even those were based on much higher State criteria, not pre-mining background water quality. In including new compliance points in surface and ground water in the Modified 2014 Permit, Ecology could not simply roll back the clock, ignore the years of previously permitted operations, and impose new unachievable limits without any evaluation of what could be practically achieved.

Respondents further attempt to brush aside Ecology's failure to consider whether the new final limits could be practically achieved by suggesting this court should not consider the issue because Crown purportedly failed to raise it below, and because neither the Ferry County Superior Court nor the PCHB ruled on the issue. Ecology Br., p. 42; OHA Br., p. 22. Respondents mischaracterize the record in this case. Crown repeatedly raised this issue in the prior appeals, and consistently cited Ecology's failure to conduct any such evaluation as one of the fundamental flaws in the Modified 2014 Permit. *See, e.g.*, Crown's Ferry County Opening Brief, CP 14 at 000000822-823 (discussing the required process for setting water quality limits and Ecology's failure to follow its Implementation Guidance requiring evaluation of AKART); Crown's Ferry County Reply, CP 21 at 000001405 (discussing Ecology's failure to conduct an AKART analysis for the renewed Permit) and 000001406-07 (discussing requirement to set limits as near natural groundwater levels as practical based on AKART); PCHB Transcript, RP 1332:6-15 (Crown closing argument to PCHB explaining that the final limits are improper due to Ecology's failure to conduct AKART analysis); PCHB Transcript, RP 935:7-937:15 (examination of S. Barik confirming Ecology's failure to conduct an AKART analysis for the final limits); PCHB Transcript, RP 853:20-854:20, 902:6-904:10 (testimony of O. Reese explaining

Ecology's failure to conduct an AKART analysis). That the PCHB and Ferry County Court decisions do not address Crown's argument that Ecology improperly failed to conduct an AKART analysis or otherwise consider whether the final limits are practical, in contradiction to Ecology's own regulations and guidance, highlights the need for this court's thorough review of this appeal.

Ecology's last argument for why it was not required to conduct an AKART evaluation of the final limits or any other evaluation of whether those limits could be practically achieved is also meritless. Ecology suggests that the Implementation Guidance supports its position, because AKART represents only the "floor for enforcement limits, but does not define how stringent they must be." Ecology Br., pp. 43-44. However, the page from the Implementation Guidance and the court case Ecology cites for that proposition both address situations where an AKART evaluation demonstrates that the proposed discharge would violate State criteria and harm a beneficial use. Implementation Guidance, AR 2747. In such an instance, additional treatment beyond AKART could be required to prevent the discharge from violating the applicable criteria and harming beneficial uses (unless background already exceeded the criteria). That is not the situation here. In the Modified 2014 Permit, Ecology set final limits based on pre-mining background calculations that, for many

constituents, are extremely low and substantially below the applicable criteria. An AKART evaluation should have been conducted to determine where to set the final limits *between* the background level and the applicable criteria. Crown has not argued that AKART should be a basis for allowing discharges to exceed the applicable criteria.

Ultimately, Ecology recognizes that its Implementation Guidance does direct that Ecology include a “buffer” between background water quality and the permit limits. Ecology Br., p. 44-45. However, Ecology’s suggestion that its method for setting the final limits somehow created a buffer and excused it from considering what limits were practical is misguided. First, Ecology states that a buffer was inherently built into the final limits because the limits were “based on the highest representative background value from all locations on the mountain.” Ecology Br., p. 45. That is false. As Crown explained in its Opening Brief, that is exactly what Ecology should have done to establish the background levels (not the limits); however, as it later acknowledges, Ecology did not do that, and instead based background on a statistical 95% confidence calculation. Crown Br., pp. 23-24; Ecology Br., p. 46. Thus, rather than building in a “buffer,” Ecology’s approach locked in permit limits that not only failed to consider what is practical, but are *below* the highest pre-mining background levels observed at certain locations. *See infra*, Section I.B.2.

In any event, even if Ecology had established background at the highest pre-mining levels, that would not excuse Ecology from conducting an AKART evaluation of the permitted Mine activities to determine what limits between that background and the State criteria are practical. Given Ecology's failure to conduct that evaluation, Ecology's adoption of the final limits was contrary to law, unsupported by substantial evidence, and arbitrary and capricious.

