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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 322076

MONICA HUNT,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

OPENING BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

A. Overview of the Facts and Consequences of the PCHB's Decision.

This case involves the scope of Ecology's interpretation of its enforcement powers under Washington's Clean Water Act, chapter 90.48 RCW. Based on Ecology's speculation and conjecture, the Pollution Control Hearings Board ("PCHB") found, as a matter of law, that Monica Hunt's activities in repairing and restoring her pasture and return flow irrigation ditch, which were severely damaged by the extreme flooding of Manastash Creek in May of 2011, caused "pollution" of the creek, in violation of RCW 90.48.080. The statute makes it unlawful for any person to discharge into any waters of the state (which include irrigation ditches) "any organic or inorganic matter that shall cause or tend to cause pollution of such waters", as the term "pollution" is defined under RCW 90.48.020. To cause or tend to cause "pollution", there must be a "discharge" of something into a water of the state that "alters" its properties to such an extent that "will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life." RCW 90.48.020.

Although it twice changed its theory of liability, Ecology ultimately charged Ms. Hunt with the following allegations: her activities in repairing

and restoring her flood-damaged pasture and irrigation ditch caused polluting sediment and temperature increases in the ditch which, because it flows into Manastash Creek, in turn caused pollution of the creek. Ecology admits it did no sampling or testing to confirm its theory of pollution; it further admits it is only speculating regarding whether sediment was discharged into the creek.

Under Ecology's interpretation of its enforcement powers under chapter 90.48 RCW, a "discharge" of any kind, standing alone, constitutes actionable pollution. Whether the discharge has a "substantial potential" to cause "pollution" is of no consequence to Ecology. In short, merely because Ms. Hunt's irrigation ditch enters Manastash Creek, Ecology posits that a *per se* pollution of the creek has occurred *ipse dixit*.

Indeed, Ecology asserts it has the statutory authority to charge a landowner with polluting any water of the state, including an irrigation ditch, for the mere act of tossing a dirt clod into the water. The following testimony of Ecology's enforcement officer, Bryan Neet, makes this clear:

Q: *... But whether or not there is, in fact, a harmful or detrimental or injurious impact or likely to be such depends upon the amount of discharge, the type of discharge, and so on. It's unique to every fact. Would you agree?*

A: *No, because we can go after somebody for sprinkling dirt in the creek. That's a discharge to the waters of the state. We don't have to prove that specific fish got hurt.*

Q: *Throwing a dirt clod or sprinkling dirt in a water of the state is a discharge that is actionable under the Clean Water Act? Right?*

A: *Yes, under 90.48, yes.*

Q: *And Ecology has the authority to go after a person who throws a dirt clod in a water of the state, correct?*

A: *Yes.*¹

Thus, under Ecology's interpretation of its enforcement powers, the mere discharge of any sediment or temperature change, regardless of how minute and harmless it might be, constitutes actionable "pollution" under chapter 90.48 RCW. To uphold the PCHB's Order would grant Ecology the unbridled authority to arbitrarily charge any landowner, at its whim, with violating Washington's Clean Water Act. It would thus empower Ecology to regulate normal ranching, farming, and agricultural activities involving rural land and irrigation ditches in a manner never intended by the Legislature.

Because any repair or restoration of Ms. Hunt's ditch, even with a shovel or by hand, would result in sediment (i.e., soil) entering the ditch and potentially winding up in the creek, under Ecology's interpretation of chapter 90.48 RCW, there was nothing Ms. Hunt could do to repair her property without violating RCW 90.48.080. Nor could any other similarly situated

¹ See Index to PCHB Case Record, File 4, #30 at 1101-02; CP 274; see also, Index to PCHB Case Record, File 2, #22 at 777-78.

landowner. The consequence is tantamount to an unconstitutional, regulatory taking of private property. *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 759-60, 265 P.3d 207 (2011).

B. The Legal Standards Governing This Appeal.

As "the agency designated by the legislature to regulate the State's water resources," courts must generally give great weight to Ecology's interpretation of chapter 90.48 RCW. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). However, "an agency's view of the statute will not be accorded deference if it conflicts with the statute." *Ryan v. DSHS*, 171 Wn. App. 454, 465, 287 P.3d 629 (2012). "Ultimately, it is for the court to determine the meaning and purpose of a statute." *Id.* While everyone shares the goal of improved water quality, achieving this goal should not give Ecology the carte blanche regulatory authority it desires.

This case comes on the heels of our state Supreme Court's decision in *Lemire v. State Dep't of Ecology*, 178 Wn.2d 227, 309 P.3d 395 (2013), which was decided during the pendency of this action. The *Lemire* Court stated: "**substantial evidence** will support Ecology's order if the evidence shows that conditions on [respondent's property] have **substantial potential** to violate prohibitions against discharging into state waters organic material that pollutes or tends to cause pollution." *Id.* at 234 (emphasis added). In

order to constitute actionable "pollution", two factors must coexist: first, the water must be "altered"; second, the alteration must be "harmful" in some appreciable manner. RCW 90.48.020.

Although actual tests or measurements are not necessary to find actionable pollution, there must nonetheless be *objective evidence* that the activities in question have a "substantial potential" to cause pollution. *Lemire* makes this clear. The following conditions were *actually observed* at the Lemire property, *over an extended period of time*, in and around the creek: "Livestock with direct access to the creek, overgrazing the riparian corridor, manure in the stream corridor, inadequate 'woody' vegetation, bare grounds, erosion, cattle trails across the creek, trampled stream banks, and cattle 'wallowing' in the creek." *Lemire*, 178 Wn.2d at 234.

The *Lemire* majority's response to the dissent confirms there must be demonstrable, substantial evidence of a potential harmful alteration of the water before a charge of pollution can be sustained:

The dissent also claims that our holding today means that 'in order for a rancher to create a 'substantial potential' to pollute all the rancher has to do is (1) have a state body of water on his or her property that is not completely fenced off and (2) own cattle that occasionally cross or drink from the body of water.' . . . ***This is not anywhere near the fact pattern presented to us here***, as our recitation of this case and the evidence before the board makes clear. As explained above, ***undisputed evidence in the record demonstrates that the cattle had much more than occasional access to the creek.***

Id. at 238 (emphasis added).

Thus, a rancher's cattle having occasional access to a water of the state will not in itself support a charge of pollution, even though such access could potentially cause pollution. Instead, the cattle's access must reach the level where it has the "substantial potential" to alter the properties of the water in a manner that rises to the level of "pollution" as defined under RCW 90.48.020.

A mere potential to pollute alone will not suffice.

Here, by contrast, although Ms. Hunt's activities *may have* caused some small measure of organic sediment to be deposited into Manastash Creek via the irrigation ditch, this did not have a "substantial potential" to alter the waters of the creek so as to cause "pollution", as defined under RCW 90.48.020. Moreover, the PCHB found that Ecology was merely speculating as to whether Ms. Hunt's activities tended to cause "pollution".²

In upholding Ecology's interpretation of its enforcement powers under chapter 90.48 RCW, the PCHB erroneously gave that agency carte blanche authority to charge a landowner with "pollution" without any objective "substantial evidence" to support the charge. What makes Ecology's interpretation of its enforcement powers particularly egregious is that, under chapter 90.48 RCW, Ecology can levy substantial fines, and even criminal charges, against the landowner without the person charged having the benefit of a trial by jury

² CP 23-24 (PCHB Finding No. 50).

of his or her peers. *See, e.g.,* chapter 24.05 RCW; RCW 90.48.140; RCW 90.48.144(3); WAC 371-08-305(3); WAC 371-08-315(1).

C. Ecology's Charge of "Pollution" Rests on Speculation.

Ecology admits it does not have any evidence, let alone "substantial evidence", establishing that Ms. Hunt's activities had "a substantial potential" to cause a polluting *alteration* of Manastash Creek. As Ecology's enforcement officer, Mr. Neet, testified:

Q: ***But there's no evidence you have, other than your speculation, that the activities that she did in the riparian area around her ditch wound up in Manastash Creek . . .***

A: I was not out there the day she did the work, so ***no***.³

* * * *

Q: Now, just so we're clear, the main channel of Manastash Creek itself . . . ***has not been altered or changed***, according to your understanding, is that right?

A: ***As of November 17th*** [shortly after Ms. Hunt completed her repair and restoration work], ***no***.⁴

Ecology's above admissions should be fatal to its charge that Ms. Hunt's repair and restoration activities tended to cause pollution of Manastash Creek. Again, and this cannot be overstated, to constitute actionable "pollution", there must be "substantial evidence" of a discharge into the creek that

³ Neet dep. tr. (Vol. II) at 164 (emphasis added). *See* Index to PCHB Case Record, File 4, #30 at 1090.

⁴ Neet dep. tr. (Vol. I) at 96-97 (emphasis added). *See* Index to PCHB Case Record, File 2, #20 at 409-10.

had a "substantial potential" to "alter" its waters in a manner that was "harmful, detrimental or injurious to the public health, safety and welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish, or other aquatic life." *Lemire*, 178 Wn.2d at 234; RCW 90.48.020.

II. ASSIGNMENTS OF ERROR

1. The PCHB erred in finding Ms. Hunt's work in attempting to repair and restore her flood-damaged pasture and irrigation ditch was not a customary, normal, or routine response under the circumstances, and thus exempt from enforcement by the clear intent of the Legislature.

2. The PCHB erred in finding Ms. Hunt's repair and restoration work in and along her pasture and irrigation ditch "tended to cause pollution" of Manastash Creek.

3. The PCHB erred in disregarding its own findings of fact establishing Ecology was only speculating when it claimed Ms. Hunt's activities caused, or tended to cause, "pollution" of Manastash Creek.

4. The PCHB erred by failing to consider the two-prong definition of "pollution" under RCW 90.48.020, both of which must be met before a charge of "pollution" can be sustained.

5. The PCHB erred in applying the law governing summary judgment motions in concluding that Ms. Hunt's activities violated RCW

90.48.080.

6. The PCHB made findings of fact estopping Ecology from charging Ms. Hunt with polluting Manastash Creek in violation of RCW 90.48.080, but failed to apply the law to the facts.

7. The PCHB's decision was arbitrary or capricious.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Ms. Hunt's response to her severely flood-damaged property a customary, normal, or routine response under the circumstances and thus exempt from a charge of pollution under chapter 90.48 RCW, as expressly intended by the Legislature in enacting and revising the chapter? (Assignments of Error Nos. 1 and 7)

2. Did the PCHB err in failing to find there was no "substantial evidence" that Ms. Hunt's repair and restoration work in and along her pasture and irrigation ditch had a "substantial potential" to cause pollution of Manastash Creek, as the term "pollution" is defined under RCW 90.48.020? (Assignments of Error Nos. 2, 3, 4, and 7)

3. Did the PCHB err in failing to apply the well-settled law governing summary judgment motions when it denied Ms. Hunt's motion for summary judgment and granted Ecology's motion for summary judgment? (Assignments of Error Nos. 2, 3, 4, 5 and 7)

4. Did the PCHB err in failing to find that Ms. Hunt's reliance

on, and compliance with, the instructions of one state agency (WDFW) in conducting her repair and restoration work estopped another state agency (Ecology) from subsequently charging her with "pollution" in conducting that work? (Assignments of Error Nos. 6, 7)

IV. STATEMENT OF THE CASE⁵

A. Background Facts Regarding Ms. Hunt's Property.

Ms. Hunt's rural, agricultural property abuts Brown Road and Manastash Creek, west of Ellensburg, with the center of the creek forming Ms. Hunt's southern boundary line.⁶ A small, seasonally flowing irrigation ditch, which originated from the Westside Canal lying to the west of Ms. Hunt's property, entered her property off a bluff, and then flowed a short distance across her pasture before entering Manastash Creek.⁷ The ditch was approximately one foot wide and only "a few inches" deep when Mr. Neet observed it on November 17, 2011, shortly after Ms. Hunt completed her work.⁸

⁵ The factual history of this case is, for the most part, accurately set forth in the PCHB's ORDER ON SUMMARY JUDGMENT (*As Amended on Reconsideration*) at CP 10-55. Unfortunately, the pages are out of order. Accordingly, the Order, with the pages in proper sequence, has been attached at Appendix 1 hereto. Ecology did not challenge the PCHB's factual findings below; and Ms. Hunt challenged only PCHB Finding Nos. 24, 42 and 47, but otherwise agreed that the PCHB's remaining findings of fact were supported by the record. CP 75-78; CP 417-18.

⁶ See Index to PCHB Case Record, File #3 at 197; CP 38 (PCHB Finding No. 1); CP 108, 110. Color copies of CP 108 and CP 110 (annotated aerial photographs of the subject area) are attached at Appendices 2 and 3, respectively, hereto.

⁷ CP 15, 38-39 (PCHB Finding Nos. 1-2, 38); CP 138; CP 238-39.

⁸ Index to the PCHB Case Record, File 4, #30 at 1082, 1089; CP 274, 283-84.

In May 2011, Manastash Creek severely flooded in what Ecology admits was considered to be a 100-year flood.⁹ Ms. Hunt was one of the victims of the flood, which severely damaged her pasture and the return flow irrigation ditch running through the pasture.¹⁰ Debris from the floodwaters clogged the ditch in four places, thus preventing the flood and return flow irrigation waters from receding.¹¹ As a result, Ms. Hunt's pasture, which had been historically used for grazing purposes, was rendered useless throughout the summer of 2011.¹² The floodwaters also deposited debris throughout Ms. Hunt's pasture, including logs, branches, and various man-made objects, including tires and a section of black pipe. Her pasture fences, and the 12"x20' long culvert in the ditch, were also damaged.¹³

In June of 2011, Ms. Hunt contacted the Kittitas County Conservation District ("KCCD") to seek advice and assistance as to what she could do to restore the flood damage to her property. In response, on June 13, 2011, KCCD's Sherry Swanson and WDFW's Brent Renfrow visited Ms. Hunt's property. Ms. Hunt explained that she wanted to restore the use of her pasture (which by definition included the pasture ditch) and clear the power lines

⁹ See Index to PCHB Case Record, File 4, #30 at 1086 (Neet dep. tr. (Vol. II) at 147).

¹⁰ CP 39 (PCHB Finding No. 3); CP 138-39.

¹¹ CP 39-41 (PCHB Finding Nos. 2-9); CP 138-39.

¹² *Id.*

¹³ See Index to the PCHB Case Record, File 1, #3 at 198 (Hunt decl. (dated 2/29/12) at ¶¶3-5; *id.* at 45-46 (2nd Hunt decl. at ¶¶2-3); see also, *id.* at 64 (photograph of the damaged culvert).

to her house that were entangled with tree branches. Ms. Hunt was also concerned about a log jam that had formed in Manastash Creek at the west end of her property as a result of the flood, and the adverse impacts it might have. Mr. Renfrow informed Ms. Hunt that WDFW would have no problem with her removing the log jam, but this would require a permit. Otherwise, as long as no equipment went into Manastash Creek, and no trees were cut or yarded from the creek's banks, he did not see a problem with what Ms. Hunt proposed to do. He advised her, however, that it would be best to wait until the water flows were low before she did any work.¹⁴

The floodwater had mostly receded by August 2011, but Ms. Hunt's pasture continued to have standing water from the flood and irrigation runoff that did not recede due to debris from the flood that was choking off the ditch in four places. After the irrigation season ended, although the pasture was still boggy and had standing water in some areas, the water had sufficiently receded to allow Ms. Hunt to access the pasture with a tracked vehicle (an excavator with a 42"-wide bucket) to begin her repair and restoration work, including removing the extensive debris deposited in her pasture.¹⁵

¹⁴ CP 39-41 (PCHB Finding Nos. 4-8); Index to the PCHB Case Record, File 1, #8 at 46-47 (2nd Hunt decl. at ¶5).

¹⁵ CP 41 (PCHB Finding Nos. 9-10); CP 138-39.

Ms. Hunt began her work on November 6, 2011, and completed it within about one week.¹⁶ As part of the work, and in order to maximize the beneficial use of her pasture, Ms. Hunt cut trees along a portion of the ditch, and away from Manastash Creek itself.¹⁷ Many of the trees were either dead, dying, or leaning at a dangerous angle; others were cut in order to access the debris pile blocking the ditch between the trees at a point where it was only about a foot wide.¹⁸

Relying on Mr. Renfrow's advice, Ms. Hunt was careful to make sure no work activities occurred in Manastash Creek or along its banks. All of Ms. Hunt's repair and restoration work was confined to the pasture and irrigation ditch, and nothing was discharged into Manastash Creek.¹⁹ Both Ms. Hunt and her expert witness, Mark Charlton, provided declarations explaining that the repair and restoration work conducted by Ms. Hunt was customary, normal, or routine.²⁰ And the PCHB found: "Ecology does not refute Mr. Charlton's opinion on the definition of normal and routine practices . . .

¹⁶ CP 41-42 (PCHB Finding Nos. 10-12).

¹⁷ CP 138-39.

¹⁸ See Index to PCHB Case Record, File No. 1 at 199 (Hunt decl. (2/29/12) at ¶10); CP 138-39; Index to PCHB Case Record, File 4, #30 at 1089 (Neet dep. tr. (Vol. II) at 157-58).

¹⁹ CP 44-45 (PCHB Finding No. 19); CP 138-39; see also, CP 112, which is a close-up photograph of the ditch entering Manastash Creek, taken by WDFW shortly after Ms. Hunt completed her work, which graphically depicts the undisturbed vegetation and crystal clear waters of the creek at the mouth of the ditch. A color photograph of CP 112 is attached at Appendix 4 hereto.

