

No. 48360-2-II

Court of Appeals, Div. II,
of the State of Washington

Esses Daman Family, LLC,

Respondent/Cross-Appellant,

v.

Washington Department of Natural Resources,

Appellant/Cross-Respondent,

Quinault Indian Nation,

Respondent,

Pollution Control Hearings Board, and Sherman Esses,

Respondents.

**Brief 5: Daman Family's Response to QIN
and Daman Family's Reply**

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1. Introduction

The Quinault Indian Nation's ("QIN") Brief 2 takes contrary positions on the application of the Forest Practices Board Manual to this case. In their own appeal, QIN asks this Court to find that the Pollution Control Hearings Board ("PCHB") "erroneously interpreted the law"—referring to the Manual as "the law" that was erroneously interpreted. On the other hand, in opposing Daman Family's appeal, QIN emphatically argues that the Manual is not law. QIN cannot have it both ways. This Court should reject QIN's arguments that are based on errors of law.

QIN's "substantial evidence" and "arbitrary and capricious" arguments also fail because there is substantial evidence in the record to support the PCHB's conclusion that the South Shore Road is a permanent barrier to channel migration.

2. Counter-Statement of the Case

QIN's "Restatement of the Case" touts the expertise and testimony of its expert, Mary Ann Reinhart, even though the PCHB rejected Reinhart's CMZ delineation and her testimony regarding rapid southward migration because she failed to follow the methods set forth in the Manual. CP 489-90. In contrast, the PCHB found that Daman Family's experts, Stephen Toth and Dr. Jon Einarsen, and DNR's designated expert, Leslie Lingley, "followed the Manual within the bounds of discretion allotted to the practitioner in the manual." CP 490.

Despite any other CMZ experience Reinhart may have had, she had never performed a CMZ delineation for a submitted Forest Practices Application and had no familiarity with the manner in which practitioners or DNR typically interpret or apply the Manual. CP 1590-91. Similarly, Lingley had never prepared a CMZ analysis for a landowner or even for DNR prior to this appeal. CP 2277-80. In contrast, Toth had performed dozens of prior CMZ delineations following the Manual. CP 2068-69. He was familiar with the way the industry and DNR interpret and apply the Manual. CP 2077. DNR has never rejected one of Toth's CMZ analyses. *Id.*

QIN asserts that "DNR failed to complete any analysis" of the CMZ and "approved the permits without the required CMZ analysis." Brief 2 at 14. However, this statement is misleading because Charles Chesney at DNR had, in fact, completed at least a partial or draft analysis prior to approval. *See* CP 563 ("charles had completed his paper review ... early enough for the FPA to be approved"), 546-48 (Chesney report, "Office Review—Step One"). Chesney had extensive experience performing CMZ delineations according to the Manual, to the point that he was the one who trained other DNR personnel, including Lingley, how to do it. *See* CP 2198. Chesney's partial analysis included an erosion setback under the Manual methodology that was one-third the size of that found by Einarsen or Toth on behalf of Daman Family. CP 2292, 2296-98; *compare* CP 547 (Chesney's setback of 115 feet) *with* CP 1316-19 (Einarsen's setback of 322-434 feet) *and* CP 2076 (Toth's setback of 448 feet). The practitioners with the most

experience in delineating Forest Practices CMZs concluded that the CMZ of the Quinault River would have no impact on the parcels.

Nevertheless, the PCHB concluded that Lingley's analysis was "more persuasive" because Lingley's analysis incorporated a 1906 GLO survey map and a longer segment length. CP 491-92. The PCHB reached this conclusion despite the fact that the testifying experts had universally rejected the 1906 survey map as inaccurate and unreliable for purposes of analyzing channel migration. CP 2079-82 (Toth); CP 2494, 2505 (Reinhart). Even Lingley admitted that the 1906 survey map identified only the main stem of the river and was therefore an incorrect starting point for a CMZ analysis.

Q. [By Mr. Cushman] But what I'm saying is the reason that one should not rely on the 1906 survey to start their channel migration zone is that it does not inform us where the historic migration zone was in 1906, does it? It informs us only where the active channel was?

A. [By Ms. Lingley] That's correct.

...

Q. Okay. But by definition, that is not where one begins a channel migration zone analysis. You've got to determine the historic channel migration zone, don't you?

A. Yes, you do have to.

CP 2288-89. Additionally, Lingley agreed with Toth that DNR routinely accepts CMZ analyses that consider only that portion of the river adjacent to the property for which an application was submitted; longer segment length was not required. *See* CP 2299, 2320.

Despite these contradictions, the PCHB adopted Lingley's analysis over the compliant analyses of Einarsen and Toth, even though Lingley

herself testified that landowners are not only entitled to rely on the Manual in preparing and submitting a Forest Practices Application, but DNR **wants** them to rely on the Manual.

Q. [By Mr. Cushman] And so as practitioners, whether it is within DNR like Rod Stallman or Charles Chesney or yourself or in the regulated community like my clients, they are entitled to rely upon the rules and the manual chapters to prepare and submit their FPAs, aren't they?

