WASHINGTON STATE COURT OF APPEALS
DIVISION II

No. 47543-0-II

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN WHITEWATER, and NORTH CASCADES CONSERVATION COUNCIL,

Appellants,

vs.

WASHINGTON DEPARTMENT OF ECOLOGY, PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, WASHINGTON, AND WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD,

Respondents.

RESPONDENT PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY'S RESPONSE BRIEF

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I. INTRODUCTION

This appeal is Appellants' fourth attempt to impose their aesthetic preferences on Public Utility District No. 1 of Okanogan County, Washington (the "District") and the Washington Department of Ecology ("Ecology"). Specifically, Appellants believe the Enloe Dam Hydroelectric Project (the "Project") is not in the public interest because the Project will diminish the aesthetics of water flowing over an existing dam on the Similkameen River of remote Okanogan County. Appellants have litigated this issue twice before the Pollution Control Hearings Board ("PCHB"), and also, most recently, before Thurston County Superior Court. Appellants now seek a different result from this Court.

The PCHB and the Superior Court both upheld Ecology's decision to issue a water right permit to the District to resume generation of hydroelectric power at the long-unused Enloe Dam (the "Dam"). In issuing the permit, Ecology found—as required by the four part water right test from RCW 90.03.290 of Washington's Water Code[1]—that the

[1] The District refers to the "Water Code" as shorthand for state statutes regulating the appropriation of water. These statutes include RCW Chapters 90.03, 90.22, and 90.54. *See, e.g., Swinomish Indian Tribal Cmty. v. Washington State Dep't of Ecology*, 178 Wn.2d 571, 579-80, 311 P.3d 6 (2013).

use will not be detrimental to the public interest.[2] Ecology's public interest finding balanced all relevant factors, including the protection of fish, the benefits of renewable energy, and the potential aesthetic effects of reduced flows in the 370 feet of the river affected by the Project.

Ecology's public interest determination for the District's water right permit relied, in part, on the resolution of Appellants' first challenge to the aesthetics issue. Appellants' first challenge was an appeal to the PCHB of Ecology's water quality certification of the Project pursuant to Section 401 of the Clean Water Act ("CWA") (the "401 Certification"). In that appeal (the "401 Appeal"), the PCHB responded to Appellants' concerns by conditioning the 401 Certification to require a future study that will evaluate the aesthetic effects of the Project and confirm or revise flows based on the result. The PCHB's 401 Appeal decision relied on the Water Code's codification of factors relevant to the public interest, which includes aesthetics. Appellants expressly endorsed this resolution in the 401 Appeal and did not further challenge the 401 Certification.

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[2] The Water Code forbids the use of public water for hydropower in a manner "likely to prove detrimental to the public interest." RCW 90.03.290(1) (emphasis added). Consequently, the Water Code requires Ecology to make a finding that the use of water will "not be detrimental to the public welfare" before granting a permanent water right. RCW 90.03.290(3) (emphasis added). The Water Code also recognizes the "public interest" in instream flows, including flows for "aesthetic" values. See RCW 90.54.020(3)(a) (emphasis added). Throughout this brief, the District refers to the "public interest" standard as shorthand for these statutory provisions. Quoted passages, however, sometimes refer to the "public welfare" standard due to the inconsistent terminology in the Water Code.

Ecology's water right permit decision incorporated the aesthetic study ordered by the PCHB's 401 Appeal decision. Appellants nevertheless appealed Ecology's decision to issue the water right to the PCHB. Appellants again objected to Ecology's findings regarding aesthetics, even though the permit incorporated the same protections of the same public interest factors that Appellants endorsed after the 401 Appeal. The PCHB and the Superior Court affirmed Ecology's decision, noting that the result of the 401 Appeal had provided Ecology with appropriate conditions to ensure that the Project's water right would not be detrimental to the public interest.

This procedural history demonstrates that Appellants are attempting to recast the pending aesthetic study in order to prolong their litigation campaign against the Project. Appellants do not have a valid legal claim against Ecology, but simply a policy disagreement with the agency about the weighing of competing public interests on the Similkameen River. Washington law does not permit Appellants to continue to use the legal system to pursue their policy objective in this matter.

In the instant appeal, Appellants have reframed their aesthetic argument as an allegation that Ecology improperly found no detriment to

the public interest in the face of "incomplete information." This claim relies on a mistaken belief that Ecology is incapable of finding that a water use will not be detrimental to the public interest until it has determined the exact amount of water that should flow over the face of a dam for aesthetic purposes. Appellants are wrong for two primary reasons.

First, aesthetics are only one aspect of the public interest standard that Ecology is charged with weighing. Here, the agency properly exercised its discretion and expertise by considering the various relevant factors of public interest, including fish protection and the benefits of clean, local energy production. Viewing those factors as a whole, Ecology concluded that the proposed water use would not be detrimental to the public interest.

Second, Ecology did, in fact, specifically address aesthetics by conditioning the District's water use on compliance with the aesthetic flow study required by the 401 Certification. Based on the results of the study, Ecology may alter flows to improve aesthetics while preserving other public interest considerations such as fish protection and hydropower production.

Appellants also claim that the Project may not satisfy the Water Code's public interest standard for aesthetics under RCW 90.54 or meet

water quality standards under RCW 90.48. However, the PCHB's ruling in the 401 Appeal ordered the performance of the aesthetic monitoring study for the purpose of satisfying RCW 90.54, and the 401 Appeal explicitly resolved the issue of compliance with water quality standards. These issues therefore have already been litigated, and Appellants are collaterally estopped from relitigating them before this Court.

In addition, Appellants claim that Ecology was required to issue a preliminary permit instead of a permanent water right, but this argument finds no support in the text of the statute and ignores Ecology's discretionary authority. Appellants also ignore the practical issues associated with their preferred permitting approach.

Finally, Appellants claim that the Project must comply with the generic instream flows of WAC 173-549-020(2) as opposed to site-specific instream flows required for hydroelectric projects under WAC 173-549-020(5). As the PCHB and Superior Court properly recognized, this argument directly contradicts the statute's plain language.

II. ISSUES UNDERLYING APPELLANTS' ASSIGNMENTS OF ERROR

Parts II-III of Appellants' Opening Brief does not accurately state the issues that underlie Appellants' Assignments of Error. At the PCHB,

Appellants, the District, and Ecology agreed on the following issue statements:

A. Did Ecology violate the state water code and other applicable law by determining that public interest and public welfare requirements set forth in RCW 90.03.290 were met by incorporating the instream flow requirements in the District's 401 water quality certification?

B. Did Ecology violate the state water code and other applicable law by failing to condition the water right on the instream flow requirements in accordance with WAC 173-549-020(2)?