²⁰ CP 137-38; Index to PCHB Case Record, File 2, #33 at 807-08.

As Mr. Charlton stated, normal maintenance includes repairing and restoring ditches, including the clearing of debris clogging the ditches.²¹ Mr. Charlton also opined that using heavy equipment, including a 42"-wide bucket for such purposes, is customary, normal and routine, as is the cutting of trees and vegetation along return flow irrigation ditches in order to maximize the beneficial use of agricultural property.²²

In early February 2012, Ms. Hunt took photographs along the length of the irrigation ditch, which show how it looked approximately two months after her work was complete.²³ Unfortunately for Ms. Hunt, after Ecology charged her on February 7, 2012, for violating RCW 90.48.080, on February 22, 2012, a man-made breach of the West Side Canal occurred to the west of Ms. Hunt's property. The canal water poured into Manastash Creek, just upstream from Ms. Hunt's property, and caused the creek itself to flood and breach the log jam at the west end of her property, which had formed during the 2011 flood. This flood event resulted in a newly forming braided side channel of Manastash Creek, *which never before existed*. The new side channel begins at the log jam and flows east through Ms. Hunt's pasture; it then fully engulfs the former irrigation ditch, continues east below where the

²¹ PCHB Order (Finding No. 41).

²² Index to PCHB Case Record, File 3, #22 at 808 (Charlton decl. at ¶3).

²³ CP 141; CP 188-98.

ditch formerly entered Manastash Creek, and then flows back into the main channel of the creek near the eastern end of Ms. Hunt's property.²⁴

B. The History of Ecology's Evolving Charges Against Ms. Hunt.

Acting upon a neighbor's lie, Ecology rushed to judgment and issued a News Release falsely accusing Ms. Hunt of (1) taking a track hoe and relocating the channel of Manastash Creek 25' south of its prior location; (2) removing 700 feet of trees and other vegetation from the shoreline of the creek; and (3) causing extensive damage to the shoreline and creek bed. Based upon this false premise, Ecology charged Ms. Hunt with causing "pollution" of Manastash Creek by "ditching, filling, and altering the creek" in violation of RCW 90.48.080. Ecology assessed Ms. Hunt with a \$16,000 penalty, and ordered her to undertake a massive restoration project.²⁵

Ecology took this action without speaking with Ms. Hunt to hear her side of the story to further investigate the facts.²⁶ During Mr. Neet's first deposition, he admitted Ms. Hunt's activities, all of which occurred on the *north* side of Manastash Creek, could not possibly reposition the channel of the creek 25 feet to the *south*. Mr. Neet also conceded that Ms. Hunt's activities did not occur in Manastash Creek, and did not involve altering the creek's

²⁴ CP 31, 35, 44-45 (PCHB Finding Nos. 18, 20-22, 65); *see also*, CP 140; Index to PCHB Case Record, File 1, #8 at 47-49, and Exs. thereto at 66-82.

²⁵ CP 42-45 (PCHB Finding Nos. 13-19); CP 120-135.

²⁶ CP 44 (PCHB Finding No. 18); Index to PCHB Case Record, File 3, #22 at 779.

location or cutting trees and vegetation from its banks.²⁷ Thus, it now appeared that Ecology finally agreed that Ms. Hunt's work involved an irrigation ditch, not a "side channel" of Manastash Creek.

However, in response to Ms. Hunt's motion for summary judgment, Ecology submitted Mr. Neet's second declaration, containing misleading statements and annotated aerial photographs, to support Ecology's new theory of the case: Ms. Hunt's repair and restoration activities, although not occurring in Manastash Creek itself, were conducted in a "side channel" of the creek, not in an irrigation ditch; therefore, she still polluted the creek.²⁸

It turns out that Ecology, at the taxpayers' expense, paid to use an airplane for the sole purpose of having Mr. Neet take aerial photographs of Ms. Hunt's property, after the breach of the West Side Canal in February of 2012. Relying on these photographs and Mr. Neet's second declaration, Ecology opposed Ms. Hunt's summary judgment motion by arguing that what Ms. Hunt was calling a return flow irrigation ditch was actually a braided side channel of Manastash Creek.²⁹ As a result, Ms. Hunt's counsel deposed Mr.

²⁷ CP 42-45 (PCHB Finding Nos. 13-19); CP 53 (PCHB Finding No. 33); CP 13-16 (PCHB Finding Nos. 36-39); Index to PCHB Case Record, File 2, #20 at 383-388 (Neet dep. tr. (Vol. I) at 45-53).

²⁸ See Index to PCHB Case Record, File 2, #21 at 340-351 (2nd Neet decl.); Index to PCHB Case Record, File 4, #30 at 1078 (Neet dep. tr. (Vol. II) at 113-14); *id.* at 1081 (Neet dep. tr. at 126); *id.* at 1093-94 (Neet dep. tr. at 176-78); *id.* at 1095-96 (Neet dep. tr. at 181-85).

²⁹ *Id.* at 1096 (Neet dep. tr. (Vol. II) at 186-87); see also, Index to PCHB Case Record, File 2, #21 at 298 et. seq. (Ecology's response to Hunt's motion for summary judgment).

Neet a second time, in order to refute Ecology's new theory of the case. During his second deposition, taken August 7, 2012, Mr. Neet finally conceded there was no "side channel" of Manastash Creek when Ms. Hunt conducted her work activities in November 2011, only the irrigation ditch.³⁰

However, before the PCHB received Ms. Hunt's supplemental documents containing Mr. Neet's recanted testimony, the PCHB issued its order denying the parties' respective summary judgment motions. The PCHB found there were "disputed issues of material fact" regarding where Ms. Hunt's activities took place. Ms. Hunt then filed a petition for reconsideration, based upon Mr. Neet's new admissions.³¹

In its response, Ecology conceded all of Ms. Hunt's work was conducted in her pasture, and did not involve using equipment in Manastash Creek, or cutting trees or vegetation from the creek's banks. Ecology further conceded Ms. Hunt's ditch was not a braided side channel of Manastash Creek. At the same time, however, Ecology again changed its theory of the case, as follows: because the irrigation ditch flows into Manastash Creek, Ms. Hunt's activities caused sediment to be deposited into the ditch, and the

³⁰ Index to PCHB Case Record, File 2, #21 at 1095-98 (Neet dep. tr. (Vol. II) at 186-196); Neet dep. tr. (Vol. II) 181-93); *see also*, CP 16 (PCHB Order, Finding No. 39: "In November 2011, the Ditch was not by definition a secondary or side channel of Manastash Creek in the riparian pasture.")

³¹ CP 52 (PCHB Finding No. 32); *see also*, Index to the PCHB Case Record, File 4, #27 at 1154-58, 1161-62 (PCHB's original Order on motion for summary judgment).

cutting of trees along the ditch caused its temperature to increase, all of which in turn caused polluting sediment discharges and temperature increases to the creek itself.³² Ecology made these allegations despite acknowledging the ditch was only a foot or so wide, a few inches deep, and that Ms. Hunt's work was done during the cold month of November.

V. SUMMARY OF ARGUMENT

Although the PCHB reduced Ms. Hunt's fine from \$16,000 to \$750, and ordered Ecology to come up with a more reasonable restoration plan, it was an error of law for the PCHB to conclude that Ms. Hunt violated RCW 90.48.080, by causing "pollution" of Manastash Creek, as that term is defined under RCW 90.48.020. The PCHB's conclusions of law are erroneous for at least the following reasons:

1. The legislative intent underlying chapter 90.48 RCW was to exempt Ms. Hunt's activities from supporting a charge of "pollution," which the PCHB failed to find.
2. The PCHB disregarded the law governing summary judgment motions, under which the "substantial evidence" rule does not apply.
3. Even under the substantial evidence rule, the PCHB's decision is untenable as a matter of law. There is no "substantial evidence" to establish (1) Ms. Hunt "discharged" anything into Manastash Creek that (2) had a

³² CP 51-53 (PCHB Finding Nos. 32-33); *id.* at 14-16 (PCHB Finding Nos. 37-39).

"substantial potential" to cause pollution" of the creek, as that word is defined under RCW 90.48.020. *Lemire*, 178 Wn.2d at 234. Both elements must be met to support a charge of violating RCW 90.48.080.

4. The PCHB improperly allowed Ecology to raise new theories and issues in opposing Ms. Hunt's summary judgment motion.

5. The PCHB's decision was arbitrary or capricious.

VI. ARGUMENT

A. The Standard of Review.

The Administrative Procedures Act ("APA"), chapter 34.05 RCW, governs judicial review of PCHB decisions. RCW 43.21B.180; *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 595, 13 P.3d 1076 (2000). The APA authorizes the reviewing court to invalidate an administrative order when the agency has erroneously interpreted or applied the law to the facts; the agency's order is not supported by substantial evidence in the record; or the order is arbitrary or capricious. RCW 34.05.570(3)(d), (e), (i). "The court applies the standards of review in RCW 34.05.570(3) directly to the agency record." *Pub. Util. Dist. 1 of Pend Oreille Cy. v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). The PCHB's interpretation and construction of a statute are reviewed de novo. *Id.* The PCHB's legal conclusions are reviewed de novo. *Bowers*, 103 Wn. App. at 596.

Where the findings involve mixed questions of law and fact, after establishing the relevant facts, the reviewing court makes a de novo determina-

tion of the correct law. "The process of applying the law to the facts . . . is a question of law and is subject to de novo review". *Tapper vs. State Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). *Id.*

"[W]here the original administrative decision was on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard." *Verizon NW v. Employment Sec.*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). "Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law." *Id.* "We evaluate the facts in the administrative record de novo and the law in light of the above-articulated 'error of law' standard." *Id.* Because "[t]he propriety of summary judgment is a question of law . . . the 'substantial evidence' standard is not appropriate". *Id.* at ¶22, n. 4.

The de novo standard of review allows this Court to substitute its own view of the law for that of the PCHB. *Ryan*, 171 Wn. App. at 465.

B. Ms. Hunt's Repair and Restoration Activities Were Exempt From the Enforcement Provisions of Chapter 90.48 RCW.

1. The Legislature Never Intended Chapter 90.48 RCW to Apply to Normal, Routine Land Use Activities Involving Return Flow Irrigation Ditches.

Ecology made the following initial charge against Ms. Hunt: "***The excavation work*** completed by Monica Hunt violated RCW 90.48.080. Ecology is citing Monica Hunt for violating RCW 90.48.080 on four days which are, November 11th, 12th, 13th, and 17th. . . . The ***pollution*** created by

ditching, filling and altering of the creek is a violation of RCW

90.48.080".³³ RCW 90.48.080 states:

It shall be unlawful for any person to throw, drain, run or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep, or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter.

"Pollution" is defined in RCW 90.48.020, which states:

Whenever the word 'pollution' is used in this chapter, it shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

Although both RCW 90.48.080 and .020 apply to "waters of the state", this phrase is ambiguous. RCW 90.48.020 defines and identifies specific "waters of the state". Irrigation ditches, however, are not identified in the statute; hence the ambiguity.³⁴

³³ CP 43 (PCHB Order, Finding No. 15 (emphasis added)).

³⁴ See Attorney General's Opinion ("AGO 1969") (attached at Ex. 2 to the 2nd decl. of Hunt's counsel dated 6/29/12) (found at Index to PCHB Case Record, File 1, #22 at 429). The opinion responded to the director of the Water Pollution Control Commission's question as to whether "waters of the state" included waters found in canals, irrigation and drainage systems. Both the Commission's question and the AGO's response acknowledge the ambiguity inherent in the definition of "waters of the state".

In interpreting and construing a statute, the court's role is "to discern and implement the Legislature's intent." *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). Where the legislative intent is not apparent from the language of a statute, the "[p]lain meaning . . . may be gleaned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* (Internal quotation omitted.) Although a court will generally give deference to an agency's interpretation of an unambiguous statute, "[a]n agency's interpretation that is not plausible or that is contrary to legislative intent is not entitled to deference." *In re Estate of Bracken*, 175 Wn.2d 549, 575, 290 P.3d 99 (2012).

Ecology's and the PCHB's interpretation of RCW 90.48.080 and .020 is not plausible; it is contrary to legislative intent; it disregards the plain definition of "pollution" under RCW 90.48.020; and it leads to absurd consequences never intended by the Legislature. An examination of the legislative history of chapter 90.48 RCW and related statutes make this clear.

"[I]n 1967, a major review of the state's water pollution laws by the legislature's interim committee for water resources resulted in the development and ultimately in the passage of a bill 'upgrading' chapter 90.48 RCW. See chapter 13, Laws of 1967."³⁵

³⁵ See AGO 1969 at 4 (found at Index to PCHB Case Record, File 2, #22 at 432).

Three sponsors of chapter 13, representatives Robert O'Dell, Eric Anderson and Dan Jolly, joined in a statement of a fourth sponsor, Representative Stewart Bledsoe, relating to the background and meaning of chapter 90.48 RCW as amended by chapter 13. In discussing the meaning of 'pollution' and the authority of the water pollution control commission, Representative Bledsoe, the House Majority 'Whip' and a member of the Interim Committee on Water Resources, made the following pertinent comments immediately preceding the vote on final passage of chapter 13, as recorded on page 531 of the House Journal, Washington State Legislature, 1967 Session:

`. . . We believe that the commission should have full control over pollution, but *we do not believe that every act which would result in a change in a condition of the state's waters should be prohibited. This is in accord with the intent of the Legislature* when a comprehensive water pollution control act was first enacted in 1945.³⁶

Representative Bledsoe further stated:

Let me make the intent of the Legislature abundantly clear as we deal with the area of agriculture, generally, and irrigation agriculture, specifically.

It cannot be denied that under certain conditions there could exist minute but measurable variations in the turbidity or salinity of the return flow of water from an irrigation system. *These variations have not yet been deemed to constitute 'pollution' as interpreted by the Pollution Control Commission in our state. Nor should they be so regarded in the future.*

But if our pollution control standards are to have meaning, factors such as turbidity and salinity must be included in the total definition of water pollution. *If, in drawing this definition, it would seem that we are zeroing in on the agricultural segment of our society, I would like the record to show that such is not the Legislative intent.*

³⁶ *Id.* at 434 (emphasis added; underscoring original).

An alternate solution to this problem would be to amend agriculture out of the Act specifically, by name. It was not the feeling of the Interim Committee that anyone be excused from a basic responsibility in this area. ***At the same time, the routine practices conducted by the irrigationist in fertilization, weed and pest control and the other agricultural techniques, need not bring down the wrath of the Pollution Control Commission upon his head. This was not the intent of the Interim Committee*** which prepared the bill after exhaustive investigation. ***This is not the intent of the Legislature as it proceeds to enact House Bill 179.***³⁷

The above legislative history establishes that Ms. Hunt's work in attempting to repair and restore her flood-damaged pasture and ditch, and to enhance the use of her pasture, was never intended by the Legislature to constitute actionable "pollution" under chapter 90.48 RCW. Indeed, if landowners were not allowed to restore flood damaged pastures and ditches, without the risk of incurring the wrath of Ecology, they would be effectively denied the beneficial use of their property. This would create an absurd result the Legislature never intended. Statutes must be construed to effect their purpose, and to avoid unlikely, absurd or strained consequences. "Unlikely, absurd or strained consequences resulting from a literal reading [of a statute] should be avoided." *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). "[T]he spirit and intent of the statute should prevail over the literal letter of the law and . . . there should be made that interpretation which best

³⁷ House Bill, Washington State Legislature, 1967 Session, at p. 531 (emphasis and underscoring added) (found at Index to PCHB Case Record, File 2, #22 at 437).

advances the perceived legislative purpose." *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 852 (1991).

2. Related Statutes Confirm This Legislative Intent.

The legislative intent to exclude activities like Ms. Hunt's from the definition of "pollution" under chapter 90.48 RCW is supported by the federal Clean Water Act. As stated in *Public Utility District v. Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002): "The issue of Ecology's authority under the Federal Water Pollution Control Act, known as the Clean Water Act, 33 U.S.C. §1251-1387, and under the state Water Pollution Control Act, chapter 90.48 RCW, is a matter of statutory construction that we review de novo." *Id.* at 806. "Under §303 of the Clean Water Act, each state must establish, subject to federal approval, comprehensive water quality standards setting water quality goals for intrastate waters." *Id.* "The department of ecology is hereby designated as the state water pollution control agency for all purposes of the federal clean water act . . ." RCW 90.48.260(1).

Since the purpose of chapter 90.48 RCW includes meeting the requirements of the federal Clean Water Act, two conclusions of law must inevitably follow: (1) chapter 90.48 RCW is designed to *complement* the federal Clean Water Act (*see, e.g.,* RCW 90.48.150 and .260); and (2) chapter 90.48 RCW should not be interpreted or construed in a manner inconsistent with the express intent and purpose of the federal Act. As Representative

Bledsoe commented: "And most important, it is the sponsors' intent to provide the State of Washington with a type of legislation which will enable it to participate in the water quality regulation field in an effective manner so as to ensure a federal-state balance and cooperation"³⁸

"Legislative bodies . . . are presumed to have full knowledge of the existing statutes affecting the matter upon which they are legislating." *Bennett v. Hardy*, 113 Wn.2d 912, 926, 784 P.2d 507 (1990) (quoting *Louthan v. King Cy*, 94 Wn.2d 422, 429, 617 P.2d 977 (1980)). Courts discern the meaning of a statute "not only from the provision in question, but also from closely related statutes and the underlying legislative purposes." *Pac. Topsoils, Inc. v. Dept. of Ecology*, 157 Wn. App. 629, 641, 238 P.3d 1201 (2010), *review denied*, 171 Wn.2d 1009 (2011).