A. [By Ms. Lingley] Yes.

...

Q. They should be able to read these rules and apply them, shouldn't they?

A. That's the goal.

Q. And in this case, we are applying, not some theoretical concept of channel migration zone, we're applying some principles set forth in such a policy, which is Section 2 of the Board Manual, right?

A. Yes.

Q. All right. So if science in a different environment might do something else, we're still entitled to rely on Section 2, aren't we?

A. We hope they will.

CP 2283, 2285. The Manual provides the landowner with some discretion in delineating a CMZ. CP 486. The PCHB found as fact that Einarsen and Toth followed the Manual within the bounds of this discretion. CP 490. However, a landowner cannot actually rely on the Manual or on this discretion if DNR or the PCHB are free to disregard the landowner's compliant analysis in favor of another analysis that is "more persuasive" solely because it makes different discretionary choices.

3. Response to QIN's Opening Brief

QIN's assignments of error boil down to a single challenge:

QIN disagrees with the PCHB's conclusion that the South Shore Road is a permanent barrier to channel migration. QIN hopes to convince the Court that the APA's "error of law" standard of review applies to 1) the PCHB's interpretation of the text of the Manual; 2) the PCHB's finding that the text is ambiguous; and 3) the PCHB's decision to give deference to DNR's interpretation of the text—all of these relate to interpretation of the Manual as a legal text. As a backup, QIN argues that the PCHB's factual determination that the road will serve as a barrier was not supported by substantial evidence or was arbitrary and capricious.

This Court should affirm the PCHB's conclusion that the South Shore Road is a permanent barrier to channel migration. First, as set forth in Part 3.1, below, QIN is judicially estopped from arguing under the "error of law" standard that the PCHB erroneously interpreted or applied the text of the Manual because QIN has previously argued—and continues to argue—that the Manual is not law. Second, as shown in Part 3.2, the PCHB's determination regarding the road was supported by substantial evidence and was not arbitrary and capricious.

3.1 QIN is estopped from seeking review of the PCHB’s interpretation of the Manual under the “error of law” standard because of QIN’s position that the Manual is not law.

QIN is estopped from taking advantage of the APA’s “error of law” standard of review due to QIN’s contradictory position that the Manual is not law, does not have the force of law, and does not create binding standards. *See, e.g.*, Brief 2 at 48 (“The Board Manual is not law and does not set legal standards.”). QIN’s schizophrenic arguments violate principles of judicial estoppel.

After discussing judicial estoppel, Daman Family will highlight examples of QIN’s inconsistent positions. QIN’s Opening Brief argues that the PCHB committed legal error in interpreting the text of the Manual. Yet, at the same time—in the very same brief—QIN’s response to Daman Family’s appeal argues that the Manual is not law. This was also QIN’s original position in superior court: that the Manual is not law. This Court should reject QIN’s “error of law” arguments and affirm the PCHB’s determinations regarding the South Shore Road.

3.1.1 Judicial estoppel bars a party from gaining advantage by taking inconsistent positions before the court.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position, as QIN has done here. *See Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The doctrine preserves respect for judicial proceedings and avoids inconsistency, duplicity,

and waste of time. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012).

In determining whether to apply the doctrine to bar a party's later, inconsistent claims or arguments, courts look primarily to three, nonexclusive factors:

(1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.

Taylor v. Bell, 185 Wn. App. 270, 282, 340 P.3d 951 (2014). In addition to these factors, judicial estoppel should only be applied when a litigant's prior inconsistent position benefited the litigant or was accepted by the court. *Id.* All of these factors are present here.

3.1.2 QIN's Opening Brief argues that the Manual must be interpreted as a binding legal text.

QIN, in support of its own appeal from the PCHB decision, argues that the PCHB was bound to interpret and apply the Manual as a legal text. QIN asks this Court to reverse the PCHB's decision because, QIN says, the decision was based on "a legally erroneous interpretation of the Forest Practices Board Manual." Brief 2 at 1. An agency cannot commit an error of law unless it is interpreting or applying **law**. Perhaps recognizing this, QIN emphasizes the legal significance of the Manual, calling it one of "[t]hree main tiers of authority govern[ing] logging in Washington" Brief 2 at 6.

QIN attempts to bolster this position with policy arguments that echo Daman Family’s argument that the Manual carries some force of law: “Citizens should be able to rely on agency guidance to mean what it says.” Brief 2 at 4. “For fairness and consistency, it is important that the public be able to rely on that language [of the Manual].” Brief 2 at 25. For purposes of **its own appeal**, QIN wants this Court to conceive of the Manual as a legal text that is binding on the agencies and upon which the public can rely as a standard.

Knowing that this argument strikes a common chord with Daman Family’s arguments, which QIN has vehemently opposed, QIN tries to finesse its position: “The PCHB committed repeated **procedural legal errors** in its interpretation of the Board Manual text.” Brief 2 at 23 (emphasis added).¹ However, this is just playing semantics. The end result QIN seeks is for this Court to compel the PCHB to apply a specific legal analysis to the text to create a binding legal standard, which the Court could then compel the PCHB to apply to the facts to achieve QIN’s desired result.

