

FILED
COURT OF APPEALS
DIVISION II
2016 JUN 21 AM 10:52
STATE OF WASHINGTON
BY _____
DEPUTY

NO. 48360-2-II

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

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Appellant/Cross-Respondent,

v.

ESSES DAMAN FAMILY, LLC,

Respondent/Cross-Appellant,

and

QUINAULT INDIAN NATION and POLLUTION CONTROL
HEARINGS BOARD,

Respondents.

**DEPARTMENT OF NATURAL RESOURCES'
RESPONSE BRIEF TO QUINAULT INDIAN NATION**

ROBERT W. FERGUSON
Attorney General
PHILIP M. FERESTER
Senior Counsel
WSBA No. 21699
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 586-3202

ORIG

pm 6/20/16

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERROR.....2

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR3

IV. COUNTERSTATEMENT OF THE CASE3

V. ARGUMENT SUMMARY.....5

VI. ARGUMENT6

 A. Judicial Review Standards.....6

 1. Review of Factual Findings.....7

 2. Review of Questions of Law.9

 3. Review Under the Arbitrary and Capricious
 Standard.....10

 B. Substantial Evidence Supported the PCHB’s Decision to
 Locate the CMZ Edge at the South Shore Road.....10

 1. Extensive Evidence Pertained to the South Shore
 Road’s Role in Limiting the Quinault River CMZ.....11

 2. Marc Engel’s Testimony Supports the PCHB’s
 Determinations in Finding of Fact 29 and Conclusion
 of Law 11 That the South Shore Road May Serve as
 a Permanent Dike or Levee.17

 3. Substantial Evidence Supports the PCHB’s Finding
 of Fact 31 and Conclusion of Law 12 Regarding the
 South Shore Road and How It Is Maintained.20

 C. The PCHB Properly Interpreted the Board Manual’s
 Guidance, Using It to Evaluate the Evidence.23

1.	Because the PCHB’s Ruling Concerning the Location of the CMZ Edge Was Primarily Factual, This Court Should Conduct Substantial Evidence Review on the Record.	23
2.	Even if the Court Reviews Conclusion of Law 10 Under the De Novo Standard, the PCHB Properly Rejected QIN’s Board Manual Reading Because It Created an “Exception” From Nonsensical Criteria, and It Conflicted With Other Aspects of the Manual.....	28
3.	The PCHB Did Not Err in According an Administrative Agency Deference on a Technical or Scientific Matter Within Its Area of Expertise.....	34
D.	The PCHB’s Decision to Locate the CMZ Edge Along the South Shore Road Was Not Arbitrary and Capricious.	39
VII.	CONCLUSION	41

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Island County</i> , 81 Wn.2d 312, 501 P.2d 594 (1972).....	10, 40
<i>Bowers v. Pollution Control Hearings Bd.</i> , 103 Wn. App. 587, 13 P.3d 1076 (2000), <i>review denied</i> , 144 Wn.2d 1005 (2001)	6, 7, 8
<i>Callecod v. Wash. State Patrol</i> , 84 Wn. App. 663, 929 P.2d 510, <i>review denied</i> , 132 Wn.2d 1004 (1997).....	8, 23
<i>Casterline v. Roberts</i> , 168 Wn. App. 376, 284 P.3d 743 (2013).....	9
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	35, 36, 37, 38
<i>Cummings v. Dep't of Licensing</i> , 189 Wn. App. 1, 355 P.3d 1155 (2015).....	7
<i>Darkenwald v. Emp't Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	7
<i>Dep't of Ecology v. Public Util. Dist. No. 1 of Jefferson County</i> , 121 Wn.2d 179, 849 P.2d 646 (1993), <i>aff'd</i> , 511 U.S. 700 (1994)	37
<i>Douglass v. City of Spokane Valley</i> , 154 Wn. App. 408, 225 P.3d 448, <i>review denied</i> , 169 Wn.2d 1014 (2010).....	9, 17
<i>Edelman v. State</i> , 160 Wn. App. 294, 248 P.3d 581 (2011).....	8, 20
<i>Franklin County Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982), <i>cert. denied</i> , 459 U.S. 1106 (1983).....	9

<i>Friends of the Columbia Gorge, Inc. v. Forest Practices Appeals Board,</i> 129 Wn. App. 35, 118 P.3d 354 (2005).....	37, 38
<i>Hahn v. Dep't of Ret. Sys.,</i> 137 Wn. App. 933, 155 P.3d 177 (2007).....	14, 20
<i>Heinmiller v. Dep't of Health,</i> 127 Wn.2d 595, 903 P.2d 433 (1995).....	40
<i>Hospice of Spokane v. Dep't of Health,</i> 178 Wn. App. 442, 315 P.3d 556 (2013).....	39
<i>Kittitas County v. Kittitas County Conserv.,</i> 176 Wn. App. 38, 308 P.3d 745 (2013).....	7
<i>Leschi Imprv. Coun. v. State Highway Comm'n,</i> 84 Wn.2d 271, 525 P.2d 774 (1974).....	9, 17
<i>McCleary v. State,</i> 173 Wn.2d 477, 269 P.3d 227 (2012).....	9
<i>Milestone Homes, Inc., v. City of Bonney Lake,</i> 145 Wn. App. 118, 186 P.3d 357 (2008).....	36
<i>Mistretta v. United States,</i> 488 U.S. 361 (1989).....	26
<i>Motley-Motley, Inc. v. State,</i> 127 Wn. App. 62, 110 P.3d 812 (2005), <i>review denied</i> , 156 Wn.2d 1004 (2006).....	7
<i>NLRB v. Marcus Trucking Co.,</i> 286 F.2d 583, 590 (2d Cir. 1961)	9
<i>Othello Cmty. Hosp. v. Emp't Sec. Dep't,</i> 52 Wn. App. 592, 762 P.2d 1149 (1988).....	38
<i>Overton v. Econ. Assistance Auth.,</i> 96 Wn.2d 552, 637 P.2d 652 (1981).....	9

<i>Pacificorp v. Wash. Util. & Transp. Comm'n,</i> No. 46009-2-II, slip op. (April 27, 2016)	8, 10, 23, 40
<i>Port of Seattle v. Pollution Control Hearings Bd.,</i> 151 Wn.2d 568, 90 P.3d 659 (2004).....	passim
<i>Probst v. Dep't of Ret. Sys.,</i> 167 Wn. App. 180, 271 P.3d 966 (2012).....	10, 40
<i>Saldin Sec. v. Snohomish County,</i> 134 Wn.2d 288, 949 P.2d 370 (1998).....	10
<i>Schuh v. Dep't of Ecology,</i> 100 Wn.2d 180, 667 P.2d. 64 (1983).....	39
<i>Slayton v. Dep't of Soc. & Health Servs.,</i> 159 Wn. App. 121, 244 P.3d 997 (2010).....	39
<i>Sleasman v. City of Lacey,</i> 159 Wn.2d 639, 151 P.3d 990 (2007).....	35, 36
<i>Snohomish County v. Hinds,</i> 61 Wn. App. 371, 810 P.2d 84 (1991).....	7
<i>Tapper v. Emp't Sec. Dep't,</i> 122 Wn.2d 397, 858 P.2d 494 (1993).....	7, 8, 21
<i>Wash. Educ. Ass'n v. Pub. Disclosure Comm'n,</i> 150 Wn.2d 612, 80 P.3d 608 (2003).....	26
<i>Wash. State Emp. Ass'n v. Cleary,</i> 86 Wn.2d 124, 542 P.2d 1249 (1975).....	39
<i>West v. Thurston County,</i> 168 Wn. App. 162, 275 P.3d 1200 (2012).....	16
<i>White v. Salvation Army,</i> 118 Wn. App. 272, 75 P.3d 990 (2003).....	38
<i>Willener v. Sweeting,</i> 107 Wn.2d 388, 730 P.2d 45 (1986).....	21

Statutes

18 U.S.C. § 3742(a)(2).....	27
18 U.S.C. § 3742(b)(2)	27
18 U.S.C. § 3742(f)(1)	27
RCW 34.05.010(8).....	26
RCW 34.05.010(15).....	26
RCW 34.05.230(1).....	26
RCW 34.05.570(1).....	6
RCW 34.05.570(2)(c)	25
RCW 34.05.570(3).....	6
RCW 34.05.570(3)(c)	7
RCW 34.05.570(3)(d)	7
RCW 34.05.570(3)(e)	7
RCW 34.05.570(3)(i).....	7
RCW 76.09.040(3)(c)	25
RCW 77.57.030	30
RCW 77.57.030(1).....	30
RCW 77.57.030(2).....	30

Other Authorities

14A Karl B. Tegland, *Washington Practice: Civil Procedure* (6th ed. 2009) 8, 21

4 Karl B. Tegland, *Washington Practice: Rules Practice*, CR 52 (2d ed. 2013)..... 9

AGO 49-51 No. 304..... 30

S. Rep. No. 98-225 (1983)..... 26

Washington Appellate Practice Deskbook (Wash. State Bar Assoc. 4th ed. 2016) 7

Webster’s Third New International Dictionary (Unabridged) (1993)..... 34

William R. Anderson, *The 1988 Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781 (1989)..... 10, 27, 39