Under the federal Clean Water Act, agricultural stormwater discharges and irrigation return flows are expressly exempt from permit requirements. 33 U.S.C. §1344(f)(1)(C) identifies, *as a non-prohibited discharge*, "the discharge of dredged or fill material . . . for purposes of construction or maintenance of farm or stock ponds *or irrigation ditches, or the maintenance of drainage ditches*."³⁹ Thus, Ms. Hunt's removal of debris clogging

³⁸ House Journal, Washington State Legislature, 1967 Session at p. 531.

³⁹ See also WAC 173-220-030(18), which excludes "return flows from irrigated agriculture" as being a "point source" from which pollutants are or may be discharged.

her pasture ditch, being expressly exempt under the federal Act, fully supports its exemption under chapter 90.48 RCW.⁴⁰

Another related statute is Washington's Shoreline Management Act ("SMA"), found at chapter 90.58 RCW. The SMA seeks to reach a reasonable, common sense balance between protection of the shorelines of the state "while, at the same time, recognizing and protecting private property rights consistent with the public interest." Any "substantial development" requires a "permit from the governmental agency having administrative jurisdiction under this chapter." RCW 90.58.140(2). Ms. Hunt's repair and restoration work, however, were expressly exempt from the definition of "substantial development". Under the SMA, "[t]he following ***shall not*** be considered substantial developments . . . ***practices normal or necessary for farming, irrigation, and ranching activities***, including . . . the construction and ***maintenance of irrigation structures including but not limited to . . . irrigation channels***." RCW 90.58.030(3)(e)(iv) (emphasis added).⁴¹

The SMA also allows the "clear cutting of timber which is solely incidental to the preparation of land for the uses authorized by this chapter." RCW 90.58.150. Ms. Hunt did not do any clear cutting of timber. Instead,

⁴⁰ On March 8, 2012, the U.S. Army Corp of Engineers inspected Ms. Hunt's property and decided to take no action against her for violating the Federal Clean Water Act. CP 32 (PCHB Finding No. 65).

⁴¹ The PCHB itself acknowledged this fact, and that Ms. Hunt was not charged with working without a permit. CP 16-17 (PCHB Finding No. 40).

she simply cut trees that were either dead, dying, or dangerous; trees necessary and incidental to cleaning the ditch and attempting to clear her power lines; and trees interfering with the beneficial use of her pasture.⁴² Ms. Hunt's tree cutting activities were thus exempt from enforcement as being "practices normal or necessary for farming, irrigation, and ranching activities". RCW 90.58.030(3)(e)(iv).⁴³ Moreover, *Ms. Hunt was never charged with cutting trees in her pasture or working without a permit.*

3. The PCHB Erred in Concluding Ms. Hunt's Activities Were Not Exempt from Enforcement Under Chapter 90.48 RCW.

The PCHB correctly found that Ms. Hunt's work activities all occurred in her pasture and along her irrigation ditch.⁴⁴ The PCHB also made the following correct findings:

- "Irrigation ditches including return flow channels are routinely maintained."
- "*The clearing of debris clogging the ditches and the cutting of vegetation and trees along the edge of a ditch in order to maximize the beneficial use of agricultural property, including the area of crop plantings, are customary, normal and routine agricultural practices.*"⁴⁵

⁴² CP 39 (PCHB Finding No. 4); CP 41 (PCHB Finding No. 10); CP 16 (PCHB Finding No. 40); Index to the PCHB Case Record, File 1, #3 at 198-99 (Hunt decl. (dated 2/29/12) at ¶8); CP 138-141 (3d Hunt decl. at ¶¶4-5, 10).

⁴³ Index to the PCHB Case Record, File 2, #22 at 807-08; CP 137-38.

⁴⁴ CP 53 (PCHB Finding No. 33); CP 14-15 (PCHB Finding Nos. 37, 39).

⁴⁵ CP 17-18 (PCHB Finding No. 40) (emphasis added).

In making these findings, the PCHB relied on the declaration of Ms. Hunt's expert, Mark Charlton.⁴⁶ The PCHB correctly found, "Ecology does not refute Mr. Charlton's opinion on the definition of normal and routine practices. . . . As Mr. Charlton stated, normal practices include repairing and restoring ditches, including the clearing of debris clogging ditches."⁴⁷ Mr. Charlton also stated the following activities are normal and routine in Kittitas County: "*[t]he cutting of vegetation and trees along the edges of such ditches, in order to maximize the beneficial use of agricultural property*"; and "*[u]sing heavy equipment in and around such ditches, including equipment with buckets to clear and maintain such ditches.*"⁴⁸

Ms. Hunt's activities fall squarely within Mr. Charlton's definition of customary, normal and routine practices, which was adopted by the PCHB in its findings of fact. Nonetheless, the PCHB made the following erroneous conclusion of law: "There are no undisputed material facts regarding these activities conducted by Mr. Hunt, and as a matter of law the Board finds that they were not normal and routine maintenance of the Ditch."⁴⁹ Upholding this conclusion depends entirely upon accepting the PCHB's following logic:

⁴⁶ *Id.*; see also, CP 46 (PCHB Finding No. 23).

⁴⁷ CP 17-18 (PCHB Finding No. 41).

⁴⁸ Index to the PCHB Record, File 3, #22 at 808 (emphasis added).

⁴⁹ CP 18-19 (PCHB Finding Nos. 42-43).

"Mr. Charlton did not provide an opinion on whether Ms. Hunt's activities were normal and routine"; therefore, they were not.⁵⁰

The PCHB's conclusion failed to properly apply the controlling law to the facts. ER 702 governs expert testimony. The rule requires only that a qualified expert opine on a subject on which specialized knowledge will assist the trier of fact. It does not require the expert to opine on the ultimate issue to be decided by the trier of fact, although the expert may be allowed to do so under ER 704.

Washington case law makes this clear. For example, in *State v. Francisco*, 148 Wn. App. 168, 199 P.3d 478 (2009), *review denied*, 166 Wn.2d 1027 (2009), the defendant was convicted of possession of cocaine. In affirming the conviction, the court held that, under ER 702, the trial court correctly allowed into evidence the expert testimony of a detective who did not opine on the specific conduct of the defendant. Instead, the detective testified generally about the habits and practices of drug users. *Id.* at 176-77. Because "his testimony assisted the trier of fact in understanding this practice, and was relevant to disproving Mr. Francisco's unwitting possession defense[,] [t]he trial court did not err in allowing the detective's testimony." *Id.* at 177.

Even without Mr. Charlton's opinion, Ms. Hunt's repair and restoration work comport precisely with the kinds of activities the Legislature in-

⁵⁰ CP 17 (PCHB Finding No. 41).

tended to exempt from causing actionable "pollution" under chapter 90.48 RCW. The PCHB also overlooked Ms. Hunt's own opinion that her activities were normal, customary, or routine practices in Kittitas County, which is an opinion she was qualified to make under ER 701.⁵¹

The PCHB's conclusion also defies common sense and logic, as its following statements make clear:

There was no evidence of Ms. Hunt's routine maintenance of the Ditch. While cleaning the Ditch may have been routine to the extent it is regularly done after a flood event, it was not a normal response. The use of the excavator to clear and remove debris from in and around the Ditch resulted in significant impacts on the riparian pasture. The excavator crushed vegetation in a large area of the riparian pasture, and in removing debris, the size of the Ditch was expanded in several locations.⁵²

The error with the PCHB's conclusion results from its limited focus on "*maintenance and cleaning*" of the ditch, as opposed to "*repairing and restoring*" flood damaged property. In short, the PCHB's error was caused by its failure to focus on the actual facts. Properly viewed, Ms. Hunt's "repair and restoration" activities were a normal response to an extraordinary event that severely damaged her property. The PCHB's above-quoted conclusion

⁵¹ CP 137-38.

⁵² CP 18 (PCHB Finding No. 42) (emphasis added)). The PCHB's finding - that Ms. Hunt's activities expanded the size of the ditch in several locations - is not supported by the record, and was challenged by Ms. Hunt in the lower court. The court agreed: "This court concludes that the Board incorrectly found that the ditch was widened in 'some locations' . . . [T]he evidence established that the ditch was widened to one location for five to 10 feet." CP 417; see also, CP 139; Index to PCHB Case Record, File No. 4, #30 at 1099.

concedes, "cleaning the ditch may have been a routine to the extent it is regularly done after a flood event." Nonetheless, in an arbitrary leap of logic, the PCHB then concluded: "Ms. Hunt's "was not a normal response." The PCHB made this leap with no supporting evidence in the record.⁵³

Continuing its misplaced focus, the PCHB concluded: "***The routine maintenance must be normal, customary and reasonable. . . . Normal and routine maintenance should not be an expansion from what previously existed.***"⁵⁴ Once again, the PCHB's conclusion disregards the uncontroverted facts in the record establishing that Ms. Hunt's repair and restoration activities were normal under the circumstances. The damage to her property *did not exist* before the flood; therefore, her activities were not "an expansion from what previously existed", as the PCHB wrongly concluded.

Under the PCHB's conclusion, any similarly situated landowner would be helpless to undertake any repair or restoration activities following severe flood damage to his or her property. Even using an ATV or truck to clear debris is going to crush vegetation in the work area. And even using a shovel to clear debris from a ditch is going to cause sediment discharges. The issue is not whether vegetation was crushed or sediment discharged into Ms.

⁵³ The PCHB correctly found: "Ecology does not refute Mr. Charlton's opinion on the definition of normal and routine practices." CP 17 (PCHB Finding No. 41). Indeed, Ecology presented *no evidence* on this issue; instead, it relied solely upon the unsupported arguments of its counsel.

⁵⁴ CP 17 (PCHB Finding No. 41) (emphasis added).

Hunt's ditch. Instead, it is whether there is "substantial evidence" that this had a "substantial potential" to cause "pollution" of Manastash Creek, as that word is defined under RCW 90.48.020. *Lemire*, 178 Wn.2d at 234.

C. There are No Facts in the Record Establishing Ms. Hunt's Activities Had a Substantial Potential to Pollute Manastash Creek.

To support its charge of pollution, it was Ecology's burden to produce "substantial evidence" that Ms. Hunt's activities had a "substantial potential" to harmfully "alter" the waters of Manastash Creek. *Lemire*, 178 Wn.2d at 234, 238; RCW 90.48.020. Ecology failed to do so. And the PCHB erred in failing to apply the "substantial potential" to pollute requirement to the facts.

After citing various general studies, including Ecology's Temperature Total Maximum Daily Load ("TMDL") Study for the Upper Yakima Basin⁵⁵, the PCHB made the following unsupported conclusions:

The TMDL plans and related studies and analysis provided by Ecology *are unrefuted evidence* of the impacts [Ms. Hunt's activities] ha[d] on the waters of the Ditch. The Ditch directly discharged into Manastash Creek in November 2011, and the evidence shows that the flows in the Ditch containing sediment and temperature changes caused by Ms. Hunt's extensive activities, *would likely*, if not directly and immediately, discharge into Manastash Creek. . . . Based on the undisputed issues of material fact, the Board finds that as a matter of law, Ms. Hunt's activities tended to cause pollution in Manastash Creek in violation of RCW 90.48.080.⁵⁶

⁵⁵ CP 24-25 (PCHB Finding No. 52).

⁵⁶ CP 26-27 (PCHB Finding Nos. 54-55) (emphasis added).

The problems with the PCHB's conclusions are two-fold. First, Ecology *did not* conduct any temperature or sediment sampling or tests in this case, a fact which the PCHB itself admits.⁵⁷ There is, therefore, no basis to support the PCHB's conclusion that Ecology's general TMDL plans and related studies provide "unrefuted evidence" of the impacts of Ms. Hunt's activities. Furthermore, the PCHB's conclusion - the evidence shows Ms. Hunt's activities "*would likely*, if not directly immediately, discharge into Manastash Creek" - failed to apply the proper legal standard, which is whether her activities provide "substantial evidence" of a "substantial potential" to cause pollution. *Lemire*, 178 Wn.2d at 234. The mere fact that the irrigation ditch flows into Manastash Creek does not itself support a finding that the waters of the ditch contained temperature changes and sediment that in turn had a "substantial potential" to harmfully alter the waters of the creek.

This leads to the second problem with the PCHB's conclusion, which is this: the PCHB's own findings confirm that Ecology's allegations rest upon sheer speculation and conjecture: "Mr. Neet did not actually observe sediment discharged into Manastash Creek . . . *Mr. Neet also agrees with the statement of [sic] that he is 'basically speculating that when Ms. Hunt did the work, sediment was discharged into Manastash Creek.'*"⁵⁸

⁵⁷ CP 24-25 (PCHB Finding No. 50).

⁵⁸ *Id.* (emphasis added).

Moreover, Ms. Hunt's uncontroverted testimony was that she was careful to make sure that all debris was deposited away from the creek: "Following the earlier instructions of WDFW's Brent Renfrow . . . I was careful to ensure that no equipment went onto the banks of Manastash Creek, or in the creek itself. I also made sure that no trees along the banks of the creek were cut or disturbed in any way. No debris or material of any kind was discharged into Manastash Creek during the work."⁵⁹

Ecology's second basis for charging Ms. Hunt with polluting Manastash Creek - that cutting trees along the ditch, away from Manastash Creek, removed the shade canopy over a portion of the ditch, thus increasing the temperature of the ditch, which in turn harmfully increased the temperature of Manastash Creek, because the ditch flows into the creek - is even more speculative. Until it reaches Ms. Hunt's property, the ditch has no canopy of trees shading it, and the trees Ms. Hunt cut in her pasture shaded the ditch for only a short distance before it entered the creek.⁶⁰ Prior to the breach of the West Side Canal on February 22, 2012, the shallow and narrow ditch flowed water only seasonally.⁶¹ On November 17, 2011, shortly after Ms. Hunt

⁵⁹ CP 138; *see also*, the photograph at Appendix 4 hereto depicting the clarity of the waters of the ditch and creek shortly after Ms. Hunt's work; Index to PCHB Case Record, File 1, #8 at 51-52.

⁶⁰ *See* aerial photographs attached at Appendices 2 and 3 hereto; CP 39 (PCHB Finding No. 2).

⁶¹ Index to PCHB Case Record, File 1, #3 at 197.

completed her work, the depth of the water in the ditch was only about one foot-wide and five inches or deep.⁶² Ms. Hunt did not cut any trees along the banks of Manastash Creek, which continued to provide abundant shade for the creek in the area adjacent to where Ms. Hunt's restoration work occurred.⁶³ Ms. Hunt's work was done in November of 2011, when the weather was cold, and it snowed that month. In July of 2012, the water in Manastash Creek was still "extremely cold."⁶⁴

Moreover, during the dead of winter in February of 2012, the man-made breach of the Westside Canal occurred, which was unforeseeable and forever materially changed the conditions on the ground. The floodwaters from the breach caused an entirely new, braided side channel of Manastash Creek to flow through Ms. Hunt's pasture, from the west of her property, overwhelming the ditch, and then continuing to flow through her property until it returned to the creek at the east end of her property.⁶⁵

Given the above uncontroverted facts, the PCHB relied upon sheer speculation and conjecture in finding Ms. Hunt's activities, in November of 2011, may have increased the temperature of the ditch, which in turn "would likely" cause "pollution" of Manastash Creek, by creating a harmful increase

⁶² Index to PCHB Case Record, File 4, #30 at 1082, 1089; CP 274, 283-84.

⁶³ CP 44-45 (PCHB Finding No. 19); CP 53 (PCHB Finding No. 33); CP 138-39.

⁶⁴ CP 44 (PCHB Finding No. 17); CP 139; *see also*, Appendix 4 hereto.

⁶⁵ CP 45 (PCHB Finding Nos. 20-21); CP 15 (PCHB Finding No. 38); CP 32 (PCHB Finding No. 65).

in the temperature of the waters of the creek. And to charge Ms. Hunt with polluting the creek based upon such changed and unforeseeable circumstances would be an unconscionable *ex post facto* application of the law.

It was thus arbitrary or capricious for the PCHB to deny Ms. Hunt's motion for summary judgment, and grant Ecology's motion for summary judgment, based upon the uncontroverted facts in the record. Ecology presented no evidence to refute the admitted evidence establishing Ms. Hunt's activities were normal, routine responses to her flood-damaged property. Ecology also failed to produce "substantial evidence" that her activities had a "substantial potential" to cause polluting sediments to be discharged into Manastash Creek, or cause a harmful increase in the creek's temperature.

D. The PCHB Misapplied the Law Governing Summary Judgment Motions in Concluding Ms. Hunt's Activities Violated RCW 90.48.080.

Summary judgment is proper when the pleadings and affidavits show that no issue of material fact exists, and the moving party is entitled to judgment as a matter of law. CR 56(e); *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999). "Where reasonable minds can reach but one conclusion from the admissible facts and evidence, summary judgment should be granted." *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Even if some facts are in dispute, where there are no material facts at issue under a legal principle that disposes of the controversy, summary judgment is proper.

Hackler v. Hackler, 37 Wn. App. 791, 794, 683 P.2d 1241 (1984), *review denied*, 102 Wn.2d 1021 (1984).

Although all reasonable inferences from the evidence are resolved against the moving party, "this does not mean that the party moving for summary judgment is compelled to meet every speculation, conjecture or possibility by [the nonmoving party] alleging facts to the contrary." *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974). "Unreasonable inferences that would contradict those raised by evidence of undisputed accuracy need not be so drawn." *Snohomish County v. Rugg*, 115 Wn. App. 218, 229, 61 P.3d 1184 (2002). "The nonmoving party must do more than show there is some "metaphysical doubt as to the material facts". *Gingrich v. Uniguard Security Ins.*, 57 Wn. App. 424, 430, 788 P.2d 1096 (1990).

