__ EXPEDITE
__ No Hearing set
X Hearing is set

Date: April 3, 2015

Time: 1:30 p.m.

Judge: Honorable Gary R. Tabor

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN WHITEWATER, and NORTH CASCADES CONSERVATION COUNCIL, Petitioners, v. WASHINGTON DEPARTMENT OF ECOLOGY, PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, WASHINGTON, and WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD, Respondents.	No. 14-2-02109-5 PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

The Center for Environmental Law & Policy, American Whitewater and North Cascades Conservation Council (collectively "Petitioners") hereby submit their opening brief in their appeal of the following decision of the Pollution Control Hearings Board ("PCHB" or "Board"): *Center for Environmental Law & Policy et al. v. Ecology et al.*, PCHB No. 13-117 (Order on Motions for Summary Judgment "SJO") (June 24, 2014), Clerk's Papers ("CP") at 504-529. This case presents a fundamental question of statutory interpretation regarding the Washington Department of Ecology's ("Ecology's") obligation to answer affirmatively four critical questions prior to issuing a water right. Washington courts have reiterated time and again the importance of Ecology's mandatory statutory duty to "look before you leap" when determining whether to grant an appropriation of the precious water resources that belong to the public. In this case, however, the Board upheld Ecology's decision to approve a water right in spite of the undisputed fact that a study, that has not been done, is required to determine whether issuance of the water right will be detrimental to the public interest. For the reasons set forth below, Petitioners respectfully request that the Court set aside the Board's decision and remand for further proceedings in compliance with all applicable law.

II. FACTS & PROCEDURAL BACKGROUND

A. The Similkameen River & the Enloe Hydroelectric Project

The Similkameen River runs about 122 miles from its headwaters in British Columbia to the Okanogan River, near Oroville, Washington. CP at 236. In 1904, the 315 foot-long concrete Enloe Dam was constructed on the Similkameen River at river mile 8.8, three and half

miles east of Oroville. CP at 236. The PUD has owned Enloe Dam since 1945, but ceased generating power from it in 1958. *Id*.

Just 350 feet downriver from Enloe Dam are twenty-foot high natural waterfalls known as Similkameen Falls. CP at 237. Since 1958, the Similkameen River has flowed naturally over both Enloe Dam and Similkameen Falls. *Id.* Natural flows over Enloe Dam and Similkameen Falls typically range from about 500 to 7,000 cubic feet per second ("cfs"). *Id.* Typical dry season (July-October) median flows range from 514 cfs in August to 764 cfs in September. *Id.*

Pursuant to the Water Resources Act of 1971, RCW 90.54, and the Minimum Water Flows and Levels Act of 1967, RCW 90.22, Ecology adopted a minimum flow rule for the Similkameen River in 1976. WAC 173-549-020(2). The minimum flow varies seasonally and ranges between 400 cfs in September and January-February, and 3400 cfs in May and June. *Id.*

The PUD currently seeks to generate hydroelectric power from Enloe Dam by installing a new powerhouse adjacent to the river, and diverting up to 1,600 cfs from the Similkameen River at the Dam. *Ctr. for Envtl. Law & Policy et al. v. Ecology et al.*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law & Final Order (as amended upon reconsideration) (Aug. 30, 2013) ("401 Certification Decision") at 20. Water would be discharged back to the river below Similkameen Falls. CP at 9, 22 (ROE at 2, 15). The Project will thus create a de-watered "bypass reach," that would include Similkameen Falls.

B. The 401 Certification & PCHB Decision

As required by the federal Clean Water Act ("CWA"), the PUD applied to Ecology for a Section 401 Water Quality Certification for the Enloe Hydroelectric Project. 33 U.S.C. §

1341(a)(1). Ecology's 401 Certification, issued in 2012, set forth a "minimum flow regime in the bypass reach of 10 cfs year round and 30 cfs for mid-July to mid-September[,] otherwise known as the 10/30 flows . . . ." 401 Certification Decision at 9:16-17. The 10/30 instream flow requirement constitutes an approximately 90-99% reduction in current flows over Enloe Dam and Similkameen Falls. Appellants to the instant case appealed the 401 Certification to the Board on the grounds that this instream flow requirement did not comply with Washington's water quality standards that protect aesthetic and recreational values of rivers. *Id*. at 1.