**3. Ecology Mischaracterizes the Background Calculation that it Used for the Final Limits**

As noted above, while Ecology suggests at one point in its brief (p. 45) that it used the "highest representative background value" for the final limits, it ultimately acknowledges that it adopted the 95% confidence calculations prepared by OHA's consultant. Ecology Br., p. 46. As detailed in Crown's Opening Brief, Ecology's use of a 95% background calculation, which set the limits below the maximum pre-mining concentrations, essentially guarantees a 5% false positive rate, even if there were no mining-related impacts. Crown Br., pp. 24-25. Citing testimony by Stephen Swope, the OHA consultant who prepared the background calculations, Ecology argues that this statistical method would not result in 5% false positives. Ecology Br., pp. 47-48. However, contrary to Ecology's characterization, Mr. Swope testified that, because

the background data came from different locations, you would not expect to see a 5% false positive rate at “all” locations. Swope Testimony, RP 1288:24-1289:18. He did not dispute that when the data from all the new compliance locations is considered collectively, it would be expected that 5% of the total samples would exceed the calculated background concentrations, based solely on variation in natural, pre-mining conditions. *See* Owen Reese Testimony, RP 856:12-24 (5% of the background water quality data would be above the statistically calculated background levels.) Consequently, Ecology’s use of the 95% background levels for the final limits erroneously results in hundreds of false positive “exceedances” every year. Reese Testimony, RP 858:8-21.

Finally, Ecology takes the testimony of Owen Reese out of context in suggesting that Mr. Reese concurred with Ecology’s use of a 95% confidence background calculation. Ecology Br., p. 48. Mr. Reese specifically testified that, for purposes of determining water quality permit limits, with nonparametric data like the data at Buckhorn, background is most appropriately calculated by using the highest historic value. Reese Testimony, RP 800:11-21. Mr. Reese also testified that he had never seen permit limits set at a statistical background level, and that the permit limits should be based on an AKART evaluation of what is practical. *Id.* at RP 854:7-16.

Ecology's adoption of final limits based on OHA's statistical background calculation, which ensures Crown will have hundreds of false positive exceedances every year due to natural variability in background concentrations, is contrary to law, unsupported by substantial evidence, and arbitrary and capricious.

**C. The Interim Limits And Compliance Schedule Are Contrary To Law, Unsupported By Substantial Evidence And Arbitrary And Capricious**

**1. The Ten-Month Compliance Schedule was not Based on a Practicable Time-Frame**

Ecology confirms that Sanjay Barik, the Ecology permit writer, chose a 10-month compliance schedule in the Modified 2014 Permit to allow for one spring freshet. Ecology Br., p. 34. Ecology also concurs that it was to set the compliance schedule to ensure that compliance with the final limits is achieved in the "shortest practicable time." Ecology Br., pp. 34-35. There is no dispute that neither Mr. Barik, nor anyone else at Ecology, undertook any technical evaluation of whether one spring freshet provided a practicable time frame for meeting the new final limits. These undisputed facts and legal principles confirm that Ecology's selection of the 10-month compliance schedule is contrary to law, unsupported by substantial evidence, and arbitrary and capricious.

Rather than trying to point to a defensible basis in the administrative record for the 10-month compliance schedule, Ecology

argues the schedule should be upheld because Crown failed to provide evidence identifying a “specific compliance period.” Ecology Br., p. 34. That argument is both legally and factually misplaced. First, it is Ecology’s obligation, not Crown’s, to include facts in the administrative record that support Ecology’s permitting decision with substantial evidence. *Overlake Fund v. Shoreline Hearings Board*, 90 Wash. App. 746, 763-64, 954 P.2d 304, 313 (1998). Where, as here, the undisputed evidence documents that Ecology did not even consider what time frame was practicable for achieving the final limits, Ecology’s decision should be reversed and remanded for Ecology to conduct the legally required evaluation.<sup>8</sup>