The moving party can satisfy her initial burden in either of two ways: (1) she can set forth her version of the facts, and allege there is no genuine issue as to those facts; or (2) she can simply point out to the court that no evidence exists to support the nonmoving party's case. *Howell v. Bloodbank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). Ms. Hunt has satisfied her initial burden in both ways. What makes the PCHB's decision truly mystifying is that it found Ms. Hunt's version of the dispositive material facts to be uncontroverted, while Ecology was only speculating that her work caused sedi-

ment to be discharged into Manastash Creek, and Ecology did no sampling or testing to measure sediment discharges or temperature changes in the creek.⁶⁶

Further compounding its error in applying the law governing summary judgment motions, the PCHB disregarded the well-settled law that a new theory of recovery not pleaded by the plaintiff cannot be raised to defeat a summary judgment motion. *Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 757-58, 125 P.3d 164 (2005), *review denied*, 157 Wn.2d 1025, 142 P.3d 608 (2006). WAC 371-08-435(2) further provides that the issues identified in the prehearing order shall control the appeal, and shall be the only issues to be decided, unless modified for good cause, which never occurred in this case. The charge against Ms. Hunt, which was never changed, was that she caused pollution of Manastash Creek by "ditching, filling and altering" the creek, by doing excavating work in the creek itself and removing trees from its banks. The charge was not based upon Ms. Hunt repairing and restoring her flood-damaged pasture and irrigation ditch.⁶⁷

E. Because of Ms. Hunt's Good Faith Reliance on the Advice of WDFW, Ecology Should be Estopped from Charging Ms. Hunt with Polluting Manastash Creek.

Before Ms. Hunt began her repair and restoration work, she sought the assistance and advice of Sherry Swanson from the Kittitas County Conserva-

⁶⁶ See, e.g., CP 14-17, 24, 29-32, 38-45, 53 (PCHB Finding Nos. 1-22, 33, 37-41, 50, 58-67).

⁶⁷ CP 43 (PCHB Finding Nos. 14-16); CP 29-30 (PCHB Finding Nos. 60-61).

tion District and WDFW's Brent Renfrow.⁶⁸ In conducting her repair and restoration activities, Ms. Hunt adhered to the advice and recommendations Mr. Renfrow gave her.⁶⁹ As the PCHB correctly found:

Ms. Hunt sought assistance and advice prior to conducting the activities. She asked Mr. Renfrow to visit the site in June 2011 prior to taking any action. Mr. Renfrow told Ms. Hunt that WDFW "would have to approve any work that involved placing equipment in the Creek or cutting/yarding trees from the Creek's banks to clear the power lines." . . . Based on Mr. Renfrow's advice, it is understandable that Ms. Hunt believed that WDFW's concerns were with activities in the banks and bed of Manastash Creek, and any work in this area would require necessary permits. As suggested by Mr. Renfrow, Ms. Hunt waited until the water receded before doing any work. Ms. Hunt states that her intent to stay out of Manastash Creek and the riparian area is evidenced by her request for the meeting with Renfrow, the agreement to wait until the waters receded before any work was done, the belief that she was following Renfrow's instructions, and the many photographs which Hunt has identified as either the Ditch or Creek.⁷⁰

Ms. Hunt confirmed she followed Mr. Renfrow's instructions, and that she "was careful to ensure that no equipment went onto the banks of Manastash Creek, or in the creek itself." She also "made sure no trees along the banks of the creek were cut or disturbed in any way", and that "[n]o debris or material of any kind was discharged into Manastash Creek during the work."⁷¹

⁶⁸ CP 40-41 (PCHB Finding Nos. 5-8).

⁶⁹ CP 41 (PCHB Finding No. 8).

⁷⁰ CP 30 (PCHB Finding No. 62); *see also*, CP 29-33 (PCHB Finding Nos. 60-61, 63-70).

⁷¹ CP 138.

Because both WDFW and Ecology are state agencies, Ms. Hunt's good faith reliance on the advice of the former agency should estop the latter from punishing her for such reliance. "Equitable estoppel may apply where there has been an admission, statement or act which has been justifiably relied upon to the detriment of another party." *Department of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002). Although equitable estoppel against the government is not favored, the doctrine will apply where "it must be necessary to prevent a manifest injustice and applying estoppel must not impair the exercise of government functions." *Id.* at 20. "Proof of the elements of estoppel must be by clear, cogent and convincing evidence." *Id.* The doctrine can and should be applied in this case. *Id.*

F. PCHB's Decision Was Arbitrary and Capricious.

"[T]his court may grant relief if the agency's order is `arbitrary or capricious.'" *Port of Seattle*, 151 Wn.2d at 589. "[A]rbitrary or capricious agency action [is] action that is willful and unreasonable and taken without regard to the attending facts or circumstances." *Id.* (Internal quotations omitted). Such is the case here. The PCHB's Order unreasonably disregarded the facts establishing Ms. Hunt's repair and restoration activities fell within the scope of those practices intended by the Legislature to be excluded from enforcement; it adopted Mr. Charlton's unrebutted expert opinion defining customary, normal, and routine practices, which included the very activities con-

ducted by Ms. Hunt, but arbitrarily refused to apply his opinion to Ms. Hunt's activities; it unreasonably interpreted and applied RCW 90.48.080 and .020; it unreasonably disregarded the controlling law governing summary judgment motions and the burden of proof; and it unreasonably drew conclusions of law that were unsupported by substantial evidence. The disconnect between the PCHB's findings of fact and its conclusions is so stark that it meets the arbitrary or capricious standard.

G. Ms. Hunt is Entitled to an Award of Attorney Fees on Appeal.

RCW 4.84.350(1) allows the prevailing party in a judicial review of any agency action to recover its fees and other expenses, including reasonable attorneys' fees, unless the court finds the agency action was substantially justified or that the circumstances make an award unjust. Subsection (2) limits the award to an amount not to exceed \$25,000. Ecology's conduct in prosecuting Ms. Hunt fits the bill to allow her to recover her expenses, including reasonable attorney fees, under RCW 4.84.350.

Another basis for awarding Ms. Hunt her attorney fees is RCW 90.14.190, which allows attorneys' fees to a party suffering damages where Ecology's water resource decision was arbitrary, capricious, or erroneous. *Retowski v. Dep't of Ecology*, 128 Wn.2d 508, 512, 910 P.2d 462 (1996). Likewise, RCW 4.84.185 allows for the recovery of attorney's fees for prose-

cutting frivolous actions. The facts here should support an award of attorney's fees and costs in favor of Ms. Hunt on all grounds.

VII. CONCLUSION

Although Ecology has broad discretionary authority to enforce Washington's Clean Water Act, the Legislature never intended to grant it the enforcement power it seeks to obtain in this action. Ecology believes RCW 90.48.080 allows it to arbitrarily charge a landowner, if it so desires, with "pollution" for the mere act of sprinkling a handful dirt in a return flow irrigation ditch. Under Ecology's interpretation of the statute, normal agricultural, ranching and farming practices -- such as using pesticides, herbicides, mowing, disking, repairing, maintaining, and cutting vegetation in or along the banks of an irrigation ditch -- would constitute unlawful pollution. Ecology's potential to abuse its power under this interpretation is readily apparent.

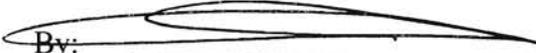
Because return flow ditches ultimately enter rivers, streams, or creeks, any of the above-described activities would technically "alter" the physical properties of such waters, even though the alteration might be slight and harmless to humans, livestock, wildlife and fish. While certain activities, such as discharging pollutants that exceed quantifiable TMDL levels in an irrigation ditch, could support a violation of RCW 90.48.080, the Legislature never intended for activities like Ms. Hunt's to constitute actionable pollution.

In closing, Ms. Hunt is asking this Court to reverse the PCHB's Order and find, as a matter of law, that (1) her activities were exempt under chapter 90.48 RCW; (2) Ecology failed to establish that her activities had a substantial potential to pollute Manastash Creek; (3) Ecology misinterpreted and misapplied the law, especially regarding summary judgment motions; (4) Ms. Hunt's good faith reliance on, and compliance with, the instructions of one state agency should estop another state agency from penalizing her for doing so; and (5) she should be awarded her attorney fees. The consequences of upholding the PCHB's Order would have a chilling effect on farmers, ranchers and other landowners in rural areas, and eliminate any checks or balances on Ecology's enforcement powers. No state agency should be vested such limitless power.

DATED this 29 day of April, 2014.

Respectfully submitted,

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP

By: 

Douglas W. Nicholson, WSBA #24854
Attorney for Appellant Monica Hunt

CERTIFICATE OF SERVICE

I certify that on the 29th day of April, 2014, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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Kimberly Bailes

Appendix 1

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LATHROP WINBAUER HARREL,
SLOTHOWER & DENISON LLP

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MONICA HUNT

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 12-022

ORDER ON SUMMARY JUDGMENT
(As Amended on Reconsideration)

This matter arises from an appeal of Administrative Order No. 8990 (Order #8990) and Notice of Penalty No. 8891 (Penalty) with the Pollution Control Hearings Board (Board). Order #8990 and the Penalty were issued by the Respondent Department of Ecology (Ecology) based on the finding that Appellant Monica Hunt (Hunt) violated the water quality laws, chapter 90.48 RCW, for activities impacting Manastash Creek in Kittitas County.

On August 21, 2012, the Board issued an Order on Motion for Summary Judgment. The Order denied Hunt's Motion for Summary Judgment and Ecology's cross motion for summary judgment on Issue No. 1 of the Pre-Hearing Order. On August 31, 2012 Hunt filed a Petition for Reconsideration of the Board's Order denying summary judgment. On September 10, 2012 Ecology filed a Response in which it also requested reconsideration of the Board's Order denying summary judgment. Both parties assert that the Board may resolve this appeal on summary judgment, without the need for hearing.

The Board, upon consideration of the motions and review of the briefs and documents presented, issues this amended Order on Summary Judgment.

AMENDED ORDER ON SUMMARY JUDGMENT
PCHB No. 12-022

000010

1
2 INTRODUCTION

3 A pre-hearing conference was held on March 23, 2012. Tom McDonald presided for the
4 Board. Attorney Douglas Nicholson, Lathrop Winbauer Harel Slothower & Denison LLP,
5 appeared on behalf of the Petitioner. Senior Counsel Joan M. Marchioro, Office of the Attorney
6 General, appeared on behalf of Ecology.¹ In the pre-hearing conference the parties submitted
7 and agreed to the following legal issues.

- 8 1. Did Monica Hunt cause "pollution" of Manastash Creek by ditching, filling, and
9 altering the creek in violation of RCW 90.48.080, as the term "pollution is defined
10 under RCW 90.48.020?
11 2. Was Ecology's \$16,000 penalty assessed against Ms. Hunt reasonable?
12 3. Was the restoration plan Ecology ordered Ms. Hunt to submit and implement
13 reasonable?

14 The following documents were received and considered in ruling on the petitions for
15 reconsideration of the motions for summary judgment:

- 16 1. Notice of Appeal.
17 2. Administrative Order No. 8990.
18 3. Notice of Penalty No. 8991.
19 4. Appellant Hunt's Motion for Summary Judgment.
20 5. Declaration of Counsel [Douglas W. Nicholson] in Support of Motion to Stay, with
21 Exhibits 1- 11.
6. Declaration of Counsel [Douglas W. Nicholson] Authenticating Documents in
Support of Appellant Hunt's Motion for Summary Judgment, with Exhibits 1-4.
7. Declaration of Douglas W. Nicholson in Support of Motion to Stay Effectiveness of
DOE's Administrative Order #8990 and Notice of Penalty Docket #8991.
8. Declaration of Monica Hunt in Support of Motion to Stay Effectiveness of DOE's
Administrative Order #8990 and Notice of Penalty Docket #8991, with Exhibits 1-5.
9. Response to Appellant's Motion for Summary Judgment.

¹ On June 5, 2012, Senior Counsel Marchioro withdrew as attorney for Ecology and Assistant Attorney General Dorothy H. Jaffe filed a Notice of Appearance on behalf of Ecology.

- 1 10. Declaration of Dorothy Jaffe in Support of Response to Motion for Summary
Judgment, with Exhibits 1 and 2.
- 2 11. Declaration of Bryan Neet in Support of Response to Motion for Stay, with Exhibits
1-10.
- 3 12. Second Declaration of Bryan Neet, with Exhibits 1-8.
- 4 13. Declaration of Lisa Iammarino, with Exhibits 1-5.
- 5 14. Declaration of Bryan Bachman-Rhodes.
- 6 15. Declaration of Brent Renfrow in Support of Response to Motion for Stay, with
Exhibits 1-6.
- 7 16. Second Declaration of Monica Hunt in Support of Motion to Stay Effectiveness of
DOE's Administrative Order #8990 and Notice of Penalty Docket #8991, with
Exhibits 1-5.
- 8 17. Appellant Hunt's Reply to Ecology's Response to Appellant's Motion for Summary
Judgment.
- 9 18. Second Declaration of Counsel in Support of Hunt's Motion for Summary Judgment
with Exhibits 1-10.
- 10 19. Third Declaration of Monica Hunt in Support of Appellant's Motion for Summary
Judgment, with Exhibits 1-14.
- 11 20. Declaration of Mark Charlton in Support of Appellant's Motion for Summary
Judgment.
- 12 21. Appellant Hunt's Petition for Reconsideration of the Board's Order Denying
Appellant's Motion for Summary Judgment.
- 13 22. Fourth Declaration of Monica Hunt, and Exhibits A through K.
- 14 23. Bryan Neet's deposition, Volume II.
- 15 24. Department of Ecology's Response to Appellant Hunt's Petition for Reconsideration
of the Order Denying Summary Judgment.
- 16 25. Appellant Hunt's Reply to Ecology's Response to Appellant's Petition for
Reconsideration of the Board's Order Denying Appellant's Motion for Summary
Judgment, and Appendix 1.

16 In addition to these documents, the Board also conducted a site visit to Ms. Hunt's
17 property on October 3, 2012, at the request of, and in the presence of counsel. The Board walked
18 the affected area of Manastash Creek, viewed the area where the irrigation ditch crosses onto
19 Hunt's property, and observed the area where Ms. Hunt removed growth from the area.
20
21

1 The Board has previously issued other orders in this appeal based on motions filed by
2 Hunt. On May 11, 2012, the Board issued two orders: the Order Denying Motion for Stay, and
3 the Order Denying Appellant's Motion to Strike Inadmissible Hearsay Statements in the
4 Declaration of Bryan Neet. Upon consideration of Hunt's Motion to Correct the Record and for
5 Reconsideration of the Order Denying Her Motion for Stay of Administrative Order No. 8990,
6 the Board issued the Order Correcting the Record and Order on Motion for Reconsideration of
7 the Order Denying Motion for Stay of Administrative Order No. 8990. In this latter Order, the
8 Board stayed Order #8990 to the extent it required Hunt to implement the restoration plan
9 required by Order #8990. Hunt filed a second Motion to Strike portions of Ecology's Response
10 to the Motion for Summary Judgment.² The Board issued an Order Denying the Motion to
11 Strike. On August 31, 2012, Hunt filed a Petition for Reconsideration of the Board's Order
12 Denying the Motion to Strike. The Petition for Reconsideration was deemed to have been denied
13 on September 30, 2012 as provided under WAC 371-08-550.

14 FACTUAL BACKGROUND

15 [1]

16 Ms. Hunt's property includes a bluff that slopes down into a pasture which is vegetated
17 by shrubs, grasses and trees, and where Manastash Creek flows, which is referred to as a riparian
18 pasture or riparian corridor. *Hunt Decl.*, at ¶ 3; *Renfrow Decl.*, at ¶ 6; Hunt's Petition for
19

20 ² Hunt's Motion is specifically: Appellant Hunt's Motion and Memorandum in Support of her Motion to Strike
21 Portions of the Following Matters Submitted in Support of Ecology's Response to Hunt's Motion for Summary
Judgment: 1. First Declaration of Bryan Neet; 2. Second Declaration of Bryan Neet; 3. Declaration of Lisa
Janmarino; 4. Declaration of Dorothy Jaffe; and 5. Ecology's Response.

1 Reconsideration at 6-7. Ms. Hunt used the area for pasturing horses prior to flooding in May
2 2011. *Hunt Decl.*, at ¶ 3.

3 [2]

4 A ditch crosses Ms. Hunt's property that collects storm water runoff and irrigation return
5 flow (Ditch). The Ditch flows from the upper portion of Ms. Hunt's property down the bluff and
6 into the riparian pasture. Prior to flooding in February 2012, the Ditch flowed in the riparian
7 pasture alongside and parallel to the main channel of Manastash Creek for a short distance before
8 finally flowing into Manastash Creek. *Hunt Decl.*, at ¶¶ 3-4; *Hunt Third Decl.*, at ¶¶ 3, 9, 11-15.

9 [3]

10 As a result of flooding in May 2011, the pasture was rendered useless throughout the
11 summer. Flooding in May 2011 created a debris jam or log jam in Manastash Creek, backing up
12 water and directing a portion of the flow across and through the riparian pasture. *Second Hunt*
13 *Decl.*, at ¶ 5; *Renfrow Decl.*, at ¶¶ 5-6.

14 [4]

15 Ms. Hunt decided to conduct activity on her property to address the impacts from the
16 May 2011 flood. First, Hunt desired to access and remove the tree branches that were entangling
17 her power lines at the west end of her property. Second, Ms. Hunt wanted to restore the riparian
18 pasture by removing the debris that had been deposited by the flood waters, including the debris
19 clogging various parts of the Ditch. *Hunt Decl.*, at ¶¶ 5-9.