After a hearing on the merits, the Board found that the 10/30 cfs minimum flow requirement was deficient for lack of adequate analysis, as required by Washington's water quality laws. 401 Certification Decision at 32:13-15. Specifically:

> The Board finds the Appellants met their burden that the aesthetic flow analysis was not sufficiently completed to make a final determination of the flows that will be protective of the aesthetic values.[1] The evidence is not sufficient to make a finding as to the flows that would protect aesthetic values without impairing the quality of the water for the fishery resource, which the Board finds would occur if the Project caused shallow flows over the bedrock shelves. Therefore, the § 401 Certification is deficient in this regard without further conditions.

401 Certification Decision at 32:11-16. After considering the evidence of presented at the hearing, the Board concluded:

> [T]here is not sufficient evidence to make a finding that the 10/30 flows meet the water quality standards for aesthetic values even when balancing these with the protecting of the fisheries. The professional judgment on aesthetic flows should be based on evidence depicting flow levels, either actual or simulated.

[1] The Board found that the water flowing over the dam and the Falls provides aesthetic values, which the Board directed Ecology to consider in determining whether there is reasonable assurance that the Project operations will meet water quality standards for protected designated and beneficial uses of the River. *Id.* at 26:1-5.

Id. at 31:16-19.

To ascertain what flows would comply with state water quality laws, the Board added a condition directing Ecology to implement an after-the-fact aesthetic flow monitoring program to "provide for management and control of alternative flows in the bypass reach that will provide opportunities for review, monitoring and analysis of either actual minimum flows or development and review of simulated flows." *Id.* at 34:5-6. Therefore, whether there are minimum flows for the Project that comply with state water quality standards will not be known for up to three years after Project operations begin. *Id*. at 34:15. It is undisputed that neither the PUD nor Ecology has undertaken the required aesthetic flow analysis or determined what modified flows would meet all applicable state water quality standards. *See* CP at 394 (Ecology's Objections & Responses to Appellants First Interrogatories & Requests for Production of Documents to Respondent Ecology at 5).

C. The Water Right & PCHB Decision on Appeal.

On August 6, 2013, Ecology issued Report of Examination ("ROE")[2] No. S4-35342 authorizing to the PUD the right to use an additional 600 cfs to produce hydropower at Enloe Dam.[3] CP at 8-29 (ROE). The ROE, which has a 2010 priority date, acknowledged that the water right is consumptive within the bypass reach. CP at 19 (ROE at 12). The ROE was conditioned on the very same 10/30 cfs instream flow requirement that the Board found to be unsupported in its 401 Certification decision. CP at 14 (ROE at 7); 401 Certification Decision at 32:16, 11-13 (finding the 401 Certification to be "deficient" on the grounds that the aesthetic

[2] Ecology's approval is set forth in a Report of Examination or ROE, which describes the factual findings for the subsequently issued water right permit. See CP at 8-29. The ROE is the final agency action appealed in this matter.

[3] The PUD also owns two pre-existing water rights for the hydroelectric project that are not subject to this appeal. CP at 18. (ROE at 11).

flow analysis "was not sufficiently completed to make a final determination of the flows that will be protective of the aesthetic values."). The ROE also directed the PUD to "comply with Ecology's 401 Water Quality Certification [for the Enloe Project] and any subsequent updates." CP at 14 (ROE at 7).

The ROE states that the "bypass flows under the 401 Water Quality Certification are designed to protect the aesthetic values of water flowing over the falls," but does not mention aesthetic flows over the dam, which are required to be studied by the Board's 401 Certification Decision. CP at 24. As part of its public welfare analysis, Ecology cites unnamed studies and documents submitted by the PUD during the FERC license application process. CP at 23. In the 401 Certification Decision, however, the Board found that these studies "did not address the aesthetics of the flow of the River over the Dam or the Falls." 401 Certification Decision at 14:5-6; *see also Id.* at 13:4-5 (finding that the "PUD did not conduct an aesthetic flow study that analyzes actual flows because flows cannot be manipulated under existing conditions"); *Id*. at 11:17-19 (finding that the PUD conducted recreational studies "but did not study the aesthetics of the water flowing over the Dam or Falls and the impact of the operation of the Project with no flows over the Dam and Falls for most of the year.").

Despite the lack of data on aesthetic flows and independent analysis of the purported social and economic benefits of the Project, Ecology found that issuing a permanent water right for the Project was not detrimental to the public welfare, stating:

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

CP at 23, 27.

On September 6, 2013, Petitioners filed a notice of appeal asking the Board to find the ROE invalid and in violation of the law. CP 1-29. The parties filed cross-motions for summary judgment on all issues. CP 52, 227, 231. On June 24, 2014, the Board issued its decision granting summary judgment for the PUD and Ecology on all issues, modifying the ROE to include the same language in the water right as it required for the 401 Certification, requiring study of aesthetic flows, but upholding the ROE in all other respects. CP 504-529.