Moreover, as described in Crown’s Opening Brief, Crown presented substantial expert evidence demonstrating that the final limits could not be practicably achieved in 10 months. Crown Br., pp. 29-32. For example, David Banton and Bob Sterrett, both experts in hydrology and hydrogeology, testified that the Water Quality Protection Program that Ecology and Crown provided for in the Settlement Agreement would take

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<sup>8</sup> As discussed in Section I.B above, the final limits adopted by Ecology are unlawful, and for several constituents cannot be consistently met since they are below maximum pre-mining levels and do not account for permitted activities at the Mine. Crown had no obligation to prepare a technical evaluation to determine a practicable time frame within which those unlawful final limits could be met. However, Crown did provide extensive evidence documenting that the final limits could not practicably be met within 10 months. Crown Br., pp 29-32.

several years, not a few months, to substantially improve water quality at certain of the new compliance points included in the Modified 2014 Permit. *Id.* That testimony included detailed and specific examples that were based on evaluations of historic water quality data, site-specific hydrogeologic conditions and water quality trend projections. *Id.* Ecology provided no such technical evaluation whatsoever. The evidence presented by Crown satisfied Crown's burden to demonstrate that Ecology's decision was not supported by substantial evidence, and that the 10-month schedule was not practicable and was arbitrary and capricious.<sup>9</sup>

Ecology states incorrectly that the PCHB rejected Crown's argument that a longer compliance period is required to address discharges from previously authorized activities, including MWTP discharges, because the PCHB found Crown's argument to be based on "speculation and conjecture by Crown's experts." Ecology Br., p. 36. Nowhere in the

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<sup>9</sup> While it presented no evidence at the PCHB Hearing that pre-mining background water quality could be practicably achieved in 10 months, Ecology now argues that a discussion of the "rate of travel" of groundwater in the 2006 FSEIS supports the conclusion that any residual water quality impacts from the much higher concentration MWTP discharges that were previously authorized by the 2007 Permit would "flush out" within the 10-month period. Ecology Br., p. 37. However, the cited section of the FSEIS provides a general description of the hydraulic conductivity of "sands and gravel," and does not address the projected rates that constituents from the previously authorized discharges would disperse and attenuate in groundwater. In contrast, Crown's experts very specifically explained that, while the concentrations in ground water from previously authorized discharges have substantially reduced, it will take several years to reach the very low pre-mining conditions. *See, e.g.*, Banton Testimony, RP 536:5-538:17 (explaining that chloride was discharged at levels of at least 100 mg/l (the 2007 Permit authorized 250 mg/l), and while chloride concentrations below Outfall 001 were down to 8 to 10 mg/l, it would take another 3-4 years to reach pre-mining conditions).

PCHB's Order did the PCHB find that the expert testimony of Mr. Banton and Mr. Sterrett was based on speculation or conjecture. In fact, the PCHB's Order does not even mention that extensive testimony.<sup>10</sup>

Instead, the PCHB upheld the 10-month compliance schedule based solely on a finding that, for "several years," Crown had been aware of the prior MWTP discharges and elevated sulfate in one monitoring well. PCHB Order, AR 1478. That, however, is not a reasoned basis for upholding the 10-month compliance schedule. First, the PCHB did not find that Ecology had conducted any evaluation of whether the new final limits could be practicably achieved in 10 months and the PCHB did not find that 10 months was practicable.

Second, while Crown has consistently collected water quality data since it started mining operations, Crown did not have "several years" notice of what new final limits it would ultimately have to meet in a renewed permit or that it would be penalized for previously authorized discharges. The original 2007 Permit did not have any limits at the surface and ground water monitoring locations, and Ecology did not select

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<sup>10</sup> Ecology also incorrectly states that the PCHB determined that a compliance schedule covering one spring freshet "created a strong incentive for Crown to achieve compliance in the shortest time practicable" as required by Ecology's regulations. Ecology Br., p. 39. The PCHB made no such finding, and the PCHB's Order does not even reference the regulatory requirement at WAC 173-201A-510 that compliance schedules be established to ensure compliance in the shortest time practicable.

the new final limits until the end of the permit renewal process in 2014, after OHA submitted its 95% background calculations during the public comment period. Even the draft renewed Permit that Ecology released for public comment in September 2013 contained higher limits for many constituents. *Compare* 2013 Draft Permit, AR 1948 (Table 6) to Modified 2014 Permit, AR 1121 (Table 6).