¹ QIN uses this phrase—“procedural legal errors”—in a misguided attempt to bring its argument within the reach of RCW 34.05.570(3)(c), which allows a reviewing court to grant relief when an agency “has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure.” *See* Brief 2 at 21; CP 2726-27 (making this argument for the first time in its reply brief to the superior court). However, this standard of review does not apply because application of case law and canons of construction in interpreting a text, even if done incorrectly, is not “engag[ing] in unlawful procedure” under the APA. It is not procedure at all; it is substantive legal analysis. Additionally, QIN has waived the “unlawful procedure” standard by failing to raise it in its petition for review or its assignments of error in this Court. *See* CP 7-8; Brief 2 at 4-5.

QIN’s arguments leave no room for discretion or agency experience or expertise or for deference to the PCHB’s role as fact-finder. Application of the “error of law” standard would require that the PCHB was interpreting and applying **law**. This logic is written into the APA itself, which allows a reviewing court to grant relief when “The agency has erroneously interpreted or applied **the law**.” RCW 34.05.570(3)(d) (emphasis added). QIN cannot avoid this logic through linguistic gymnastics. In its own appeal, QIN treats the Manual as law.

3.1.3 QIN simultaneously argues in response to Daman Family’s appeal that the Manual is not law.

At the same time—and, most surprisingly, in the very same brief—QIN argues unequivocally that the Manual is **not** law. “The Board Manual is not law and does not set legal standards.” Brief 2 at 48. QIN does this, of course, with the specific purpose of attempting to defeat Daman Family’s appeal.² “The Quinault recognize that the Forest Practices Board Manual is a guidance document [*i.e.*, not legally binding] ... In contrast, the Daman Family argues that the Board Manual is itself law that sets forth substantive and binding legal standards. The Daman’s argument is wrong...” Brief 2 at 46-47. QIN is forced to engage in bizarre linguistic gymnastics in its attempts to avoid the contradiction in its two positions. QIN says the Manual is only a

² Daman Family’s appeal, if successful, would necessarily defeat QIN’s appeal. If Daman Family prevails, the CMZ falls far short of the South Shore Road. Because the CMZ never reaches the road, there is no need to consider whether the road would serve as a permanent barrier to channel migration. QIN’s appeal would become moot, at least as to Daman Family’s parcel.

“guidance document” that does not contain any “substantive and binding legal standards,” yet it must be interpreted as a legal text, and applied as a binding, substantive standard, but apparently only when we are talking about what constitutes a “permanent dike or levee.”

In opposing Daman Family’s appeal, QIN argues that the Manual is nothing more than a “starting place” for the PCHB’s analysis:

By definition, the Board Manual is “advisory.” It serves as a valuable starting place to guide presumptive interpretation of the rules, but is not itself the governing legal standard. The governing legal requirement is the prohibition on logging in the channel migration zone set forth in the forest practices rules.

Brief 2 at 48 (citing WAC 222-30-020(13) and WAC 222-16-010) If the only governing legal requirements are the formal regulations prohibiting logging in a CMZ, then these rules are the only “law” to be interpreted and applied to this issue. If the Manual is only “advisory,” the location of the CMZ—including whether it is limited by a “permanent dike or levee”—is a purely factual question to which only a substantial evidence standard can apply. An agency cannot commit “legal error” in determining the existence of a fact.

QIN quotes from the Manual itself to support its argument that the Manual is not a binding legal standard: “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” Brief 2 at 49 (quoting CP 590). But based on this logic, it would also be reasonable for the PCHB to deviate from the “permanent dike or

levee” exception on the basis of testimony received at the hearing, because the definition and exception are, like the rest of the Manual, merely “recommendations.”

QIN faults Daman Family for relying “on the incorrect premise that the Board Manual sets forth legal standards.” Brief 2 at 50. Yet QIN relies on the same premise when it asks this Court to require the PCHB to interpret and apply the “permanent dike or levee” language as a binding definition. This is precisely the sort of change in position that judicial estoppel is intended to prevent. QIN cannot reap the benefit of arguing that the Manual is law while simultaneously seeking a different benefit from arguing that the Manual is **not** law.

3.1.4 QIN’s original position was that the Manual is not law, but just one factor among many for making a factual determination as to the location of the CMZ.

In applying judicial estoppel, courts bar the later, changed position argued by a party. Here, QIN’s original position—staked out in its own briefing to the PCHB (filed in superior court) seeking to certify direct review in this Court, as well as in briefing to this Court opposing Daman Family’s motion for discretionary review—was that the Manual is not law, but only one factor among many for making a factual determination as to the location of the CMZ. Judicial estoppel should bar QIN’s newer, contradictory position in support of its own appeal, and restrict QIN to substantial evidence review of the PCHB’s determination that the South Shore Road is a permanent barrier to channel migration.