Rules

ER 103(a)(1) 19

RAP 10.3(a)(4)..... 7

RAP 10.3(a)(6)..... 7

RAP 10.3(h) 7

Regulations

WAC 222-12-090..... 20, 25, 26

WAC 222-16-010..... passim

WAC 222-24-020(6)(d) 30

WAC 222-24-041(1)..... 29

WAC 222-24-041(6)..... 30

WAC 222-30-020(13).....	3
WAC 222-30-021.....	3
WAC 371-08-515.....	19

I. INTRODUCTION

Throughout history people have located trails, and eventually rail corridors and roads, adjacent to rivers. This practice occurred because the floors of river valleys tend to be flatter and easier to travel than traversing hills. But major rivers tend to migrate across the flat portions of valley floors, and that may cause rivers to come into contact with these man-made structures. Thus, “[r]ivers and streams unconfined by hillslopes can . . . be artificially constrained by dikes or road grades constructed on the floodplain or in the channel itself.”¹

The Quinault Indian Nation’s (QIN’s) judicial review appeal involves such a road. QIN challenges a Pollution Control Hearings Board (PCHB) decision that, for purposes of regulating forestry under the Forest Practices Act, ended the channel migration zone (CMZ) for the Quinault River along a major county road called the South Shore Road. That road sits between the Quinault River and the two parcels at issue.

The Forest Practices Act’s rules limit timber harvests within CMZs and use the CMZ edge as the starting point for a riparian management zone. Additionally, CMZs are defined to recognize that a “permanent levee or dike” like a public road may limit river movement.

¹ CP 614 (Board Manual at M2-45).

The parties sharply disputed whether the South Shore Road should be considered a permanent levee or dike during the eight-day administrative hearing. The PCHB considered competing expert opinions and evaluated the guidance in technical supplement to the rules called the Forest Practices Board Manual (Board Manual), which was also introduced as evidence.

The PCHB found the Department of Natural Resources' (DNR's) testimony on this issue was the most persuasive and, based on that testimony, it treated the South Shore Road as a permanent levee or dike and ended the Quinault River's CMZ there. QIN's argument relies on a reading of the Board Manual's guidance that the PCHB rejected because it made no sense, and because it would have resulted in the absurd consequence that the CMZ would have extended beyond a long-established and well-maintained public road. The PCHB's CMZ decision was based upon substantial evidence and followed the Forest Practices rules. The PCHB's decision should be affirmed.

II. ASSIGNMENT OF ERROR

The superior court erred by reversing the PCHB's fact-intensive determination that the Quinault River's CMZ ended at the South Shore Road for purposes of two forest practices permits.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was the PCHB's decision to establish the Quinault River CMZ along the publicly maintained South Shore Road supported by substantial evidence and consistent with the Forest Practices rules?

IV. COUNTERSTATEMENT OF THE CASE

Both Esses Daman Family, LLC (Daman Family) and QIN sought judicial review of the PCHB's Final Order. This is the second response brief filed by DNR in this case. DNR included the general factual background in its Response to Daman Family, and that is incorporated herein by reference.

QIN's case challenges the PCHB's findings and conclusions ruling that the Quinault River's CMZ was limited by the South Shore Road. The Forest Practices Act statutes contain no guidance on how to determine where a river may migrate. The Forest Practices Board has adopted three key rules concerning CMZs. One rule prohibits the harvest of timber within the CMZ area.² Another rule indicates that the riparian management zone begins at the outside edge of the CMZ for migrating rivers.³ The last rule, defining a CMZ, is the most pertinent to QIN's portion of the case. That rule provides:

² WAC 222-30-020(13).

³ WAC 222-30-021.

'Channel migration zone (CMZ)' means the area where the active channel of a stream is prone to move and this results in a potential near-term loss of riparian function and associated habitat adjacent to the stream, *except as modified by a permanent levee or dike*. For this purpose, near-term means the time scale required to grow a mature forest. (See board manual section 2 for descriptions and illustrations of CMZs and delineation guidelines).⁴

The rules do not further define what constitutes a "permanent levee or dike," though the Board Manual provides guidance on it. The Board Manual was admitted as an exhibit, and its language relating to permanent dikes and levees is discussed below.

The PCHB considered extensive testimony about the road and the Board Manual's guidance, as well as other evidence to implement the CMZ definition at this site. The PCHB resolved the disputed CMZ edge location by following the CMZ delineation of DNR's geologist, Leslie Lingley. The PCHB deemed Ms. Lingley's delineation the most credible because it was most consistent with the rule definition and the Board Manual.⁵ In addition, the PCHB found DNR's testimony concerning the Board Manual, its history, and its guidance persuasive. The PCHB set the CMZ edge at the South Shore Road based upon a robust

⁴ WAC 222-16-010 ("channel migration zone") (emphasis added).

⁵ CP 491-92 and 506 (PCHB Final Order, Finding Nos. 26-27, and Conclusion No. 7).

administrative record spanning over 1,000 pages of testimony and over 900 pages of exhibits.⁶

V. ARGUMENT SUMMARY

The underlying administrative hearing required the PCHB to resolve where the Quinault River would migrate 140 years into the future, and, by doing so, determine if the CMZ would restrict the timber harvests proposed in two forest practices permits. This was a factual, site-specific determination arrived at after the PCHB received a mountain of evidence, often conflicting, to help it make this prediction.

QIN, like Daman Family, seeks to treat the Board Manual as an administrative rule. The Board Manual's guidance helped the PCHB evaluate the witnesses' testimony, and the witnesses' testimony helped inform the PCHB's understanding of the Board Manual's guidance. But the Board Manual was not adopted as a rule, it is nonbinding, and it confers no legal rights. QIN does not even argue that the PCHB's interpretation of the Board Manual conflicts with any Forest Practices Act statute or rule.

QIN misses the mark with its "plain language" argument about a sentence in the Board Manual, which it contends creates an "exception" that prevents some public roads from acting as permanent dikes or levees.

⁶ CP 510-11 (PCHB Final Order, Conclusion No. 13).

QIN's argument fails because the criteria composing the alleged exception have nothing to do with dikes or levees. The PCHB determined that treating the sentence as an exception made no sense. Its decision was consistent with the evidence and the rule defining CMZs, which indicates a CMZ may be limited by a levee or dike. Nothing prevented DNR from offering evidence about the meaning of the Board Manual, and nothing prevented the PCHB from considering and relying upon it.

The PCHB's Final Order was a well-reasoned result, and QIN does not show error. The superior court's decision should be reversed, and the PCHB's ruling should be affirmed.

VI. ARGUMENT

A. Judicial Review Standards.

Review of administrative decisions under the APA applies various tiers of scrutiny depending upon the aspect or nature of the challenged decision. The PCHB's decision is presumptively correct. QIN bears the burden of demonstrating the decision's invalidity.⁷ RCW 34.05.570(3) sets forth nine potentially relevant standards for judicial review of administrative

⁷ RCW 34.05.570(1); *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 595, 13 P.3d 1076 (2000), *review denied*, 144 Wn.2d 1005 (2001).

orders. QIN's appeal concerns only the standards applicable to review of factual findings, alleged errors of law, and discretionary agency decisions.⁸

1. Review of Factual Findings.

Reviewing courts deem unchallenged findings to be verities on appeal.⁹ When challenged, courts review the factual findings of an administrative agency under the "substantial evidence" test in RCW 34.05.570(3)(e). This is the same test that an appellate court would apply to a superior court's findings of fact.¹⁰

Substantial evidence is a sufficient quantity to persuade a fair-minded person of the truth or correctness of the finding.¹¹ Courts must view the evidence in the light most favorable to the party that prevailed in the highest forum that exercised fact-finding authority.¹² The

⁸ RCW 34.05.570(3)(e), (3)(d), and (3)(i); QIN Opening Brief at 4. QIN also cites RCW 34.05.570(3)(c) (unlawful procedure or decision making process), but it failed to assign error or dedicate argument about the hearing process itself (as opposed to the result). QIN Opening Brief at 21-22. Unlawful procedure issues generally involve claims of bias, ex parte communications, or the appearance of fairness doctrine, none of which QIN raises. *Washington Appellate Practice Deskbook* § 21.11(2) at 21-102 (Wash. State Bar Assoc. 4th ed. 2016). To the extent QIN asserts an unlawful procedure argument, it should be deemed waived. RAP 10.3(a)(4), 10.3(a)(6), and 10.3(h).

⁹ *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993); *Darkeiwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015).

¹⁰ *Snohomish County v. Hinds*, 61 Wn. App. 371, 378-79, 810 P.2d 84 (1991); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812 (2005), *review denied*, 156 Wn.2d 1004 (2006).

