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SUPREME COURT  
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SARA FOSTER,

Appellant,

v.

WASHINGTON DEPARTMENT OF ECOLOGY; THE CITY OF  
YELM, and WASHINGTON POLLUTION CONTROL HEARINGS  
BOARD,

Respondents.

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APR 15 2015  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
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AMICUS CURIAE BRIEF OF THE CARNEGIE GROUP AND THE CENTER FOR  
ENVIRONMENTAL LAW AND POLICY

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A ORIGINAL

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2. Even were Out of Kind Mitigation authorized, the mitigation required by the Department of Ecology from the City of Yelm is arbitrary and capricious in that it fails to comply with the Department’s own policy on mitigation, does not directly mitigate for impacts, improperly credits Yelm with actions and activities that are already in baseline conditions, and is not certain to occur.

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## I. INTRODUCTION

The Carnegie Group (“Carnegie”) and the Center for Environmental Law and Policy “CELP” (collectively Amici) respectfully offer this brief in support of the appeal by Sara Foster of the decision of the Pollution Control Hearings Board (“PCHB,” or “Board”) upholding the issuance by the Department of Ecology (“Ecology”) in 2011 of a new and substantial groundwater right to the City of Yelm (“City,” or “Yelm”) to serve claimed future growth. The issue before the Court is whether the decisions of both Ecology and the PCHB are arbitrary and capricious, unsupported by the evidence, or in contravention of state law. In particular, this Court must decide whether the issuance of the water right permit by Ecology in 2011, and the PCHB’s 2013 decision supporting the Ecology decision—which indisputably impairs established and senior instream flow water rights--comply with the principles and standards described in this Court’s seminal decision in *Swinomish Indian Tribal Cmty v. Ecology*, 178 Wn. 2d 571, 311 P. 3d 6 (2013).<sup>1</sup> In addition, the Court must also decide whether state law authorizes the use by Ecology of

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<sup>1</sup> Ms. Foster is challenging only the issuance of the water right to the City of Yelm, and not the issuance of water rights to either the City of Lacey or the City of Olympia. The Court’s decision in this case will not affect those rights, nor the mitigation plans associated with them that are conditions of their respective rights.

“out-of-kind” mitigation for such impairment, in the form of monetary payments and habitat improvements to be undertaken by Yelm.

Respondents argue that the PCHB, in its decision, fortuitously made findings that correctly anticipated and applied this Court’s strong language in Swinomish regarding impairment of instream flow rights, and the improper use of OCPI by Ecology in diminishing those rights. Amici disagree, and believe that the Board’s decision was wrongly decided. Amici respectfully submit that their expertise in water law and land use policy will assist this Court in deciding the important issues before it.

## II. IDENTITY AND INTERESTS OF AMICI CURIAE

Carnegie is a 19- year old cooperative (and nonprofit corporation) of good government activists who live in Thurston County. Carnegie advocates in Thurston County for economic justice (e.g., growth paying for growth), environmental techniques, and compliance with the state’s Growth Management Act for land use planning and permitting.

In 2013, Carnegie organized and sponsored a public forum and workshop addressing Thurston County’s “Sustainable Thurston” planning project, where a panel of speakers presented vigorous approaches for maintaining the County’s agriculture, water , energy, air quality, and other resources

that Carnegie believes should be preserved to the maximum extent possible as part of its growth strategies. The speakers noted that work done by the County and other groups indicate that aquifer levels in Thurston County are in decline, and that flows in the County's rivers and streams increasingly are failing to meet minimum streamflows. The workshop was attended by approximately 60 people, including some elected officials. Carnegie will be sponsoring (along with CELP) an April 18 followup workshop on water, climate change and growth in Olympia.