Additionally, the Water Quality Protection Program measures that Ecology and Crown agreed to in the June 2013 Settlement Agreement (and which provided the basis for Ecology including the compliance schedule in the 2014 Permit) were implemented by Crown in 2013 and 2014, with additional work continuing in 2015. The positive effects of those measures would not be fully known until after they were constructed and water quality data could be collected to determine post-construction water quality trends. Crown Br., pp. 7-8; Banton Testimony, RP 499:18-500:20. Thus, the period for evaluating how long is practicably needed to meet the new final limits would have started no earlier than 2014, when the new final limits were known and Crown could begin evaluating the extent to which the Water Quality Protection Program was successful in meeting those limits. The undisputed evidence in the record confirms that Ecology did not conduct any such evaluation and that the new final limits adopted in the Modified 2014 Permit could not be practicably achieved in

10 months. Consequently, Ecology's adoption of the 10-month compliance schedule was contrary to law, unsupported by substantial evidence, and arbitrary and capricious.<sup>11</sup>

Contrary to Ecology's suggestion, Crown is not asking for "an unlimited or excessive" compliance period. Ecology Br., p. 35. Crown is requesting that the Modified 2014 Permit be remanded with direction that Ecology conduct the legally required technical evaluation to determine the practicable time period within which appropriate final limits can be achieved given previously permitted activities, current water quality conditions and the agreed-on Water Quality Protection Program.

**2. The Interim Limits are Unsupported by Substantial Evidence, are Arbitrary and Capricious, and are Contrary to Law**

As discussed in Crown's Opening Brief, not only was the 10-month compliance schedule arbitrary and capricious, the interim limits themselves also were flawed, and put Crown in immediate non-compliance with the new limits. Crown Br., pp. 35-38.

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<sup>11</sup> Ecology now suggests that Crown should not be entitled to a longer compliance schedule given that Crown "was still implementing water protection measures in 2014 and 2015" pursuant to the Settlement Agreement. Ecology Br., p. 39. However, that argument is directly contrary to Ecology's position in the Settlement Agreement that Crown's implementation of the Water Quality Protection Program "justif[ies] Ecology in placing a compliance schedule and interim limits in the new permit." Settlement Agreement, AR 1427. Ecology's attempt to flip that agreement on its head and now suggest that Crown should not have been given a reasonable compliance schedule to implement those water quality protection measures is unfounded.

It is undisputed that Ecology, in setting the interim limits in the Modified 2014 Permit, simply adopted the 2007 MWTP effluent limits as the interim limits at the new ground and surface water compliance points. Ecology Br., p. 30. Ecology, however, acknowledges that natural pre-mining background levels for some constituents, such as arsenic, manganese and total suspended solids exceeded the 2007 MWTP limits. Ecology asserts that it addressed those situations by: (i) selectively using the new final limits as the interim limits, and (ii) exempting arsenic, manganese and total suspended solids from the interim limits and final limits at certain locations. Ecology Br., pp. 31-32. However, those adjustments did not resolve this problem. First, as discussed above, the final limits were based on an inappropriate 95% confidence statistical calculation. *Supra* Section I.B.2. Thus, for those constituents for which Ecology used the final limit as the interim limit, Ecology essentially guaranteed numerous false exceedances every year. Additionally, while Ecology did modify the 2014 Permit during the PCHB appeal to change a couple of compliance locations for arsenic and manganese to monitoring-only locations, it did not address other locations where pre-mining background exceeded the interim limit. For example, Mr. Banton testified that natural levels of arsenic at MW-13 regularly exceed the interim limit of 0.01 mg/l. Banton Testimony, RP 545:20–546:21. However, the

Modified 2014 Permit still required Crown to meet that interim limit at MW-13. Modified 2014 Permit, AR 1120.