Prior to the filing of QIN's Opening Brief in superior court, QIN argued that Daman Family's position would improperly "transform the Forest Practices Board Manual, commonly understood to provide guidance, into law." CP 137-38. QIN insisted, "The Forest Practices Board Manual is not law." QIN's Answer to Motion for Discretionary Review, Court of Appeals No. 47540-5-II, at 11 (emphasis added). QIN was adamant that the Manual was not binding:

The Forest Practices Rules and Board Manual confirm that the Board Manual provides technical guidance. It was a useful tool by which the PCHB judged credibility, but is not an exclusive prescription and **does not constitute substantive law or minimum standards.**

Id. at 12 (emphasis added). QIN argued that the Manual was only "one factor among many" for the PCHB to use in assessing the credibility of experts in order to make a factual determination as to the location of the CMZ. *Id.* at 7 ("The PCHB weighed the evidence before them and its assessment of the credibility of the various experts. The PCHB relied on adherence to the Forest Practices Board Manual as one factor in assessing credibility."), 10 ("adherence to the Board Manual was one factor among many relevant to an expert's credibility").

If, as QIN originally asserted, the Manual is just one factor among many in making a factual determination, the "error of law" standard cannot apply to the PCHB's use of the Manual in determining whether the South Shore Road would act as a permanent barrier to channel migration. QIN's

new position, in support of its own appeal, directly contradicts QIN's former position. QIN cannot have it both ways.

3.1.5 QIN is judicially estopped from arguing that the PCHB committed legal error in interpreting and applying the Manual.

QIN's position in its Opening Brief is entirely inconsistent with its earlier position. In prior briefing, QIN unequivocally took the position that the Manual is not law, does not carry the force of law, and is nothing more than one factor among many for the PCHB to use in determining, as a question of fact, the location of the CMZ. The superior court adopted QIN's original position when it denied Daman Family's petition on the merits, finding that the PCHB weighed disputed evidence. *See* CP 2631:16-17.

The superior court subsequently, in granting QIN's petition, adopted QIN's changed, contradictory position: that the Manual must be interpreted and applied as a legal text. *E.g.*, CP 2807-08 ("although the Manual is not actually a statute or a rule, it also makes sense that general rules of construction applicable to statutes, contracts and 'other writings' be used"). The superior court's decisions create the perception that the court was misled. The Manual cannot simultaneously be 1) a binding legal text and 2) only one factor among many for reaching a factual determination. This Court cannot accept both of QIN's positions without creating the perception that this Court has been misled or confused.

QIN has presented diametrically opposing legal theories in the various stages of review in this case, depending on QIN's interest in the

outcome. QIN cannot have it both ways—either QIN is correct now and the Manual sets forth binding standards on which a practitioner is entitled to rely, in which case Daman Family is entitled to its permit without any CMZ impact because the CMZ never reaches the South Shore Road; or QIN was correct before and the Manual is merely one factor among many for the PCHB to consider in making a purely factual determination, in which case QIN’s appeal necessarily fails because the PCHB’s findings are supported by substantial evidence.

This is an appropriate case for application of the doctrine of judicial estoppel. This Court should bar QIN from taking unfair advantage of its contradictory positions and should decline to address QIN’s arguments under the “error of law” standard.

3.2 The PCHB’s determination that the South Shore Road will serve as a barrier to channel migration was supported by substantial evidence and was not arbitrary and capricious.

3.2.1 The PCHB’s determination that the County will likely armor the road against the River was supported by substantial evidence.

QIN challenges the PCHB’s order under the substantial evidence standard of review. Under the substantial evidence standard, the reviewing court considers whether there was “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). In other words, with the agency’s order as a starting

point, was there a sufficient quantity of evidence in the record to support that order? The “substantial evidence” standard gives deference to the factfinder who heard the evidence presented at the hearing. It is not an opportunity for the reviewing court to re-weigh the testimony.

QIN’s brief only develops one argument under the substantial evidence standard. Brief 2 at 43-46. QIN argues that there was not substantial evidence to support the PCHB’s determination that “it is likely that the County will armor the road if necessary to protect it from erosion caused by the River.” CP 494-95. Any other “substantial evidence” arguments have been abandoned. *See Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (“If a party fails to support assignments of error with legal arguments, they will not be considered on appeal.”). In any event, QIN’s argument fails because there is a sufficient quantity of evidence in the record to persuade a fair-minded person of the truth or correctness of the order.

The PCHB was careful to recite in its final order all of the evidence upon which it based its findings and conclusions. The PCHB found as follows:

The South Shore Road is a major collector road, the highest category of rural highways. The County is able to access FEMA money for repairs to this type of road when the appropriate circumstances are present. The road receives regular maintenance from Jefferson County because it is a popular loop road and provides access to federal lands including the Olympic National Park. The County has armored sections of the road when the River threatens them. There have been sections of the road eroded and relocated in

other parts of the River valley. While the South Shore Road has not been constructed in the immediate area of the parcels to withstand the River, it is likely that the County will armor the road if necessary to protect it from erosion caused by the River. Abbe Testimony, R. Esses Testimony, Lingley Testimony, B. Daman Testimony, Ex. DNR 6.

