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Court of Appeals
Division III
State of Washington

No. 35199-8

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

CROWN RESOURCES CORPORATION,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY

Respondent,

and

OKANOGAN HIGHLANDS ALLIANCE,

Intervenor-Respondent.

**RESPONSE BRIEF OF INTERVENOR-RESPONDENT
OKANOGAN HIGHLANDS ALLIANCE**

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I. INTRODUCTION

Intervenor-Respondent Okanogan Highlands Alliance (OHA) submits this response brief in opposition to Appellant Crown Resources Corporation's Opening Brief (Opening Brief). OHA hereby adopts and incorporates by reference the response brief filed in this case by Respondent Washington State Department of Ecology (Ecology). For the sake of brevity this brief will supplement, but not repeat, Ecology's points and arguments.¹

This case is an appeal by Crown Resources Corporation (Crown) of a Pollution Control Hearings Board decision upholding a National Pollutant Discharge Elimination System (NPDES) permit that Ecology issued to Crown in 2014 pursuant to the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA or Act), and the state Water Pollution Control Act, RCW 90.48. The 2014 permit authorizes discharges of pollutants to waters of the state from the Buckhorn

¹ Throughout this brief, citations to the Clerk's Papers are abbreviated "CP at [page number]." Citations to the administrative record compiled before the Pollution Control Hearings Board are abbreviated "AR at [bates-stamp number]." Citations to the Pollution Control Hearings Board ruling that is the subject of this appeal are abbreviated "FFCL at [PCHB opinion page number] [bates-stamp number]." One note about the administrative record: throughout its July 30, 2015 Findings of Fact, Conclusions of Law, and Order, the Board referred to the modified 2014 permit and related documents as "Ex. R-44." The Index to the Certified Record does not list an Exhibit R-44, but those documents, which the Board accepted into the record after the hearing, are in the administrative record at AR 1103-1354.

Mountain Mine (the mine) in north-central Washington State. Before issuing the permit, Ecology created a technical team that met twenty-one times so that Crown and OHA could participate in the development of the permit. After Crown appealed the permit, the Pollution Control Hearings Board (Board) held a seven-day, trial-like hearing; deliberated for nearly six months; and then issued a forty-six page decision evaluating the evidence presented, denying Crown's appeal, and upholding the permit. *See* AR 1442-1487 (July 30, 2015 Findings of Fact, Conclusions of Law, and Order in *Crown Resources Corp. v. State of Washington, Department of Ecology*, PCHB No. 14-018).

Crown then appealed to the Ferry County Superior Court, which reviewed the parties' extensive briefing and the administrative record, and heard at least two hours of argument by the parties, before affirming the Board's ruling in all respects. CP 1426-1428, 1432.

The question presented by this third appeal is whether substantial evidence supports the Board's findings of fact. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568 587-589 (2004). In general, Crown does not challenge the Board's legal conclusions regarding the validity of the permit; instead, it argues the Board improperly weighed or ignored Crown's evidence in making its findings of fact. OHA respectfully submits that this Court must deny Crown's appeal. Crown argues to the wrong

standard of review when it contends the evidence supporting its position requires reversal of the Board's decision. Crown must instead demonstrate that the Board's findings do not have a basis in the record. Because substantial evidence supports the Board's findings, this Court must deny Crown's appeal.

The one legal argument Crown does make is meritless. Crown claims Ecology erred by failing to conduct an analysis of “all known, available, and reasonable methods of prevention, control, and treatment”—referred to as AKART—before establishing the final effluent limitations in the permit, which according to Crown resulted in permit limits that are not practically and reasonably achievable. *See* Opening Brief at 15-16. That argument fails, however, because Crown waived it by failing to argue it below. Moreover, none of the legal authorities Crown cites establishes that effluent limitations must be “practicably and reasonably achievable,” as Crown claims. To the contrary, Ecology must establish effluent limitations that protect water quality and if a permittee cannot meet those limitations they may not discharge to waters of the state. *Puget Soundkeeper Alliance v. Pollution Control Hearings Bd.*, 189 Wn. App. 127, 137-138 (2015) (Div. II) (“Agencies issuing NPDES permits must impose limits on discharges as necessary to implement water quality standards set by state or federal statutes and regulations, regardless of technical practicability.”); *see also*

WAC 173-201A-010 (“The purpose of this chapter is to establish water quality standards for surface waters of the state of Washington.... All actions must comply with this chapter.”).