III. STANDARD OF REVIEW

This Court has jurisdiction over this matter pursuant to RCW 34.05.510. Venue is proper in this Court pursuant to RCW 34.05.514(1). This appeal is governed by the Washington Administrative Procedure Act ("APA"), RCW 34.05. This court provides the first level of appellate review and applies APA standards directly to the PCHB record. RCW 34.05.558; *City of Union Gap v. Dep't of Ecology*, 148 Wn. App. 519, 525, 195 P.3d 580 (2008). The APA authorizes relief if the order, inter alia, erroneously interprets or applies the law, or is arbitrary and capricious. RCW 34.05.570(3).

In the underlying decision, the PCHB was required to interpret and apply the statute governing issuance of new water rights, RCW 90.03.290, as well as the instream flow rule that applies to the Similkameen River. WAC 173-549-020. Under the "error of law" standard, this Court may substitute its judgment for that of the agency. *R.D. Merrill v. Pollution Control Hrgs. Bd.,* 137 Wn.2d 118, 142-43, 969 P.2d 458 (1999). When the inquiry demands construction of a statute, review is de novo. *Port of Seattle v. Pollution Control Hrgs. Bd.,* 151 Wn.2d 568, 587, 90 P.3d 659 (2004); *Motley-Motley v. Ecology,* 127 Wn. App. 62, 71-71, 110

P.3d 812 (2005). Absent ambiguity, the Court does not defer to an agency's interpretation of a statute. *Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47-48, 118 P.3d 354 (2005). Deference to an administrative agency "does not extend to agency actions that are arbitrary, capricious, and contrary to law." *Skokomish Indian Tribe v. Fitzsimmons,* 97 Wn.App. 84, 94, 982 P.2d 1179 (1999). Administrative action is arbitrary and capricious if it is willful, unreasoned, and taken without regard to the attending facts and circumstances. *WA Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998).

Because the decision appealed is a summary judgment order, there are no findings of fact. The court must therefore overlay the APA standard of review with the summary judgment standard. This court evaluates facts in the record de novo and the law in light of the error of law standard, also de novo. *Skagit County v. Skagit Hill Recycling, Inc.,* 162 Wn. App. 308, 317-18, 253 P.3d 1135, 1140 (2011) (citing *Verizon Northwest, Inc. v. Wash. Emp't Sec. Dept.,* 164 Wn.2d 909, 916, 194 P.3d 255 (2008)). A recent case discusses the "error of law" standard in reviewing a summary judgment order issued by the Board.

> [T]he substantial evidence standard applies only to an agency's findings of facts. The Hearings Board's order here did not include findings. And findings are neither necessary nor helpful for our review of a summary judgment. There is no dispute over the material facts here, in any event. Instead, the question before us . . . is a question of law.

Union Gap, 148 Wn. App. at 525-26 (citations omitted).

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IV. ARGUMENT

A. The PCHB Erred in Finding the ROE Met the "Four Tests" for a Water Right.

The PCHB erred in finding that the PUD's water right complied with the public interest and public welfare requirements that comprise part of the "four tests" for which affirmative findings are required before a water right may issue. RCW 90.03.290. The PCHB erroneously interpreted and applied the law by concluding that Ecology has the discretion to defer findings on the mandatory public interest tests and issue the ROE in the face of incomplete information.

It is black letter law that, when processing a water right application, Ecology must make four affirmative findings *before* it may issue a permit. These four tests require that (1) water is (physically) available; (2) the use is beneficial; (3) senior water rights will not be impaired;[4] and (4) the new use will not be detrimental to the public welfare.[5] RCW 90.03.290. *Lummi Indian Nation v. State of Washington*, 170 Wn.2d 247, 252-53, 241 P.3d 1220 (2011); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 101, 107, 114, 11 P.3d 726 (2000); *Ecology v. Theodoratus*, 135 Wn.2d at 590-91; *Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 384, 932 P.2d 139 (1997); *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 115, 508 P.2d 166 (1973); *Hubbard v. Dept. of Ecology*, 86 Wn.App. 119, 124, 936 P.2d 27 (1997). When issuing a water right for power purposes, as here, Ecology must "hav[e] in mind the highest feasible use of

[4] As discussed in Section A, the requirement to prevent impairment of existing water rights, includes preventing impairment of instream flow rights. RCW 90.03.247.