C. Did Ecology violate the state water code and other applicable law by determining that the water right should be issued as a permanent water right as opposed to being denied or issued as a temporary or preliminary water right?

CR 45-46.

With regard to issues A and C above,[3] Appellants mischaracterize these issues in their Opening Brief by assuming that the aesthetic study required by the Project's 401 Certification is a necessary prerequisite to a

[3] Appellants' Opening Brief states the issues in a different order than agreed to by the parties at the PCHB. Specifically, Appellants' Opening Brief reverses the order of issues B and C.

public interest determination under RCW 90.03.290. With regard to issue B above, Appellants inaccurately claim that the PCHB "conclud[ed] that the ROE did not need to be conditioned on compliance with the Similkameen River instream flow rule." (App. Br. 2). In actuality, the PCHB and the Superior Court both held that subsection (5) of the Similkameen River instream flow rule (WAC 173-549-020) regarding appropriate flows in the bypass reach of a hydroelectric project applies to the Project rather than subsection (2) of this rule, which sets default minimum flows for the river.

III. STATEMENT OF THE CASE

Appellants' Statement of the Case does not accurately portray the facts relevant to this case. The District therefore offers the following statement.

The District owns the Dam on the Similkameen River near the town of Oroville in Okanogan County. (CR 126.) The Dam was built in 1920 and was used to produce hydroelectric power from 1922 to 1958. (CR 86, 122.) The historical hydroelectric facility diverted water from above the Dam for power production and returned this water to the river approximately 800 feet downstream. (CR 86.)

Since 1958, the full volume of the river has flowed over the Dam and into a man-made channel and other incised channels before flowing over Similkameen Falls (the "Falls"). (CR 86, 89.) The Falls are approximately 350 feet downstream of the Dam and are 20 feet in length. (CR 86.) The Falls act as a natural barrier to anadromous fish passage, and the stretch of the river between the Dam and the Falls consists of bedrock substrate with limited fish habitat. (CR 89.) Very few people visit the Dam and the Falls. (CR 98.)

In the 1990s, the District decided it wished to increase its supply of renewable energy. The District therefore applied for a license from the Federal Energy Regulatory Commission ("FERC") to resume hydropower generation at the Dam. (*See* CR 90; 132.) The water right at issue in this case would allow the proposed Project facilities to divert up to 600 cfs of the Similkameen River immediately upstream of the Dam and return the water to the river 370 feet downstream, just below the Falls.[4] (*See* CR 122, 126.) This 370-foot stretch of the river is referred to as the bypass reach (the "Bypass"). (*See* CR 90-92, 118-126.)

[4] The Project will utilize the new 600 cfs water right as well as the District's additional 1,000 cfs in water rights for a total water appropriation of up to 1,600 cfs. (CR 507-08.)

A. The 401 Certification

Related to the FERC licensing process for the Project, the District applied to Ecology in 2008 for a certification under CWA Section 401. This certification requires a showing of "reasonable assurance" that the Project complies with state water quality standards promulgated under RCW 90.48 and "other appropriate requirements of state law." (*See* CR 83-117.) In July 2012, Ecology issued a CWA Section 401 certification for the Project. (CR 101.) Among the conditions in Ecology's 401 Certification was a requirement that the District maintain aesthetic instream flows of 10 cfs and 30 cfs (depending on the season) in the Bypass. (*See* CR 157.) Ecology determined that these aesthetic flow conditions satisfied the public interest standard of the state Water Code at RCW 90.54.020, as well as state water quality standards under RCW 90.48. (*See* CR 171-74) (Ecology explaining its reasoning to the PCHB); (CR 186-89) (PCHB upholding Ecology's legal authority to apply the Water Code to the 401 Certification as an "other appropriate requirement of state law" under CWA Section 401).

Appellants appealed Ecology's 401 Certification to the PCHB. Following the PCHB's order on motions for summary judgment, the issues heard by the PCHB largely revolved around whether the Project

would impair the aesthetics of water flowing over the Dam and the Falls. (*See* CR 83-117.)

In the summer of 2013, the PCHB resolved the 401 Appeal by affirming the 401 Certification subject to a condition that aesthetic instream flow conditions be evaluated within three years following the commencement of Project operations. *Id.* Based on the results of the evaluation, Ecology could potentially adjust the specific aesthetic instream flow requirements for the Bypass in the 401 Certification. *Id.*[5]

The PCHB specifically considered aesthetic values under the Water Code and state water quality standards as part of the 401 Appeal, and this analysis formed the basis for its decision to add a condition for aesthetic flows. The PCHB explained that:

> The protections in RCW 90.54.020(1) and (3)(a) for aesthetics is recognized as an "other appropriate requirement of state law" under CWA §401 . . . . In [the *Elkhorn II* case] the U.S. Supreme Court affirmed the state's authority to look beyond water quality criteria and protect designated uses by requiring minimum instream flows as a condition of a §401 Certification. The finding of reasonable assurance is not limited to application of water quality criteria, and may include other requirements

[5]The PCHB subsequently made clarifying changes to the Final Order on August 30, 2013, in response to Appellants' request for reconsideration. (*See* CR 202-06.) Throughout this brief, the District cites to the amended Final Order, found at CR 83-117.

> that protect the designated uses including minimum instream flows.

(CR 105-06.)

B. The Water Right

In June 2010, while the District's 401 certification application was pending with Ecology, the District also applied to Ecology for four water rights necessary to redevelop the Project. Among these applications was S4-35342, a request to appropriate 600 cfs of water for hydropower generation as contemplated by the District's FERC proposal and 401 certification application. (CR 118-38.) Appellant Center for Environmental Law & Policy filed a protest with Ecology of all four water right applications, including S4-35342.

In August 2013, after the PCHB issued its original Final Order on the 401 Appeal, Ecology issued its Record of Examination ("ROE") approving water right application S4-35342. (CR 118-38.) The ROE requires the District to adhere to Ecology's July 2012 401 Certification for the Project, including "any subsequent updates" to the 401 Certification. (CR 136.) With regard to instream flows in the Bypass, the ROE further clarified that Bypass flows permitted by the water right depend on the flows ultimately approved through the 401 Certification study:

> [The District] will need to meet the bypass flows under the 401 Water Quality Certification, which are currently identified in Table 2 [the 10/30 cfs flows], <u>or as the bypass flow requirements in the 401 Water Quality Certification may be amended in the future</u>.

(CR 124) (emphasis added).

The ROE also included findings indicating that the Project's water use was non-consumptive except to the Bypass reach:

> <u>The use of this water right is non-consumptive, except to the bypass reach leading from the point of diversion upstream of the dam to the tailrace of the hydropower facility below the dam</u>. The bypass reach for the prior hydropower facility was a distance of approximately 900-ft measured downstream of the dam. The bypass reach for the proposed hydropower facility will be a distance of approximately 370-ft measured downstream of the dam. No surface water diversions are located within either bypass reach.