¹¹ *Bowers*, 103 Wn. App. at 596; *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004).

¹² *Cummings v. Dep't of Licensing*, 189 Wn. App. 1, 10-11, 355 P.3d 1155 (2015); *Kittitas County v. Kittitas County Conserv.*, 176 Wn. App. 38, 48, 308 P.3d 745 (2013).

substantial evidence test does not allow a reviewing court to reweigh witness credibility or the evidence presented to the administrative agency.¹³ The mere presence of contradictory evidence in the record does not render an agency's finding unsupported by substantial evidence.¹⁴ Even inconsistent testimony offered during cross-examination does not affect this analysis, because courts conducting judicial review do not reweigh.¹⁵ Review of the factual findings is thus deferential and asks whether any fair-minded person considering the evidence could make the PCHB's findings.¹⁶

As discussed below, at least two of QIN's challenged conclusions are actually findings of fact. The substantial evidence standard applies to findings of fact regardless of whether they are labelled as such or whether they appear within conclusions of law.¹⁷ The APA does not define the meaning of "finding" or "conclusion," but factual issues resolve "who-what-when-where-and-how" questions,¹⁸ and assert that something "has happened or is or will be happening independent of or anterior to

¹³ *Bowers*, 103 Wn. App. at 596; *Edelman v. State*, 160 Wn. App. 294, 310-11, 248 P.3d 581 (2011).

¹⁴ *Pacificorp v. Wash. Util. & Transp. Comm'n*, No. 46009-2-II, slip op. at 24 (April 27, 2016).

¹⁵ *Id.* at 37 n.31.

¹⁶ *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673-76 and 676 n.9, 929 P.2d 510, review denied, 132 Wn.2d 1004 (1997).

¹⁷ *Tapper*, 122 Wn.2d at 406.

¹⁸ 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 33:18, at 418 (6th ed. 2009).

any assertion of its legal effect.”¹⁹ The PCHB’s Final Order contains a general finding adopting any findings later found within its conclusions of law.²⁰

2. Review of Questions of Law.

In contrast, questions of law “represent the conclusions that follow when, through the process of legal reasoning, the law is applied to the facts as found” by the trier of fact.²¹ Questions of law receive de novo review, which allows courts to “say what the law is.”²²

Courts give substantial weight to an agency’s interpretation of law, even when the de novo standard of review applies. This is particularly true when an agency administers a specialized field of law (such as DNR),

///

///

///

///

¹⁹ *Leschi Imprv. Coun. v. State Highway Comm’n*, 84 Wn.2d 271, 283, 525 P.2d 774 (1974), quoting *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590 (2d Cir. 1961); *Dougllass v. City of Spokane Valley*, 154 Wn. App. 408, 417-18, 225 P.3d 448, review denied, 169 Wn.2d 1014 (2010).

²⁰ CP 503 (PCHB Final Order, Finding No. 46).

²¹ 4 Karl B. Tegland, *Washington Practice: Rules Practice*, CR 52, at 281 (2d ed. 2013); *Dougllass*, 154 Wn. App. at 418; and *Casterline v. Roberts*, 168 Wn. App. 376, 382-83, 284 P.3d 743 (2013).

²² *McCleary v. State*, 173 Wn.2d 477, 515, 269 P.3d 227 (2012); *Franklin County Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106 (1983), quoting *Overton v. Econ. Assistance Auth.*, 96 Wn.2d 552, 554-55, 637 P.2d 652 (1981).

as well as when an agency conducts quasi-judicial functions and develops its expertise in that manner (such as the PCHB).²³

3. Review Under the Arbitrary and Capricious Standard.

A court will not overturn an administrative decision under the arbitrary and capricious standard unless it is a “willful and unreasoning action taken without regard to or consideration of the facts and circumstances surrounding the action.”²⁴ When there is room for two opinions, action is not arbitrary and capricious if it is taken honestly and upon due consideration, even if the reviewing court may have reached a different result.²⁵ A tribunal that bases its conclusion on disputed evidence has not acted in an arbitrary or capricious manner.²⁶

B. Substantial Evidence Supported the PCHB’s Decision to Locate the CMZ Edge at the South Shore Road.

WAC 222-16-010 frames the dispute in this case. It provides that the CMZ “is the area where the active channel of a stream is prone to move . . . except as modified by a permanent levee or dike.” The PCHB

²³ *Port of Seattle*, 151 Wn.2d at 587 and 591-95; *Franklin County Sheriff’s Office*, 97 Wn.2d at 325-26; see also William R. Anderson, *The 1988 Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 837 (1989) (“Judicial deference on . . . questions of law is most appropriate when the determination is inextricably bound up with factual issues and most especially when those factual issues are technical, complex, or specialized and are within the presumed expertise of the agency.”).

²⁴ *Probst v. Dep’t of Ret. Sys.*, 167 Wn. App. 180, 191, 271 P.3d 966 (2012).

²⁵ *Anderson v. Island County*, 81 Wn.2d 312, 317, 501 P.2d 594 (1972); and *Probst*, 167 Wn. App. at 192.

²⁶ *Pacificorp*, slip. op. at 41-42; *Saldin Sec. v. Snohomish County*, 134 Wn.2d 288, 297, 949 P.2d 370 (1998).

needed to determine the size of the CMZ, and if it reached the South Shore Road, whether the road was such a levee or dike. The parties presented voluminous and contradictory evidence on these issues. The PCHB also visited the site and toured locations along the South Shore Road near the parcels to contextualize the evidence.²⁷

QIN challenges findings concerning a part of the PCHB's overall CMZ decision related to the evidence about the South Shore Road. QIN challenges the evidence concerning how the Board Manual's "permanent dike or levee" guidance should be applied to the road, and the evidence concerning the maintenance and structural integrity of the road. This section first summarizes the key evidence and then will address QIN's arguments concerning the evidence.

1. Extensive Evidence Pertained to the South Shore Road's Role in Limiting the Quinault River CMZ.

The Board Manual recognizes that the migration of rivers can be artificially constrained by dikes or road grades constructed on the floodplain or in the channel itself.²⁸ A section discussing "Disconnected Migration Areas" addresses these man-made structures so that those delineating forest practices CMZs consider that certain roads and other

²⁷ CP 479 (PCHB Final Order).

²⁸ CP 614 (Board Manual at M2-45).

structures will act as barriers to channel migration. The Board Manual's text describes Disconnected Migration Areas:

The disconnected migration area (DMA) is the portion of the CMZ behind a permanently maintained dike or levee. . . . As used here, a permanent dike or levee is a channel limiting structure that is either:

1. A continuous structure from valley wall or other geomorphic structure that acts as a historic or ultimate limit to lateral channel movements to valley wall or other such geomorphic structure and is constructed to a continuous elevation exceeding the 100-year flood stage (1% exceedence [sic] flow); or
2. A structure that supports a public right-of-way or conveyance route and receives regular maintenance sufficient to maintain structural integrity (Figure 19).

A dike or levee is not considered a "permanent dike or levee" if the channel limiting structure is perforated by pipes, culverts, or other drainage structures that allow for the passage of any life stage of anadromous fish and the area behind the dike or levee is below the 100-year flood level.

The Washington Department of Fish and Wildlife (WDFW) and the Indian tribes can often provide assistance in evaluating the potential for seasonal fish passage and use of the floodplain, as well as details on dike permitting.²⁹

Most of the road-related evidence in this case focused on the criteria of "point 2" above, concerning public rights of way. Other evidence concerned the sentences following point 2. The Board Manual itself was

²⁹ CP 507 (PCHB Final Order, Conclusion No. 9); CP 599. This is page M2-30 in the Board Manual, which also appears in the Appendix.

an exhibit.³⁰ It served as a scientific foundation to guide the evaluation of other evidence and was a subject of expert testimony.

Two geologists, Steve Toth (a Daman Family expert witness) and Leslie Lingley (a DNR expert witness), testified that the South Shore Road should be considered a barrier to channel migration if the river were to get to the road, using the language in point 2 and treating the county road as a public right-of-way that receives regular maintenance. Mr. Toth's CMZ delineation for the Daman Family parcel fell short of the road due to other factors. But he acknowledged that if his rate of erosion applied to Sherman Esses' parcel (where the river is closer), he would have used the road as the CMZ edge because it would act as a permanent dike or levee.³¹ Mr. Toth also testified that the South Shore Road would be an appropriate "worst case analysis" for this site as a CMZ delineation line.³²

Leslie Lingley delineated the CMZ's edge at the road, which she explained in both testimony and her written report.³³ Ms. Lingley observed that the South Shore Road was well maintained and that the County would apply rip-rap to harden the side of the road exposed to the

³⁰ CP 570-638 (Ex. A-29).

³¹ CP 2164-65 and 2173-76 (Tr. Vol. VI, 124:20-125:3 and 133:20-136:20).

³² CP 2176 (Tr. Vol. VI, 136:12-20).