II. RESTATEMENT OF THE CASE

A. Consistent with State Policy, Washington Adopted Strict Water Quality Standards, Including an Anti-Degradation Policy, to Protect Groundwater and Surface Waters of The State from All Sources of Water Pollution.

In 1972, Congress adopted the federal CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The Act declared a national goal of eliminating discharges of pollutants to navigable waters by 1985. 33 U.S.C. § 1251(a)(1). It also established an “interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife[.]” 33 U.S.C. § 1251(a)(2).

To help accomplish those goals, the CWA requires states to develop water quality standards that establish the desired conditions of each waterway within the state’s regulatory jurisdiction. 33 U.S.C. § 1313(a); 40 C.F.R. § 131.2. Water quality standards must be sufficient to “protect the public health or welfare, enhance the quality of water, and serve the purposes of [the CWA].” 33 U.S.C. § 1313(c)(2)(A). Upon review and

approval by EPA, state water quality standards become a component of a state's regulatory program.

Washington has developed water quality standards for both groundwater and surface waters of the state. *See* Wash. Admin. Code Chapters 173-200 and 173-201A. The goal of Washington's groundwater standards "...is to maintain the highest quality of the state's groundwaters and protect existing and future beneficial uses of the groundwater through the reduction or elimination of the discharge of contaminants to the state's groundwaters." WAC 173-200-010(4). Washington's groundwater standards are intended to "...provide for the protection of the environment and human health and protection of existing and future beneficial uses of groundwaters." WAC 173-200-010(5).

Washington also established "...water quality standards for surface waters of the state of Washington consistent with public health and public enjoyment of the waters and the propagation and protection of fish, shellfish, and wildlife, pursuant to the provisions of chapter 90.48 RCW."

WAC 173-201A-010. In Washington:

- (a) All surface waters are protected by numeric and narrative criteria, designated uses, and an antidegradation policy.
- (b) Based on the use designations, numeric and narrative criteria are assigned to a water body to protect the existing and designated uses.

- (c) Where multiple criteria for the same water quality parameter are assigned to a water body to protect different uses, the most stringent criteria for each parameter is to be applied.

Id. Washington's standards describe the designated water uses and water quality criteria for all surface waters throughout the state of Washington. WAC 173-201A-200 through -260; WAC 173-201A-600 through -612.

As part of its water quality standards, Washington also adopted an anti-degradation policy to protect waters of the state by limiting water quality impacts from human activities as much as possible. *See* WAC 173-201A-300 through -330; WAC 173-200-030. Under Washington's anti-degradation policy, where background water quality is better than the numeric standards listed in Ecology's regulations, the background water quality becomes the applicable water quality standard. *See* WAC 173-201A-320(1) (stating that, where water quality exceeds criteria, no measurable change may be allowed without a specific finding that lowering water quality is necessary and in the overriding public interest); WAC 173-200-030(2)(c).

Washington's water quality standards reflect the state's very strong policy in favor of protecting clean water. Washington law states:

It is ... the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of

wild life, ... and the industrial development of the state and to ... require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington.

RCW 90.48.010. Washington's water quality standards are complex and technical, but Washington state law is clear:

Existing and designated uses must be maintained and protected. No degradation may be allowed that would interfere with, or become injurious to, existing or designated uses, except as provided for in this chapter.

WAC 173-201A-310.

B. Ecology Issues NPDES Permits That Implement Water Quality Standards and Washington's Anti-Degradation Policy to Protect Waters of the State.