(CR 128) (emphasis added).

Finally, the ROE included findings with regard to the four part test for a water right found at RCW 90.03.290. With regard to the public interest prong of this test, Ecology found that there was no basis upon which to determine the Project would be detrimental to public interest/welfare:

> Given that this project will produce valuable electrical energy and will do so in a sustainable manner, that the impacts on the bypass reach are reduced from those under previous project scenarios, that minimum instream flows necessary to protect the aesthetic and instream resources in the bypass reach will be a required condition of project operation, and that any negative impacts are further mitigated by the downstream discharge channel, there is no basis on which to determine that this project will be detrimental to the public welfare.

(CR 132) (emphasis added).

C. Appellants' Water Right Appeals

Appellants appealed the ROE to the PCHB.[6] At the PCHB, Appellants advanced arguments under each of the three issues defined above in Part II of this brief. First, Appellants argued that Ecology's issuance of the ROE was improper because "Ecology simply has not and cannot meet its statutory duty to make a final public interest determination until it completes the aesthetic flow study mandated in the 401 Certification Decision." (CR 251.) Second, Appellants argued that because Ecology lacked "adequate information" to make a public interest determination, Ecology's choices were limited to denial of the water right or issuance of a preliminary permit. (CR 255.) Finally, Appellants

[6]Although Appellants initially protested all four of the Project's water right applications before Ecology, Appellants only appealed the Project's hydropower water right, S4-35342, to the PCHB.

asserted that "the ROE does not condition the PUD's water right on the Similkameen's minimum instream flows as required by law." (CR 258.) The PCHB rejected each of these arguments. (CR 504-28)

Appellants then appealed all three issues to the Superior Court. With regard to the first issue, Appellants repackaged their argument into a claim that Ecology "waived" or "deferred" the public interest finding required by RCW 90.03.290. (CP 63-64.) Appellants then expanded on this theory in their argument for a preliminary permit, claiming that Ecology had not only failed to make a public interest determination, but had also not determined whether the Project would comply with water quality standards. Specifically, Appellants stated:

> It is undisputed that Ecology was without information to determine that the ROE would not be detrimental to public interests because it is unknown whether the 10/30 cfs flow will protect aesthetic values of the Similkameen River or whether there is an instream flow that will comply with water quality standards.

(CP 76.) Finally, Appellants repeated their claim that the ROE was contrary to the "Similkameen River minimum flow rule." (CP 70.)

The Superior Court rejected all of Appellants' arguments. In doing so, the court noted that the Project's compliance with water quality standards was adjudicated in the 401 Appeal, and that this appeal also

addressed the public interest in aesthetics under the Water Code. Specifically, the court stated:

> While we don't have exact numbers as to aesthetics, it seems to me that it was acknowledged [by Appellants] in not appealing the 401 [Certification] matter beyond the Pollution Control Hearings Board decision that the [aesthetic] study would result in a decision that would be good for the public.

(CP 156-57.)

With regard to the Similkameen River instream flow rule, WAC 173-549-020, the court held that the ROE properly applies subsection (5) of the rule:

> I'll just say that I agree that subsection five of [WAC 173-549-020] seems to say that flows can be tailored to a specific [hydropower] project, and I believe that's part of the process that is going to be ongoing here, and I believe that's legally appropriate.

(CP 156.)

Appellants now bring before this Court the same three issues decided in Ecology's favor by both the PCHB and the Superior Court.

IV. ARGUMENT

A. Standard of Review

This Court reviews PCHB orders under the Washington Administrative Procedure Act ("APA"). *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004) ("*Port of Seattle*"); RCW 43.21B.180. Under the APA, the burden of demonstrating the "invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a); *Port of Seattle*, 151 Wn.2d at 587. The APA allows the Court to reverse the PCHB only in certain circumstances, including if the PCHB's order is arbitrary and capricious, if the order is not supported by substantial evidence, or if the PCHB erroneously interpreted or applied the law. RCW 34.05.570.

Appellants argue that the Court's review of this case is *de novo* because the issues in this case involve statutory construction. (*See* App. Br. at 1, 10-11.) This case, however, primarily concerns Ecology's exercise of its discretionary authority under the Water Code.[7] The Washington Supreme Court has determined that courts must give

[7] The exception is Appellants' final argument, which concerns Ecology's minimum flow rules for the Similkameen River. This issue concerns Ecology's interpretation of its own rules, and this interpretation is also entitled to deference. *See Kaiser Aluminum & Chemical Corp. v. Dep't of Ecology*, 32 Wn. App. 399, 404, 647 P.2d 551 (1982). For the reasons described in Part IVE, however, no deference is needed because the rules are plain and Appellants' interpretation of these rules is contrary to their plain text.

deference to Ecology's water rights permitting decisions in appeals from the PCHB due to the discretionary nature of Ecology's authority under the Water Code. *Port of Seattle*, 151 Wn.2d at 593-94; *State Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998); *State Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cnty.*, 121 Wn.2d 179, 200-01, 849 P.2d 646 (1993) *aff'd sub nom.*; *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) ("*Elkhorn I*") ("[I]n analyzing the [PCHB]'s decision under the clearly erroneous standard, <u>we also give due deference to Ecology's expertise in this area</u>.") (emphasis added). And when Ecology and the PCHB agree, as they did in this case, courts "are loath to override the judgment of both agencies, whose <u>combined expertise merits substantial deference</u>." *Port of Seattle*, 151 Wn.2d at 600 (emphasis added). The appropriate standard of review therefore is abuse of discretion. *See Schuh v. Ecology*, 100 Wn.2d 180, 186-87, 667 P.2d 64 (1983).

Appellants also argue that this Court's review of facts in the record is *de novo* because the PCHB decided this case on summary judgment. This is true, but irrelevant because the parties agreed before the PCHB that there are no material issues of fact in this case. Specifically, the PCHB stated:

> The parties to this case agree that no genuine issues of material fact exist and this matter can be resolved on summary judgment. The Board concurs and concludes that all issues may be fully resolved on summary judgment.

(CP 31.) There is therefore no material dispute of fact before the Court in the instant appeal.

B. The PCHB and the Superior Court properly held that Ecology's issuance of the District's water right was within Ecology's discretionary authority under the Water Code

Appellants' first three arguments[8] are all based on the theory that specific, numeric flows for aesthetics must be established before Ecology can properly determine whether the Project's water use is consistent with the public interest requirement of RCW 90.03.290. Because the aesthetic study required by the 401 Certification is not yet complete, Appellants assert that Ecology improperly granted the District a water right "in the face of incomplete information." (App. Br. 13, 15, 17, 21.) This argument misconstrues the nature of the water right public interest test and Ecology's discretionary authority under the Water Code. Appellants also misstate the purpose of the aesthetic study ordered by the PCHB in its 401 Appeal decision.