³³ Lingley's report appears at CP 935-954 (Ex. DNR-6). The conclusion reads in part, "the southern edge of the Quinault River Channel Migration Zone lies at the north side of the South Shore Road." CP 951.

river where the river flowed beside the road.³⁴ Ms. Lingley also knew the South Shore Road from having driven it as a prior QIN employee.³⁵ She contacted the Jefferson County Roads Department for purposes of her CMZ Report, which confirmed its intent to continue maintaining this road.³⁶

Ms. Lingley explained how her opinion followed the Board Manual's guidance. She testified that she located the CMZ edge at the South Shore Road because of the "point 2" language in the Board Manual, as well as the Board Manual's glossary definition of a "dike or levee (constructed)," which reiterated the express language of points 1 and 2 but contained no "exception" to points 1 and 2.³⁷ She testified that her CMZ stopped at the road because that was "the limiting factor."³⁸

³⁴ CP 2224-27 (Tr. Vol. VII, 33:12-36:11).

³⁵ CP 2197 (Tr. Vol. VII, 6:7-22) and CP 2225-26 (Tr. Vol. VII, 34:19-35:10).

³⁶ CP 948 (Ex. R-DNR-6, at 14).

³⁷ CP 2330-31 (Tr. Vol. VII, 139:21-140:14). The Board Manual glossary defines "dike or levee (constructed)" with the following language:

A continuous structure from valley wall to valley wall or other geomorphic feature that acts as an historic or ultimate limit to lateral channel movements and is constructed to a continuous elevation exceeding the 100-year flood stage (1% exceedence [sic] flow); or a structure that supports a public right-of-way or conveyance route and receives regular maintenance sufficient to maintain structural integrity.

CP 630 (Ex. A-29, M2-61).

³⁸ CP 2342 (Tr. Vol. VII, 151:6-8). QIN mistakenly asserts that Ms. Lingley testified inconsistently with her expert witness report and that she changed her opinion "after being instructed to do so." QIN Opening Brief at 41. QIN's citation, CP 2270-71, fails to support its assertion. Ms. Lingley's report, CP 935-54, treated the road as a barrier to channel migration, and her testimony supported that opinion. Regardless, the PCHB deemed Ms. Lingley's CMZ testimony the most credible (CP 506), and this Court does not make new credibility determinations. *Hahn v. Dep't of Ret. Sys.*, 137 Wn. App. 933, 942, 155 P.3d 177 (2007).

Other testimony supported the PCHB's treatment of the South Shore Road as a regularly maintained public right of way. The South Shore Road crosses between Grays Harbor and Jefferson Counties and is maintained by the counties. Russ Esses, the Grays Harbor County Roads Engineer, testified about the South Shore Road's designation as a "major collector route" and a "forest highway route," which make it eligible for federal emergency relief monies.³⁹ Both Leslie Lingley and Marc Engel observed road maintenance during site visits and testified that the road was well maintained.⁴⁰ Engel observed the South Shore Road on the 1939 aerial photograph.⁴¹ Bob Daman indicated that the South Shore Road has been well maintained and armored.⁴² Even QIN's expert acknowledged that the County has placed rip-rap where the river and road met.⁴³

Two other classes of evidence harmonized with that previously discussed. First, QIN's publication and exhibit, *Salmon Habitat Restoration Plan, Upper Quinault River*, expressly recognized that the South Shore Road limits the Quinault River's migration:

"The North Shore and South Shore roads parallel each side of the Upper Quinault River. *The location of these roads*

³⁹ CP 1832-1834 (Tr. Vol. IV, 13:3-15:23).

⁴⁰ CP 2225-26 (Tr. Vol. VII, 34:19-35:25 (Lingley, also discussing armoring)); CP 2412-13 (Tr. Vol. VIII, 22:5-23:6 (Engel)).

⁴¹ CP 2379-80 (Tr. Vol. VII, 188:11-189:25).

⁴² CP 1273 (R-DNR-40 (Answer to Interrogatory 10)).

⁴³ CP 1597-98 (Tr. Vol. II, 55:24-56:3).

*has isolated the river from portions of its floodplain and channel migration zone, resulting in a reduction of total available habitat area throughout the valley. The two roads essentially define the available channel migration zone.*⁴⁴

This admission carried added weight because one of QIN's expert witnesses authored the Restoration Plan.⁴⁵ The PCHB quoted this material in Finding of Fact 30.⁴⁶

Second, the foregoing evidence harmonized with and was supplemented by Marc Engel's testimony about the disputed language in the Board Manual concerning permanent dikes or levees. Mr. Engel was the lead and facilitator of the group who authored the Board Manual's CMZ guidance.⁴⁷ His testimony is discussed below.

///

///

///

///

⁴⁴ CP 711 (Ex. A-63) (emphasis added).

⁴⁵ CP 1734 (Tr. Vol. II, 192:6-14) and CP 1792 (Tr. Vol. III, 32:15-18).

⁴⁶ CP 494 (PCHB Final Order, Finding No. 30). QIN apparently assigned error erroneously to Finding of Fact 30. QIN Opening Brief at 21. Finding of Fact 30 merely quoted the above material from the admitted exhibit. QIN devoted no argument in its brief to this material. QIN likely meant to identify Finding of Fact 29 as erroneous, which largely pertained to Marc Engel's testimony about the Board Manual, a matter QIN argued. QIN Opening Brief at 18-19 and 35-42. This Court should ignore QIN's apparently mistaken assignment of error to Finding of Fact 30. *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (courts do not consider conclusory arguments without authority). This brief assumes QIN intended to assign error to Findings of Fact 29 and 31, both of which involved testimony concerning the South Shore Road, and treats all other findings as verities.

⁴⁷ CP 2352-53 (Tr. Vol. VII, 161:9-162:6).

2. Marc Engel's Testimony Supports the PCHB's Determinations in Finding of Fact 29 and Conclusion of Law 11 That the South Shore Road May Serve as a Permanent Dike or Levee.

Finding of Fact 29 and Conclusion of Law 11 each discuss the language of the Board Manual's permanent dike or levee provisions and the testimony concerning them. Marc Engel testified about this language, where it came from, and how he interprets it, and the PCHB incorporated that evidence into its final order. Conclusion of Law 11 primarily reviews Mr. Engel's testimony and explains why it was credible. The evaluation of testimonial credibility apart from its legal effect is a factual matter.⁴⁸

Mr. Engel testified that in order to qualify under the Board Manual's guidance as a "permanent dike or levee" that disconnects a migration area, there are two sets of criteria for different structures – those contained in point 1 and point 2 on page M2-30 of the Board Manual.⁴⁹ Mr. Engel testified that those two criteria alone were the criteria intended for determining whether a dike or levee disconnected a CMZ at a given site. This was amplified by the "dike or levee (constructed)" definition in the Board Manual's glossary, because the glossary does not contain the sentence following point 2 which QIN contends is an "exception" to one or both

⁴⁸ *Leschi Imprv. Coun.*, 84 Wn.2d at 282-83; *Douglass*, 154 Wn. App. at 417-18.

⁴⁹ CP 2378-79 (Tr. Vol. VII, 187:15-188:10).

points.⁵⁰ Steve Toth agreed with Mr. Engel's testimony regarding the glossary terms and how they harmonized with points 1 and 2.⁵¹ Leslie Lingley did as well, calling the term "dike or levee (constructed)" synonymous with "permanent dike or levee" as used in the Board Manual's text, because "permanent dike or levee" has no definition in the glossary.⁵²

Mr. Engel also addressed the two sentences on page M2-30 that follow point 2. Mr. Engel refuted QIN's reading of the first sentence after point 2.⁵³ He testified that *both* sentences following point 2 in the Board Manual were added at the last minute as an afterthought, at the request of the Tribal Caucus that participated in the Board Manual re-write. More significantly, the two sentences following point 2 were added to the Board Manual *as a unit* that related to each other rather than to the numbered points before them.⁵⁴ The sentences following point 2 were added to address the fish use of the floodplain as off-channel habitat during high-water events.⁵⁵ Those sentences allayed concerns that the streams and wetlands

⁵⁰ CP 2382-83 (Tr. Vol. VII, 191:21-192:6). The glossary language appears in n. 37, *supra*.

⁵¹ CP 2174-75 (Tr. Vol. VI, 134:14-135:2).

⁵² CP 2337 (Tr. Vol. VII, 146:11-25).

⁵³ CP 2381 (Tr. Vol. VII, 190:9-14).

⁵⁴ CP 2381 (Tr. Vol. VII, 190:15-191:12); CP 2441-43 (Tr. Vol. VIII, 51:25-53:8); and CP 2460-61 (Tr. VIII, 70:25-71:24).