To help ensure water quality standards actually result in better water quality, the CWA prohibits the "discharge of any pollutant by any person" unless in compliance with an NPDES permit. 33 U.S.C. § 1311(a). Section 402(a) of the Act then empowers EPA to issue NPDES permits authorizing discharges of pollutants under certain terms and conditions. 33 U.S.C. §1342(a); *and see generally* 40 C.F.R. Part 122, Subpart C. In general, NPDES permits must implement state water quality standards and a state's anti-degradation policy by incorporating them into effluent limitations and other permit conditions that limit the amount of pollution discharged. *Puget Soundkeeper Alliance v. Pollution Control Hearings Bd.*, 189 Wn. App. 127, 137-138 (2015) (Div. II) ("Agencies issuing NPDES permits must

impose limits on discharges as necessary to implement water quality standards set by state or federal statutes and regulations, regardless of technical practicability.”) (citations omitted); WAC 173-220-130(2)-(3); WAC 173-201A-010 (“The purpose of this chapter is to establish water quality standards for surface waters of the state of Washington.... All actions must comply with this chapter.”). For facilities in Washington State, EPA delegated administration of the NPDES permit program to Ecology. *See* Wash. Admin. Code Chapter 173-220.

Ecology has extensive experience and technical expertise that it applies in formulating water quality standards, including the anti-degradation policy, and in developing NPDES permits to implement those standards to protect water quality. *See* Wash. Admin. Code Chapters 173-200, 173-201A, & 173-220. State law authorizes permit-holders and other interested persons to appeal Ecology’s issuance of an NPDES permit to Washington’s Pollution Control Hearings Board pursuant to RCW 43.21B. WAC 173-220-225. Like Ecology, the members of the Board are “qualified by experience or training in pertinent matters pertaining to the environment,” RCW 43.21B.020, and given the Board’s specialized docket handling appeals of Ecology actions, *see* WAC 371-08-540, the Board has extensive expertise related to water quality standards and NPDES permits. For these reasons, Washington courts “...defer to Ecology on technical and

scientific issues.” *Clark County v. Rosemere Neighborhood Ass’n*, 170 Wn. App. 859, 876 (2012) (Div. II) (citing *Port of Seattle*, 151 Wn.2d at 595). “[S]ubstantial judicial deference to agency views [is] appropriate when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency’s expertise.” *Spokane County v. Sierra Club*, 2016 Wash. App. LEXIS 1941, *30 (February 23, 2016) (Div. II) (quoting *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 383 (1997)).

C. The Mine Is Closed So The Permit Limits Will Not Prevent Mining at the Site.

The mine at issue in this case—the Buckhorn Mine—is a very new mine that was just about to close at the time of the hearing before the Board, *see* FFCL at 3 (AR 1444), and that has since ceased active mining operations. As explained by the Board, Crown discovered the gold deposit at Buckhorn Mountain in 1988; it proposed an open-pit mine in the 1990s, which never came to fruition; and it started mining the current underground mine in 2008. *Id.* at 2-3 (AR 1443-1444). Crown expected to finish extracting ore in 2016 and begin reclamation of the mine in 2017. *Id.* at 3 (AR 1444). The expectation is that the 2014 permit will ensure the mine does not leave a legacy of water pollution after it closes and Crown moves

on to other endeavors. *Id.* at 10, 12-13, 45-46 (AR 1451, 1453-1454, 1486-1487).

D. Okanogan Highlands Alliance Has Worked for Nearly Twenty-Five Years to Prevent Water Pollution from Mining at Buckhorn Mountain.

OHA is a public interest, not-for-profit organization with members who live directly downstream from the Buckhorn Mine and who use water from groundwater near the mine for living, farming and aesthetic enjoyment. *See* AR 358-361 (Kliegman Declaration). OHA is participating in this case because it has a formal oversight role resulting from decades of participation in the public processes related to the mine. *Id.* OHA formed in 1992 in response to the original proposal to create a large-scale, open-pit, cyanide-leach gold mine near the summit of Buckhorn Mountain and mine 450 feet into the aquifer that feeds five local creeks. AR 358 (Kliegman Dec. ¶ 2). In an effort to protect water quality in the area, OHA appealed the 1992 open-pit mine proposal, which proposal Crown's business partners later abandoned after the Board ruled against it on water quality-related issues. AR 359 (Kliegman Dec. ¶ 4).