The interim limits, like the final limits, were also flawed because they were not based on an evaluation of the current ground and surface water quality conditions that resulted from authorized mine activities, such as construction fill and use of magnesium chloride for dust control. Crown Br., p. 36; Banton Testimony, RP 534:11–535:4; 550:18–551:7. As Ecology acknowledged in the Settlement Agreement, and as discussed above, the purpose of the interim limits was to provide a bridge between the 2007 Permit, which did not contain any surface or groundwater compliance limits, and the new, more stringent final limits during the period in which Crown was implementing the Water Quality Protection Program. Ecology Br., p. 30. *See also* Settlement Agreement, AR 1427, 1683. However, rather than undertaking an evaluation of what interim limits would provide a meaningful bridge, Ecology simply transposed the end-of-pipe MWTP limits to the new surface and ground water compliance locations, even though those limits were not achievable at certain locations upon issuance of the 2014 Permit. Consequently, Ecology failed in its legal responsibility to use best professional judgment in adopting the interim limits, and those limits are arbitrary and capricious. WAC 173-201A-510(4)(c).

Ecology argues incorrectly that the Clean Water Act (“CWA”) anti-backsliding provision prevented Ecology from adopting interim limits that were less strict than the 2007 MWTP limits. Ecology Br., p. 33. That *post hoc* argument presented by Ecology’s lawyers was never referenced by Ecology in the administrative record during the 2014 Permit renewal process as a reason for using the MWTP limits as interim limits, was not mentioned by the PCHB as grounds for its decision, and may not now be relied on as a justification for the interim limits. RCW 34.05.558 (judicial review is limited to agency record); *Aviation West Corp. v. Washington State Dep’t of Labor and Industries*, 138 Wash. 2d 413, 446, 980 P.2d 701, 718 (1999) (agency decision must be supported by rationale in the administrative record.)

Moreover, the CWA anti-backsliding provision is inapplicable here. That provision prevents an agency from renewing a permit issued under the CWA “to contain effluent limitations which are less stringent than the *comparable effluent limitations* in the previous permit.” 33 U.S.C. § 1342(o)(1) (emphasis added). *See also Communities for a Better Env’t v. State Water Res. Control Bd.*, 132 Cal. App. 4 1313, 1330-31, 34 Cal. Rptr. 3d 396, 407 (Cal. Ct. App. 2005) (holding that old final limits were not comparable to new interim limits and anti-backsliding did not apply). Thus, the CWA anti-backsliding provision would apply only if

Ecology was relaxing existing effluent limits, not setting new limits at new locations. The 2007 Permit effluent limits applied only to end-of-pipe discharges from the MWTP, whereas, for the first time, the Modified 2014 Permit also set numeric limits at new surface and ground water locations in the environment. *See* PCHB Order, AR 1466:18-19 (finding that the 2014 permit “is the first permit to impose numeric limits at those monitoring locations”). Crown is not asking that the 2007 MWTP limits be relaxed, but it is instead challenging Ecology’s new limits at the new ground and surface water compliance points. Those new compliance points are not subject to the CWA anti-backsliding requirement.<sup>12</sup>

Finally, Ecology argues that adopting interim limits that were higher than the 2007 MWTP effluent limits would remove any incentive for Crown to comply with State standards. *Ecology Br.*, p. 33. That is not

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<sup>12</sup> Additionally, the CWA anti-backsliding provision applies only to “effluent limits” included in a NPDES Permit, which govern discharges from a point source to “navigable waters.” 33 U.S.C. § 1342(o)(1). The State of Washington water quality statutes and regulations do not contain independent anti-backsliding provisions, and the CWA anti-backsliding provision does not apply to other types of water quality limits that Ecology may adopt pursuant to the State of Washington waste discharge program for groundwater and other waters that are not navigable waters. 33 U.S.C. § 1362(11) (defining “effluent limitation” as “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from a point source into navigable waters”). The new interim limits that Ecology applied to groundwater in the environment are not “effluent limitations” that govern discharges from point sources to navigable waters, and therefore are not subject to the CWA anti-backsliding provision. *See, e.g.*, 80 Fed. Reg. 37054, 37073 (June 29, 2015) (the responsible federal agencies have never interpreted groundwater to be navigable waters (or waters of the United States) under the CWA).

true. As explained in Crown’s Opening Brief, Ecology’s regulations expressly authorize Ecology to use interim limits and compliance schedules as a tool to give a permittee time to take actions (e.g., implementing storm water control measures or other best management practices) to come into compliance with new permit limits. Crown Br., p. 28; WAC 173-201A-510(4). Allowing interim limits does not disincentify a permittee from coming into compliance. At the end of the reasonable compliance period, the permittee must still meet the new final limits.