1 [5]

2 Pursuant to a request by Hunt for assistance regarding the restoration of the pasture,
3 Sherry Swanson from the Kittitas County Conservation District and Brent Renfrow from the
4 Washington State Department of Fish & Wildlife (WDFW) visited Hunt at her property on June
5 13, 2011. *Hunt Decl.*, at ¶ 6, *Ex. 1*; *Renfrow Decl.*, at ¶¶ 2-7.

6 [6]

7 Mr. Renfrow is the District Habitat Biologist and senior field person at WDFW. *Renfrow*
8 *Decl.*, at ¶ 1. He has several responsibilities regarding protection and restoration of fish habitat,
9 including administering the Hydraulic Code and issuing Hydraulic Project Approvals for projects
10 to be conducted in the natural flow or bed of the waters of the state. Based on his knowledge and
11 experience, he is qualified to opine on the condition of stream flows. *Id.* During his visit with
12 Ms. Hunt, Mr. Renfrow made several observations regarding the high flows of Manastash Creek
13 and the log jam. Manastash Creek has a big variation in flow from the spring runoff period to
14 the low flows in the fall. *Renfrow Decl.*, at ¶¶ 3-5. The pasture, which Mr. Renfrow describes as
15 a ravine, is a flood plain, and during the high flows of the spring, it is a normal occurrence for
16 the creek to flow across the flood plain and use secondary channels. *Id.*

17 [7]

18 In June 2011, Mr. Renfrow and Ms. Hunt observed the spring flow of Manastash Creek
19 using several channels in the pasture. The flow in Manastash Creek was high and water was
20 flowing across the flood plain in the bottom of the pasture. The water flowed through numerous
21

1 trees and shrubs that were within, and at the edges of, the main channel of Manastash Creek.

2 *Hunt Decl.*, at ¶ 7, *Ex. 1*; *Renfrow Decl.*, at ¶¶ 2-7.

3 [8]

4 Mr. Renfrow advised Ms. Hunt that the log jam could be removed and WDFW would not
5 have any problem approving it; however, it would be best to wait until the flows of Manastash
6 Creek had receded. *Id.* Mr. Renfrow stated that WDFW's concerns were with Manastash Creek
7 and activities that affect the creek. He said that Ms. Hunt would need approval if the work
8 involved getting equipment in Manastash Creek or cutting/yarding trees from the creek banks.

9 *Hunt Decl.*, at ¶¶ 6 and 7, *Ex. 1*; *Renfrow Decl.*, at ¶¶ 6 and 7.

10 [9]

11 The high water receded from Ms. Hunt's land in August 2011, but the pasture continued
12 to have standing water from the flood and irrigation runoff. *Hunt Second Decl.*, at ¶ 6. It was
13 not until November 2011 that the standing surface water receded to allow Hunt to access the
14 pasture with equipment to remove the debris. *Hunt Second Decl.*, at ¶ 7.

15 [10]

16 Beginning on November 6, 2011, Ms. Hunt began to take action to remove debris and cut
17 down several trees. *Hunt Decl.*, at ¶¶ 8-9, *Exs. 2 and 4*; *Iammarino Decl.*, at ¶¶ 5 and 6;
18 *Bachman Rhodes Decl.*, at ¶¶ 5 and 6. These activities continued to November 12, 2011. *Hunt*
19 *Decl.*, at ¶¶ 8-9.

1 [11]

2 On November 10, 2011, Lisa Iammarino, a code enforcement officer with Kittitas County
3 Community Development Services (CDS), visited the property after being contacted by WDFW
4 staff person William Meyer. Ms. Iammarino and Mr. Meyer met with Ms. Hunt. Ms. Iammarino
5 observed the area where Ms. Hunt was conducting her work, which Ms. Iammarino described as
6 within riparian area and the flood plain of the Manastash Creek. During the visit, they discussed
7 the requirement for a flood development permit and possibly other state and local permits. Hunt
8 went to CDS to seek a flood development permit as instructed by Ms. Iammarino, but
9 determined that the permit did not apply to her activities. *Hunt Decl.*, at ¶¶ 11-13, *Exs. 2 and 4*;
10 *Iammarino Decl.*, at ¶¶ 4-6.

11 [12]

12 On November 14, 2012, Ms. Hunt left a message with Mr. Renfrow stating that she had
13 completed the removal of debris and clearing. *Hunt Decl., Ex 1.*

14 [13]

15 On November 17, 2011, Bryan Neet, Environmental Specialist with Ecology, visited the
16 Bachman-Rhodes property that is adjacent to and across the creek from Ms. Hunt's property.
17 From the neighbor's land, Mr. Neet observed the pasture on Ms. Hunt's property where Ms.
18 Hunt had removed trees and conducted activities. Mr. Neet observed a channel flowing from the
19 bluff to Manastash Creek that Ms. Hunt describes as the Ditch. Mr. Neet first described it as a
20 dredge channel. Mr. Neet also observed an area above the Ditch that he believes was an "over
21 flow channel" for Manastash Creek. Mr. Neet did not walk to the area above the Ditch and did

1 not observe water flowing in the "over flow channel." Ms. Hunt did not conduct any activities
2 above the Ditch and in this "over flow channel." *Neet Decl.*, at ¶¶ 4-7; *Neet Depo.*, at 49-50;
3 *Neet Depo., Vol. II*, 182-188, 191-198.

4 [14]

5 Based on the evidence he gathered, Mr. Neet determined that Ms. Hunt had conducted
6 her activities in and along Manastash Creek, including the excavation of a channel of the Creek
7 and the construction of a berm in the creek. *Neet Decl.*, at ¶¶ 4-7. Based on this analysis and
8 findings, Mr. Neet recommended that Ecology issue an order of violation and a \$16,000 Penalty.
9 *Id.*, at ¶ 14.

10 [15]

11 On February 7, 2012 Ecology issued Order #8990 under the authority of RCW
12 90.48.120(2), and the Penalty under the authority of RCW 90.48.144, based in part on the
13 following findings:

14 The excavation work completed by Monica Hunt violated RCW 90.48.080.
15 Ecology is citing Monica Hunt for violating RCW 90.48.080 on four days which
16 are November 11th, 12th, 13th, and 17th. Three of those days are included as the
17 days where the work was conducted by Monica Hunt, and one day where Mr.
18 Neet took photos of finished work conducted in Manastash Creek.

19 Order #8990 and the Penalty conclude that "[t]he Pollution created by ditching, filling
20 and altering the creek is a violation of RCW 90.48.080." Order # 8990, at 2.

21 [16]

Order #8990 also requires Ms. Hunt to "[r]estore the functions of Manastash Creek..." by
submitting and implementing a restoration plan that restores Manastash Creek pursuant to

1 several guidelines and criteria, including filing a Joint Aquatics Resources Permit Application
2 (JARPA). Ms. Hunt must demonstrate that the functions of the stream have been restored and
3 continue to function as intended through January 1, 2020. *Id.* Neet describes the plan as
4 restoring the Ditch as it existed before her excavations and restoring the habitat that existed on
5 either side of the Ditch. *Neet Depo.*, at 93-95.

6 [17]

7 The Penalty states that the violations occurred on November 11, 12, 13 and 17, 2011.
8 November 11, 12, and 13 were dates that Ecology determined Ms. Hunt conducted the activities,
9 and November 17 is the date Mr. Neet first inspected the site from the neighboring property.
10 The Penalty was issued for \$16,000.00 based on a calculation of \$4,000.00 per day for four days
11 of violation.

12 [18]

13 Prior to issuing Order #8990 and the Penalty, Ms. Hunt was in communication with Ms.
14 Iammarino and apparently never spoke to Mr. Neet or Ecology staff. *See* the Penalty, at 2; *Hunt*
15 *Decl.*, at ¶¶ 15-17, *Exs. 4 and 5*. After Order #8990 and the Penalty were issued, Mr. Neet
16 conducted additional investigations and site visits on February 23, 2012 and on March 13, 2012,
17 which visits were after the Westside canal was breached causing water to flood and flow through
18 the riparian pasture. *See Neet Decl.*, at ¶¶ 7-11; *Hunt Second Decl.*, at ¶¶ 8-9.

19 [19]

20 Upon further review and consideration, Ecology clarified and otherwise corrected the
21 basis of its Order #8990. Ms. Hunt's activities were not in or along the shoreline of the main.

1 channel of Manastash Creek, as first indicated in the Order. Ms. Hunt did not construct a berm
2 in the Creek as first opined by Mr. Neet. Rather, Ms. Hunt's activities were within and along the
3 irrigation return flow Ditch, which flows off the bluff, through the riparian pasture and into the
4 main channel of Manastash Creek. *Neet Decl.*, at ¶¶ 3-5; *Neet Depo.*, at 94-97; *Neet Depo., Vol.*
5 *II*, 126, 178, 197-198; Ecology's Response to Hunt's Petition for Reconsideration, at 1.

6 [20]

7 On February, 22, 2012, the Westside canal was breached. The water flooded the riparian
8 pasture. The flooding has significantly changed the flow of Manastash Creek through the
9 pasture. Manastash Creek now flows in side channels from the location of the log jam through
10 the pasture. *Hunt Second Decl.*, at ¶¶ 8-14.

11 [21]

12 As a result of the change in the manner of Manastash Creek flow through the pasture, the
13 Ditch, as it flowed through the pasture, has been engulfed and subsumed by a side channel that
14 flows off of the main stem of Manastash Creek at the log jam and reenters the main channel of
15 Manastash Creek further down and through the riparian corridor. *Id.*; *Neet Depo., Vol. II*, 183-
16 184.

17 [22]

18 Ecology did not intend to prohibit Ms. Hunt from conducting activities that are normal
19 maintenance and cleaning of the Ditch as it existed in November 2011, as long as Hunt avoided
20 placing equipment in Manastash Creek or cutting trees from the Creeks banks. Ecology
21 Response to Motion for Summary Judgment, at 18-19.

1 [23]

2 Irrigation ditches including return flow channels are routinely maintained. *Charlton*
3 *Decl.* The clearing of debris clogging the ditches and the cutting of vegetation and trees along
4 the edges of a ditch in order to maximize the beneficial use of agricultural property, including the
5 area of crop plantings are customary, normal and routine agricultural practices. *Id.*, at ¶ 3.c.

6 [24]

7 Ms. Hunt's activities included the cleaning of debris from the ditch and removal of trees
8 within the riparian pasture, primarily with the use of a large excavator track hoe with a 42-inch
9 bucket, which excavated the banks and widened the Ditch in some locations. Many of the trees
10 that were removed were mature trees that existed when Ms. Hunt used the ravine as a pasture.
11 The trees did, however, provide a canopy over the Ditch. *Iammarino Decl., Exs. 1-5; Neet*
12 *Depo.*, at 81-89, *Renfrow Decl., Ex. 1, Figure 3, Exs. 2-5; Nicholson Decl., Ex. 9; Hunt Fourth*
13 *Decl.*, at ¶ 24; *Second Hunt Decl.*, at ¶ 22; *Neet Depo., Vol. II*, at 122, 189-190, 203-205.

14 [25]

15 Manastash Creek is a tributary of the Yakima River. The Creek has been designated as
16 an impaired water body under section 303(d) of the federal Clean Water Act. *Neet Decl.*, at
17 ¶¶ 8-9. Following this designation Ecology finalized *The Upper Yakima Suspended Sediment,*
18 *Turbidity and Organochlorine Pesticide Total Maximum Daily Load Report (Sediment TMDL)*
19 and a Detailed Implementation Plan for the TMDL (*The Upper Yakima Suspended Sediment,*
20 *Turbidity and Organochlorine Pesticide TMDL—Detailed Implementation Plan* (Washington
21 Department of Ecology, Publication 03-10-058, 2003)) (Sediment TMDL DIP). *Id.* There have

1 been ongoing efforts to reduce turbidity, suspended sediments and organochlorine pesticides in
2 the Manastash Creek. *Id.*

3 [26]

4 In 2005, Ecology developed *Ecology's Quality Assurance Plan, Upper Yakima Basin*
5 *Temperature Total Maximum Daily Load Study* (Washington Department of Ecology,
6 Publication 05-03-111, 2005) (Temperature TMDL). *Neet Second Decl.*, at ¶¶ 9-10. Ecology
7 also issued an update to *Washington's Water Quality Management Plan to Control Nonpoint*
8 *Sources of Pollution. Id.* In January 2011, Ecology developed additional temperature criteria for
9 specified surface waters to protect the needs of salmonids during their early life stages.
10 Manastash Creek has a special temperature requirement of 13 ° C from September 15 to June 15.
11 Response to Appellant's Motion for Summary Judgment, at 3, citing *Waters Requiring*
12 *Supplemental Spawning and Incubation Protection for Salmonoid Species* (Washington
13 Department of Ecology Publication 06-10-038), at 38.

14 [27]

15 Sediment discharges from erosion of the banks and increased temperature of the waters
16 caused by damaged riparian areas are of particular concern for Manastash Creek. *Id.*; *Neet*
17 *Decl.*, at ¶ 8; *Neet Second Decl.*, at ¶¶ 9-11 (citing to and quoting from the *Sediment TMDL* and
18 *Sediment TMDL DIP.*) Daily maximum temperatures of water in a stream are strongly
19 influenced by removal of riparian vegetation. *Id.*; *See Neet Second Decl.*, at ¶ 10 (citing to and
20 quoting from the *Temperature TMDL*, at 19-22.)

1 [28]

2 Manastash Creek, as a tributary to the Yakima River, is critical habitat for fish species
3 including the Middle Columbia River Basin steelhead listed as threatened under the federal
4 Endangered Species Act (ESA). 64 Fed. Reg. 14,517; 65 Fed. Reg. 7777-7779, 7785, Table 20.
5 Critical habitat for the salmon and steelhead in Washington is defined as the areas that consist of
6 the water, substrate, and adjacent riparian zone of estuarine and riverine reaches in hydrologic
7 units and counties identified in the rule. 65 Fed. Reg. 7777, § 226.212; 65 Fed. Reg. 7785, Table
8 20. These defined critical habitat areas include Manastash Creek.

9 ANALYSIS

10 [29]

11 The Board has jurisdiction over the subject matter and the parties pursuant to RCW
12 43.21B.110. The Board reviews the issues raised *de novo*. WAC 371-08-485(1).

13 Summary Judgment Standard

14 [30]

15 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
16 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
17 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 Wn.2d 1152 (1977). The summary
18 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
19 Summary judgment is appropriate when the only controversy involves the meaning of statutes,
20 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*

1 *Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d
2 1004 (1991).

3 The party moving for summary judgment must show there are no genuine issues of
4 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
5 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a
6 summary judgment proceeding is one that will affect the outcome under the governing law.
7 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
8 and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate*
9 *Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment may also be granted to
10 the non-moving party when the facts are not in dispute. *Impecoven v. Department of Revenue*,
11 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

12 A party may also move for summary judgment by showing there is a lack of competent
13 evidence to support an essential element of the cause of action against a party. *Young v. Key*
14 *Pharmaceuticals*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989); *Seybold v. Neu*, 105 Wn.App.
15 666, 677, 19 P.3d 1068 (2001). *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516,
16 799 P.2d 250 (1990); *Traeger v. City of Spokane*, SHB 07-010 (2007); *Wallingford Community*
17 *Council v. City of Seattle*, SHB 04-012 (2005). The burden shifts to the non-moving party to
18 present evidence demonstrating a material fact is in dispute (there is a genuine issue for trial),
19 and may not rely upon the allegations made in its pleadings. *Young*, at 225-27. If the nonmoving
20 party fails to make a showing sufficient to establish an essential element of its case, the motion

1 for summary judgment should be granted. *Id.*; *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127,
2 148, 787 P.2d 8 (1990).

3 Scope of Issues Presented

4 [31]

5 Based on the briefing and evidence presented, it is important to define the scope of the
6 issues that are subject to the Motion for Summary Judgment. Both parties have sought summary
7 judgment on Issue No. 1. See Appellant Hunt's Motion for Summary Judgment, at 1; Ecology's
8 Response to Motion for Summary Judgment, at 2. The parties have also urged the Board to
9 resolve the appeal on summary judgment, and that all the evidence the parties would otherwise
10 submit at hearing has been provided to the Board through the motion practice. *Id.*; Appellant
11 Hunt's Reply to Ecology's Response to Hunt's Petition for Reconsideration, at 2. The Board has
12 indeed been provided very extensive briefing, declarations, and exhibits.

13 The Board also finds that the record is replete with the arguments and evidence necessary
14 for the Board to consider Issues No. 2 and 3. The Board has discretion to resolve issues if the
15 record is complete and the evidence is before the Board for it to make a decision. Based on the
16 parties' mutual desire to resolve this appeal, and having a complete record, the Board has
17 determined that it will resolve issues No. 2 and No. 3.

1 Violation of 90.48.080

2 [32]

3 Issue No. 1 states:

- 4 1. Did Monica Hunt cause "pollution" of Manastash Creek by ditching, filling, and
5 altering the creek in violation of RCW 90.48.080, as the term "pollution" is defined
6 under RCW 90.48.020?