OHA also participated in the formal public processes around permitting of the current underground mine on Buckhorn Mountain. AR 359 (Kliegman Dec. ¶ 5). As it did in the 1990's, OHA appealed that proposal to protect water quality in the area. AR 359 (Kliegman Dec. ¶¶ 5-

6). In April 2008, OHA settled that appeal with an agreement that the mine would proceed but would also provide funding for OHA to use to monitor the environmental impacts of the mine and to implement mitigation projects in the Okanogan Highlands, among other things. AR 359 (Kliegman Dec. ¶ 6). Since 2008, and as part of that formal oversight work, OHA has analyzed monitoring data, memoranda, reports, and on-the-ground conditions at the mine; regularly participated in meetings with Crown and Ecology and annual meetings with the mining company regarding operations at the mine; analyzed the mine's impacts on water quality; and made recommendations for improvements. AR 359-360 (Kliegman Dec. ¶¶ 7-8). Also as part of that work, OHA reviewed and commented on the 2014 NPDES permit at issue here, which OHA believes will increase the mine's compliance with water quality standards and the mitigation measures in the Final Supplemental Environmental Impact Statement for the project. AR 360-361 (Kliegman Dec. ¶¶ 8-9).

E. All Parties Reasonably Expected the 2014 NPDES Permit to Ensure Compliance with State Water Quality Standards, Including Washington's Anti-Degradation Policy.

Crown has known since the 1990's that NPDES permits for the mine would require it to monitor water quality and manage discharges of pollutants to ensure compliance with water quality standards after it ceased mining. FFCL at 3-4, 7-10 (AR 1444-1445, 1448-1451). Environmental

review during mine development determined there was a risk the mine would pollute local waters and impair water quality. *Id.* at 3-8 (AR 1444-1449). However, according to the Final Supplemental Environmental Impact Statement (Final SEIS) prepared for the mine, "...these potential impacts are considered avoidable with the proposed and recommended mitigation measures." *Id.* at 4 (AR 1445).

The FSEIS identified several mitigation measures to address the mine's potential impacts to water quality, most notably the following:

A Final Water Quality Monitoring Plan will be developed for all phases of mining **as part of the water quality discharge permit process, as regulated under NPDES.** The plan will include groundwater and surface water monitoring requirements during operations, reclamation and post-closure designed to detect potential water quality impacts. The plan should outline an adequate monitoring system and ensure that groundwater and surface water sampling methods provide representative samples. The plan will address monitoring needed to confirm that all of the mine workings, including the easternmost part of the Southwest Zone, are within the capture zone for the mine dewatering system.

* * *

The proposed Water Quality Monitoring Plan will be designed to detect water quality impacts related to the Proposed Action Alternative. 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.

* * *

An adaptive management plan will be established that specifies testing, monitoring, and mitigation measures that will address concerns for geochemical impacts to water quality and changes in water quantity as the mine is developed. * * * .

Id. at 7 (AR 1448) (emphasis added). As the Board recognized, the Final SEIS expected the Mine Water Treatment Plant to “continue to operate **until water quality standards are met** and water quality monitoring will continue **until conditions have stabilized below permit limits or water quality criteria.**” *Id.* at 8 (emphasis added).

The 2007 NPDES permit for the mine, as well as a subsequent settlement agreement between Ecology and Crown, make it clear that Crown would be obligated to meet strict limits in its upcoming permit to protect water quality. Creating and maintaining a capture zone through adaptive management was a fundamental basis for permitting the Buckhorn Mine in 2007. *See* AR 2027 (Condition S1.D. of the 2007 permit); AR 2055 (Condition S14. of the 2007 permit) (“The Permittee must implement necessary actions identified in the Adaptive Management Plan for Water Quality.”); AR 5986-6145 (adaptive management plan). Indeed, the adaptive management plan for the mine requires Crown to take action to protect water quality if the capture zone is not effective as indicated by monthly water quality data from monitoring wells, springs and seeps, or surface water that exceeds background values:

The analysis used will involve a combination of hydrological assessment and geochemistry that will include: **Comparison of the surface water quality results to pre-mining statistical background values** (Golder, 2006b, and Ecology 2006) and/or water quality criteria. Changes in water quality in stations downgradient of the mine may indicate that the water treatment plant is not operating effectively, or that the hydraulic containment system provided by the mine (capture zone) is not fully effective in containing mine water. **Adaptive management involve modification of the water treatment plant or changes in the mine dewatering system.**

AR 6093 (numbered “Golder 006705” in bottom right corner) (emphasis added). Crown’s 2013 settlement agreement with Ecology confirms the parties’ expectations that the new permit would “... include more stringent effluent limits, capture zone standards and discharge requirements, and that these new standards, **particularly background based groundwater standards**, have the potential to put Crown into immediate noncompliance when the new permit is issued.” AR 1428 lines 1-4.

To replace the expiring 2007 NPDES permit, Ecology established a technical team that included Crown and OHA and that met approximately 21 times to develop the terms of the new permit. *Id.* at 12-13 (AR 1453-1454). The public process allowed both Crown and OHA to comment extensively on the proposed new permit for the mine. AR 2114-2168, 2185-2613. Following that process, Ecology issued a permit that increases the likelihood that, once closed, the mine will not leave a legacy of ongoing

water pollution. AR 1103-1354, 1495-1609; FFCL at 45-46 (AR 1486-1487).

F. Both The Board And The Ferry County Superior Court Did A Thorough Job, Gave Crown Full and Fair Opportunities to Present Its Case, and Concluded Crown Did Not Carry Its Burden of Proof.

Crown appealed the permit to the Board, which held a seven-day hearing on the validity of the permit; heard live testimony from expert and other witnesses; and admitted over eighty exhibits into evidence. AR 1442-1487; CP 1318-1325 (Index to the Certified Record). Following the hearing, Ecology modified the 2014 permit to address some of Crown's concerns and the parties then asked the Board to take official notice of Ecology's post-hearing modification to the 2014 permit. *See* AR 1103-1354; FFCL at 13-14 (AR 1454-1455). The Board deliberated for six months after the hearing before issuing a forty-six page opinion that discussed the evidence supporting each of the Board's factual findings and concluded that Crown had failed to meet its burden of proof. AR 1442-1487. Specifically, the Board concluded:

Crown has the burden of proving the invalidity of any challenged condition in the Modified 2014 Permit. WAC 371-08-485(3); WAC 371-08-540(2). The Board concludes that Crown failed to carry its burden to establish the invalidity of the Modified 2014 Permit's conditions regarding: outfall capacity, compliance schedule, interim discharge limits, final discharge limits, definition of the capture zone, and the Haul Road. As discussed in the Findings of Fact above, the record presented to the

Board contains substantial evidence supporting those conditions as they are set forth in the Modified 2014 Permit. The Final SEIS determined that potential detrimental impacts from the Mine operation to water quality were avoidable through implementation of the identified mitigation measures. EX. A-23 at S-7. The Modified 2014 Permit constitutes a mechanism for requiring Crown to ensure that the long term impact of the Mine are consistent with the impacts predicted in the Final SEIS. The conditions in the Modified 2014 Permit requiring the capture and treatment of all Mine-contaminated waters are reasonable provisions that attempt to make certain that the Mine does not leave a legacy of water pollution. The Modified 2014 Permit provides Crown with sufficient flexibility to conduct mining operations consistent with the requirements of state and federal law to protect water quality.

FFCL at 45-46 (AR 1486-1487) (emphasis added).

The Ferry County Superior Court came to the same conclusion. The court considered extensive briefing by the parties, the administrative record compiled before the Board, and extensive oral argument before affirming the Board's decision. CP 1426-1428; CP 1492-1495. After summarizing the evidence supporting the Board's decision, the court in its oral ruling specifically stated: "These are all pieces of evidence and the Board is entitled to give some deference to the agency and its expertise, but taken together they do represent substantial evidence to support the Board's findings." CP 1494. The court continued: "I find that the findings and conclusions made by the Board, albeit a six month's delay in getting them

issued, were the result of a careful, thoughtful, and deliberative process.”