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[8] *See* Appellants' Opening Brief parts VIA-C.

Aesthetics are only one element of the public interest in water use, but Appellants conflate the broad public interest with a specific determination of aesthetic flows in the Bypass. The PCHB properly affirmed Ecology's conclusion that the Project's water use will not be detrimental to the public interest, based in part on the sustainable energy benefits of the Project and the 401 Certification conditions designed to protect instream resources, including aesthetics.

1. Ecology explicitly found compliance with each prong of the statutory four part test for issuance of a water right

The District agrees with Appellants that the Water Code provides a four part test for issuance of a water right, but disagrees with Appellants' characterization of how that test was applied in this case. Ecology must find compliance with each element of the four part test of RCW 90.03.290(3) in order to issue a water right. One prong of this test requires that the proposed water use will not "be detrimental to the public welfare." RCW 90.03.290(3). With regard to water rights for hydropower, the Water Code requires Ecology to investigate whether an appropriation of water for hydropower is "*likely* to prove detrimental to the public interest." RCW 90.03.290(1) (emphasis added).

Appellants mischaracterize the findings in Ecology's water right ROE. Specifically, Appellants claim that Ecology "assumed" that the District's water right would not be detrimental to the public interest. (App. Br. 13.) Appellants also allege that Ecology "substituted" the aesthetics study for an "explicit, affirmative finding" on the public interest test. (App. Br. 24.) These claims are inaccurate because the ROE includes explicit findings on each element of the four part test.

Ecology's public interest decision was not based on an assumption, but rather relied, in part, on the PCHB's adjudication of the 401 Appeal. By the time that Ecology issued the ROE in August 2013, the PCHB had concurred with Ecology that the 401 Certification's aesthetic instream flow requirements must satisfy the Water Code's public interest standard (RCW 90.03.290 and RCW 90.54.020), as well as state water quality standards (RCW 90.48). (*See* CR 188-89.) Moreover, the PCHB had issued its initial 401 Appeal Final Order, which requires further monitoring and evaluation of the 10/30 cfs aesthetic instream flows to ensure satisfaction of the Water Code's public interest standard. The ROE explicitly incorporates the conditions of the 401 Certification, including future amendments to the 401 Certification resulting from the aesthetic study. (CR 124.) The PCHB's resolution of the 401 Appeal therefore

informed Ecology's public interest finding for the District's water right. As explained by the PCHB:

> [T]his is not a case in which available information shows that the applicant cannot meet some aspect of the four part test for a water right. Rather, the [PCHB] concluded that some additional assessment is needed to finalize the appropriate level of aesthetically protective flows on the Similkameen River in the area of the project. However, in approving and conditioning the § 401 Certification, the [PCHB] also provided Ecology a basis upon which to conclude that there was no "detriment to the public welfare" as required by the four part test of RCW 90.03.290.

(CR 522-23.)[9]

The ROE also includes explicit findings regarding the public interest element of RCW 90.03.290. Specifically, Ecology determined that the Project's water use will not be detrimental to the public interest given the public benefits of the Project and the 401 Certification conditions designed to protect fish, aesthetics, and other instream resources:

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[9] Appellants quote an earlier part of the PCHB's decision out of context to claim that "the [PCHB] also acknowledged that the ROE contained insufficient information to support affirmative findings on the public interest tests for the Enloe water right." (App. Br. 15.) The full quote referenced by Appellants states "[t]hus, *as argued by [Petitioner Center For Environmental Law and Policy]*, Ecology still needs additional information to make a public interest determination in relation to the PUD water right." *Id.* The PCHB, therefore, was simply summarizing Appellants' argument here, not stating the PCHB's own conclusion. This is clear from the holding at CR 522-23 quoted above.

> Given that this project will produce valuable electrical energy and will do so in a sustainable manner, that the impacts on the bypass reach are reduced from those under previous project scenarios, that minimum instream flows necessary to protect the aesthetic and instream resources in the bypass reach will be a required condition of project operation, and that any negative impacts are further mitigated by the downstream discharge channel, <u>there is no basis on which to determine that this project will be detrimental to the public welfare</u>.

(CR 133.) (emphasis added). Ecology's ROE therefore includes the required public interest finding.

In sum, there is no question that Ecology must find compliance with the four part test before issuing a water right, nor is there any question that Ecology in fact did make the requisite findings in the ROE. These findings include a public interest finding that relies in part on the PCHB's resolution of the 401 Appeal.

2. Appellants conflate the public interest finding required by RCW 90.03.290 with a determination of specific aesthetic flows in the Bypass

Appellants' mischaracterization of the ROE reflects Appellants' larger distortion of the nature of the Water Code's public interest test. Specifically, Appellants equate the public interest with the establishment of specific numeric aesthetic flows in the Bypass. Nothing in Washington

law, however, requires Ecology to impose specific aesthetic flows before issuing a water right.

The Water Code demonstrates that specific numeric findings are not required for Ecology to make a public interest finding. The public interest in aesthetics is established in RCW 90.54.020, which provides that the "[u]tilization and management of waters of the state shall be guided by the following general declaration of fundamentals." (Emphasis added). As this provision suggests, the statute requires Ecology to consider and balance a broad range of factors under the rubric of the public interest, including, for example, "fish and wildlife maintenance," "hydroelectric power production," and "preservation of environmental and aesthetic values."[10]

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[10]RCW 90.54.020 includes the following language:

> Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:
>
> (1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.
>
> (2) Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits

Washington courts have not required numeric certainty or a formulaic application of the public interest test, but instead have recognized that Ecology has the discretion and expertise to evaluate the public interest holistically. *See Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 397, 932 P.2d 139 (1997) (deferring to Ecology's expertise regarding the public interest); *Schuh*, 100 Wn.2d at 187 (Ecology "is in a far better position to judge what is in the public interest regarding water permits than a court."). For instance, in *Concerned Morningside Citizens v. State of Washington, Dep't of Ecology, et al.*, the PCHB agreed with Ecology that a change in water rights to accommodate a proposed dairy would not negatively affect the public interest. *Concerned Morningside Citizens v. State of Washington, Dep't of Ecology, et al.*, PCHB No. 03-016, 2003 WL 22505701 (Oct. 31, 2003). In weighing the public interest, the PCHB considered the many factors that were before Ecology, including the zoning of the area, Ecology's belief that water quality standards would be protected, and the ROE's requirement to send data to

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> less costs including opportunities lost.
>
> (3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:
>
> (a) <u>Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.</u>

(emphasis added)

Ecology and allow Ecology to inspect the water use records. *Id.* at *8. The PCHB concluded that, "[w]hen all of these considerations are viewed together, the Board cannot find the proposed water right changes are detrimental to the public interest." *Id.* (emphasis added).