7 The basis for Ecology's Order #8909 has evolved since the Order was first issued. Ecology
8 has since determined that the violation of chapter 90.48 is not the result of activities along the
9 main channel of Manastash Creek. It clarified its position that there was a violation of RCW
10 90.48.080 resulting from activities in and along the Ditch, which in turn caused pollution to
11 Manastash Creek:

12 Ms. Hunt altered Manastash Creek by removing the trees and vegetation around
13 one of its side channels (referred to as a "return flow irrigation ditch" by Ms.
14 Hunt), which provided shade for Manastash Creek, its channels and the riparian
15 area. This side channel is part of Manastash Creek. The removal of the trees and
16 vegetation and use of the trackhoe in and around the riparian area of Manastash
17 Creek added sediment to Manastash Creek. This caused pollution to Manastash
18 Creek through the increase in turbidity and temperature. Regardless of whether
19 the Creek's side channel is labeled a "return flow irrigation ditch," it is still a
20 water of the state and subject to the requirements of RCW 90.48.

21 Ecology Response to Motion for Summary Judgment, at 1-2, 9. *See also, Nicholson Decl., Ex. 1;*
Neel Depo., at 93-97.

Based on these arguments and the record before the Board on the Motion for Summary
Judgment, the Board denied Ms. Hunt's Motion and Ecology's Cross Motion because of a
disputed issue of fact regarding whether Ms. Hunt's activities were in and along Manastash

1 Creek, a side channel of Manastash Creek, or a separate and independent irrigation return flow
2 ditch.

3 Ms. Hunt and Ecology have both petitioned for reconsideration stating that there is not a
4 dispute that the activities were in and along the Ditch. The parties do not dispute that the Ditch
5 flowed from the bluff through the riparian pasture, and that the Ditch was the only channel
6 existing as of November 2011 in the riparian pasture. Ms. Hunt and Ecology urge the Board to
7 grant summary judgment on their respective positions in consideration of these undisputed facts.

8 Ecology clarifies and otherwise confirms its position that the basis for a violation of
9 RCW 90.48.080 is pollution to the main channel of Manastash Creek caused by the activities in
10 and around the Ditch:

11 The Ditch undisputedly flows directly into the main channel of Manastash
12 Creek. (cites omitted) Therefore, any work done in and around the Ditch, has a
13 direct impact on the main channel of Manastash Creek and this is the basis for
14 Ecology's action. Citing, *Neet Dep. Tr., Vol II, 113*. Ecology's Response to
15 Appellant's Petition for Reconsideration of the Order Denying Summary
16 Judgment, at 3 (emphasis added).

17 Ecology argues that as a matter of law the Ditch contained "waters of the state" as
18 the term is defined in RCW 90.48.020 and was a side channel of Manastash Creek in
19 November 2011. Ecology's Response to Appellant's Petition for Reconsideration of the
20 Order Denying Summary Judgment, at 1.

21 Ms. Hunt's position is that the flow in the Ditch was not "waters of the state" under RCW
90.48.020, and the Ditch was not a side channel of Manastash Creek in November 2011. Ms.
Hunt argues that there is no evidence that Ms. Hunt's activities, which were allowed as normal

1 and routine maintenance, caused pollution to Manastash Creek or caused harm to fish and
2 aquatic life in Manastash Creek. Hunt's Petition for Reconsideration of the Order Denying
3 Summary Judgment, at 7-22.

4 [33]

5 In consideration of the evidence and arguments of the parties, the Board finds there are
6 no disputed issues of material fact regarding Ms. Hunt's activities. These activities were in and
7 along the Ditch and not the main channel of Manastash Creek. In November 2011, the Ditch
8 flowed from the bluff through the riparian pasture and into the main channel of Manastash
9 Creek. Therefore, the Board grants the respective requests for reconsideration of the Order on
10 Summary Judgment, and concludes that as a matter of law, summary judgment is appropriate on
11 the issue of whether Ms. Hunt's activities violated RCW 90.48.080 by causing or tending to
12 cause pollution in the Manastash Creek, as well as on the issues of reasonableness of both the
13 penalty and the restoration plan.

14 Waters of the State

15 [34]

16 Under RCW 90.48.020, waters of the state are defined as follows:

17 Wherever the words "waters of the state" shall be used in this chapter, they shall
18 be construed to include lakes, rivers, ponds, streams, inland waters, underground
19 waters, salt waters and all other surface waters and watercourses within the
20 jurisdiction of the state of Washington.

21 The courts have broadly interpreted the legislature's intent to protect the water
quality of the waters of the state under chapter 90.48 RCW. Ecology's authority to prevent

1 pollution is defined in part under RCW 90.48.030, which provides:

2 The department shall have the jurisdiction to control and prevent the pollution of
3 streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other
4 surface and underground waters of the state of Washington.

5 In *Pacific Topsoils v. Ecology*, 157 Wn. App 629, 238 P.3d 1201 (2010), Pacific Topsoils
6 contended that Ecology does not have statutory authority to impose fines for violations of
7 chapter 90.48 RCW because this law does not expressly include wetlands in its definition of
8 "waters of the state." *Id.*, at 640. Ecology responded that wetlands are "other surface waters"
9 within the definition of "waters of the state" in RCW 90.48.020. The Court agreed with Ecology
10 based on the legislature's intent to broadly apply the state's water quality laws to protect the
11 waters of the state:

12 RCW 90.48.010 expresses the legislature's intent that the DOE protect "all
13 waters of the state." The legislature indicated the broad scope of this intent by its
14 choice of the enlarging term "include," which modifies the phrase "all other
15 surface waters" in its definition of "waters of the state." RCW 90.48.020. RCW
16 90.48.035 authorizes and requires the DOE to issue regulations it determines are
17 necessary to protect the quality of "waters of the state." Accordingly, the DOE
18 issued regulations that reflected its determination that wetlands contain "surface
19 water or ground water," that this brings wetlands within the definition of
20 "surface waters of the state" and, therefore, that wetlands must be protected
21 under the WPCA. WAC 173-201A-020.

Pacific Topsoils, 157 Wn. App., at 644.

 The Board's previous decisions have been consistent with the Court's findings and
 holding in *Pacific Topsoils*. The Board has broadly defined waters of the state and found that the
 water in wasteways, ditches and irrigation ditches are waters of the state as defined under RCW
 90.48.080 and discharges into these water bodies create liability under RCW 90.48.080.

1 *Ellensburg Water Company v. Ecology*, PCHB 86-232 (1988) (Discharge of herbicide to a
2 wasteway); *Bosma Dairy v. Ecology*, PCHB 94-121(1995) (Discharge of manure waste water
3 into irrigation canal); *Murphy & Moors, Inc. v. Ecology*, PCHB 97-80 (1999) (Pesticide allowed
4 to drain into an irrigation ditch).

5 The Board finds that there are no disputed issues of material fact and that as a matter of
6 law, the flows in the Ditch, which includes both stormwater and irrigation return flow water, are
7 “waters of the state” as defined in RCW 90.48.020.

8 **Defining the Ditch**

9 [35]

10 The status of the Ditch is relevant in regard to the underlying issue of whether the Ditch
11 was part of Manastash Creek in the riparian pasture in November 2011. Ecology argues the
12 Ditch was a side channel and part of Manastash Creek, and implies that even routine
13 maintenance would have required permits to dredge and clear the Ditch and respective banks.
14 See Ecology’s Response to Appellant’s Motion for Summary Judgment, at 14, 18-19. However,
15 if the basis of the violation under Order #8990 and the Penalty are for the discharge of pollution
16 to the *main channel* of Manastash Creek caused by Ms. Hunt’s activities in the riparian pasture,
17 the status of the Ditch as either a side channel of Manastash Creek or a separate and independent
18 irrigation return flow ditch in November 2011 may not necessarily be relevant. If the Ditch was
19 an independent irrigation return flow channel and not part of Manastash Creek, the Board must
20 address whether Ms. Hunt’s activities were normal and routine ditch maintenance.

1 The parties do not dispute that the Ditch flowed in a riparian pasture that is characterized
2 as a flood plain. *Renfrow Decl.*, at ¶¶ 2-7; *Hunt Decl.*, at ¶ 5; *Hunt Fourth Decl.*, at ¶ 24. In June
3 2011, when the Creek was divided by the log jam and water flowed into and across the riparian
4 pasture, Mr. Renfrow opined that the pasture was an active flood plain. It is typical, Mr.
5 Renfrow said, for such streams to flow into secondary channels and across a flood plain during
6 the spring high flow periods. *Renfrow Decl.*, at ¶¶ 3-6. In the summer of 2011, flood waters
7 were flowing in the pasture caused by a log jam³ that had formed and divided the flow of
8 Manastash Creek. *Renfrow Decl.*, at ¶ 5; *Hunt Decl.*, at ¶ 3,5; *Hunt Second Decl.*, at ¶ 5. Water
9 was also flowing through the trees and shrubs in the riparian pasture, including the location
10 where Ms. Hunt conducted her activities after the water receded. *Id.* *Renfrow Decl.*, at ¶ 5
11 (“water was flowing across the flood plain”); *Hunt Second Decl.*, at ¶ 5.

12 [36]

13 The existence of a flood plain does not, however, *per se* define the Ditch as a side
14 channel of Manastash Creek within the riparian pasture. The courts have opined on the
15 definition of a side channel within a flood plain primarily in the context of the common
16 enemy doctrine. *See, Halverson v. Skagit County*, 139 Wn.2d 1, 14-15, 983 P.2d 643
17 (1999); *Sund v. Keating*, 43 Wn.2d 36, 42-46, 259 P.2d 1113 (1953); *Fitzpatrick v.*
18 *Okanagan County*, 143 Wn. App. 288, 295-297, 177 P. 3d 716 (2008). These cases have
19 generally defined a side channel as a channel created by the waters escaping from the

20 ³ The “log jam,” or as described by Renfrow, the “debris jam,” that Hunt and Renfrow describe as causing the Creek
21 to flow into different channels is to be distinguished from the “debris” that Hunt actually removed. *See Hunt Second*
Decl., at ¶ 5; Appellant Hunt’s Motion to Correct the Record and for Reconsideration, at 2. Hunt did not remove
the log jam. *Id.*

1 banks of a main channel and flowing into a defined flood channel until it returns to the
2 main channel. Ecology and U.S. Fish and Wildlife service also have provided similar
3 definitions.⁴ See also, Hutchins, *Water Right Laws in the Nineteen Western States, Vol.*
4 *I*, at 38-45 (U.S. Department of Agriculture 1971). If a side or flood channel exists, it is
5 considered a natural part of the stream as the main river channel. *Fitzpatrick v.*
6 *Okanagan County, supra*. If the water does not flow into a channel it is diffused surface
7 water subject to the common enemy rule. *Halverson v. Skagit County, supra*.

8 [37]

9 It is uncontroverted that the Ditch, which the parties agree is the location of Ms. Hunt's
10 activities in June 2011 and was the only channel in the riparian pasture, originates above the
11 bluff and not as overflow from Manastash Creek. *Neet Depo., Vol II*, at 112-139; *Hunt Decl.*, at
12 3. The Ditch carries irrigation return flow water from the surrounding area, and discharges the
13 water directly into Manastash Creek at a specific point. *Id.*, at 114, 126-128. Ms. Hunt is the
14 person most familiar with the property. Over the past 30 years, since Ms. Hunt was living on the
15 property, a side channel did not exist until the Westside canal was breached and flooded the
16 pasture. *Hunt Third Decl.*, at 4-5. She provides supporting photographs that prior to February

17 ⁴Secondary channel: Any channel on or in a floodplain that carries water (intermittently or perennially in time;
18 continuously or interrupted in space) away from, away from and back into, or along the main channel. Secondary
19 channels include: side channels, wail-based channels, distributary channels, anabranh channels, abandoned channels,
20 overflow channels, chutes, and swales. http://www.ecy.wa.gov/programs/sca/sma/cma/page17_appendix.html
21 Side Channel: Flowing water bodies with clearly identifiable upstream and downstream connections to the main
channel. In some cases, side channels are miles long and define the boundaries of big islands in the active
floodplain; in others, they define small islands and are relatively short. Water in side channels is mostly derived
directly from the main channel at the upstream connection; therefore, the water characteristics of side channels are
very similar to main stem. Sometimes, there is also input from a hyporheic flow derived from subsurface water
sources that flow up through gravelly substrate.
http://www.fws.gov/orcgonfwo/Contaminants/PortlandHarbor/Documents/HabTermsHEA_0967.pdf

1 2012, Manastash Creek was a single channel that flowed from above the bluff on her property,
2 through the riparian pasture and into Manastash Creek. *Hunt Third Decl.*, at ¶¶ 5-9. Ecology has
3 not disputed Ms. Hunt's statements that while the log jam in 2011 caused the creek to divide and
4 flow through the pasture, the only channel that existed in the riparian pasture as of November
5 2011 was the Ditch. *See Ecology Response to Petition for Reconsideration* at 2, lines 4-6
6 (“There are no other side channels to Manastash Creek, only the Ditch”).

7 [38]

8 Mr. Neet opined that based on his first visit to the site on November 17, 2011 an area
9 above the Ditch appeared to be an overflow channel. However, in November, 2011, there was
10 no water flowing through the side channel as described by Ecology. *Hunt Third Decl.*, at ¶ 5;
11 *Neet Depo.*, at 49-50, 94-97. Mr. Neet did not observe water flowing in the area he observed as
12 an overflow channel Ditch, and he did not walk to and directly observe this area. Mr. Neet can
13 only speculate whether flood waters existed in the pasture prior to the flood waters in February
14 2012, and he opines that the flooding in the pasture in February 2012 was not in a defined
15 channel but spread throughout the flood plain. *Neet Depo., Vol. II* at 145-146. The flow of
16 water was spread and diffused over the flood plain. *Hunt Fourth Decl.*, at ¶¶ 23-26; *Neet Depo.,*
17 *Vol. II*, at 113. Ms. Hunt clarified her observations from May 2011 that any channels formed in
18 the pasture from the log jam had merged back into Manastash Creek above the Ditch and the
19 area where she conducted her activities. *Hunt Fourth Decl.*, at ¶¶ 21-23.

20 Irrespective of Mr. Neet's observations in November 2011, Ecology does not dispute that
21 in November 2011 when Ms. Hunt conducted her activities, the only channel in the riparian

1 pasture was the Ditch, and Ecology has not offered any evidence to dispute Ms. Hunt's evidence
2 that prior to February 2102, there was no side or secondary channel of Manastash Creek that
3 flowed in the riparian pasture at the location of Ms. Hunt's activities. To the extent there now
4 exists a side channel of Manastash Creek, defined as a braided channel that flows directly from
5 the main channel through the riparian pasture, it was created after the Westside canal breached in
6 February 2012. *Hunt Second Decl.*, at 8-10; *Neet Depo. Vol. II*, at 184-185.

7 [39]

8 The Board finds there are no disputed issues of material fact as to the location of the
9 Ditch. In November 2011 the Ditch was not by definition a secondary or side channel of
10 Manastash Creek in the riparian pasture. The Ditch was an independent and defined ditch
11 flowing off of the bluff, through the riparian pasture until it discharged into Manastash Creek.

12 **Maintenance of the Ditch**

13 [40]

14 The parties agree that Ms. Hunt may take reasonable action to maintain the Ditch.
15 Ecology states it did not intend to prohibit Ms. Hunt from conducting activities that are normal
16 maintenance and cleaning the Ditch as it existed in November 2011, as long as Hunt avoided
17 placing equipment in Manastash Creek or cutting trees from the Creeks banks. Ecology
18 Response to Motion for Summary Judgment, at 18-19.

19 Irrigation ditches including return flow channels are routinely maintained. *Charlton*
20 *Decl.* The clearing of debris clogging the ditches and the cutting of vegetation and trees along
21 the edges of a ditch in order to maximize the beneficial use of agricultural property, including the

1 area of crop plantings, are customary, normal and routine agricultural practices. *Id.*; at ¶ 3.c.
2 While Ecology has not issued any order against Ms. Hunt for failure to obtain permits under the
3 federal Clean Water Act (CWA), 33 U.S.C. §1251 et. seq., or under the Shoreline Management
4 Act (SMA), ch. 90.58 RCW, these laws also recognize the necessity for maintenance of
5 irrigation return flow ditches and exempts the maintenance of the ditches from a 404 permit
6 under the CWA and obtaining a shoreline substantial development permit. 33 U.S.C. §1344; 40
7 CFR parts 232-404, sec. 232.3(c); RCW 90.58.030(3)(e)(iv),(viii),(x). *See, Ritchie v. Markley*,
8 23 Wn. App 569, 597 P.2d 449 (1979) (“The SMA agricultural exemptions foster certain
9 agricultural activities along shorelines and wetlands, and protect them from what the legislature
10 evidently considered to be unnecessary administrative regulation”).

11 [41]

12 The routine maintenance must be normal, customary and reasonable. Ms. Hunt states
13 that her activities were normal and customary maintenance isolated to the Ditch as it existed in
14 November 2011, prior to the breach of the Westside canal. *Hunt Decl.*, at ¶ 4-5; *Hunt Second*
15 *Decl.*, at ¶¶ 3-7; *Nicholson Decl., Ex. ¶¶ 6-10; Hunt Third Decl.*, at ¶¶ 9-15. Ecology argues that
16 her activities went beyond normal maintenance, especially considering these activities were in an
17 entire riparian area of Manastash Creek. Ecology Response to Motion for Summary Judgment at
18 18-21; *Neet Decl.*, at ¶¶ 3-4;

19 Ecology does not refute Mr. Charlton’s opinion on the definition of normal and routine
20 practices; however, Mr. Charlton did not provide an opinion on whether Ms. Hunt’s activities
21 were normal and routine. As Mr. Charlton stated, normal maintenance includes repairing and

1 restoring ditches, including the clearing of debris clogging the ditches. Normal and routine
2 maintenance should not be an expansion from what previously existed. The term "maintain" is
3 generally defined as acts that preserve the status quo (existing conditions) and general repair and
4 upkeep. See *American Heritage Dictionary*, New College Ed. 757 (1976); *Black's Law*
5 *Dictionary*, Ninth Ed. 1039 (1983). The term routine is defined as an act followed regularly and
6 as customary standard procedure, *American Heritage Dictionary*, *supra*, at 1074. The term
7 normal is defined as a usual and typical standard. *Id.*, at 848.