CP 1495. Accordingly, the court ruled:

The Court concludes that the PCHB did not erroneously interpret or apply the law in issuing its Order and that the PCHB’s findings in support of the permit conditions challenged by Crown are supported by substantial evidence in the administrative record.

CP 1428. Based on that ruling, the court denied Crown’s petition for review and affirmed the Board’s Findings of Fact and Conclusions of Law. *Id.*

III. ARGUMENT

A. The Board’s Findings of Fact Are Supported by Substantial Evidence.

This Court should affirm the Board’s ruling because the Board’s findings of fact are thorough and based on substantial evidence in the record. Washington courts “...defer to the Board’s factual findings and will overturn them only if they are clearly erroneous.” *Clark County*, 170 Wn. App. at 871-872 (citing *Port of Seattle*, 151 Wn.2d at 588, 594). Courts “will not overturn an agency decision even where the opposing party reasonably disputes the evidence with evidence of ‘equal dignity.’” *Id.* (citations omitted). Where both Ecology and the Board agree on a question, a reviewing court should be “loath to override the judgment of both agencies, whose combined expertise merits substantial deference.” *Port of Seattle*, 151 Wn.2d at 600.

Here, to support its findings upholding the capture zone definition and boundary map in the 2014 permit, the Board relied on the 2007 NPDES permit for the mine (Exhibit A-4) (AR 2019-2064); a draft of the 2014 permit (Exhibit A-3) (AR 1934-2018); an extensive and detailed recommendation for enforcement by Ecology (Exhibit R-22) (AR 9349-9385); the testimony of Ecology witness Mr. Sanjay Barik; the modified 2014 permit (Exhibit R-44) (starting at AR 1103); the fact sheet for the 2014 permit (Exhibit A-2) (AR 1610-1933); capture zone maps from 2009 and 2010 (Exhibit R-7) (AR 8576-8590); capture zone maps from 2011 (Exhibit R-12) (AR 8658-8670); capture zone maps from 2012 (Exhibit R-16) (AR 9326-9344); capture zone maps from 2013 (Exhibit R-24) (AR 9388-9412); a comparison of capture zone boundaries (Exhibit A-80) (AR 6865-6866); and the 2014 permit (Exhibit A-1) (AR 1495-1609). *See* FFCL at 19-24 (AR 1460-1465).

Additionally, to support its findings upholding the interim effluent limitations, the compliance schedule, and the final effluent limitations in the 2014 permit, the Board relied on the 2007 NPDES permit for the mine (Exhibit A-4) (AR 2019-2064); the fact sheet for the 2007 permit (Exhibit A-5) (AR 2065-2113); an extensive and detailed recommendation for enforcement by Ecology (Exhibit R-22) (AR 9349-9385); the testimony of Ecology witness Mr. Sanjay Barik; the modified 2014 permit (Exhibit R-

44) (starting at AR 1103); Crown's October 2013 comments on the draft permit for the mine (Exhibits A-6 & A-7) (AR 2114-2168); the fact sheet for the 2014 permit (Exhibit A-2) (AR 1610-1933); a settlement agreement between Crown and Ecology (Exhibit A-8) (AR 2169-2184); the testimony of OHA witness Stephen Swope; October 2013 comments on the draft permit for the mine by OHA witness Dr. Ann Maest (Exhibit A-11) (AR 2405-2426); October 2013 comments on the draft permit for the mine by OHA consultants Stephen Swope and Jeffrey Parker of Pacific Groundwater Group (Exhibits A-13 & A-14) (AR 2450-2613); the fact sheet for the modified 2014 permit (Exhibit R-44) (starting at AR 1103); the testimony of Crown witness Ms. Gina Myers; Ecology's Implementation Guidance for the Ground Water Quality Standards (Exhibit A-20) (AR 2726-2867); a March 2009 report by the U.S. Environmental Protection Agency (Exhibit A-51) (AR 4951-5838); the testimony of Crown witness Mr. Owen Reese; and a document showing sulfate concentrations at MW-14 (Exhibit A-112) (AR 8276-8277). *See* FFCL at 25-38 (AR 1466-1479).