Moreover, Ecology and the PCHB often include conditions in water rights that require future studies and potential corrective action to ensure compliance with the public interest test. For example, in a series of cases involving the risk of seawater intrusion into local aquifers due to increased groundwater use, Ecology imposed conditions that required regular well tests and empowered Ecology to curtail water use if the tests revealed risks of seawater intrusion. These adaptive management[11] conditions enabled Ecology to approve new groundwater rights in aquifers prone to seawater intrusion consistent with the public interest in water quality protection. *See Citizens for Sensible Dev. v. State of Washington*, PCHB 90-134, 1991 WL 137104 at *2, 4; *Bucklin Hill Neighborhood Ass'n v. State of Washington*, PCHB 88-177, 1989 WL 107498 at *9; *Wilbert v. State of Washington*, PCHB 82-193, 1983 WL 197441 at *2-3.

The PCHB endorsed this approach as appropriate under the Water Code's public interest standard. *See Citizens for Sensible Dev.*, 1991 WL

[11] Ecology defines "adaptive management" as "an iterative and rigorous process used to improve decision-making and achieve objectives in the face of uncertainty." (CR 144.)

137104 at *2, *4; *Bucklin Hill*, 1989 WL 107498 at *9; *Wilbert*, 1983 WL 197441 at *2-3. In *Bucklin Hill*, for example, the PCHB stated that:

> Sea water intrusion, were it to occur, would violate the public welfare standard. Our findings do not support the likelihood of this effect. But, again, the monitoring conditions of the permit provide a mechanism for detection and correction.

Bucklin Hill, 1989 WL 107498 at *9. In reaching this conclusion, the PCHB rejected the appellant's argument that Ecology could not make a public interest determination on the proposed water use until the planning for the underlying residential project was "more precise." *See id.* at *8. The PCHB therefore has endorsed adaptive management conditions where the ultimate mitigation solution is unknown at the time of water right approval, allowing for later imposition of conditions on water use informed by the monitoring results to protect the public interest.

Moreover, in *Wilbert*, the PCHB added conditions that created an undefined limitation on the quantity of water that could be used under the permanent groundwater right. Specifically, the PCHB added the following two conditions to the disputed groundwater permit "to conform it with the public welfare requirement" of the Water Code in response to uncertainty regarding future aquifer conditions:

> 1. The permittee or its successor(s) shall report to [Ecology], in April or August of each year or at such times as [Ecology] determines to be appropriate, the chloride concentration and static water level of the well(s) authorized by the permit.
>
> 2. The withdrawals of groundwater under this permit may be limited, or other appropriate action may be required, by [Ecology] order to prevent sea water intrusion notwithstanding whether chloride concentration exceeds 250 mg/L in the well(s) authorized by this permit.

Wilbert, 1983 WL 197441 at *3 (emphasis added). *Wilbert* therefore demonstrates that specific numeric water use limitations are not required at the time of permit issuance in order to meet the public interest standard. Rather, Ecology may impose an adaptive management program to address an identified risk to the public interest.

In this case, at Appellants' request,[12] the PCHB applied RCW 90.54.020 to the Project in the PCHB's 401 decision. (*See* CR 105.) In that decision, the PCHB described how aesthetic conditions must be addressed by the Project and balanced against other public interest considerations:

[12]Appellants' arguments regarding RCW 90.54.020 are contained in Appellants' 401 Appeal Motion for Partial Summary Judgment, available at CR 477.

> As with all designated uses, the preferred flows for aesthetics become part of the trade-offs and negotiations to determine flow regime that maximizes the beneficial uses of the water and provides the most opportunities for the use of the water, including power production. While there is this balancing of beneficial uses of water, flows for aesthetics are not necessarily a priority of use when competing with flows for other uses of water, most importantly water quality for the protection of the fisheries resource.

(CR 98); (*see also* CR 105-06) (clarifying the legal bases for the PCHB's aesthetics findings).

Ecology's findings in the ROE therefore address the range of public interest considerations that are relevant in this case. Specifically, Ecology found that the Project would not be detrimental to the public interest because "the project will produce valuable electrical energy. . . in a sustainable manner," and that "minimum instream flows necessary to protect the aesthetic and instream resources in the bypass reach will be a required condition of project operation."[13] (CR 133.)

[13] In the 401 Appeal, the PCHB pragmatically realized that additional aesthetic flow studies could not be conducted before Project construction due to the nature of the existing facilities and safety hazards associated with data collection. (CR 106.) Conducting the studies after Project construction is therefore necessary as a practical matter, and the PCHB and Ecology considered this as part of their public interest determination.

Appellants mischaracterize the aesthetic study required by the 401 Certification as an additional referendum on whether the Project is consistent with the public interest. Specifically, Appellants envision the aesthetic study as a binary test of whether the Project satisfies "aesthetic . . . flow requirements that must be protected under state water quality laws." (App. Br. 16.) Appellants then present scenarios in which either the Project would be uneconomical because of required aesthetic flows or the Project "would be deemed detrimental to the public interest because it would significantly degrade the aesthetic and recreational values of Similkameen Falls." *Id.* These scenarios are fictional for two reasons.

First, the aesthetics of the Bypass are subjective and dynamic. Aesthetic judgments are further complicated by natural seasonal variations in water flows and the influence of the existing Dam and other artificial structures on flows in the Bypass. Given this situation and the absence of quantitative aesthetic standards in Washington law, it would be inconsistent with the holistic nature of public interest under RCW 90.03.290 and RCW 90.54.020 to prioritize aesthetic interest over the continued viability of the Project.

Second, the PCHB's 401 Appeal decision prevents aesthetic considerations from overriding other public interest considerations of fish protection and power production. The 401 Appeal decision explicitly states that the Project "shall operate" subject to aesthetic flows defined after completion of the aesthetic study. (CR 116.) The PCHB's water right decision further clarifies that "[e]ven if unprotective [of aesthetics], the 10/30 flows may not be subject to change based solely on aesthetic values." (CR 523.) The PCHB's water right decision also reaffirmed that "[a]esthetic flows 'are not necessarily a priority of use when competing with flows for other beneficial uses of water . . . .'" (CR 523) (citing PCHB's 401 Appeal ruling). The production of hydropower is a "beneficial use" that Ecology found is "valuable" to the public welfare. (*See* CR 129; 132.) The protection of fish is another public interest consideration, with which the optimal aesthetic flows "may conflict." (CR 523.) The aesthetic study therefore is designed to secure the best practicable aesthetics in the Bypass consistent with the protection of fish and the generation of renewable energy.