CELP is a Washington state non-profit corporation with members located throughout Washington, including Thurston County, with a mission to protect and restore Washington's rivers and aquifers. CELP has litigated as both party and *amicus curiae* in Supreme Court cases with significant bearing on this case: *Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn. 2d 571, 311 P. 3d 6 (2013), concerning Ecology's lack of authority to impair an existing and senior instream flow water right by use of "overriding considerations of the public interest"; *Knight v. City of Yelm*, 173 Wash. 2d 325, 267 P. 3d 973 (2011), concerning the right of a senior water right holder to challenge the City of Yelm's land use decision likely to prejudice her water rights; *Kittitas County v. EWGMHB*, 172 Wash.2d 144, 256 P.3d 1193 (2011), concerning counties' duties to consider the legal availability of water in land use decisions; and *Five Corners Family*

*Farmers, et al. v. Washington, et al.*, 173 Wash.2d 296, 268 P.3d 892 (2011), regarding the stockwatering exemption from Department of Ecology’s (“Ecology”) water permitting.

CELP has been actively engaged in Ecology’s policymaking and litigation regarding Ecology’s proposed use of “out of kind” mitigation to allow reduction of instream flows. CELP is an intervenor in an appeal currently pending before the Pollution Control Hearings Board of Ecology’s issuance of a water right to Kennewick Hospital District (KGH), where it contests Ecology’s issuance of a water right permit that will indisputably impair instream flows rights in the Columbia River, and substitute “out of kind” mitigation for mitigation by eliminating other water uses.<sup>2</sup>

*Amici* are dedicated to preserving resources and resource values—particularly water resources, and the value of flowing streams and their groundwater sources--to the maximum extent possible for themselves and future generations. In addition, *Amici* are committed to state and local government agencies following the rule of law in making land use and water resource permitting decisions, including the protection of senior

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<sup>2</sup> *Okanogan Wilderness League, et. al. v. Dept. of Ecology et. al.*, PCHB 13-146. Motions to dismiss (agreed to by all parties) and for vacatur are currently pending in that case. Ecology rescinded the permit and issued one conditioned on meeting established Columbia River flows:  
<https://fortress.wa.gov/ecy/wrx/wrx/fsvr/ecylcyfsvrfile/WaterRights/ScanToWRTS/hq4/06400593.pdf>

water rights held for instream flows, and the preservation of instream flow values in basins that have been closed to further water withdrawals. Each of these values is at stake in the case before this court.

### III. STATEMENT OF THE CASE

Amici adopt and incorporate by reference the Statement of Facts in Petitioner-Appellant's Opening Brief. Amici provide and highlight the following additional information from the record or from publicly-available sources.

The Department of Ecology's ("Ecology") Report of Examination ("ROE") granting a water right permit to the City of Yelm (for the "Yelm") acknowledges that modelling shows the use of the permit will impair established and senior instream flows in the Nisqually River, and cause illegal future withdrawals from closed streams (Yelm Creek, McAllister Creek and its tributaries, except for Medicine Creek, and Lake St. Clair) in both the Deschutes (WRIA 13) and Nisqually (WRIA 11) Basins (ROE, p 14).<sup>3</sup> To address this undisputed harm to the County's imperiled rivers and streams, Yelm's proposed mitigation, accepted by Ecology, is as follows:

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<sup>3</sup> The text of the ROE begins at CP 224. For convenience, the actual pages of the ROE will be used.

- o Nisqually River Basin: Completion of “out-of-kind mitigation actions identified in the Mitigation Plan,” and continuation of current discharges from the City’s reclaimed water plant;<sup>4</sup>
- o McAllister Creek Basin: No mitigation by the City. Mitigation is separately provided by the City of Olympia via the model’s predicted improved streamflows in McAllister Creek as a result of the transfer of Olympia’s water rights from McAllister Springs to the McAllister Wellfield some distance from the Springs;
- o Woodland Creek Basin: “Out-of-kind participation in the acquisition of property and/or conservation easements along Woodland Creek to increase the amount of undeveloped protected land along the creek.” These acquisitions are identified and required by the permits issued to the cities of Lacey and Olympia. Yelm’s contribution, if any, to the potential acquisitions appears to be money.
- o Deschutes River Basin: “Joint regional mitigation measures, which will include both in-kind and out-of-kind methods.” The in-kind methods include joint acquisition and retirement of consumptive irrigation rights, and joint land acquisition and restoration of 200 acres of farmland.