This evidence is substantial and more than sufficient for this Court to affirm the Board's decision. *See, e.g.*, CP 1492-1495. Accordingly, OHA respectfully submits this Court should be "loath to override the judgment of

both agencies, whose combined expertise merits substantial deference.”

Port of Seattle, 151 Wn.2d at 600.

B. Crown Fails to Meet Its Burden of Proof And This Court Should Reject Crown’s Attempts to Re-Try Its Case on Appeal.

Crown fails meet its burden on appeal to this Court because it fails to explain how the findings it is challenging are not based on substantial evidence. First, Crown failed to identify the specific findings it is challenging on appeal. *See* Opening Brief at 3. In order for this Court to review the Board’s decision, Crown must specifically assign error to the Board’s findings or they become verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644 (1994); *Brown v. Dep’t of Health*, 94 Wn. App. 7, 13 (1999). Crown’s failure to assign error to specific Board findings is sufficient reason to deny Crown’s petition for review.

Second, Crown fails to explain how the evidence the Board relied upon was not probative of the findings it made, as required; instead, Crown attempts to re-try the case it made to the Board. For example, Crown challenges the final limits in the permit not by explaining how the Board erred but by reciting at length the testimony it presented to the Board. Opening Brief at 15-27. Similarly, in its discussion of the compliance schedule and interim limits in the permit, Crown focuses almost exclusively on the evidence it presented to the Board and makes no serious attempt to

attack the evidence the Board relied upon. *Id.* at 27-38. The same is true for Crown's discussion of the capture zone. *Id.* at 38-45. On all these issues, Crown makes little or no attempt to explain why the evidence the Board relied upon is not substantial or does not support the findings made; instead, Crown recites the evidence it presented without providing any meaningful discussion of the evidence the Board actually relied upon. That is not enough, however; courts "will not overturn an agency decision even where the opposing party reasonably disputes the evidence with evidence of 'equal dignity.'" *Clark County*, 170 Wn. App. at 871-872. Here, as described above, the Board considered Crown's evidence, did not find it persuasive, and relied instead on extensive evidence in the record to support its findings of fact.

Crown also complains that the Board found Mr. Barik's or Mr. Swope's testimony more credible than Crown's experts. *See, e.g.*, Opening Brief at 11, at 11 n.4, and at 41. But as the trier-of-fact, the Board was charged with deciding which testimony it found persuasive, and in this case the Board weighed the testimony and found Ecology's and OHA's witnesses to be more persuasive. *See, e.g.*, FFCL 36-378 (AR 1477-1479) (discussing Reese and Barik testimony and concluding "[t]he record contains ample evidence supporting the final limits in the Modified 2014 Permit."). This Court should not disturb such findings on appeal. *Port of*

Seattle, 151 Wn.2d at 588 (“We do not weigh the credibility of witnesses or substitute our judgment for the PCHB’s with regard to findings of fact.”); *Clark County*, 170 Wn. App. at 877 (refusing to disturb the Board’s credibility findings because “[t]he Board’s power to conduct a *de novo* review allowed it to weigh the evidence and decide which experts were more credible.”); *Cnty. Ass’n for Restoration of the Env’t v. Dep’t of Ecology*, 149 Wn. App. 830 (2009) (Div. II) (“We do not review the fact finder’s credibility determinations.”).

C. Crown’s Contention That The Permit’s Final Limits Violate The Law Is Wrong.

Finally, Crown is simply wrong when it claims Ecology erred by failing to conduct an AKART analysis before establishing the final permit limits. *See* Opening Brief at 15-23. According to Crown, “Ecology’s complete failure to evaluate what final limits would be practicably and reasonably achievable given background conditions and previously permitted activities violates Ecology’s regulations and Guidance....” *Id.* at 22; *see also id.* at 15-23. Crown’s argument fails for a number of reasons.

First, Crown waived its AKART argument by failing to argue it below. RAP 5.2; RCW 34.05.554; *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 597-598 (2000) (“RCW 34.05.554 precludes appellate review of issues not raised below.”); *King County v. Wash. State*

Boundary Review Bd., 122 Wn.2d 648, 670, 860 P.2d 1024 (1993); CP 1406-1409.