⁵⁵ CP 2385-86 (Tr. Vol. VII, 194:4-195:17) (discussing CP 960 (Ex. DNR-18)).

behind dikes or levees might not continue to be treated (and buffered) as fish bearing, despite the presence of a dike or levee.⁵⁶ Thus, Mr. Engel testified that regularly maintained public roads like the South Shore Road should be considered as permanent dikes or levees for purposes of forest practices CMZ delineation, and that no exception excluded some public roads from that role.⁵⁷

QIN did not object to this evidence describing the origin of the Board Manual's permanent dike or levee language. Objections to evidence must be made at the time it is offered.⁵⁸ Once admitted, the PCHB's job was to evaluate it. Here, the PCHB found Mr. Engel's testimony credible by positively discussing it in Finding 29 and Conclusion 11.⁵⁹

QIN argues that this testimony is "legislative history" and should not have been relied upon.⁶⁰ But legislative history pertains to statutes and rules, and even QIN agrees that the Board Manual is neither one.⁶¹ Rather, it is a technical guidance document prepared by the DNR for the

⁵⁶ CP 2441-43 (Tr. Vol. VIII, 51:20-53:8); CP 960 (Ex. DNR-18). This concern arose because the regulation of CMZs as well as the treatment of permanent dikes or levees were still new concepts to forest practices regulation. CP 2441-43.

⁵⁷ CP 2462-63 (Tr. Vol. VIII, 72:21-73:4 (sentence after point 2 is a "separate thought from either 1 or 2")).

⁵⁸ WAC 371-08-515; ER 103(a)(1).

⁵⁹ CP 493-94 and 509. As discussed below at pages 27-33, this evidence harmonized with other contextual signals in the Board Manual.

⁶⁰ QIN Opening Brief at 18-19 and 35-42.

⁶¹ QIN's own brief states, "the Board Manual is not law and does not set legal standards." QIN Opening Brief at 48. How testimony about a piece of evidence that "is not law" suddenly becomes "legislative history" remains a mystery.

Forest Practices Board.⁶² Given its advisory nature, the PCHB appropriately considered testimony about how the Board Manual was written. To the extent QIN challenges the PCHB's decision to give this evidence weight, that argument fails because appellate courts do not reweigh evidence.⁶³

This Court should find that substantial evidence supports the PCHB's findings. Here, Mr. Engel's testimony concerned other evidence – the Board Manual itself. Finding of Fact 29 and Conclusion of Law 11 are thus supported by substantial evidence, including Mr. Engel's testimony and other evidence. A fair-minded person is entitled to believe the layers of evidence discussed above. QIN's arguments to the contrary on this point fail.

3. Substantial Evidence Supports the PCHB's Finding of Fact 31 and Conclusion of Law 12 Regarding the South Shore Road and How It Is Maintained.

Finding of Fact 31 and Conclusion of Law 12 each contain a paragraph discussing evidence concerning the construction and maintenance of the South Shore Road. In both paragraphs, the PCHB evaluated what the South Shore Road is, how it is constructed, and whether it is reasonable to assume that the road will be armored when the

⁶² WAC 222-12-090 (“The department . . . is directed to prepare, and submit to the board for approval, revisions to the forest practices board manual.”).

⁶³ *Edelman*, 160 Wn. App. at 310-11; *Hahn*, 137 Wn. App. at 941-42.

river more closely approaches the road.⁶⁴ The Quinault River presently sits at least 600 feet away from the South Shore Road near the properties.⁶⁵ The PCHB found from Ms. Lingley's testimony that the average rate of Quinault River erosion was 10.9 feet per year.⁶⁶ It would take 55 years for the Quinault River to reach the road at that rate.⁶⁷

The PCHB determined in both Finding of Fact 31 and Conclusion of Law 12 that it was reasonable to infer that armoring of the road would occur when it was needed, as the County had done in the past. Conclusion of Law 12 merely discusses the parties' testimony and other evidence, despite its label. It contains nary a legal citation and does not apply any law. These are "who-what-when-where-and-how" questions, apart from their legal effect.⁶⁸ Conclusion of Law 12 should be treated as a finding and reviewed under the substantial evidence standard.⁶⁹

There was ample evidence in the record to support these findings. Finding of Fact 31 indicates that it was drawn from the testimony of QIN's witness, Dr. Abbe, as well as the testimony of Russ Esses,

⁶⁴ CP 494-95 and 510 (PCHB Final Order, Finding 31 and Conclusion 12).

⁶⁵ CP 480 (PCHB Final Order, Finding of Fact 1).

⁶⁶ CP 491-91 and 506 (PCHB Final Order, Findings 26-27 and Conclusion 7).

⁶⁷ 600 feet of distance ÷ 10.9 feet/year = 55 years.

⁶⁸ 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 33:18, at 418 (6th ed. 2009).

⁶⁹ *Tapper*, 122 Wn.2d at 406; *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

Leslie Lingley, Bob Daman, and Ms. Lingley's written report (DNR-6).⁷⁰ Daman Family expert Steve Toth also supported the road as a barrier to CMZ migration. Marc Engel offered testimony about the condition of the road, and its permanence, having observed it on aerial photographs dating back to 1939. That evidence was summarized above. The same evidence supports the PCHB's findings in Conclusion of Law 12.

QIN's argument seems to be that the road is not presently armored to withstand the river. QIN contends that assuming that the road will be armored when the river approaches the road is speculative.⁷¹ That is not an error by the PCHB. First, the entire exercise of trying to predict what a river might do 140 years into the future depends on informed prediction and some speculation. Second, the PCHB did not err by drawing upon the evidence of prior road maintenance and armoring, and finding that the road would likely be armored once it became necessary. Several witnesses testified that the road would likely be armored once the river

///

///

///

///

⁷⁰ CP 494-95 (PCHB Final Order, Finding of Fact 31).

⁷¹ QIN Opening Brief at 43-46.

approached it.⁷² This record provides substantial evidence that sustains the challenged findings.

Moreover, the Board Manual's guidance does not suggest that public rights of way ought to be constructed to presently withstand a river's forces before such a road may serve as a "permanent dike or levee."⁷³ Nor is it reasonable to expect public agencies to armor their roads 50 or more years before seeing what is or is not actually needed. This Court's review of factual findings is highly deferential.⁷⁴ Substantial evidence clearly supports Finding of Fact 31 and Conclusion of Law 12.

C. The PCHB Properly Interpreted the Board Manual's Guidance, Using It to Evaluate the Evidence.

1. Because the PCHB's Ruling Concerning the Location of the CMZ Edge Was Primarily Factual, This Court Should Conduct Substantial Evidence Review on the Record.

This case was an evidentiary dispute, and the previous section of the brief demonstrates that the PCHB's decision should be affirmed.

⁷² See, e.g., CP 2399-2400 (Tr. Vol. VIII, 9:11-10:7) (Engel Testimony, indicating that there is no requirement that the road be presently built to withstand the river); CP 2457 (Tr. Vol VIII, 67:14-25) (Engel Testimony, stating that "permanent" for a county road means maintenance demonstrated over time); CP 2227 (Tr. Vol. VII, 36:3-11) (Lingley Testimony, stating that requiring armoring of the road when the river was still 600 hundred feet away would be "ridiculous").

⁷³ In fact, the contrasting verbiage of the Board Manual's point 1 criteria contains some construction standards, such as being built to a continuous elevation exceeding the 100-year flood stage. But the language concerning public roads is stated disjunctively from point 1 and contains no construction standard other than the road needs "regular maintenance" (to which several witnesses attested for the South Shore Road).

⁷⁴ *Callecod*, 84 Wn. App. at 673-76 and 676 n.9; *Pacificorp* slip op. at 12.

QIN's argument invites this Court to elevate the Board Manual beyond its role as technical guidance to those delineating CMZs, and to substitute its judgment about the CMZ evidence for the PCHB's. Given the nature of the Board Manual and the factual nature of the decision to locate the CMZ edge at the South Shore Road, QIN's arguments inviting this Court to sit as a "super-PCHB" should be rejected.

In addition to the aspects of the PCHB's decision previously discussed, QIN also challenges Conclusion of Law 10.⁷⁵ Conclusion of Law 10 evaluated the Board Manual evidence in light of the other evidence and the parties' arguments about its interpretation. QIN alleges that the PCHB erred in Conclusion of Law 10 by not reading the Board Manual's permanent dike or levee language in the manner that it advanced.⁷⁶ In so arguing, QIN seeks to treat the Board Manual as a rule and argues that the de novo judicial review standard applies. But the PCHB's decision involved a factual dispute, the Board Manual itself was evidence before the PCHB, and the Board Manual only provides scientific

///

///

///

⁷⁵ QIN Opening Brief at 21.

⁷⁶ QIN Opening Brief at 24-35.

guidance, rather than having status as a rule.⁷⁷ The Board Manual was never adopted as a rule, so it lacks the force of law.⁷⁸

Both RCW 76.09.040(3)(c) and WAC 222-12-090 discuss the Board Manual as technical guidance, not as a rule that dictates rights or obligations. The Board Manual repeatedly indicates that it provides guidance on how to determine if a CMZ is present, and if so, how to delineate a CMZ based upon site-specific, factual analysis. For example, it states,

[t]he following *guidelines* and delineation scenarios contain technical recommendations for CMZ delineation. It may be reasonable to deviate from these recommendations based on carefully developed technical analysis of the historical channel and watershed processes that control channel migration.⁷⁹

The Board Manual also recognizes that its guidance is a reflection of the state of CMZ science: “CMZ delineation is a relatively recent concept, and *no one method of analysis has been adopted or prescribed.*”⁸⁰

///

///

///

⁷⁷ CP 485 (PCHB Final Order, Finding No. 14).