CP 494-95 (Finding of Fact # 31). Each of these statements is supported by testimony or documentary evidence in the record sufficient to persuade a fair-minded person. The initial statements support the ultimate finding that the County is likely to armor the road to protect it from the River.

Contrary to QIN's arguments, the PCHB's determination was not merely speculation. The PCHB received testimony regarding historical actions and present policies. Rather than speculate as to how policies might change in the future, as QIN urges this Court to do, the PCHB applied the historical evidence to determine the most likely outcome. This is sound forecasting technique, similar to that required by the Manual in other parts of the CMZ analysis. The PCHB addressed QIN's concern in Conclusion of Law #12:

QIN further argues that the South Shore Road in the vicinity of the parcels will not function as a permanent dike or levee because the County has not currently built it to withstand the erosive forces of the River. There have been sections of the road eroded and relocated in other parts of the River valley. All parties agree that the South Shore Road in the area of the parcels, while well maintained now, would not hold the River back if it approaches the road. However, the River has not approached the road in this area to date, so Jefferson County has not had to take action to protect the road. The County has protected other sections of the South Shore Road through armoring, however, when those sections were

threatened or damaged by the River. DNR argues, and the Board agrees, that based on the history of efforts to protect the road from erosion and the reliance of the residents and the local, state, and the federal governments on the South Shore Road, it is reasonable to conclude that Jefferson County will take similar action in the future to protect the South Shore Road from the River in the vicinity of the parcels. This approach is supported by the language in point 2 of the manual which identifies a road that “receives regular maintenance sufficient to maintain structural integrity” as one that should be considered a permanent dike or levee.

CP 510 (Conclusion of Law # 12).

The PCHB’s findings regarding the road were not speculative, but based on real evidence of what exists now and what has been done in the past. It is QIN, not the PCHB, that asks this Court to speculate about the future of South Shore Road. QIN’s arguments would require this Court to speculate that Jefferson County will change from its historic pattern of behavior. QIN speculates that budgets, politics, and public policy might change. QIN speculates that Jefferson County or the Department of Transportation might decide to change the location of the road. QIN’s speculation is not based on evidence in the record of actual, or even likely, changes.

The section of the Manual on permanent dikes or levees states, “Applicants should also contact local, state, federal, and tribal entities to make sure that there are no plans to remove the structure.” CP 599. The assumption implicit in this statement and the rest of the section is that a structure that has historically been maintained will remain in place and continue to be maintained unless there are **existing plans** to remove it.

There is no evidence of any such plans to remove the South Shore Road. The PCHB's findings that it would be maintained and armored if necessary are supported by substantial evidence.

3.2.2 The PCHB's determination that the County will likely armor the road against the River was not arbitrary and capricious.

QIN's only "arbitrary and capricious" argument is the same as its substantial evidence argument regarding the South Shore Road: QIN argues that the PCHB's determination that the road would be maintained and armored against the river is too speculative and therefore arbitrary and capricious. QIN acknowledges that the arbitrary and capricious standard of review requires QIN to demonstrate that there is no rational connection between the facts found and the conclusions made or that the agency's explanation runs counter to the evidence. Brief 2 at 23.

The PCHB's findings of fact regarding the road are supported by substantial evidence. Based on that evidence, the PCHB concluded that the road would act as a permanent barrier to channel migration because it is likely that the road will be armored against the river as may become necessary in the future, just as has been done in the past. This is a rational conclusion that is consistent with the evidence. The PCHB's interpretation of the Manual was also supported by and consistent with the evidence, including the testimony of Marc Engel, the most knowledgeable person on what the Manual was intended to mean. *See* CP 493-94, 508-09, 2444. QIN has failed to demonstrate that the PCHB's order was arbitrary and capricious.

4. Reply in Support of Daman Family’s Appeal

4.1 The PCHB erroneously interpreted or applied the law when it disapproved Daman Family’s FPA despite the PCHB’s express finding that Daman Family’s CMZ analysis followed the standards of the Board Manual.

Daman Family, in its Opening Brief, argued that because DNR and the PCHB cannot disapprove a permit without identifying the specific manner in which the application fails to comply with the Forest Practices Act and Rules, a landowner who complies with the minimum standards—including the standards for delineating a CMZ—is entitled to approval of their permit. Brief 1 at 9-12. The existing permitting process places the burden on the applicant to locate any CMZ that may affect the application. The applicant’s only source of information as to how to meet that burden is the text of the Manual. DNR reviews applications to ensure the applicant has correctly implemented the methods set forth in the Manual. An applicant who implements the Manual will meet the standards of the rules, and should be entitled to a permit.

Daman Family noted that the PCHB found that Daman Family’s experts “followed the Manual within the bounds of discretion allotted to the practitioner in the manual.” CP 490. Daman Family argued that the PCHB erroneously interpreted or applied the law by imposing additional CMZ/RMZ requirements based on a “better” analysis by DNR. Brief 1 at 12-15.