3. Ecology properly exercised its discretion to issue the District a water right given the various public interest considerations in this case

The plain language of RCW 90.03.290 indicates that Ecology has the discretion to issue a permit without conclusively determining the ideal specific, numeric flows for aesthetics. The statute provides that Ecology shall investigate a proposed appropriation of water for hydropower to "determine and find whether the proposed development is likely to prove detrimental to the public interest . . . ." RCW 90.03.290(1) (emphasis added). "Likely" necessarily implies a lack of certainty, that Ecology will not have every piece of potentially relevant information when it makes a permitting decision. Moreover, the statute does not require Ecology to affirmatively find that a proposed withdrawal is in the public interest, but rather only that the withdrawal will not likely be "detrimental" to the public interest. RCW 90.03.290(1) and (3).

As noted above in section IVA, the Washington Supreme Court has repeatedly held that Ecology is entitled to deference in exercising its authority under the state Water Code because of the agency's expertise in this area. For example, in *Schuh*, the Court specifically deferred to Ecology's application of the Water Code's public interest standard. In doing so, the Court explained that "due deference must be given 'to the

specialized knowledge and expertise of the administrative agency.' Here, [Ecology] is in a far better position to judge what is in the public interest regarding water permits than a court." *Schuh*, 100 Wn.2d at 187 (quoting *English Bay Enterprises, Ltd. v. Island Cy.*, 89 Wn.2d 16, 21, 568 P.2d 783 (1977). The Supreme Court therefore reversed the Court of Appeals for substituting its judgment for Ecology's and failing to apply an abuse of discretion standard. *Id.* at 186. *See also Theodoratus*, 135 Wn.2d at 589; *Okanogan Wilderness League v. Twisp*, 133 Wn.2d 769, 776, 947 P.2d 732 (1997); *Elkhorn I,* 121 Wn.2d at 201-04; *Port of Seattle*, 151 Wn.2d at 594.[14]

In this case, Ecology similarly applied the criteria in RCW 90.03.290 and determined that it is not detrimental to the public interest to issue a water right to the Project conditioned on the District's compliance with the instream aesthetic flow requirements in the 401 Certification. Ecology made this decision with full consideration of the public interest as administrator of both the Water Code and CWA Section 401, and based on the guidance Ecology had received from the

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[14] The abuse of discretion standard has also been codified by the Legislature. RCW 34.05.574(1) provides that:

> In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.

PCHB's ruling in the 401 Appeal. It is therefore appropriate for the court to defer to Ecology's decision in this case.

Appellants attempt to circumvent the deference due to Ecology by arguing that Ecology did not exercise its delegated authority, but instead misinterpreted the Water Code, and therefore Ecology's application of the Water Code warrants no deference. This argument fails for two reasons. First, as explained in Part IVB(1) above, Ecology made a full public interest finding. Thus, contrary to Appellants' characterization, Ecology did not rely on an interpretation of the statute that allows it avoid making a public interest finding.

Second, even if Ecology's exercise of its delegated authority to issue permits involved statutory interpretation, the Court must give deference to Ecology's interpretation of the Water Code. The Washington Supreme Court recently reaffirmed that courts "give the agency's interpretation of the law great weight where the statute is within the agency's special expertise." *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015) (citing *Port of Seattle*, 151 Wn.2d at 593).

Appellants also claim that case law supports only that "Ecology has discretion to deny . . . or limit previously issued permits," implying that this discretion somehow does not extend to Ecology's ability to *grant*

permits. (App. Br. 18, 27.) But Appellants' overly narrow reading of these cases ignores that Ecology also has the discretion to grant permits by applying its expertise to the four part test. *See Theodoratus*, 135 Wn.2d at 597 ("The decision to issue a permit is a discretionary act.") (emphasis added); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 80, 101, 11 P.3d 726 (2000) ("A decision whether to grant a permit to appropriate water is within Ecology's exercise of discretion.") (emphasis added). As the PCHB recognized in this case, the Washington Supreme Court has also held that "the power to disapprove necessarily implies the power to condition an approval." *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 899, 602 P.2d 1172 (1979); *see also Theodoratus*, 135 Wn.2d at 597 ("an agency which has authority to issue or deny permits has authority to condition them"). In this case, Ecology exercised its discretion to condition the approval of the District's water right permit on the aesthetic flow study that was already mandated and approved by the 401 Certification.

Moreover, Appellants wrongly read the PCHB's case law as requiring Ecology to deny a permit "in the face of incomplete information" regarding any issue relevant to the four part test. (App. Br. 17-18, 20-21.) For example, Appellants claim that *Black Star Ranch,*

et al. v. Ecology "stands for the principle that when Ecology is faced with a situation in which 'incomplete information prevents answering' the statutory criteria, 'the appropriate response is to deny the permit, and hold that in these circumstances the proposed use threatens to prove detrimental to the public interest.'" (App. Br. 21.)

Appellants misrepresent the facts and the holding in *Black Star*. The *Black Star* case was principally about two of the other prongs of the four part test in RCW 90.03.290, namely availability of water and impairment of existing water rights. The PCHB's opinion in that case explains "[t]he problem in this case is what to do when incomplete information prevents answering the water availability and impairment of existing rights questions either way." *Black Star*, 1988 WL 158984 at *4. The PCHB solved this problem by affirming Ecology's decision to deny the water right permit on the grounds that it was not in the public interest. *Black Star*, 1988 WL 158984 at *4-5. In the instant case, by contrast, there is no question that water is available and that there will be no impairment to other users from the District's water use. This case therefore does not present the "incomplete information" situation that was present in *Black Star*.

The PCHB's water right decision in the instant case confirmed that *Black Star* stands for the proposition that Ecology must deny a permit only when facts exist to answer "any of [the statutory] criteria in the *negative*." (CR 520.) (quoting *Black Star*, 1988 WL 158984 at *4) (emphasis added by PCHB). Thus, *Black Star* does not support that Ecology must deny a permit when faced with imperfect information. In fact, the PCHB confirmed in *Black Star* that determining whether enough information exists to make a decision is "essentially a matter of [Ecology's] discretion." *Id.*

Appellants also point to *Squaxin Island Tribe v. State of Washington, Dep't of Ecology, et al.*, to argue that the issuance of a water right permit is not a discretionary decision by Ecology. *Squaxin Island Tribe v. State of Washington, Dep't of Ecology, et al.*, PCHB No. 05-137, 2006 WL 3389969 (Nov. 20, 2006). Appellants argue that the PCHB reversed Ecology's permitting decision in *Squaxin* because Ecology lacked information regarding how groundwater withdrawals would affect nearby surface waters. (App. Br. 20.) But as the PCHB pointed out in its opinion in this case, Ecology not only lacked information in *Squaxin*, it had information to indicate that the withdrawals would "likely lower the stream flow" of certain creeks, negatively impacting fish relied on by

nearby tribes. (CR 521) (citing *Squaxin*, 2006 WL 3389969 at *25). Moreover, in *Squaxin*, the PCHB further concluded that water was not available for the proposed wells because information in the record showed that groundwater withdrawals would negatively impact nearby surface water levels. *Id.* at *28. *Squaxin* therefore does not limit Ecology's discretionary authority to balance competing public interests when the other prongs of the four part test are satisfied, as in this case.