**D. Respondents Have Not Provided Grounds For Upholding Ecology’s New Capture Zone Delineation**

**1. The New Capture Zone Boundary in the Modified 2014 Permit is not Supported by Substantial Evidence and is Arbitrary and Capricious**

Crown challenges the capture zone requirements of the Modified 2014 Permit because Ecology’s undisputed basis for the capture zone boundary line is fundamentally flawed. Ecology relied on modeling performed for the sole purpose of evaluating and depicting the hydrologic area of influence of Crown’s deep groundwater pumping wells to define a regulatory capture zone (with the same shape and size) within which Crown was required not only to capture mine-impacted groundwater, but also surface and shallow subsurface runoff that never comes anywhere near the pumping wells.

Ecology admits that the capture zone boundary was based on the 2006 FSEIS modeling and the monthly interpreted capture zone maps prepared by Golder Associates. Ecology Br., p. 20. Ecology further acknowledges that the FSEIS modeled the “cone of depression *created by pumping dewatering wells and sumps at the site,*” meaning water captured and drawn down by these pumps. *Id.* at 22 (emphasis added). Ecology suggests that “Crown disputes this testimony,” but that is incorrect. *Id.* at 20. Crown concurs that this was the basis for Ecology’s delineation of the capture zone boundary in the Modified 2014 Permit, and that is precisely why Ecology’s new boundary line is not supported by substantial evidence and is arbitrary and capricious. Crown Br., pp. 39-43.

After admitting that the modeling it relied on was designed to delineate only the cone of depression created by the mine dewatering wells and sumps, Ecology argues that other language in the FSEIS somehow suggests that the modeled capture zone included all mine-contaminated water at the site, including waters that never reach the groundwater aquifer that is affected by the mine dewatering pumping. Ecology Br., p. 22. That erroneous suggestion is contradicted by the same FSEIS citations that Ecology references.

For instance, Ecology cites the FSEIS, Figure 3.7-10 (AR 3140). However, that Figure is captioned as the “Dewatered Mine Capture Zone,”

and the areas delineated on the Figure are referred to as the “Predicted *Dewatered Mine Capture Zone*” and the “Approximate Horizontal Extent of *Underground Mine Workings*.” (Emphasis added). Thus, rather than supporting Ecology’s expansive 2014 “regulatory” capture zone definition, the FSEIS clearly recognizes that the capture zone modeling in the FSEIS was limited to the deep groundwater that would be influenced by the mine dewatering wells.

Similarly, Ecology incorrectly states that the FSEIS “recognized that this capture zone” would include seepage from surface stockpiles “in the shallow vadose zone.” Ecology Br., p. 22. However, the cited portion of the FSEIS directly contradicts that statement. In discussing potential water quality impacts from the development rock and ore stockpiles, the FSEIS concluded that some seepage that “infiltrated into the groundwater” would be captured and treated, but that “[s]ome residual seepage may remain uncaptured within the vadose zone.” FSEIS, AR 3160, 3161. The FSEIS concluded that monitoring would be conducted to confirm that this uncaptured seepage does not cause significant impacts (i.e. exceedance of State water quality criteria) away from the mine site. *Id.*

Nowhere in the FSEIS is there any suggestion that the modelled cone of depression boundary for the mine dewatering wells would capture surface and shallow subsurface flow that does not reach the groundwater

pumping wells. While some seepage from the surface development rock and other stockpiles would infiltrate from the surface into the groundwater aquifer and be collected by the deep bedrock groundwater wells, the capture zone boundary created by the dewatering wells would never capture surface or shallow surface water flowing across the site that did not infiltrate to groundwater, and the FSEIS never assumed that it would. Banton Testimony, RP 732, 476-477, 563-564, 571, 754:13-24; Sterrett Testimony, RP 1038:20-1039:2.