In response, QIN argues that the Manual does not set legally binding standards and is nothing more than a “valuable starting place.” At the same

time, QIN urges that applicants must be able to rely on the text of the Manual, which should be interpreted and applied as a legal text. It is unclear which argument QIN actually believes. Nevertheless, even if the Manual is a “guidance document,” approval of Daman Family’s application would still have been the correct result. Where the regulatory process places the initial burden on the applicant to locate the CMZ in accordance with certain “guidance,” an applicant who complies with the “guidance” should be entitled to a permit unless the agency is able to identify some failure to comply with that “guidance.” As a matter of due process and procedural fairness, neither DNR nor PCHB should be able to impose additional conditions when both acknowledge that Daman Family followed the Manual within the allowable range of discretion.

Both QIN and DNR argue that there is no difference between the words “standards” and “guidelines” as used in the Forest Practices Rules to refer to different sections of the Manual. This argument is contrary to standard rules of statutory construction. When a statute or rule uses different words, they are presumed to have distinct meanings. In WAC 222-12-090, the various sections of the Manual are referred to in different terms. This cannot have been accidental. While most of the sections are referred to as “guidelines,” Section 2 is referred to as “Standards for identifying channel migration zones.” *Id.* Other sections are referred to as, *e.g.*, “Method for determination of adequate shade requirements on streams” (WAC 222-12-090(1)) or “The standard methodology for conducting watershed analysis” (WAC 222-12-090(11)). These distinctions must have some meaning. The

regulatory context in which Section 2 of the Manual is placed demands that it is more than a non-binding advisory document that is only one factor among many for DNR or the PCHB to make a factual determination.

DNR argues that because the PCHB found Lingley's CMZ analysis "most consistent" with the Manual, it necessarily found Daman Family's experts "less consistent," thereby identifying a failure to comply with the Manual. This argument is inconsistent with the PCHB's actual, stated analysis. The PCHB noted that the Manual "allow[s] for some discretion on the part of the practitioner in making the delineation." CP 486 (Finding of Fact #11). After reviewing the various analyses, the PCHB concluded that Daman Family's experts "followed the Manual within the bounds of discretion allotted to the practitioner in the Manual." CP 490 (Finding of Fact #25). In other words, Daman Family's experts did not fail to comply with the Manual. In fact, the PCHB expressly found that "Ms. Reinhart's analysis was the only one that deviated from the approach outlined in the Manual." CP 489 (Finding of Fact #24).

The PCHB subsequently found Lingley's analysis more scientifically persuasive on the basis of **different discretionary choices** that were all "within the bounds of discretion allotted to the practitioner in the Manual." This does not change the fact that the PCHB did not identify any flaw in Daman Family's compliance with the Manual.

DNR argues that the PCHB did identify a failure to comply by Daman Family: lack of a required riparian management zone for the Quinault River. However, this assumes that the PCHB was not bound to

accept the fully compliant analysis of the applicant. Under Daman Family's compliant analysis, the CMZ was located far from the Daman Family parcel—far enough, in fact, that the resulting RMZ would not have reached the parcel. Daman Family's evidence demonstrated this fact. Daman Family could not have failed to comply with the RMZ standard when its delineation of the CMZ was fully compliant with the standards in the Forest Practices Act and Rules and with the Board Manual.

4.2 Daman Family properly raised its arguments before the PCHB.

Daman Family's Opening Brief addressed some of the ways in which the PCHB was informed that it could not reverse Daman Family's permit without showing that Daman Family had failed to comply with the standards in the Forest Practices Act, Rules, and Manual. Brief 1 at 16-18. QIN, as the appellant on the CMZ issue, bore the burden of demonstrating that Daman Family's analysis failed to comply with the Manual. CP 413. Daman Family pointed out that when QIN inevitably failed to meet that burden, the only remaining choice for the PCHB was to affirm on the CMZ issue. CP 359.

DNR and QIN both misconstrue Daman Family's argument on appeal. They assert that Daman Family demands that the PCHB be required to adopt the "most minimal CMZ." This is not, and never has been, Daman Family's argument. Rather, Daman Family argues that the PCHB erroneously interpreted or applied the law by requiring Daman Family to exceed the minimum standards established by law for approval of an FPA.

Daman Family's Amended Petition for Judicial Review described the issue and basic arguments as follows:

Relief should be granted pursuant to RCW 34.05.570(3)(d). ... The Board's Order erroneously interpreted or applied the law.

The rules promulgated under the Forest Practices Act (found primarily in Title 222 WAC) set minimum standards for approval of FPAs. A landowner may choose to exceed those standards. However, the State cannot require the landowner to do so. ...

[Daman Family] met the minimum standards. [Daman Family]'s expert witnesses demonstrated, within the discretion allowed by the Board Manual, that FPA 2612019 was not affected by the CMZ or RMZ of the Quinault River. The Board expressly affirmed [Daman Family]'s compliance in its Findings of Fact. The Board then erroneously interpreted or applied the law by requiring [Daman Family] to **exceed** the minimum standards for delineating a CMZ. The Board's Order requiring [Daman Family] to meet a more restrictive standard for approval of the FPA was contrary to law.