Second, none of the legal authorities that Crown cites establishes that effluent limitations must be “practicably and reasonably achievable.” Crown is correct that Ecology must consider the State’s antidegradation policy and set limits “as near the natural groundwater quality *as practical*.” Opening Brief at 15 (citing WAC 173-200-050(3)(a)(i), (ii) (emphasis in Opening Brief)). But the “as practical” phrase does not mean Ecology must set limits that are practically achievable, as Crown suggests in the next sentence in its brief. *See* Opening Brief at 15 (“In determining what limits are practical to achieve...”). Rather, that phrase means Ecology must set the limits as close to the natural groundwater quality as it can.

Crown’s other citations to the administrative record are also incorrect. Crown cites AR 2747 to support its claim that Ecology must set limits that protect water quality “to the extent practical.” But AR 2747 includes no such language and does not mean that Ecology can only set limits that are “practicably and reasonably achievable.” Nor do AR 2793 or AR 2795 include any language stating that Ecology must set final effluent limitations based on what can be “practically and reasonably achieved,” as Crown claims. *See* Opening Brief at 17, 18-19 (citing AR 2793, 2795).

In fact, the portions of Ecology’s guidance that Crown cites support Ecology’s position in this case. AR 2795 supports Ecology’s contention that AKART is the minimum basis for an effluent limitation and that final permit limits may be based on other factors. It states: “Enforcement limits will be established on a case-by-case basis considering the application of AKART **and** the conditions specified in WAC 173-200-050(3)(a).” AR 2795. That portion of the record also rebuts Crown’s contention that Ecology somehow erred if it did not conduct an AKART analysis when establishing the final limits. Opening Brief at 20. Even if AKART were required, it is the permittee, not Ecology, that must complete the AKART study. AR 2795.

Crown’s citations to Ecology’s regulations and guidance documents do not withstand scrutiny—those authorities do not say what Crown says they say. Nor do those few citations alter the legal requirements that obligate Ecology to include final permit limits that will protect water quality. *See Puget Soundkeeper Alliance v. Pollution Control Hearings Bd.*, 189 Wn. App. 127, 137-138 (2015) (Div. II) (“Agencies issuing NPDES permits must impose limits on discharges as necessary to implement water quality standards set by state or federal statutes and regulations, regardless of technical practicability.”); *see also* WAC 173-201A-010 (“The purpose of this chapter is to establish water quality standards for surface waters of the state of Washington.... All actions must comply with this chapter.”).

IV. CONCLUSION

Crown decided to mine Buckhorn Mountain knowing its mine might pollute waters of the state and knowing that Ecology and others would insist that Crown limit and mitigate any water pollution. Crown later joined a technical team to help develop the 2014 permit. Notwithstanding the joint effort to develop the permit, Crown appealed it to the Board and Ecology then modified the permit to address some of Crown's concerns. On appeal, after giving Crown a full and fair opportunity to demonstrate that the permit was invalid, the Board deliberated for six months and found that Crown had not met its burden of proof. Crown then filed a second appeal to the Ferry County Superior Court, which found the Board's findings to be based on substantial evidence in the record. CP 1426-1428; CP 1492-1495.

Crown's assertion that the Board should have relied on its evidence, instead of the evidence presented by Ecology and OHA, does not meet its burden of proof in this Court or justify remanding the Board's decision. The 2014 permit is consistent with applicable law and the facts and testimony presented in this case. It is also consistent with longstanding expectations around the mine. The enforcement actions that Crown expresses concern about are simply not the result of unreasonable or arbitrary actions on Ecology's part; they are the result of Crown's failure to implement effective adaptive management strategies to maintain the capture zone, required of

the mine since it was permitted, and to limit water pollution from the mine. The Board weighed the evidence from all sides, applied its expertise, and did not find Crown's evidence compelling. OHA respectfully submits that this Court should not disturb the Board's findings.

For the foregoing reasons, Intervenor-Respondent Okanogan Highlands Alliance respectfully requests that this Court affirm the ruling of the Pollution Control Hearings Board in all respects.

RESPECTFULLY SUBMITTED this 2nd day of November 2017.

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