8 [42]

9 Ms. Hunt's activities were not routine in regard to the felling and removal of the mature
10 trees that existed along the Ditch and in the pasture. The undisputed evidence shows that these
11 were large mature trees that clearly existed prior to the 2011 floods. There was no evidence it
12 was a routine practice to remove the trees for the purpose of maintaining and preserving the
13 status quo of the Ditch. In this same regard, removal of these trees would not be a normal
14 maintenance activity that is necessary to maintain the Ditch.

15 There was no evidence of Ms. Hunt's routine maintenance of the Ditch. While cleaning
16 the Ditch may have been routine to the extent it is regularly done after a flood event, it was not a
17 normal response. The use of the excavator to clear and remove debris from in and around the
18 Ditch resulted in significant impacts on the riparian pasture. The excavator crushed vegetation in
19 a large area of the riparian pasture, and in removing debris, the size of the Ditch was expanded in
20 several locations. The photographs attached to the several declarations show the significant
21 change to the riparian area as compared to pasture in June 2011 when Mr. Renfrow visited the

1 site. *Neet Decl., Exs. 1-9; Iammarino Decl., Exs. 1-5; Renfrow Decl., Exs. 2-5; Hunt Second*
2 *Decl., Ex. 3; Nicholson Decl. Ex 1, Neet Depo., Exs. 9-10; Neet Second Decl., Exs. 6-8; Hunt*
3 *Third Decl., Ex. 4.* The Ditch as it flowed through the riparian pasture and into Manastash Creek
4 was estimated to be 12 to 24 inches, much smaller than the 42-inch bucket on the track hoe that
5 was employed by Ms. Hunt. While the excavation did not occur on the banks of the main stem
6 of Manastash Creek, a 42-inch excavation from five to ten feet in length occurred in the Ditch
7 near the mouth of the Ditch, where it entered Manastash Creek. *Neet Depo., at 81-89; Neet*
8 *Depo., Vol II, at 200, 203; Hunt Third Decl., at ¶ 22.* These activities were clearly beyond the
9 action reasonably necessary to remove the debris and preserve the Ditch.

10 [43]

11 There are no undisputed material facts regarding these activities conducted by Ms. Hunt,
12 and as a matter of law the Board finds that they were not normal and routine maintenance of the
13 Ditch.

14 **Discharge and Cause of Pollution**

15 [44]

16 It is the declared policy of the state of Washington to “maintain the highest possible
17 standards to insure the purity of all waters of the state consistent with public health and public
18 enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other
19 aquatic life, and the industrial development of the state....” RCW 90.48.010.

20 Ecology has been granted the authority to “control and prevent the pollution of streams,
21 lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground

1 waters of the state of Washington.” RCW 90.48.030. In furtherance of this policy, Washington
2 law makes it unlawful to discharge or to cause or to permit or allow to seep or discharge organic
3 or inorganic matter if it will “cause or tend to cause pollution of” waters of the state. RCW
4 90.48.080.⁵ Pollution is very broadly defined to encompass any alteration of the physical,
5 chemical or biological properties of the water, including change in temperature of the water, or a
6 discharge that “will or is likely to” render such waters harmful to beneficial uses such as aquatic
7 life. RCW 90.48.020.⁶ *Ellensburg v. Ecology, supra*, at 7.

8 [45]

9 It is not necessary that harm itself be shown for a discharge to constitute pollution.
10 *Ellensburg v. Ecology, Id.* (“harmful potential is proscribed”). Further, compliance with RCW
11 90.48.080 is a matter of strict liability. *First Romanian Pentecostal Church of Kenmore v. Ecology*,
12 PCHB 08-098, 099 (Order on Summary Judgment, 2009), at 10. *See also Ecology v. Lundgren*, 94
13 Wn. App. 236, 244, 245, 971 P.2d 948 (1999)(noting that compliance with the Federal Clean Water
14 Act, which in Washington State is implemented through the WPCA, is a matter of strict liability).
15 Strict liability means that a defendant’s intentions or good faith efforts to comply do not excuse a

17 ⁵ RCW 90.48.080 provides: “It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any
18 of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise
19 discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters
20 according to the determination of the department, as provided for in this chapter.”

19 ⁶“Pollution” is defined as: “...such contamination, or other alteration of the physical, chemical or biological
20 properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters,
21 or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or
is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or
welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to
livestock, wild animals, birds, fish or other aquatic life.” RCW 90.48.020

1 violation. *First Romanian Pentecostal Church* at 10; *Lundgren*, at 244 (citing *United States v. Golf*
2 *Park Water Company*, 972 F. Supp. 1056 (S.D. Miss. 1997)).

3 [46]

4 The Board limits its review to Ecology's stated basis for Order #8990, which as described
5 above is for violating RCW 90.48.080 by causing or tending to cause pollution in the main
6 channel of Manastash Creek. Ecology's Response, at 3; *Neet Depo., Vol II*, at 113. Although
7 the Ditch was not a side channel and part of Manastash Creek in November 2011, Hunt's
8 activities were within a riparian corridor of, and in close proximity to, Manastash Creek. The
9 riparian zone of a creek is an important element of the ecosystem of a water course, and the loss
10 of the riparian corridor is a primary contributor to the degradation of the water. *See, Washington*
11 *Water Quality Management Plan to Control Nonpoint Sources of Pollution (WQ Management*
12 *Plan)* at 16-19; *Neet Second Decl.*, at ¶ 9. Activities in the riparian corridor could have impacts
13 on the creek depending upon the extent and timing of those activities. *Id.*

14 In regard to nonpoint pollution from agricultural land, Ecology has defined a riparian
15 zone as a streamside area physically linked due to water:

16 Riparian zones include both the active floodplain (a flat or nearly flat land next
17 to a stream or river, stretching from the banks of its channel to the base of the
18 enclosing valley walls) and the adjacent plant communities.
<http://www.ecy.wa.gov/programs/wq/nonpoint/Agriculture/agwqrisks.html>;
Ecology Publication 00-10-023 (2001).

19 Mr. Renfrow opined that Ms. Hunt's riparian pasture is a floodplain. *Renfrow Decl.*, at
20 ¶¶ 3-6. Ms. Hunt does not refute Mr. Renfrow's findings and conclusions, which we find
21 credible and based on Mr. Renfrow's professional experience. Ms. Hunt agrees that the pasture

1 is a flood plain, and she describes the pasture as an area that is otherwise defined as a riparian
2 zone or corridor. *Hunt Decl.*, at ¶ 5; *Hunt Fourth Decl.*, at ¶ 24:

3 As WDFW's Brent Renfrow acknowledged...“water was flowing across the
4 flood plain in the bottom of the ravine, which was vegetated with trees, shrubs
5 and grasses.” This was the area of my pasture located downstream from the log
6 jam, including the area in which I did the work in question. Mr. Renfrow's
description of the area is not a channel of Manastash Creek; instead, it is diffuse,
vagrant surface waters spreading across the flood plain among terrestrial
vegetation.

7 [47]

8 Within this riparian corridor, Ms. Hunt's activities were extensive and damaging. As
9 described above, heavy equipment consisting of an excavator with large track hoe and a 42-inch
10 bucket were employed. *Iammarino Decl., Ex. 5; Second Hunt Decl.*, at ¶ 22; *Neet Depo., Vol II,*
11 *at 122, 203-205.* Vegetation throughout the riparian area was crushed, many mature trees were
12 removed, and the Ditch was dredged and at locations widened. Although there was no flooding
13 in November 2011, Ms. Hunt's activities were within the riparian corridor of Manastash Creek,
14 including in the Ditch and in areas of pooled water and saturated ground that was residual from
15 irrigation flow and from the earlier flooding of the Creek. *Second Hunt Decl.*, at ¶ 34; *Neet*
16 *Depo.*, at 50, *Vol II.*, at 164, 192; *Neet Decl., Exs. 1-5; Iammarino Decl., Exs. 1-5.* The use of
17 the excavator with the 42-inch track hoe within the riparian corridor and in and along the Ditch
18 clearly disturbed the soils and would cause sediments to drain and discharge into and be
19 suspended within the flow of the Ditch.

1 [48]

2 Sediment, turbidity and increases in temperature change the physical properties of the
3 water and are causes of pollution as defined under RCW 90.48.020. *Sediment TMDL DIP*, at 3-
4 5; *Temperature TMDL; Neet Second Decl.*, at ¶¶ 10-11. Based on his experience and familiarity
5 with the Sediment TMDL, the Sediment TMDL DIP, the Temperature TMDL, Ecology's surface
6 water quality standards, the WQ Plan, and his personal observations at his site visit on February
7 17, 2011, Mr. Neet opined that because of Ms. Hunt's activities, exposed soils were eroded and
8 sediment would transport to the main channel of Manastash Creek. *Neet Depo., Vol II*, at 164,
9 170-177; *Neet Second Decl.*, at ¶¶ 9-11.

10 [49]

11 Ms. Hunt cut down trees that had provided and maintained a canopy and shaded the Ditch
12 in the riparian corridor. Although Ms. Hunt states the trees were dead and dying, *Hunt Decl.*, at
13 ¶ 10, the evidence shows that prior to November 2011 there were live trees in the riparian pasture
14 providing shade to the Ditch. *Renfrow Decl., Ex. 1, Figure 3, Exs. 2-5; Nicholson Decl., Ex. 9;*
15 *Hunt Second Decl.*, at ¶ 24. The loss of the canopy over the Ditch by the removal of trees and
16 the destruction of riparian vegetation along the Ditch and in the riparian corridor resulted in a
17 wider flow of water through the Ditch, thereby allowing for influences of solar warming of the
18 water that directly discharges into and impacts Manastash Creek. *Id; Neet Depo.*, at 47-50.

19 [50]

20 Ms. Hunt argues that Ecology's conclusion that her activities caused pollution is mere
21 speculation because Ecology did not take any measurements for sediment and temperature and

1 Mr. Neet did not actually observe sediment discharged into Manastash Creek. Hunt's Petition
2 for Reconsideration, at 9-15. Ecology admits it did not conduct any sampling or tests to measure
3 sediment discharges, turbidity, and changes in temperature in the Ditch or main channel of
4 Manastash Creek. *Neet Depo.*, at 92. Mr. Neet also agrees with the statement of that he is
5 "basically speculating that when Ms. Hunt did the work, sediment was discharged into
6 Manastash Creek." *See Neet Depo., Vol II*, at 133. The Board recognizes that this statement was
7 made in the context of Mr. Neet responding to questions regarding his personal knowledge and
8 observation of the sediment discharges on the days the activities occurred. Mr. Neet was not at
9 the site on these days, and therefore he could not truthfully state he saw the sediments discharged
10 in the creek on those days. *Neet Depo., Vol II*, at 164.

11 [51]

12 The failure to have quantitative evidence including actual turbidity and temperature
13 measurements or tests does not absolve one from liability under RCW 90.48.080. While
14 measurements and tests would be helpful evidence of actual pollution entering Manastash Creek,
15 the legal test is whether there were activities that would *tend to cause* pollution of Manastash
16 Creek. RCW 90.48.080. Actual tests and measurements are not necessary if the evidence
17 otherwise shows that the activities caused or allowed material to flow into the Ditch that would
18 *tend to cause* pollution of the Creek.

19 [52]

20 The Board looks at the evidence as a whole, and merely because Mr. Neet is said to have
21 speculated, the other evidence is not ignored. Mr. Renfrow personally observed the riparian

1 pasture and documents the state of existing vegetation prior to Hunt's activities at the site.
2 *Renfrow Decl., Exs. 1-6.* Ms. Iammarino personally observed the activities as they were
3 occurring in November 2011, and she documented the close proximity of the activities to the
4 Creek. This is supported by photographs of the ongoing activities and the operation of the
5 excavator. *Iammarino Decl.,* at 4-8, and *Exs. 1-5.* Ms. Hunt describes her activities and admits
6 to the use of the excavator within the riparian pasture, the use of the 42-inch bucket, and removal
7 of the trees. *Hunt Second Decl.,* at ¶¶ 22, 34. As the Board found above, sediment discharges
8 from erosion of the banks and increased temperature of the waters caused by damaged riparian
9 areas are of particular concern for Manastash Creek. *Id.; Neet Decl.,* at ¶ 8; *Neet Second Decl.,*
10 ¶¶ 9-11, citing to and quoting from the *Sediment TMDL DIP.* The TMDL studies show that
11 daily maximum temperatures of water in a stream are strongly influenced by removal of riparian
12 vegetation. *Id.; Neet Second Decl.,* at ¶ 10, citing and quoting the *Temperature TMDL DIP.* In
13 *First Romanian Pentecostal Church of Kenmore v. Ecology,* PCHB Nos. 08-98 & 08-099 at 13,
14 19 (2009), the Board found that the removal of vegetation and reduction of shade will likely
15 cause water temperature to increase until the canopy coverage is able to re-establish. Ultimately,
16 Mr. Neet's opinions are supported by the evidence and the studies and analysis of the TMDLs,
17 TMDL DIP and WQ Management Plan, which the Board finds credible and unrefuted with
18 evidence by Ms. Hunt.

19 [53]

20 Ecology has the broad authority to take "immediate action ... necessary to accomplish
21 the purposes of" ch. 90.48 RCW, and may issue an order or directive "as it deems appropriate

1 under the circumstances.” RCW 90.48.020(2). To limit Ecology’s authority by requiring
2 numerical evidence and tests for every event would result in the discharge of pollution without
3 liability if the discharge was not discovered until after the pollution had occurred and had
4 dissipated into waters of the state. The Board finds that this is not the intent under the broad
5 authority the legislature has granted Ecology to protect the waters of the state.

6 [54]

7 The Board finds that there are no disputed issues of material fact regarding the discharge
8 of sediments and the increase in temperature in the Ditch caused by Ms. Hunt’s activities on
9 November 11, 12, and 13. Ms. Hunt’s type of activities and the location of the activities in a
10 riparian corridor are not disputed. The evidence shows that the level of these activities was
11 beyond normal maintenance of an irrigation ditch as defined by Mr. Charlton. These activities
12 were extensive, with the operation of heavy machinery in the Ditch and on saturated land in the
13 riparian corridor for Manastash Creek. The activities included a disruption of the soils and loss of
14 vegetation that had shaded and stabilized the Ditch. The TMDL plans and related studies and
15 analysis provided by Ecology are unrefuted evidence of the impacts the loss of vegetation and
16 the excavation of the Ditch and surrounding riparian area has on the waters of the Ditch. The
17 Ditch directly discharged into Manastash Creek in November 2011, and the evidence shows that
18 the flows in the Ditch containing sediment and temperature changes caused by Ms. Hunt’s
19 extensive activities, would likely, if not directly and immediately, discharge into Manastash
20 Creek.

1 [55]

2 Based on the undisputed issues of material fact, the Board finds that as a matter of law,
3 Ms. Hunt's activities tended to cause pollution in Manastash Creek in violation of RCW
4 90.48.080. Ecology is granted summary judgment on Issue No. 1.

5 The Reasonableness of the Penalty

6 [56]

7 Issue No. 2 states:

8 2. Was Ecology's \$16,000 penalty assessed against Ms. Hunt reasonable?

9 Ecology is authorized by state law to assess civil penalties for violations of Washington
10 water pollution laws and regulations in an amount up to ten thousand dollars for each day of
11 violation. RCW 90.48.144 provides:

12 [Any person who] violates the provisions of RCW 90.48.080, or other sections of
13 this chapter or chapter 90.56 RCW or rules or orders adopted or issued pursuant to
14 either of those chapters, shall incur, in addition to any other penalty as provided by
15 law, a penalty in an amount of up to ten thousand dollars a day for every such
16 violation. Each and every such violation shall be a separate and distinct offense, and
17 in case of a continuing violation, every day's continuance shall be and be deemed to
18 be a separate and distinct violation. Every act of commission or omission which
19 procures, aids or abets in the violation shall be considered a violation under the
20 provisions of this section and subject to the penalty herein provided for. The penalty
21 amount shall be set in consideration of the previous history of the violator and the
severity of the violation's impact on public health and/or the environment in
addition to other relevant factors. The penalty herein provided for shall be imposed
pursuant to the procedures set forth in RCW 43.21B.300.

RCW 90.48.144(3).

1
2 In reaching a decision on the reasonableness of a civil penalty, the Board considers three
3 main factors: (1) the nature of the violation, (2) the prior history of the violator, and (3) the
4 remedial actions taken by the penalized party. *Andrew Noel Construction, Inc. v. Ecology*, PCHB
5 No. 07-150 (2009); *Pacific Topsoils, Inc. v. Ecology*, PCHB Nos. 07-046 & 07-047 (2008);
6 *Douma v. Ecology*, PCHB No. 00-019 (2005).

7 The Board also considers whether the violator was knowingly taking actions that would
8 result in violation of the permit. *Harmon v. Ecology*, PCHB No. 05-025, at 10-11 (2006). The
9 purpose of a civil penalty is also to influence behavior, encourage compliance, and deter future
10 violations. *Watts Construction, Inc. and Masterson Construction, Inc. v. BCAA*, PCHB Nos. 04-
11 032 & 037 (2005). To achieve the purposes of the penalty, the Board may take into account other
12 extenuating or exacerbating factors not adequately accounted for in the original penalty
13 calculation. See e.g., *Harmon; Ostrom Company v. ORCAA*, PCHB Nos. 04-105 & 140 (2005).