CP 176-77 (emphasis in original). The issue is not whether the PCHB must adopt the "most minimal CMZ." Rather, the issue is whether the PCHB could properly reverse DNR's approval of the FPA when a **fully compliant** CMZ delineation had shown that the FPA **was not affected** by the CMZ or RMZ of the Quinault River. The question is not "which CMZ is the smallest?"; the question is "did the applicant comply with the standards?" The PCHB's final order required Daman Family to exceed the minimum standards of the Forest Practices Act and rules, contrary to law.

DNR faults Daman Family for not trying to establish a separate CMZ issue beyond the one broad issue that appeared in the PCHB's

prehearing order: “Whether the Forest Practices channel migration zone of the Quinault River impacts the forest practices proposed in Application Nos. 2612019 or 2612020, and if so, whether the Act and Rules require further conditioning on the applications?” This broadly stated issue includes Daman Family’s argument under its wide umbrella. Daman Family’s position was that the CMZ would not impact the applications, based on its fully compliant CMZ analyses. There was no need to raise a separate issue.

Daman Family’s issue in this judicial review is that on the facts found and the law applying to CMZ, Daman Family was entitled to have the permit below approved as to CMZ. The issue of the legal effect of the PCHB’s finding that the Daman Family’s CMZ analysis complied with law did not arise until the PCHB issued its final order, in which it erroneously interpreted and applied the law by imposing a higher standard. This judicial review was the first opportunity for Daman Family to raise the issue. Daman Family did **not** know and **could not have known** that the PCHB would find Daman Family’s CMZ analysis fully compliant and yet impose restrictions beyond minimum requirements because the PCHB found DNR’s analysis “more persuasive.” Daman Family had no duty to raise that issue below, only a duty to defeat QIN’s appeal, which Daman Family did. This Court is free to consider the issue on judicial review.

Application of RCW 34.05.554 to bar Daman Family’s petition for judicial review stands the appeal process on its head. Daman Family, as respondent before the PCHB, had no burden to raise or prove any issues regarding the manner in which the FPA dealt with the CMZ. The FPA was

presumed valid. QIN had the burden to prove invalidity. The PCHB's appellate jurisdiction was limited to applying the same standards that DNR was required to apply in the first instance. Daman Family could not be expected or required to foresee that the PCHB would violate its own jurisdictional limitations.

4.3 This Court has inherent authority to consider the issue even if it was not properly raised.

Even if the issue was not before the PCHB, this Court has inherent authority to consider the issue for the first time. “Ordinarily, a party may not raise on appeal an issue it did not raise before the agency. However, this court has inherent authority to consider all issues necessary to reach a proper decision.” *Heidgerken v. Dep’t of Nat. Res.*, 99 Wn. App. 380, 387 n.3, 993 P.2d 934 (2000). This inherent authority should be exercised where the error is clear, *Nielsen v. Emp’t Sec. Dep’t*, 93 Wn. App. 21, 43, 966 P.2d 399 (1998); where consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights, *Maynard Inn. Co. v. McCann*, 77 Wn.2d 616, 622, 465 P.2d 657 (1970); where the issue affects the public interest, *Id.* at 622-23; where the parties or the agency have ignored a governing statute, *King Cnty. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993); or where the agency acted outside its statutory authority, *Hertzke v. Dep’t of Ret. Sys.*, 104 Wn. App. 920, 928, 18 P.3d 588 (2001). “[W]hen an agency acts outside its statutory powers, it is acting without jurisdiction over the subject matter, and subject matter jurisdiction may be raised at any time.” *Boise*

Cascade Corp. v. Wash. Taxies Coal., 68 Wn. App. 447, 451-52, 843 P.2d 1092 (1993).

No matter what the parties argued in their pre-hearing briefs, it was incumbent on the PCHB to recognize the limits of its statutory authority. In its exercise of jurisdiction over appeals of FPA determinations, the PCHB must abide by the same forest practices regulations that DNR is bound to apply in the first instance. The FPA could only be reversed if the PCHB could find and articulate a specific manner in which the FPA failed to comply with the minimum standards. *See* RCW 76.09.050(5). The PCHB's final order does not articulate any such failure to comply. Rather, the PCHB expressly found as a fact that Daman Family's CMZ analysis complied with the Manual. The PCHB's erroneous interpretation and application of the law, requiring that a landowner exceed the minimum standard required by law, exceeded its statutory authority. Substantial justice has not been done. Small forest landowners all over the state can no longer rely on the standards set forth in the Manual if the PCHB is left free to adopt whatever analysis it finds "best" or "most persuasive," even though the landowner's analysis fully complies. This Court should exercise its inherent authority to hear Daman Family's issue on judicial review, even if it was not sufficiently raised below.

DNR argues that RCW 34.05.510(2) is an absolute bar to this Court's exercise of inherent authority to hear the issue if it was not properly raised below. However, the statute has nothing to say about a court's inherent authority. It states only that ancillary procedural matters are governed by court rule to the extent not inconsistent with the APA. This is not an

ancillary procedural matter. It is a matter of the PCHB exceeding its jurisdiction. This Court has inherent authority and should decide the issue in the interests of justice even if the Court finds it was not properly raised below.