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<sup>4</sup> Although Yelm plans to expand its reclaimed water use, that expansion is not required by the permit.

Yelm's contribution to both the in-kind and out-of-kind mitigation is not specified in the ROE. (ROE, pp 15-16 )

The ROE concludes (at p. 20) that the use by Yelm of water under its new water right will, according to the accepted model, cause impairment or impacts in the above basins that are not fully mitigated in-kind. It states, without providing any evidence, that Yelm's impacts could not be mitigated with in-kind mitigation (ROE, p. 20). However, it goes on to apply Ecology's three-part OCPI analysis (described at p. 17 of the ROE, and later discarded by the PCHB for a "more stringent" test), and concludes that OCPI justifies the impairment.(ROE, p. 22)

Neither the ROE nor the PCHB decision correctly applies Ecology's own Mitigation Policy (Policy 2035) to the proposed use by Yelm of out-of-kind mitigation. In particular, there is little to no evaluation of alternatives (e.g., issuance of a water right with reduced quantities of water; conditioning withdrawals on meeting flows; construction by Yelm of storage that would allow it to withdraw water during peak flows, and reduce or eliminate withdrawals during low flow periods), nor is there any

monitoring required to assure that the presumed benefits from out of kind mitigation actually occur.<sup>5</sup>

Moreover, the Board cites as “overriding considerations” certain activities—e.g., development of regional mitigation plans, use of watershed plans, involvement of stakeholders—that should be simply good public policy, and could, under the Board’s approach simply and easily become both the norm and the rare OCPI exception contemplated in chapter 90.54 RCW. That should not be the case.

#### IV. ARGUMENT

##### **A The Department of Ecology and the Pollution Control Hearings Board erred in concluding that the City of Yelm’s Water Right Complies with Washington Water Law as Set Forth in *Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn. 2d 571, 311 P. 3d 6 (2013).**

Both the decision by the Department of Ecology, and subsequently by the PCHB, were made before the Supreme Court issued its October 2013 opinion in the *Swinomish* case. In that case, the Court fundamentally and vigorously established—as if it needed establishing—that senior water rights for instream flows are entitled to the same protection from

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<sup>5</sup> Both the ROE and the Board’s decision note that (1) although minimum flows were set for the Nisqually River at River Mile 4.3, there is no stream gauge at that point to measure flows, and (2) flows at that point to some extent are controlled upstream via operation of Alder Dam by the City of Tacoma under water rights issued to it for hydropower purposes. Neither the ROE nor the Board decision discuss the option of requiring Yelm to install a gauge at River Mile 4.3, nor negotiating with Tacoma releases from its facilities that would ensure meeting senior instream flows. See ROE, p. 15.

impairment as are senior out-of-stream rights under the state Water Code. The Swinomish decision further held that the overriding considerations of the public interest (“OCPI”) exception under the Water Resources Act, Ch. 90.54 RCW, in a different chapter of the state’s water laws providing overarching principles for water management, does not broadly authorize Ecology to disregard established stream flows in order to reallocate water from the same water body to future out-of-stream uses.

The proper course for Ecology to follow, in the wake of the Swinomish decision, would be to review all of its decisions—both permitting and rulemaking—that have relied upon its interpretation of the state’s water laws, including use of OCPI, to impair instream flows, and reevaluate whether those decisions comport with the fundamentals contained in the *Swinomish* decision. In particular, it seems clear that the Court has told Ecology that the use of a “balancing” test to justify overriding the instream flow protections in an established rule does not meet the high standards, and stringent tests for an “exception,” that is contemplated under current law. Ecology regrettably is persisting in the position that the application of the *Swinomish* standards for OCPI to justify impairment by Yelm of instream flows. On its face, that position is legally untenable.

The parties to this case have already provided extensive briefing to this Court on their views as to the application of the Swinomish decision here. Amici do not wish to duplicate any of those arguments. Instead, amici hope to provide a public interest perspective on the proper application of the law, informed by their knowledge and expertise, and offer suggestions to the Court on how to address the issues raised by Swinomish here.