Here, the exact aesthetic effect may not be known, but the overall effect of the Project—including the anticipated aesthetic effects—left Ecology with no reason to conclude that the Project will be detrimental to the public interest. Ecology considered the limitations of the information currently available regarding aesthetics along with several other factors, including the protection of fish and the public benefit of a sustainable energy source. Balancing these factors, Ecology concluded that the Project will not be detrimental to the public interest.

In sum, the PCHB and the Superior Court properly viewed Ecology's decision in this case as a discretionary matter. Appellants have failed to make the case that the inexactness inherent in conditioning a permit on future evaluation of aesthetics is detrimental to the public interest. Ecology's issuance of a water right to the District was within the

scope of Ecology's discretion given the relevant public interest considerations and the terms of the 401 Certification.

C. Appellants' current appeal is a collateral attack on the PCHB's resolution of the 401 Appeal

In this appeal, Appellants attack the sufficiency of the same protections they endorsed in the 401 Appeal. The aesthetic study mandated by the 401 Appeal was designed by the PCHB to assure that the Water Code's public interest standard is met under RCW 90.54.020. (CR 115-16.) The public interest test for a water right from RCW 90.03.290 "furthers the policy of" RCW 90.54.020 and reflects the same considerations. *See Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wn.2d. 778, 796, 51 P.3d 744 (2002). Thus, Appellants are litigating the same finding and the same legal standard that was resolved in the 401 Appeal.

Appellants explicitly endorsed the PCHB's resolution of the aesthetics issue in the 401 Appeal. Appellants' Petition for Reconsideration of the PCHB's initial Final Order in the 401 Appeal stated that: "The Board's findings regarding temperature and aesthetics, and its direction to require a balance that ensures compliance with all water quality standards is sufficient to ensure that state law is fulfilled." (CR 485.)

Despite this history, Appellants now contend that "[a]t this point it is unknown whether there is a flow that simultaneously satisfies the aesthetic, recreation and fisheries flow requirements that must be protected under state water quality laws." (App. Br. 16.) The 401 Certification is squarely focused on compliance with water quality standards, and it is too late for Appellants to change their position on the 401 Certification. The doctrine of collateral estoppel prevents Appellants from challenging the sufficiency of the aesthetic flow program that Appellants specifically endorsed in a prior proceeding concerning the same aesthetic flows at issue in the instant appeal. *See Irondale Cmty. Action Neighbors v. Western Washington Growth Management Bd.*, 163 Wn. App. 513, 524-28, 262 P.3d 281 (2011) (explaining collateral estoppel doctrine in the context of Growth Management Hearings Board and PCHB decisions).

In order to avoid collateral estoppel, Appellants attempt to draw a distinction between the "reasonable assurance" standard of CWA Section 401 and the public interest standard in the Water Code. Specifically, Appellants claim that "[t]he 'reasonable assurance' legal standard presents a lower bar than the more onerous standards for issuance of a water right." (App. Br. 26.) Both of these standards, however, require the exercise of discretion by Ecology.

If there is a practical difference between the two standards, the CWA Section 401 "reasonable assurance" standard is more restrictive of Ecology's discretion. The Washington Supreme Court has held that "reasonable assurance" means Ecology must be "reasonably certain" of compliance with the standards evaluated in a 401 certification. *Port of Seattle*, 151 Wn.2d at 600 (emphasis added). This determination requires evaluation of data developed in the record. There is no balancing of competing interests in making this determination. Whether or not a proposed water use will be detrimental to the public interest, however, is an exercise of agency judgment that by its nature involves balancing of interests, an exercise in which courts are loathe to inject themselves. *See id.*; *Schuh*, 100 Wn.2d at 187.[15]

The procedural history of this case reveals that Appellants have changed their view of the pending aesthetic study in order to prolong their litigation campaign against the Project. This reversal of position demonstrates that Appellants do not have a legal claim against Ecology so

[15] As described in Part IVB(3) above, the Water Code requires only a determination that a proposed hydropower water use not be "likely to prove detrimental to the public interest . . . ." RCW 90.03.290(1) (emphasis added). The Merriam-Webster dictionary defines "likely" as "having a high probability of occurring." *See Likely Definition*, Miriam-Webster.com, http://www.merriam-webster.com/dictionary/likely (last visited October 8, 2015). As a matter of semantics, therefore, "high probability" under RCW 90.03.290 is not a more demanding standard than "reasonability certain" under CWA Section 401.

much as a policy disagreement with the agency about the weighing of competing public interests on the Similkameen River. Washington law does not permit Appellants to continue using legal system to pursue their policy objective in this matter.

D. The PCHB and the Superior Court properly concluded that Ecology was not required to issue a preliminary water permit to the District

Appellants' argument regarding the preliminary permit provision at RCW 90.03.290(2)(a) is also grounded in the theory that Ecology lacked "sufficient information" to make an "affirmative finding" regarding the public interest test of RCW 90.03.290. (App. Br. 28.) Appellants argue that, as a result, Ecology's choices are limited to denying the District's permit or issuing a preliminary permit. (App. Br. 28.)

As described above in Part IVB, however, the situation that Appellants describe does not exist in this case because Ecology did properly find compliance with all elements of the four part test at RCW 90.03.290. Under RCW 90.03.290(2)(a), Ecology may issue a preliminary permit if a water right application "does not contain . . . sufficient information on which to base such findings." Because Ecology determined that the agency *did* have sufficient information to make the required four part findings, there was no reason for Ecology to issue a

preliminary permit. The Water Code offers preliminary permits as one tool in the toolbox that Ecology in its discretion may choose to invoke where continuing study is needed. Ecology is equally free to conditionally issue the water right under an adaptive management approach when the application, as a whole, provides Ecology with enough information to make findings.