4.4 This Court has authority to review the superior court's error.

Both DNR and QIN argue that this Court cannot review Daman Family's appeal, asserting that Daman Family did not expressly assign error to the superior court's dismissal of Daman Family's petition for judicial review on summary judgment. The applicable rules are not so clear or so restrictive.

This Division's General Order 2010-1 modifies the standard procedures for appeals under the APA. The Order recognizes that, in APA appeals, this Court sits in the same position as the superior court. Division II General Order 2010-1. Sitting in that position, this Court reviews the PCHB's decision by applying the standards of review in RCW 34.05.570 directly to the agency record. *Fort v. Dep't of Ecology*, 133 Wn. App. 90, 95, 135 P.3d 515 (2006). For purposes of this Court's review, the party asserting the invalidity of agency action continues to bear the burden of showing invalidity in this Court. Div. II Gen. Ord. 2010-1. The Order recognizes that, given the unique positions of the parties and the Court in an APA appeal, the ordinary briefing and argument procedures in RAP 10.2(a), (b), and (d); and RAP 10.3(a), (b), and (c) do not strictly apply. *Id.*

RAP 10.3(h) applies to assignments of error on review in an APA case. The party challenging the agency order should include in its brief assignments of each error which the party contends was made by the agency. RAP 10.3(h). Daman Family did so. Brief 1 at 2. The Rule notes that these assignments of error are in addition to those required by Rule 10.3(a)(3). However, Rule 10.3(a)(3) does not relate to assignments of error, and Rule 10.3(a)(4) (assuming that was the intended section) relates to errors of the “trial court,” which is ambiguous in the APA context because there was no trial court. Finally, the General Order indicates that Rule 10.3(a) does not strictly apply in the APA context. Taken together, the rules are not clear in requiring a specific assignment of error to the superior court’s decision.

Indeed, such an assignment of error is implied in the very fact that Daman Family appealed from the superior court’s dismissal of Daman Family’s petition for judicial review. CP 2846 (designating the Order on Cross-Motions for Summary Judgment). QIN expressly notes in its brief, “The Daman Family, LLC appealed **all of Judge Harper’s decisions.**” Brief 2 at 20 (emphasis added). The basis of Daman Family’s challenge was well known to all parties, as the parties have briefed both sides of the issue in connection with Daman Family’s motion for discretionary review of the Order on Cross-Motions for Summary Judgment. *See* Court of Appeals No. 47540-5-II (acknowledged by QIN in Brief 2 at 56).

Rule of Appellate Procedure 1.2 calls for liberal interpretation of the Rules, “to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or

noncompliance with these rules except in compelling circumstances where justice demands.” RAP 1.2(a).

With the parties occupying the same positions and having the same burdens as in superior court, it was Daman Family’s burden to raise and argue the errors of the PCHB. To the extent DNR or QIN believe Daman Family’s arguments were not raised below, it was their burden to raise that issue, which they have. Daman Family has responded. There is no prejudice to any party in the manner in which this issue was briefed.

Even if this Court finds that Daman Family has misunderstood its burden, Daman Family clearly appealed from the superior court’s dismissal of its petition for judicial review on summary judgment. Both DNR and QIN had full knowledge of the basis of Daman Family’s challenge to that order. Both DNR and QIN used that knowledge to argue the merits of the issue in their briefs. *See* Brief 2 at 51-54 and Brief 3 at 25-34; Daman Family had also previewed its argument in Brief 1 at 16-18. Justice does not demand that Daman Family’s appeal be decided on the basis of a procedural technicality. No party has been prejudiced. The Court is fully informed of the parties’ respective arguments and the relevant portions of the record. This Court may appropriately review the issue.

5. Conclusion

The PCHB erroneously interpreted or applied the law when it disapproved Daman Family’s FPA and ordered that additional CMZ/RMZ restrictions be imposed. The PCHB expressly found that Daman Family’s

CMZ analysis followed the required standards. Without some failure to comply with the Forest Practices Act, Rules, or the Manual, the PCHB could not reverse DNR's approval of Daman Family's FPA. This Court should reverse the PCHB and remand for approval of the FPA without any CMZ/RMZ restrictions.

This Court should also decline to address QIN's arguments under the "error of law" standard of review. QIN's original position, on which it prevailed, was that the Manual is not law, but only a one factor among many for rendering a factual determination. QIN cannot now be heard to argue that the PCHB "erroneously interpreted or applied the law" when it interpreted and applied the Manual. This Court should reverse the superior court and affirm the PCHB on the issue of the South Shore Road.

Respectfully submitted this 20th day of June, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 20, 2016, I caused the original of the foregoing document, and a copy thereof, to be filed and served by the method indicated below, and addressed to each of the following:

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Karen Allston Peter Crocker Quinault Indian Nation PO Box 613 Taholah, WA 98587 kallston@quinault.org pcrocker@quinault.org	<u>XX</u> U.S. Mail, Postage Prepaid _____ Legal Messenger _____ Overnight Mail _____ Facsimile <u>XX</u> Electronic Mail
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DATED this 20th day of June, 2016.

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Transmittal Letter

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