⁷⁸ To have the force of law, rules must be properly promulgated. RCW 34.05.570(2)(c) (court may invalidate rules adopted without compliance with statutory rule-making procedures).

⁷⁹ CP 590 (Board Manual at M2-21) (emphasis added).

⁸⁰ CP 610 (Board Manual at M2-41) (emphasis added).

As Marc Engel testified, the Board Manual is a guidance document that leaves flexibility for *discretionary* decision making.⁸¹

QIN cites cases applying the federal sentencing guidelines to argue that this Court should review the PCHB's evaluation of the Board Manual *de novo*.⁸² However, there is nothing analogous between a court sitting in judicial review of a scientifically technical administrative decision like the PCHB's and an appellate court's determination of the appropriate criminal sentence. The judiciary has a unique role in the area of criminal justice.⁸³ The determination of a criminal sentence involves factors that judges have routinely and historically addressed. Moreover, Congress elected to

⁸¹ CP 2410 (Tr. Vol. VIII, 20:1-15). The Board Manual was first adopted in 1976. WAC 222-12-090 (Code Reviser's notes). Because the Board Manual's provisions are discretionary and lack the force of law, it bears a familial relationship to interpretive or policy statements in Washington's more modern, 1988 APA. RCW 34.05.010(8) and (15). Such documents are only advisory. RCW 34.05.230(1); *Wash. Educ. Ass'n v. Pub. Disclosure Comm'n*, 150 Wn.2d 612, 618-23, 80 P.3d 608 (2003) (guidelines were interpretive statements and had no legal or regulatory effect); *Port of Seattle*, 151 Wn.2d at 635 n.32 (permit challengers could not rely upon contents of permit writer's manual not adopted as a rule to challenge permit terms). Since the Board Manual is advisory and lacks the force of law, its provisions cannot be enforced as a rule, as QIN argues.

⁸² QIN Opening Brief at 22 and 24.

⁸³ While Congress may fix the sentence for federal crimes, judges have always had broad discretion in setting criminal sentences. *Mistretta v. United States*, 488 U.S. 361, 363-64 (1989). Even after enacting the sentencing reforms that brought about the Sentencing Guidelines, placement of the United States Sentencing Commission under the judicial branch reflected that sentencing "has been and should remain 'primarily a judicial function.'" *Id.* at 390, quoting S. Rep. No. 98-225, at 159 (1983). *De novo* review of activities traditionally performed by the judicial branch is not surprising.

preserve full review of a lower court's application of the federal criminal sentencing guidelines after sentencing reforms were enacted.⁸⁴

In contrast, the judiciary's role in administrative law is more limited. As noted by Professor Anderson:

When the legislature authorizes executive branch officials to act and that action comes before the judicial branch for review, the intersection of all three branches of government creates a complex structural problem. In the overall design, the basic function performed by judicial review is to keep administrative agencies within the bounds set for them by legislative and constitutional command.⁸⁵

Review to ensure administrative discretion is exercised within legislatively established bounds is wholly different from reviewing the appropriateness of criminal sentences.

Moreover, the Board Manual is a scientific document in a technical area. It was used by the PCHB to help guide the evaluation of scientific evidence *during* the administrative hearing. It was part of the evidence the PCHB evaluated. The Federal Sentencing Guidelines, in contrast, are applied by judges *after* the verdict has been obtained, to determine the incarceration period.

The PCHB weighed competing testimony about the facts on the ground, about the technical guidance for evaluating such information, and

⁸⁴ 18 U.S.C. § 3742(a)(2), (b)(2), and (f)(1).

⁸⁵ William R. Anderson, *supra*, n.23, at 819.

made a factual choice about where to locate the CMZ edge. The de novo review standard is inappropriate under these circumstances.

2. Even if the Court Reviews Conclusion of Law 10 Under the De Novo Standard, the PCHB Properly Rejected QIN's Board Manual Reading Because It Created an "Exception" From Nonsensical Criteria, and It Conflicted With Other Aspects of the Manual.

QIN's textual argument about the Board Manual's guidance treats the sentence after point 2 as an exception to point 2. That sentence states:

A dike or levee is not considered a "permanent dike or levee" if the channel limiting structure is perforated by pipes, culverts, or other drainage structures that allow for the passage of any life stage of anadromous fish and the area behind the dike or levee is below the 100-year flood level.⁸⁶

While QIN insists that this sentence creates an exception with three criteria (culverts, fish, and flooding behind a levee), it never introduced any testimony to explain why that interpretation makes any sense, despite the fact that it bore the burden of proof. But an examination of those criteria reveals that they make no sense in sorting the classes of roads that serve as permanent dikes or levees from those that do not.

To the extent QIN introduced any "why" evidence, it focused exclusively upon the mere presence of culverts or "holes" under the road bed. A culvert is a pipe or other structure that enables a road to cross a

⁸⁶ CP 599 (Board Manual at M2-30).

stream and allows the stream to flow under the road.⁸⁷ QIN's lead CMZ witness, Mary Ann Reinhart, repeatedly testified that she "could not get past" the concept of a dike or levee having "holes" in it.⁸⁸ QIN's briefing before the PCHB also heavily focused on the mere presence of culverts to establish that such a road should not be a permanent dike or levee.⁸⁹

The other parties attacked that position because all roads along a major river with a channel migration zone will have some culverts – they are necessary when roads cross tributary streams that flow towards larger bodies of water. Part of the evidence on that point concerned "Figure 19" which is referenced in point 2 of the Board Manual concerning public rights of way which serve as dikes or levees. That aerial photograph shows a road cutting off a CMZ.⁹⁰ Steve Toth and Mark Engel both testified that the nature of the topography pictured made it more likely than not that the picture – the example in the Board Manual for a road confining a CMZ – would have drainage structures under it.⁹¹ Other

⁸⁷ WAC 222-24-041(1).

⁸⁸ CP 1522-23 (Tr. Vol. I, 89:24-90:6); CP 1524 (Tr. Vol. I, 91:6-17); and CP 1584 (Tr. Vol. II 42:9-15).

⁸⁹ "The South Shore Road has three sizeable culverts under it. In concluding that the road is a dike or levee DNR and the Esses ignore the obvious: *a structure with holes in it does little to restrict the movement of water.*" CP 414 (QIN Prehearing Brief at 17) (emphasis added). Later, QIN added, "A road perforated in this manner does not function as a permanent dike or levee." CP 418 (QIN Prehearing Brief at 21).

⁹⁰ CP 599 (Board Manual at M2-30).

⁹¹ CP 2175-76 (Tr. Vol. VI, 135:17-136-8); CP 2387-89 (Tr. Vol. VII, 196:16-198:16).

testimony indicated that lakes would be created behind these structures if they had no culverts to pass water from tributary streams into larger waterways.⁹² Moreover, state law requires culverts underneath roads at stream crossings to provide for the passage of fish.⁹³

So all roads along major, migrating rivers have culverts where they cross tributary streams, and those culverts must pass fish. Those are the first two “criteria” of the sentence that QIN contends must be treated as forming an exception. However, as the PCHB determined in Conclusion of Law 10, it makes no sense to craft an “exception” out of meaningless criteria or criteria that would swallow the general rule.⁹⁴

QIN introduced no evidence regarding the significance of having floodwaters behind the dike or levee, other than for purposes of meeting the criteria of its imaginary “exception.”⁹⁵ Even if we assume for purposes of argument that culverts and the presence of flood waters *behind* a dike or levee has something to do with a road’s ability to act as a

⁹² CP 2338 (Tr. Vol. VII, 147:1-18); CP 2385 (Tr. Vol. VII, 194:20-25).

⁹³ RCW 77.57.030(1) and (2); AGO 49-51 No. 304, at 1-4 (predecessor statute to RCW 77.57.030 applies to culverts under public highways); WAC 222-24-020(6)(d) and WAC 222-24-041(6) (fish passage required under forest roads).

⁹⁴ CP 508 (PCHB Final Order, Conclusion No. 10).

⁹⁵ Point 1 in the Board Manual contains construction criteria requiring dikes or levees to be built to a height that exceeds the 100-year flood. But that construction standard pertains to the side facing the main river channel, not to the floodwaters behind the dike or levee. Put another way, QIN’s evidence never explained why a 99-year flood *behind* a dike or levee would be acceptable for purposes of the structure serving as a CMZ barrier, but that the same levee should not serve as a CMZ barrier once the flood waters at the 100-year level were slightly more extensive.

barrier to channel migration, fish have nothing whatsoever to do with that. And yet, QIN's reading of the sentence after point 2 requires fish to be one of three meaningful sorting criteria to separate some roads that serve as dikes or levees from others that do not.