14 As part of its review of an agency penalty calculation, the Board also considers the
15 approach used by the agency in counting and characterizing number, type, and duration of
16 violations in the first instance. See, e.g., *Piccolo/Magnum Trailers Co. v. Ecology*, PCHB No.
17 05-154 (2006); *Pacific Topsoils, Inc. v. Ecology*, PCHB Nos. 07-046 & 07-047 (2008); *Harmon*.
18 The Board looks to whether the agency has been conservative or expansive in its characterization
19 of the violations. The Board also considers whether the agency set the penalty amount below the
20 maximum amount authorized by law. *Harmon, supra*. The Board balances all these factors to
21 best achieve the purpose of a civil penalty.

1 Nature of the Violation

2 [58]

3 In considering the nature of the violation, the Board considered the extent of Ms. Hunt's
4 activities and several unique and extenuating circumstances in this case.

5 [59]

6 As the Board found, Ms. Hunt's activities were well beyond normal and routine
7 maintenance, and were in close proximity to Manastash Creek. Conducting such extensive
8 activities in any riparian corridor would reasonably lead to possible negative effects on a creek.
9 Manastash Creek is in particular known to be an important tributary to the Yakima River and for
10 critical habitat for fish species.

11 [60]

12 The Board also finds that there are unique circumstances in this case that offer
13 extenuating factors relevant to the reasonableness of the penalty. These circumstances, which
14 are analyzed below, make this a unique case, and require the Board to balance many factors with
15 the severity of Ms. Hunt's activities and the potential level of a penalty.

16 [61]

17 The description of the violation as stated in Order # 8990 and the Penalty did not clearly,
18 nor necessarily correctly describe Ms. Hunt's actions. She was alleged to have operated the
19 equipment in Manastash Creek. This was not correct. As Ecology has now conceded and the
20 Board has found, Ms. Hunt was not in the main channel of Manastash Creek. She also did not
21 create a berm, which Ecology also alleged. It is now undisputed by Ecology that Ms. Hunt's

1 activities were in and along the Ditch that was the irrigation return flow ditch that flowed off of
2 the bluff into the riparian pasture. While Ecology argued that the Ditch is still a side channel and
3 part of Manastash Creek, the Board has found that at the time of Ms. Hunt's activities the Ditch
4 was not a side channel of Manastash Creek.

5 [62]

6 Ms. Hunt sought assistance and advice prior to conducting the activities. She asked Mr.
7 Renfrow to visit the site in June 2011 prior to taking any action. Mr. Renfrow told Ms. Hunt that
8 WDFW "would have to approve any work that involved placing equipment in the Creek or
9 cutting/yarding trees from the Creek's banks to clear the power lines," *Renfrow Decl.*, at ¶ 6.
10 Based on Mr. Renfrow's advice, it is understandable that Ms. Hunt believed that WDFW's
11 concerns were with activities in the banks and bed of Manastash Creek, and any work in this area
12 could require necessary permits. As suggested by Mr. Renfrow, Ms. Hunt waited until the water
13 receded before doing any work. Ms. Hunt states that her intent to stay out of Manastash Creek
14 and the riparian area is evidenced by her request for the meeting with Renfrow, the agreement to
15 wait until the waters receded before any work was done, the belief she was following Renfrow's
16 instructions, and the many photographs which Hunt has identified as either the Ditch or Creek.
17 *Hunt Decl.*, at ¶ 9; *Hunt Second Decl.*, at ¶¶ 3-7; *Hunt Third Decl.*, at ¶¶ 5-12. It is reasonable
18 that there was likely an unspoken difference of opinion between Ms. Hunt and Mr. Renfrow
19 regarding the definition of the bed and banks of Manastash Creek in June 2011 when flood
20 waters were flowing across the pasture. While Ms. Hunt's intentions do not excuse the violation,
21 the Board may consider her intentions and good faith efforts in regard to the Penalty:

1 [63]

2 Ms. Hunt's ability to maintain her Ditch as an irrigation return and storm water ditch is
3 not itself being challenged by Ecology. Any disturbance of the soils from reasonable routine and
4 normal maintenance that incorporated best management practices may cause some level of
5 turbidity and loss of shade from removal of vegetation. Therefore, unlike the actions where the
6 activities were illegal by the mere action, Ms. Hunt was not *per se* acting illegally simply by
7 conducting activities in the Ditch, which this Board had determined was not a side channel of
8 Manastash Creek.

9 [64]

10 While the Board finds that documentation of actual pollution by taking measurements
11 and testing is not required to find a violation, the lack of such data compromises the ability of the
12 Board to evaluate the seriousness of the violation in regard to the level of pollution discharged
13 into the main channel of Manastash Creek. Further, unlike the facts in *First Pentecostal v.*
14 *Ecology, supra*, the activities conducted by Ms. Hunt were not in a natural creek that was used
15 for all stages of the life cycle of fish species of salmon and steelhead, and there was no evidence
16 of the presence of these species and level of harm caused to such species in Manastash Creek
17 during the activities in November 2011. In addition, the violation for November 17, 2011 is not
18 supported by evidence other than this was the day Mr. Neet was observing Ms. Hunt's pasture
19 from the neighboring property. He did observe any discharges of sediments or temperature
20 impacts on that day. There is also no evidence that he observed any further activities by Ms.
21 Hunt.

1 [65]

2 The February 2012 breach of the Westside canal has now caused the Ditch to be engulfed
3 by Manastash Creek and become part of a new side channel of the Creek. This contributed to the
4 sediment loading in Manastash Creek. The Army Corps of Engineers upon visiting the site on
5 March 8, 2012, opined that based on the documents they reviewed and the results of the field
6 investigation, they "were not able to determine if the observed sediments and cobble deposits
7 were from the May 2011 floods, the February 2012 floods or from your [Ms. Hunt] activities in
8 November 2011." *Jaffe Decl., Ex. 1.*

9 [66]

10 The foregoing circumstances offer unique and extenuating factors to consider, however
11 these also do not excuse Ms. Hunt who is not wholly without fault for her extensive activities in
12 the riparian corridor. In consideration of both these factors and Ms. Hunt's activities the Board
13 finds that the nature of the violation, being defined as tending to cause pollution to and harming
14 the waters of the main stem of Manastash Creek, is not as serious as Ecology initially alleged,
15 and that the seriousness is tempered by the facts recited above.

16 Prior History of the Violator

17 [67]

18 There is no evidence that Ms. Hunt has any history of violations under chapter 90.48
19 RCW.

1 Remedial Actions

2 [68]

3 Ms. Hunt ceased her activities well prior to the issuance of Order #8990. The evidence
4 shows that Ms. Hunt attempted to cooperate prior to the issuance of Order #8990. Ms. Hunt visited
5 Kittitas County Community Development Services to file a flood development permit application as
6 recommended by Ms. Iammarino, although Ms. Hunt could have been more diligent in that process.
7 Ms. Hunt also showed a desire to work with Ms. Iammarino for resolution of the matter prior to
8 receiving Order #8990 and the Penalty from Ecology, who apparently never contacted or visited Ms.
9 Hunt before issuing the Order and the Penalty. *Hunt Decl., Exs. 4 and 5.*

10 [69]

11 The vegetation has begun to grow back in the riparian area. *Hunt Third Decl., Ex. 5.* A
12 remedial plan is also required in the Order #8990. The restoration plan calls for restoring the riparian
13 pasture to the state it existed prior to the February 2012 floods, caused by the breach of the Westside
14 canal. Because of the significant changes to the riparian area from the February 2012 floods, the
15 Board stayed the implementation of the plan. As stated below, the Board is remanding this matter to
16 Ecology to draft a new restoration plan based on the current condition of the riparian corridor.

17 [70]

18 Based on the foregoing, the Board finds that the \$16,000.00 penalty is not reasonable.
19 Recognizing the unique and extenuating circumstances of this case, and the Board's finding that Ms.
20 Hunt must comply with and be responsible for the implementation of a restoration plan, the Board
21 reduces the Penalty to \$750.00.

1 Restoration Plan

2 [71]

3 Issue No. 3 states:

- 4 3. Was the restoration plan Ecology ordered Ms. Hunt to submit and implement
5 reasonable?

6 Order #8990 states that Ms. Hunt must "Restore the functions of Manastash Creek...."

7 See Order, at 3. To accomplish the restoration the Order requires Ms. Hunt to submit a
8 restoration plan for Ecology's approval. The plan shall be consistent with the WDFW *Stream*
9 *Habitat Restoration Guidelines*, including among other conditions, a minimum riparian buffer
10 from Manastash Creek, riparian plantings and a five year maintenance. *Id.* Ms. Hunt will
11 require approval from appropriate agencies and therefore is required to file a Joint Aquatics
12 Resources Permit Application (JARPA). The Order #8990 requires Ms. Hunt to demonstrate
13 that the functions of the stream have been restored and continue to function as intended through
14 January 1, 2020. *Id.*

15 [72]

16 The Board stayed the implementation of the restoration plan based primarily on the
17 evidence of significant changes to the riparian pasture and the flow of Manastash Creek resulting
18 from the 2012 flooding. See Order Correcting the Record and Order on Motion for
19 Reconsideration on the Order Denying Motion for Stay of Administrative Order No. 8990 (June
20 14, 2012).

1 [73]

2 Ecology has the authority to impose a restoration plan to repair damaged shoreline and
3 require mitigation to ensure full restoration of damaged wetlands and streams. *First Romanian*
4 *Pentecostal Church of Kenmore v. Ecology*, PCHB Nos. 08-98 & 08-99 (Order on Summary
5 Judgment 2009). In *R/L Associates, Inc. v. Ecology*, PCHB No. 90-124 (1991) (COL 2), the
6 Board stated:

7 [T]he test for a regulatory order under RCW 90.48.120 is whether it is
8 "appropriate under the circumstances" to accomplish the purposes of the
Washington State Clean Water Act, chapter 90.48 RCW. (citations deleted).

9 See also, *Kinzel v. Ecology*, SHB No. 05-007 (2007) (COL 8).

10 [74]

11 The Board concludes that Ecology properly imposed the restoration plan along the Ditch
12 within the riparian corridor, and issuance of the regulatory Order #8990 was appropriate in this
13 regard. As this Board has found, the Ditch contains waters of the state, and activity in and along
14 the Ditch within the riparian corridor has a direct and immediate impact on Manastash Creek.
15 The condition of the area where the activities occurred included a disruption on the soils and loss
16 of vegetation that shaded and stabilized the Ditch. However, the restoration plan specified in
17 Order #8990 was also required based on Ecology's findings that Ms. Hunt's activities were in
18 and along the Manastash Creek and not the Ditch. Further and most importantly, the restoration
19 plan was based on the riparian area as it existed in November 2011, prior to the 2012 flooding.
20 The flood has resulted in Manastash Creek fully engulfing the Ditch within the riparian corridor,
21

1 and the flows of the Ditch and Manastash Creek within the pasture are possibly permanently
2 altered. *Hunt Second Decl.*, at ¶¶ 9-15.

3 [75]

4 Since issuing the Order, Mr. Neet has explained that the restoration plan is to establish a
5 riparian buffer from the ordinary high water mark of Ditch, and restore the Ditch and the riparian
6 habitat to what existed prior to Ms. Hunt's activities in November 2011. *Neet Depo.*, at 93-95.
7 In addition, as stated above, the vegetation has begun to grow back and provide a level of
8 shading of the channels in the area where the activities occurred. *Hunt Third Decl., Ex. 5.* Based
9 on these changed circumstances, the Board remands Order #8990 to Ecology to reevaluate the
10 intent and specific requirements of a restoration plan considering additional analysis of the
11 current and future flows and channels in the riparian corridor.

12 **CONCLUSION AND ORDER**

13 Based on the foregoing Findings of Fact and Analysis, the Board finds that there are no
14 disputed issues of material fact, and as a matter of law, concludes:

15 1. Ms. Hunt conducted activities that tended to cause pollution to Manastash Creek
16 on November 11, 12 and 13, 2011, violating RCW 90.48.080.

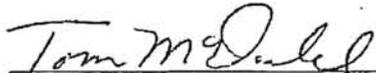
17 2. The Penalty of \$16,000 is not reasonable in consideration of the extenuating and
18 unique circumstances, and the Penalty is reduced to \$750.00

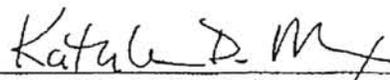
19 3. Ecology's Administrative Order #8990 was appropriate under the circumstances.
20 The restoration plan as required in Order #8990 does not reflect the current status of the flow of
21 Manastash Creek through the riparian pasture, and Order #8990 is remanded solely for the

1 purpose of Ecology developing the requirements of a restoration plan in coordination with Ms.
2 Hunt and in consideration of the current and future flow of Manastash Creek through the riparian
3 corridor.

4 SO ORDERED this 29th day of November, 2012.

5 POLLUTION CONTROL HEARINGS BOARD

6 
7 _____
TOM MCDONALD, Presiding

8 
9 _____
KATHLEEN D. MIX, Chair

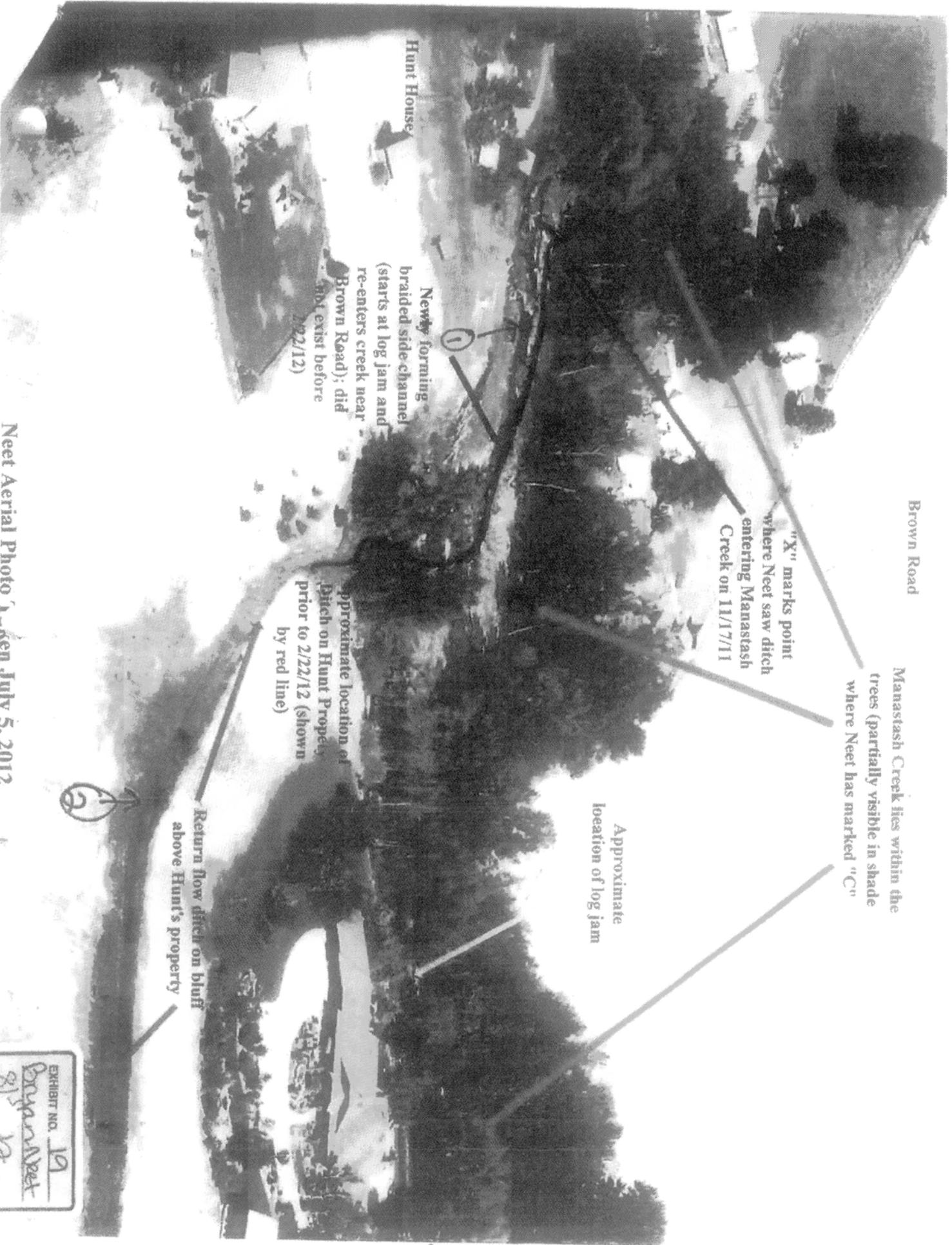
10 
11 _____
WILLIAM H. LYNCH, Member

Appendix 2



000108

Appendix 3



Brown Road

Manastash Creek lies within the trees (partially visible in shade where Neet has marked "C")

"X" marks point where Neet saw ditch entering Manastash Creek on 11/17/11

Approximate location of log jam

Approximate location of ditch on Hunt Property prior to 2/22/12 (shown by red line)

Return flow ditch on bluff above Hunt's property

Newly forming braided side channel (starts at log jam and re-enters creek near Brown Road); did not exist before 2/22/12

Hunt House

Neet Aerial Photo Taken July 5, 2012

EXHIBIT NO. 19
Bryan Neet
8/12/12

Appendix 4