While Ecology states that the new capture zone boundary in the Modified 2014 Permit was based on “Crown’s own analyses and reports,” Ecology omits to note that Crown’s expert from Golder, who prepared those same analyses, repeatedly confirmed that those analyses modeled only the zone within which the mine dewatering wells and sumps were capturing groundwater and not surface or shallow subsurface flow in the vadose zone. Crown Br., pp. 40, 42 (describing David Banton testimony).

Ecology claims that the PCHB “rejected” Crown’s position regarding the basis of the capture zone modeling, including the testimony from Crown’s experts, implying that the PCHB analyzed, considered and weighed Crown’s evidence as part of its decision. Ecology Br., p. 20. To the contrary, the PCHB arbitrarily ignored this evidence, failed to address the undisputed basis for the capture zone modeling (i.e., cone of

depression around the deep mine dewatering wells), and did not account for this evidence in its evaluation of whether the capture zone requirements in the Modified 2014 Permit are arbitrary, capricious and lack substantial evidentiary support in the record.

For example, the PCHB found that the groundwater pumping wells only “capture water that moves vertically,” and “do not directly impact water in the vadose zone.” AR 1463. However, the PCHB failed to explain, given these factual findings, how Ecology’s decision to require Crown to capture *all* water, even water that runs horizontally across the site and is never captured by the groundwater pumping wells, within a boundary line created from modeling only the area of influence of these same pumping wells is supported by substantial evidence in the record. Here, as with the numeric limits discussed above, the undisputed factual findings of the PCHB on the Modified 2014 Permit’s capture zone requirements simply do not support its decision to uphold these requirements. The result of Ecology’s misapplication of the FSEIS and Golder modeling, and PCHB’s failure to require Ecology to re-evaluate the capture zone requirements considering the area within which surface and shallow subsurface water could reasonably be contained, is yet another permit term that is not technically or practically feasible. *See* Crown Br., p. 42.

Ecology faults Crown for not conducting additional modeling to demonstrate how surface and shallow subsurface water travels at the Mine site. Ecology Br., p. 26. However, there has never been a permit requirement (past or present) requiring Crown to develop and run its own model of all water pathways at the site. Ecology previously required only that Crown model the cone of depression created by the deep groundwater wells at the Mine, and provide Ecology with monthly interpreted capture zone maps based on this limited modeling, which is exactly what Golder did. Banton Testimony, RP 507-508. Additionally, it is Ecology's regulatory obligation to support its permitting decisions with substantial evidence. *Overlake Fund*, 90 Wash. App. at 763-64; 954 P.2d at 313. In this proceeding, Crown must only demonstrate how Ecology failed to do so, which Crown has done. By not evaluating the actual scope and extent of the capture zone area required to capture all mine-impacted water before imposing a new capture zone boundary line in the Modified 2014 Permit, and instead relying solely on past modeling done for a very different and much-more limited purpose, Ecology failed to support its decision with substantial evidence, and the new capture zone boundary is arbitrary and capricious.

**2. Ecology Acknowledges that the Modified 2014 Permit Capture Zone Boundary Excludes Permitted Facilities and Mine Workings**

Ecology summarily dismisses Crown's argument that the capture zone boundary in the Modified 2014 Permit is arbitrary because it excludes permitted surface features and underground mine workings, by stating that "the boundary should be interpreted to include these features." Ecology Br., p. 29 n.7. However, as explained in Crown's Opening Brief, the fact that Ecology issued a permit that on its face puts Crown out of compliance for Mine features that Ecology agrees should not constitute a violation is, by definition, arbitrary and capricious. Crown Br., p. 43. If Ecology has no intention of bringing an enforcement action against Crown for these facial permit violations, it should revise the capture zone boundary map to include these permitted surface features and Mine workings. Leaving the permit terms as is puts Crown at risk of not only future action by Ecology, but a potential third-party citizen suit.