1. The Yelm Water Right Impairs a Senior Instream Flow Water Right Even if the Impairment is “Minimal” as Forecasted by Computer Models

In order to issue a new water right, Ecology must examine the application and make findings that (1) water is available, (2) that the proposed use is a beneficial use under state law, (3) that the appropriation will not impair existing rights; and (4) that the appropriation will not be detrimental to the public welfare. RCW 90.03.290. In this case, the ROE makes clear—and it is not disputed by the parties—that, based on the computer model, there is not water available for Yelm to fully use the quantity of water without depleting protected resources, including established senior instream flows and closed streams. Nor is there any doubt that the instream flows, and basin closures, are senior to and take priority over the Yelm application. ROE, at p. 19-20. In short, the application, and the use of water under the permit, fails to meet at least two of the four parts of the basic appropriation test. Each of the four parts is a separate determination that

must be met before a new water right can issue. *Hillis v. Department of Ecology*, 131 Wn.2d 373, 384, 932 P.2d 139 (1997). And with regard to impairment, *Swinomish* stands for the proposition that impairment to an established instream flow is the same as impairment to an out of stream preexisting water right—the Water Code does not allow it.

Ecology averred, and the PCHB erroneously found, that because the forecasted impairment is “minimal,” and generated by a “conservative” model, the impairment may not only be disregarded, but actually considered to be a positive factor under the OCPI test (PCHB Final Order, pp. 23-24).<sup>6</sup> However, it has been clear for 15 years that under Washington law any impact by groundwater pumping to a protected surface water source—even if it is not measured but is only predicted by a reliable model—is sufficient to establish impairment. *Postema v Pollution Control Hearings Bd.*, 142 Wn. 2d 68, 79, 11 P. 3d 72 (2000).

Despite acknowledging in the ROE that the groundwater model for Yelm constituted the best available science, Ecology now disavows that groundwater model as too conservative—a position that evidently the Board agrees with. Perhaps because the model clearly shows the Yelm water right would impair protected instream flows, the PCHB simply

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<sup>6</sup> The Board’s final order is found at CP 248; for the sake of convenience, the references will be to the pages of the final order itself.

concludes that the model is and was too good. Nothing in the Water Code supports Ecology's disregard of the best available science in the absence of "better" available science not in the record. In the absence of any monitoring imposed on Yelm to validate the model's forecasts (none were imposed by Ecology), the model is uncontroverted, and both Ecology and Yelm must live with its results, and its predicted impairments. Ecology cannot use the limited OCPI provision in chapter 90.54 RCW to excuse an impairment of a senior water right. *Swinomish*, at 583, 589. *A fortiori*, they cannot use those same factors that demonstrate the impairment as benefits to the public interest that support an OCPI determination.

2. The Determination by the Pollution Control Hearings Board that the issuance of the water right under the OCPI determination by the Department of Ecology was permissible under a set of standards developed and applied by the Board is arbitrary and capricious, and not supported by the evidence.

Even prior to this Court's decision in *Swinomish*, the application of OCPI by Ecology to its water rights decisions has been meandering and difficult to predict or understand. See *Swinomish*, *passim*. As the Court noted, Ecology has had no regulation or formal policy on how it evaluates OCPI in a given water right application, as here.<sup>7</sup>

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<sup>7</sup> Under the Administrative Procedures Act, Ch. 34.05 RCW, any criteria to be applied by a state agency for the issuance of a license or permit is to be promulgated by rule. RCW 34.05.010 (16) Agencies are authorized as well to issue either policy or interpretive statements as to how it interprets and implements statutory provisions. RCW 34.05.230