Recall that Marc Engel testified that *two* sentences following point 2 were added to the Board Manual at the very end of the drafting process, and that neither was intended to modify the criteria for what constitutes a dike or levee.⁹⁶ Together, those sentences said:

A dike or levee is not considered a "permanent dike or levee" if the channel limiting structure is perforated by pipes, culverts, or other drainage structures that allow for the passage of any life stage of anadromous fish and the area behind the dike or levee is below the 100-year flood level.

The Washington Department of Fish and Wildlife (WDFW) and the Indian tribes can often provide assistance in evaluating the potential for seasonal fish passage and use of the floodplain, as well as details on dike permitting.

The common thread of these sentences is that they pertained to fish use of the floodplain – exactly what Mr. Engel indicated was their intent.⁹⁷ The PCHB also correctly noted that the second added sentence, concerning seasonal fish passage and fish use of the floodplain, stands completely

⁹⁶ CP 2381-82 (Tr. Vol. VII, 190:15-191:12); CP 2441-43 (Tr. Vol. VIII, 51:25-53:8); and CP 2460-61 (Tr. VIII, 70:25-71:24).

⁹⁷ CP 2385-86 (Tr. Vol. VII, 194:4-195:17) (discussing CP 960 (Ex. DNR-18)).

without purpose in this Board Manual section about permanent dikes or levees without the linkage to the other added sentence.⁹⁸

There were other textual indicators that the Forest Practices Board did not intend the sentence after point 2 to be read as an exception. First, it set off the text that forms the criteria with numbers and indentation. But the sentence afterwards, which QIN reads as an exception and part of the definition, is not part of the indented language. Second, the Board Manual glossary contains no version of any terms pertaining to dikes or levees that contains any exception. No mention is made in the glossary of a limitation for dikes or levees with culverts, passing fish, and having flood waters behind them. But the glossary's definition of a "dike or levee (constructed)" exactly matches the language used in the text at points 1 and 2:

A continuous structure from valley wall to valley wall or other geomorphic feature that acts as an historic or ultimate limit to lateral channel movements and is constructed to a continuous elevation exceeding the 100-year flood stage (1% exceedence flow); or a structure that supports a public right-of-way or conveyance route and receives regular maintenance sufficient to maintain structural integrity.⁹⁹

///

///

⁹⁸ CP 476-77 (PCHB Order Denying Reconsideration at 3-4).

⁹⁹ CP 630 (Board Manual at M2-61). Compare to points 1 and 2. CP 599 (Board Manual at M2-30).

No exception is stated in this parallel glossary definition, which further supported the PCHB's CMZ edge decision.¹⁰⁰

The PCHB believed that the Board Manual's permanent dike or levee language was ambiguous because either DNR's or QIN's construction could be facially plausible.¹⁰¹ And because the Board Manual is neither a statute nor a rule, the PCHB was not quite as restricted in its methods for arriving at the drafters' intent.¹⁰² Given that Mr. Engel's testimonial interpretation was "the only explanation offered by any party that makes sense of this Manual language,"¹⁰³ the PCHB reasonably and appropriately resolved this issue, particularly because QIN bore the burden of proof and failed to demonstrate why an exception with meaningless criteria made sense.

Most importantly, the PCHB had to apply the Board Manual consistently with the Forest Practices rules. WAC 222-16-010 defines a CMZ to include the area where the river may migrate, "except as modified by a permanent levee or dike."¹⁰⁴ "Dike" means a bank of earth constructed to confine water, as well as a "causeway" which is a type of a

¹⁰⁰ CP 508-09 (PCHB Final Order, Conclusion 10).

¹⁰¹ CP 476 (PCHB Order Denying Reconsideration at 3).

¹⁰² CP 475-76 (PCHB Order Denying Reconsideration at 2-3).

¹⁰³ CP 476 (PCHB Order Denying Reconsideration at 3).

¹⁰⁴ WAC 222-16-010 ("channel migration zone").

raised road across wet ground or water.¹⁰⁵ The evidence reflected that the South Shore Road is a raised road, built with earth, and confines the river's movement.¹⁰⁶ QIN's own Salmon Habitat Restoration Plan indicated that the South Shore Road "has isolated the river from portions of its floodplain and channel migration zone. . . ."¹⁰⁷ That is exactly what a dike or levee does – it isolates certain areas from water. The PCHB's decision to treat the South Shore Road as a permanent dike or levee was thus entirely consistent with CMZ definition in WAC 222-16-010.

Even if this Court applies the de novo review standard, the PCHB did not err in finding the Board Manual provisions subject to more than one interpretation. Nor did it err in relying upon testimony that it found compelling to resolve the issue.

3. The PCHB Did Not Err in Accordng an Administrative Agency Deference on a Technical or Scientific Matter Within Its Area of Expertise.

QIN overstates the role that deference played in the PCHB's Final Order. The PCHB based its decision on a thorough and complete evidentiary record. In Conclusions of Law 10, 11, and 12, the PCHB recounts that QIN's interpretation of the Board Manual provisions made

¹⁰⁵ *Dike and Causeway, Webster's Third New International Dictionary* (Unabridged) (1993).

¹⁰⁶ CP 493-95 (PCHB Final Order, Findings of Fact 29, 30, and 31).

¹⁰⁷ CP 494 (PCHB Final Order, Finding of Fact 30).

no sense, that the evidence supported DNR's CMZ delineation, and that DNR's approach was "the better interpretation of this section of the Manual."¹⁰⁸ Conclusion of Law 11 noted that given the ambiguity of the Board Manual, DNR was entitled to deference because it is the agency charged with enforcement of the Forest Practices Act and rules.¹⁰⁹ However, this was after the PCHB weighed the parties' positions and evidence and determined that QIN's position "did not make sense" and was "not reasonable."¹¹⁰ The PCHB's decision in this matter was driven by the facts and evidence, as it indicated when it denied direct review.¹¹¹

QIN argues that the PCHB's rational explanation for deference is error, citing *Cowiche Canyon Conservancy v. Bosley* and *Sleasman v. City of Lacey*, and claiming that agency interpretations need to be part of a "pattern of past enforcement" before they receive deference.¹¹² QIN myopically reads those cases. First, *Cowiche Canyon* involved the interpretation of an unambiguous *statute* and *Sleasman* involved the interpretation of an unambiguous *ordinance*, the equivalent of local legislation. This case involves an advisory technical guidance document.

¹⁰⁸ CP 509 (PCHB Final Order, Conclusion of Law 11).

¹⁰⁹ *Id.*

¹¹⁰ CP 508-09 (PCHB Final Order, Conclusion of Law Nos. 10 and 11).

¹¹¹ CP 80; CP 168-69.

¹¹² QIN Opening Brief, 38-42, citing *Cowiche Canyon, Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992), and *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007).

This is not a case where an agency seeks deference to an ad hoc interpretation of a statute, as rejected in the above cases. Rather, the PCHB gave precise and sound reasons for deference based upon the fact that the guidance is technical and that it originated with the agency. The type of deference sought and rejected in *Cowiche* and *Sleasman* has no relevance here.¹¹³

As recognized by the PCHB, courts routinely give deference to agencies charged with administering governmental programs. No decision contains a more thorough discussion of this concept than *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 591-95, 90 P.3d 659 (2004). That case is particularly apt here because it parses out the different types of deference as between one agency that administers a program (there, Ecology), and the PCHB itself, which receives deference as a result of its specialized responsibilities to conduct quasi-judicial hearings regarding certain technical permits.

First, *Port of Seattle* says nothing about patterns of prior interpretation as a pre-requisite to deference, either for the administering

¹¹³ An additional problem is that both *Cowiche* and *Sleasman* dealt with legislation that both Courts deemed unambiguous. *Cowiche Canyon*, 118 Wn.2d at 813-14, and *Sleasman*, 159 Wn.2d at 642-43. Because courts do not construe unambiguous statutes and administrative interpretations are not used in such situations, one court has observed that *Sleasman's* language about deference (borrowed directly from *Cowiche Canyon*) was *dictum*. *Milestone Homes, Inc., v. City of Bonney Lake*, 145 Wn. App. 118, 127-28, 186 P.3d 357 (2008).

agency or for the quasi-judicial agency. But the Court noted that it was “well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency.”¹¹⁴ Hence, Ecology’s interpretations of its own rules were entitled to “great weight.”¹¹⁵ While the Board Manual carries less formality than a rule, it still falls within DNR’s specialized expertise. Under *Port of Seattle*, DNR’s interpretations of that guidance are entitled to “great weight.”