For the above reasons, and as further described in Crown's Opening Brief, the capture zone boundary in the Modified 2014 Permit is arbitrary, capricious and not supported by substantial evidence.

**E. The PCHB And Superior Court Rulings Regarding The Effective Date Of The Modified 2014 Permit Are Contrary To Law And Ecology's New Argument Is Incorrect**

Crown's position regarding the effective date of the Modified 2014 Permit is detailed in its Opening Brief, and relies on the plain language of the Washington APA, RCW 34.05.422(3). Crown Br., pp. 45-48. Ecology's argument in response does not change the fact that the language of RCW 34.05.422(3) is straightforward and provides that the *license* being renewed, in this case the 2007 Permit, remained in effect until thirty (30) days after the PCHB's final ruling on July 30, 2015. *Id.*

Ecology argues for the first time in this appeal that the Ecology decision Crown is appealing was not a "license" renewal, but an "order," and is therefore governed by the PCHB's process for staying agency orders. Ecology Br., pp. 45-48. While it is true that a party wishing to stay the effective date of a challenged agency order must request a stay from the PCHB, this case involves a challenge to a license renewal, as defined by the APA.

Ecology acknowledges that the procedures set forth in the APA govern PCHB appeals, unless they conflict with the PCHB's rules. Ecology Br., p. 49; WAC 371-08-300. Ecology cites the APA's definition of an "order" as "a written statement...that finally determines [a party's] legal rights." RCW 34.05.010(11)(a). Ecology fails to mention, though,

that the same APA provision more specifically defines a “license” to include a “permit.” RCW 34.05.010(9)(a). Under the APA, the Modified 2014 Permit thus is considered a license, not an order. The APA further provides that, with respect to a renewed “license” that has been limited in any way, which is undeniably the case here, the original license remains in place until the final day for seeking court review of that modified license. RCW 34.05.422(3).

Although RCW 43.21B.310 addresses what a party must do to secure a stay if it challenges an agency “order” before the PCHB, it is not in conflict with and does not change in any way the APA’s automatic stay provision for agency license renewal decisions. Chapter 43.21B of the Washington Revised Code and the PCHB regulations repeatedly distinguish between agency “orders” on the one hand, and permits and licenses on the other hand. *See, e.g.*, RCW 43.21B.110 and WAC 371-08-315(2)(b) & (c) (giving PCHB jurisdiction to hear appeals from various types of “orders” and to hear challenges to various “permit” or “license” decisions); 43.21B.230 (requiring that the appeal include a copy of the challenged “order, permit, license, or decision”). However, the stay provision relied on by Ecology at RCW 43.21B.310 applies only to agency orders, and does not address license renewal decisions, which are specifically addressed in RCW 34.05.422(3). The PCHB has

previously recognized that the provisions in RCW 34.05.322(3) addressing licenses are relevant in permit appeal proceedings before the PCHB. *See, e.g., Okanogan Highlands Alliance v. Dep't of Ecology*, PCHB No. 04-064, 2005 WL 878023 (Apr. 12, 2005); *Ellensburg Water Co. v. Dep't of Ecology*, PCHB No. 86-153, 1990 WL 151750 (Feb. 2, 1990)

Pursuant to RCW 34.05.422(3), the 2007 Permit remained in effect until thirty (30) days following the PCHB's issuance of its July 20, 2015 Order, and Crown did not need to request a stay from the PCHB of either the 2014 Permit or the Modified 2014 Permit. Accordingly, Crown asks this court to overturn the PCHB's and Ferry County Superior Court's contrary conclusion of law regarding the effect of RCW 34.05.422(3).

## II. CONCLUSION

For the reasons stated in Crown's Opening Brief and this Reply, Crown respectfully requests this court to reverse the Final Order of the Ferry County Superior Court, and remand the Modified 2014 Permit to Ecology with directions to develop new final limits, a new compliance schedule, new interim limits, and a new definition and delineation of the capture zone. Crown further requests that this court reverse the Ferry County Superior Court's holding affirming the PCHB's Conclusion of Law No. 6.

Respectfully submitted this 8<sup>th</sup> day of December 2017.

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CERTIFICATE OF SERVICE

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