Ecology staff testified at the hearing before the PCHB that it had applied a three-part “balancing” test in arriving at its decision to authorize Yelm to impair senior instream flows. (See the description of this approach in the ROE, p. 17) The PCHB—applying its own pre-Swinomish views of the law—rejected this approach, and stated that Ecology had to apply a “more stringent” test in reaching its conclusion. Final Order at 21. The PCHB never enunciated what that test, or standard, is or should be. It simply reviewed the testimony, and drew 12 “factors” that it concluded met the “more stringent” test. ” Among those 12 factors were that (1) the model was “conservative,” i.e., accurate, and might over-predict the impacts to flows (although the modelers stated that the model’s margin of error was 1%, that margin could also have resulted in under-prediction of impacts to flows); (2) the simple existence of a regional mitigation plan, with separate strategies for each affected basin; and (3) the absence of an appeal from the Nisqually and Squaxin Tribes. None of these speak to an evaluation of public interests to be served by allowing impairment. None of those factors meet the definition of public interests to be served. As this Court has noted were OCPI a simple weighing of benefits, future growth needs would almost invariably prevail over the public interests in protecting environmental values. Swinomish, at 585. <sup>8</sup>

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<sup>8</sup> The ROE states that, aside from the habitat benefits, other “public interests” to be

Moreover, only Ecology has the authority to promulgate rules as to the issuance of water rights, and the PCHB does not have the authority retrospectively to create its own standard after concluding that Ecology's were not adequate. Chapter 34.05 RCW, *passim*.<sup>9</sup> Because the PCHB has done so in this case, without citing any authority for the factors that it considered in reaching its decision, the Board's decision is arbitrary and capricious, and not authorized by the law.

**B. The Department of Ecology Exceeded its Authority Under State Law in Using "Out-of-Kind" Mitigation to Purportedly Avoid Impairing Senior Instream Flow Rights**

1. While Out of Kind Mitigation is authorized to remedy adverse environmental impacts under the State Environmental Protection Act, state law does not authorize Out of Kind Mitigation as a substitute or remedy for water rights impairment.

In a strained effort to grant the water right Yelm seeks, Ecology excused impairment of instream flows with the following mitigation: (1) future implementation of one or more already-planned stormwater habitat projects as outlined in the "Mitigation Plan," which may or may not benefit affected instream flows or groundwater levels; and (2) a financial

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served by issuing the water right include meeting the future needs of "customers and businesses" of Yelm, and providing "a measure of security" for Yelm's anticipated growth. ROE, at p. 18.

<sup>9</sup> There are a number of other explicit limitations on the PCHB's authority. For instance, it may not entertain challenges to the validity of a rule. RCW 34.05.570(2)(b)(i); *City of Seattle v. Ecology*, 37 Wn. App. 819, 683 P. 2d. 244 (1984)

contribution by Yelm for a portion of both “in-kind” and “out-of-kind” projects identified in the regional mitigation plan.<sup>10</sup> Nothing in the Water Code, or elsewhere in state law, substantiates Ecology’s creativity here. Ecology’s discretion does not justify impairment by double counting projects, financial contributions, and other mitigation already being provided elsewhere by another party in a separate water right decision.

It is axiomatic that Ecology must deny an application for a water right where water is unavailable, or where it will impair an existing water right. RCW 90.03.290. The Water Code does not allow exceptions. While case law provides that Ecology may condition a water right, that authority only extends to ensuring that the requirements of RCW 90.03.290 are actually met. *Swinomish*, at 584-85, 588-89. There is no exception or authorization in the Water Code for out of kind mitigation to compensate for any impairment, nor is there any suggestion that the Water Code’s provisions governing legal uses of water may be superseded by the substitution of habitat improvements. The Water Code is not the Habitat Code.

Ecology attempts to sidestep this issue by using the language of RCW 90.54.020(3)(a)—the so-called “OCPI” language—to assert that the

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<sup>10</sup> There is nothing in the ROE that demonstrates that, with the exception of the multi-party purchase of two irrigation water rights, any of the other projects or Yelm’s monetary contribution will ensure that instream flows are met, or that existing water levels are otherwise maintained in closed basins.