QIN also criticizes the PCHB’s reliance upon *Friends of the Columbia Gorge, Inc. v. Forest Practices Appeals Board*, 129 Wn. App. 35, 118 P.3d 354 (2005), a case involving a DNR forest practices permit approval.¹¹⁶ That case involved a provision of the Columbia River Gorge Management Plan. The appellants in that matter cited *Cowiche Canyon* for the proposition that DNR did not demonstrate a prior interpretation of the ambiguous provision, but the court of appeals still gave deference to DNR. The opinion expressly states, “[b]ecause DNR is the agency charged

///

///

///

¹¹⁴ *Port of Seattle*, 151 Wn.2d at 595, quoting *Dep’t of Ecology v. Public Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993), *aff’d*, 511 U.S. 700 (1994).

¹¹⁵ *Port of Seattle*, 151 Wn.2d at 595, 634.

¹¹⁶ QIN Opening Brief at 39-40.

with administering this ambiguous statute, we defer to its interpretation.”¹¹⁷

The opinion therefore supports the PCHB’s decision.

QIN also argues about the language in *White v. Salvation Army*, a case where the court of appeals deferred to an agency’s interpretation of its own regulation based upon the agency’s construction of its ambiguous policy statement.¹¹⁸ The agency, Labor and Industries, expressed its clarification for the first time in its amicus brief, and the court required no “pattern of enforcement.” QIN argues that the court gave such interpretations weight depending upon its power to persuade, and that “no deference is to be accorded a policy that is wrong.”¹¹⁹ This does not help QIN, because it does not show that the PCHB’s interpretation of the Board Manual is “wrong” or inconsistent with any statute or rule.

This case concerns administrative guidance on a technical issue. Predicting the future movement of a river 140 years into the future is scientifically complex. Marc Engel noted the Board Manual’s complexity, testifying that it “has almost like a college thesis” within it.¹²⁰ Agencies always receive deference regarding the interpretations of ambiguous rules

¹¹⁷ *Friends of the Columbia Gorge*, 129 Wn. App. at 56. The court of appeals brushed aside appellant’s *Cowiche Canyon* argument, treating it as the appellant’s burden of proof on appeal to demonstrate that DNR’s interpretation was arbitrary and capricious. *Friends of the Columbia Gorge*, 129 Wn. App. at 58-59.

¹¹⁸ *White*, 118 Wn. App. 272, 281-83, 75 P.3d 990 (2003).

¹¹⁹ *White*, 118 Wn. App. at 277, quoting *Othello Cmty. Hosp. v. Emp’t Sec. Dep’t*, 52 Wn. App. 592, 596, 762 P.2d 1149 (1988).

¹²⁰ CP 2360 (Tr. Vol. VII, 169:11-19).

that they administer.¹²¹ For the same reason, the PCHB properly gave DNR deference on a dispute involving technical and scientific matters within the agency's regulatory field.¹²² No error of law occurred in the limited deference that the PCHB accorded DNR.

D. The PCHB's Decision to Locate the CMZ Edge Along the South Shore Road Was Not Arbitrary and Capricious.

QIN also contends that the PCHB's decision in this matter was arbitrary and capricious. It was not.

Administrative discretion exercised within the established legal limits is not an arbitrary action, particularly when that discretion is exercised after having received disputed testimony on the issue. As previously discussed, this case involved a contentious dispute about the role the South Shore Road played for the two permits at issue. Numerous experts presented different opinions about the CMZ and about the road's function as a CMZ barrier. The PCHB ultimately adopted the position

¹²¹ See, e.g., *Hospice of Spokane v. Dep't of Health*, 178 Wn. App. 442, 451, 315 P.3d 556 (2013) (ambiguity in rule required great deference to agency's interpretation); *Slayton v. Dep't of Soc. & Health Servs.*, 159 Wn. App. 121, 128, 244 P.3d 997 (2010) (citing numerous cases); *Port of Seattle*, 151 Wn.2d at 593, 604-05, 612, 631, and 634; and *Wash. State Emp. Ass'n v. Cleary*, 86 Wn.2d 124, 128-29, 542 P.2d 1249 (1975) (agency interpretation of own rule entitled to great weight).

¹²² William R. Anderson, *supra*, n.23, 64 Wash. L. Rev. at 837 ("Judicial deference on questions seen as questions of law is most appropriate when the determination is inextricably bound up with factual issues and most especially when those factual issues are technical, complex, or specialized and are within the presumed expertise of the agency."); *Schuh v. Dep't of Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64 (1983) (error for lower court not to defer to the specialized knowledge and expertise of administrative agency's assessment of groundwater permit's effect on public welfare).

that used the road as the CMZ edge, supported by the testimony offered by DNR and other witnesses. That was consistent with QIN's Salmon Habitat Restoration Plan, which observed that the South Shore Road "defined the available channel migration zone."¹²³ The PCHB properly performed its job by weighing the competing testimony. Moreover, the PCHB's result in this case was consistent with the CMZ definition in WAC 222-16-010, which indicates that CMZs are limited by permanent dikes or levees.

When there is room for two opinions, action is not arbitrary and capricious if it is exercised honestly and upon due consideration, even though the reviewing court may have reached a different conclusion.¹²⁴ When a decision is founded upon disputed evidence, it is not arbitrary.¹²⁵

The PCHB based its decision on a wealth of disputed evidence, as has previously been discussed. The PCHB's action in this case was not arbitrary or capricious, because it thoroughly considered the evidence and offered a reasoned opinion. The mere fact that QIN would have weighed the evidence in a different manner does not establish arbitrary action.

¹²³ CP 494 (PCHB Final Order, Finding No. 30).

¹²⁴ *Anderson v. Island County*, 81 Wn.2d 312, 317, 501 P.2d 594 (1972), and *Probst v. Dep't of Ret. Sys.*, 167 Wn. App. 180, 192, 271 P.3d 966 (2012) (quoting additional cases).

¹²⁵ *Pacificorp*, slip op. at 41-42 (an action is not arbitrary and capricious simply because of the possibility of contradictory evidence or conflicting conclusions), and *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609-10, 903 P.2d 433 (1995) (action taken after fair, administrative hearing not an arbitrary, "willful and unreasoning" action).

VII. CONCLUSION

Like the Daman Family's appeal, QIN seeks to convert factual determinations about where to locate the CMZ's edge into a legal decision so that it can receive a more favorable standard of review. But the PCHB received extensive testimony about how to locate the CMZ edge and made its decision based upon the testimony and other evidence it received. Substantial evidence supports the PCHB's determination. Both lay and expert witnesses testified about the South Shore Road and its role as a permanent dike or levee at this location.

The PCHB also received extensive evidence about how to apply the Board Manual at this site. The PCHB's resolution of the Board Manual's meaning, to the extent it deemed the language subject to more than one possible interpretation, was consistent with the CMZ definition in WAC 222-16-010. The PCHB properly rejected QIN's approach to the Board Manual's permanent dike or levee language, which would create an exception out of meaningless criteria, particularly where the applicable rule contains no exception.

///

///

///

///

For the foregoing reasons, DNR respectfully requests that the Court reverse the Jefferson County Superior Court and affirm the decision of the PCHB.

RESPECTFULLY SUBMITTED this 20th day of June, 2016.

ROBERT W. FERGUSON
Attorney General



PHILIP M. FERESTER
Senior Counsel
WSBA No. 21699
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504
(360) 586-3202
philf1@atg.wa.gov
OID #91023

*Attorneys for Appellant/Cross-
Respondent State of Washington,
Department of Natural Resources*

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on June 20, 2016, as follows:

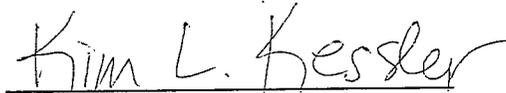
<p>Jon E. Cushman Kevin Hochhalter Cushman Law Offices, P.S. 924 Capitol Way South Olympia, WA 98501-1210 joncushman@cushmanlaw.com kevinhochhalter@cushmanlaw.com doreenmilward@cushmanlaw.com</p> <p><i>Attorneys for Respondent/Cross-Appellant Esses Daman Family, LLC</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email</p>
<p>Karen Allston Peter Crocker Quinault Indian Nation PO Box 613 Taholah, WA 98587 kallston@quinault.org pcrocker@quinault.org</p> <p><i>Attorneys for Respondent Quinault Indian Nation</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email</p>
<p>Wyatt Golding Washington Forest Law Center 615 Second Avenue, Suite 360 Seattle, WA 98104 wgolding@wflc.org tkaps@wflc.org</p> <p><i>Attorneys for Respondent Quinault Indian Nation</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email</p>

RECEIVED
JUN 21 2016
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

<p>Dionne Padilla-Huddleston Office of Attorney General Licensing and Administrative Law Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 dionnep@atg.wa.gov amyp4@atg.wa.gov</p> <p><i>Attorneys for Respondent Pollution Control Hearings Board</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>Sherman Esses 520 W Pioneer Avenue Montesano, WA 98563 pccascara@techline.com</p> <p><i>Pro se Respondent</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email</p>

I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 20th day of June, 2016, at Olympia, Washington.



KIM L. KESSLER
Legal Assistant
Natural Resources Division