Moreover, the aesthetic flow condition of the Project's 401 Certification ensures that additional information regarding aesthetic flows will be developed. As the PCHB recognized in its decision on the water rights appeal:

> This case is unique because the § 401 Certification has already been approved with a condition for a study to determine the aesthetic flows . . . Ecology will be developing these aesthetic flows in compliance with the Water Resources Act of 1971, ch. 90.54 RCW, which requires the protection of designated beneficial uses such as aesthetics, and using the authority of the water code for issuing water rights and the CWA for issuing a § 401 Certification.

(CR 522.) Because Ecology already had enough information to make a public interest finding and because the ROE integrated the 401 Certification condition ensuring that aesthetic flow will be evaluated, the issuance of a preliminary permit would not be appropriate and would

serve no useful purpose. Ecology therefore properly exercised its discretion in declining to issue a preliminary permit to the District.[16]

Appellants express fear that a permanent, phantom water right with 10/30 cfs minimum flows will remain in place even if the Project is not ultimately constructed. (App. Br. 25-26.) This is contrary to both Washington law and the plain language of the ROE. Under RCW 90.03.320, Ecology is required to cancel a water right permit when the permit holder does not develop the water granted by the permit within the deadlines established in the permit. The permit at issue in this case requires the District to put the 600 cfs to full use by 2026. (CR 119.) The District's permit will therefore be cancelled if the Project does not go forward.

Moreover, even if the District's water right did remain in place in the absence of Project operation, the water would simply remain in the Similkameen River. Therefore, there would be no practical impact from an unutilized water right.

[16] Appellants concede that Ecology's choice as to whether to issue a preliminary permit is a discretionary decision. (App. Br. 29.)

E. The PCHB and the Superior Court properly concluded that the default Similkameen River instream flows do not apply to the Bypass given the plain text of WAC 173-549-020(5).

Part VIB of Appellants' brief concerns the state's water resources rules for the Okanogan River Basin at WAC-173-549. These rules contain general numeric minimum streamflows for the Similkameen River. *See* WAC 173-549-020(2). The rules, however, specifically address flows in the bypass reach of a hydroelectric project as follows:

> (5) Projects that would reduce the flow in a portion of a stream's length (e.g. hydroelectric projects that bypass a portion of a stream) will be considered consumptive only with respect to the affected portion of the stream. Such projects will be subject to instream flows as specified by the department. These flows may be those established in WAC 173-549-020 or, when appropriate, may be flows specifically tailored to that particular project and stream reach. When studies are required to determine such reach- and project-specific flow requirements, the department may require the project proponent to conduct such studies.

WAC 173-549-020(5) (emphasis added).

In its 401 decision, the PCHB concluded that, under WAC 173-549-020(5), "while hydropower facilities are considered to be consuming water in a bypass reach, the rule provides that the hydro projects will be

subject to only those minimum flow specified by Ecology." (CR 87.) The 401 decision then directed Ecology to determine appropriate instream flows in the Bypass through the aesthetic flow monitoring program. (CR 115-16.) As described in Part IVC above, Appellants did not challenge this decision and instead praised it. (*See* CR 485.) Ecology thereafter incorporated the conditions of the 401 Certification into the ROE for the Project's water right. (*See* CR 136.)

Appellants now collaterally attack the PCHB's 401 decision by asserting that the Project is subject to the default minimum flows in WAC 173-549-020(2) rather than the site specific flows contemplated by WAC 173-549-020(5). Appellants are estopped from making this argument for the reasons described in Part IVC above.

Moreover, Appellants' argument is contrary to the plain text of WAC 173-549-020. As the PCHB recognized, there is "only one reasonable interpretation" of the relevant rule, which is that Ecology is required to set minimum flows in a bypass reach on a case-by-case basis. *See* WAC 173-549-020(5). Appellants attempt to overcome the plain text of this rule with a variety of irrelevant and inaccurate information.

First, Appellants note that the Okanogan Basin rules date to 1976 and are therefore older than the new water right approved by the ROE,

which has a priority date of 2010. Based on this history, Appellants argue that the instream flows specified in the basin rules take priority over the District's junior water right for the Project. (App. Br. 30-31.) The age of the instream flow rules, however, is irrelevant given that the rules specifically decline to adopt a standardized instream flow for a hydroelectric bypass reach.

Second, Appellants argue that WAC 173-549-020(5) is an "exception" to the minimum flow rules, and therefore must be "narrowly construed." (App. Br. 32-35.) As support for this theory, Appellants rely on *Swinomish Indian Tribal Community v. Washington State Department of Ecology*, 178 Wn. 2d 571, 579-80, 311 P.3d 6 (2013). In *Swinomish*, the Washington Supreme Court held that Ecology's water appropriation rules for the Skagit River Basin exceeded Ecology's authority to grant exceptions to minimum flow requirements under the "overriding-considerations" provision of RCW 90.54.020. Here, Ecology and the PCHB are not granting the District an exception to minimum flow requirements, but rather are implementing a program to determine appropriate minimum flows as required by the Similkameen River instream flow rules. Appellants' reliance on *Swinomish* is therefore

misplaced. Furthermore, even a narrowly construed regulation must be construed consistent with its plain text.

Finally, Appellants argue that the aesthetic study required by the 401 Certification and incorporated into the ROE does not satisfy WAC 173-549-020(5) because it is not "specifically tailored." (App. Br. 27.) This argument is illogical given that the 401 Certification specifically requires the "management and control of alternative flows in the bypass reach that will provide opportunities for review, monitoring and analysis." (CR 116.) Based on this analysis, Ecology is required to "make a finding of the aesthetic flows that meet the water quality standards for aesthetic purposes and is consistent with the Order." *Id.* The aesthetic flow program, therefore, is plainly designed to result in instream flows that are specifically tailored to the particular circumstances of the Project and the local area. The aesthetic flow program is therefore consistent with WAC 173-549-020(5).

V. CONCLUSION

For the reasons described above, the District respectfully requests that the court affirm the PCHB's decision in this case, as affirmed by the Superior Court. The District also respectfully requests that the Court grant

such other relief, including but not limited to fees and costs, that the Court deems appropriate and as authorized by law. RCW 34.05.574.

RESPECTFULLY SUBMITTED this 12th day of October, 2015.

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DECLARATION OF SERVICE

I, David Joseph Ubaldi, hereby declare that on this day I caused Respondent Public Utility District No. 1 of Okanogan County's Response Brief to be served on the parties via electronic mail in accordance with the parties' electronic service agreements.

Stated under oath this 12th day of October, 2015, in Bellevue, Washington.

/s/ David Joseph Ubaldi
David Joseph Ubaldi
Attorney for Appellants

DAVIS WRIGHT & TREMAINE

October 12, 2015 - 3:09 PM

Transmittal Letter

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Case Name: CELP v. WA Dept. of Ecology, et al
Court of Appeals Case Number: 47543-0

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