“public interests” served by issuing the new water right to Yelm “override” any harm that would be created by the impairment and other negative impacts on water bodies it would cause. (ROE, pp 17-21) Ecology’s conclusion is that “the public interest benefits of the subject water right application requested by Yelm, the three change applications requested by Olympia, and the six water right applications requested by Lacey, override any public interest detriments associated with the subject application and with the three cities’ new water supply and change or source projects.” *Id.* In short, Ecology could only approve Yelm’s application by applying OCPI to conclude that because of the benefits accruing to Lacey and Olympia from having new water supplies, coupled with those cities’ commitments to indirect, unquantified, and unproven habitat improvements somehow offset Yelm’s inevitable impairment of instream flows. That is not and should not be the law.<sup>11</sup>

An agency possesses only those powers granted to it in statute. See *Rettkowski v. Ecology*, 122 Wn. 2d 219, 226 (1993) (the Court held that Ecology has only the authority given it and cannot draw authority from “penumbras” of a number of statutes. Here, not only does Ecology not have statutory authority to offer up out-of-kind mitigation for impairment

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<sup>11</sup> Other entities could, of course, provide full, enforceable “in-kind” mitigation (i.e. water) above a baseline for Yelm’s impairments of senior instream flows.

of instream flow rights, the relevant statute—RCW 90.03.247—expressly prohibits depletion of instream flows by new rights.

Ecology has also adopted no rules or regulations authorizing or governing the use of out of kind mitigation for impairment of senior water rights.<sup>12</sup> There are provisions in the Water Code that allude to Ecology’s use of “resource management techniques” as part of its consideration of issuance of a new water right. See RCW 90.03.255, 90.44.055. However, by their own language, it is clear that those exceptions are limited only to the use of water (i.e., “in-kind” mitigation) for mitigating the impacts of the new water right—and not “out of kind” mitigation.

2. Even were Out of Kind Mitigation authorized, the mitigation required by the Department of Ecology from the City of Yelm is arbitrary and capricious in that it fails to comply with the Department’s own policy on mitigation, does not directly mitigate for impacts, improperly credits Yelm with actions and activities that are already in baseline conditions, and does not even comport with requirements of SEPA (e.g., does not use the best mitigation, and is not certain to occur).

In response to pressure from stakeholders, Ecology’s water resources program adopted (as of February, 2013) its Policy 2035 regarding the use of mitigation in the water right decision process.<sup>13</sup> The policy prescribes a

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<sup>12</sup> The Legislature is currently considering a bill that directs Ecology to evaluate and report back to the Legislature on out of kind mitigation, including authority : <http://app.leg.wa.gov/billinfo/summary.aspx?bill=5965&year=2015>

<sup>13</sup> The policy is posted at the Water Resources Program’s website, <http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol2035.pdf>. The policy was

hierarchy of mitigation measures, and implementing provisions (including the use of out of kind mitigation as a last resort, and requiring ongoing monitoring). In the case of Yelm, Ecology did not follow its own policies; it did not consider other alternatives (as noted above) in the hierarchy required in the Policy (i.e., out of kind mitigation as a last resort).

However, even taking into consideration POL-2035, and its reference to out-of-kind mitigation as a last resort, a state agency policy cannot give that agency the authority to do something that it is not authorized to do under statute. *Mills v. W. Wash. Univ.*, 170 Wn. 2d, 903, 911-912 (2011). Accordingly, it cannot use Policy 2035 to impair instream flows.<sup>14</sup>

No statute or case authorizes Ecology's use of the State Environmental Protection Act (SEPA), Chapter 43.21 RCW, or its implementing rules (WAC Chapter 197-11), to allow impairment of established instream flows. Water rights impairment under the Water Code is not the same as environmental impact under SEPA.<sup>15</sup> Evaluation of mitigation may be relevant to Yelm's water right only to determine compliance with SEPA. However, even under SEPA, the first option for mitigation is always to

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adopted in the month before the PCHB decision was issued. Provisions regarding hierarchy of mitigation, and proof that it works, are at p. 10 of the Policy.

<sup>14</sup> It should be noted that Policy 2035 allows the impaired water right holder to agree to mitigation. Here, it is the state itself—and the public-- that holds the instream flow right.

<sup>15</sup> Yelm's Mitigation Plan appears to have been based on an analytical structure derived from SEPA requirements, including "point" tallies for separate measures. It is at: <http://www.ci.yelm.wa.us/uploads/library/reports/MitPlan/YelmMitigationPlan.pdf>

avoid the impact. WAC 197-11-768. The impairment here could easily have been avoided by reduction in the amount of the water right, conditioning the right on meeting flows, or issuing a temporary, lower right that would require Yelm to look for additional sources of water. To the extent that Ecology (and the PCHB) used SEPA as guidance for making a mitigated OCPI determination, the result is arbitrary and capricious, in that the mitigation measures for Yelm do not appear meet SEPA requirements, such as that they be “capable of being accomplished.” WAC 197-11-660(1)(c). SEPA allows mitigation requirements to be imposed upon any given applicant only to the extent attributable to identified adverse impacts from the applicant’s own proposal, and enforceable against it. WAC 197-11-660(1)(d). In this case, the mitigation proposed for Yelm’s impacts to instream flows are a combination of possible projects in its own Mitigation Plan, and a set of other actions that may collectively be carried out by all three cities (Yelm, Lacey, and Olympia) participating in the “regional” mitigation plan.

For all the foregoing reasons, the out-of-kind mitigation measures proposed by Ecology, and supported in the PCHB’s decision with only minor changes, do not conform to the requirements of state law for impairment of established instream flows and basin closures.

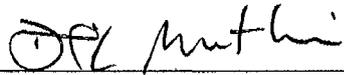
V. CONCLUSION

Water is an increasingly scarce resource in Washington. The State holds our water resources in trust for Washington's citizens. Protection of instream flows is coming under increasing assault from man-made and natural changes to the environment. This case is critical to protecting those flows, as eloquently affirmed by this Court in the *Swinomish* decision.

Out-of-kind mitigation will not replace the water removed from the water bodies protected from impairment by junior water rights, like Yelm's. Nothing in state law authorizes out-of-kind mitigation projects—including monetary payments--as acceptable means of mitigating water loss.

Ecology and the City of Yelm have other options for addressing their future water needs. That is where both Ecology and Yelm should be focusing their efforts.

DATED this 6<sup>th</sup> day of April, 2015.



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David Monthie, WSBA #18772

DLM & Associates

519 75<sup>th</sup> Way NE

Olympia, WA 98506

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IN THE SUPREME COURT OF WASHINGTON

SARA FOSTER,

Appellant,

v.

WASHINGTON DEPARTMENT OF  
ECOLOGY, POLLUTION CONTROL  
HEARINGS BOARD, and THE CITY  
OF YELM,

Respondents.

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No. 90386-7

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

On April 6, 2015, I filed with the Washington Supreme Court the Motion for Leave to File Brief of Amicus Curiae the Carnegie Group and the Center for Environmental Law and Policy, and the Brief of Amicus Curiae the Carnegie Group and the Center for Environmental Law and Policy, and served a copy via email to:

Joseph Brogan

Foster Pepper

1111 Third Ave., Suite 3400

Seattle, WA 98101

Via email to: [brogi@foster.com](mailto:brogi@foster.com)

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M. Patrick Williams, Attorney for Appellant Sara Foster

Law Offices of M. Patrick Williams, PLLC

600 N. 36<sup>th</sup> Street, Suite 228

Seattle, WA 98103

Via email to: [Patrick@patrickwilliamsllaw.com](mailto:Patrick@patrickwilliamsllaw.com)

I declare under penalty of perjury in accordance with the laws of the State of Washington that the foregoing is true and correct.

DATED this 6<sup>th</sup> day of April, 2015, at Olympia, WA.



---

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[dlmandassoc@comcast.net](mailto:dlmandassoc@comcast.net)

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Attached for filing in the above matter on behalf of The Carnegie Group and The Center for Environmental Law and Policy are (1) Motion for Leave to File Amicus Curiae Brief, (2) Amicus Curiae Brief, and (3) Certificate of Service.

Per discussion with the Clerk, I understand that electronic filing of one copy meets the Court's requirements.

Please contact me if you have any concerns or questions.

Thank you.

David Monthie

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