[5] As discussed in Section C *infra*, although Ecology is not statutorily authorized to grant a water permit when one or more of the four tests are not satisfied, the agency does have discretion to issue a preliminary permit, in lieu of a denial, under those circumstances. RCW 90.03.290(2)(a).

the waters belonging to the public" when determining "whether the proposed development is likely to prove detrimental to the public interest." RCW 90.03.290(1) and (3). Hereafter, we refer to these two inquiries as the "public interest tests."

In affirming Ecology's approval of an ROE that authorizes Okanogan PUD to de-water Similkameen Falls, the Board recognized, as it had to, that affirmative findings on the four tests are required before a water right permit is issued. CP at 517 (SJO at 14) (*citing Postema*, 142 Wn.2d at 79). The PCHB agreed with Appellants that aesthetic values of the Similkameen River are to be protected under the water code through the public interest tests. CP at 518 (SJO at 15) (*citing* RCW 90.54.020(3)(a)). The Board also acknowledged that the ROE contained insufficient information to support affirmative findings on the public interest tests for the Enloe water right. CP at 519 (SJO at 16) ("Ecology still needs additional information to make a public interest determination in relation to the PUD water right."). Notwithstanding these statements, the Board erroneously interpreted and applied the law in holding that Ecology has unfettered discretion to issue a water right in the face of incomplete information. Specifically, the Board stated that:

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

CP at 522 (SJO at 19). Petitioners submit that there is no basis for the public interest finding, because the requisite aesthetic flow study is yet to be done. Therefore, Ecology has no legitimate

basis to conclude that there is no detriment to the public interest. The Board's rationale and rulings are in error for the reasons set forth below.

i. The Board Erred in Assuming No Detriment to the Public Interest.

The Board's ruling is based on the erroneous and unsupported assumption that a future aesthetic/recreation flow can and will be established through the 401 certification. CP at 522, 523 (SJO at 19, 20). At this point, it is unknown whether there is a flow that simultaneously satisfies the aesthetic, recreation and fisheries flow requirements that must be protected under state water quality laws. *See, e.g.*, CP at 519, 512 (SJO at 16, 20) ("Higher flows for aesthetic purposes may conflict with flows necessary to protect the fishery resource in the Similkameen River."). It is possible that, when aesthetic flows are finally studied, Ecology may find that there is no instream flow that can satisfy all requirements, and that operation of the project would violate Clean Water Act requirements. Similarly, the aesthetic flow study could result in a flow that is so high it renders the project uneconomic and thus unacceptable to the PUD. The PCHB ignored these potential outcomes and their practical consequences, and instead arbitrarily assumed only one side of the equation, i.e., that the aesthetic flow study may affirm the 10/30 flows and that "higher flows for aesthetic purposes may conflict with flows necessary to protect the fishery resource in the Similkameen River."). CP at 523 (SJO at 20).

The potential for not achieving a legally-compliant instream flow is a key concern in the water rights context. That is because the Board left the ROE intact, including as a default, the 10/30 cfs instream flow requirement as the mandatory flow condition in the water right, *i.e.*, the very flow that the Board previously found inadequate. 401 Certification Decision at 32:16. If, after the aesthetic flow study is completed, Ecology determines that no instream flow can be adopted that would satisfy all water quality requirements or the PUD abandons the project, the

PUD would still hold a water right with an instream flow condition that has never been found to comply with the public interest tests. This result violates RCW 90.03.290.

ii. The Board Erroneously Interpreted & Applied RCW 90.03.290 By Concluding Ecology Has Discretion To Defer Findings on the Public Interest Tests.

The Board erred in ruling that Ecology has discretion to approve a water right without first making the mandatory affirmative findings on the four-part test, particularly where information is incomplete. Neither Ecology, nor the Board in reviewing Ecology's decision, may waive, or defer, the four tests. The statutory language is clear that these are *non-discretionary* prerequisites for a water right in Washington:

> The department *shall* make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it *shall find* that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it *shall* issue a permit . . . ."

RCW 90.03.290(3) (emphasis added); *see also Black Star Ranch v. Ecology*, PCHB No. 87-19 (Final Findings of Fact, Conclusions of Law & Order) (Feb. 19, 1988) (emphasis added) at 11 ("RCW 90.03.290 requires the issuance of a permit *only if* DOE can answer affirmatively concerning all the statutory criteria."); *see also Wash. State Coal. for the Homeless v. DSHS*, 133 Wn.2d 894, 907-08, 949 P.2d 1291 (1997) ("the word 'shall' . . . imposes a mandatory duty . . ."") (citations omitted). There are good reasons for these mandatory findings, embedded in the history and principles of the prior appropriation doctrine. As the Board recognizes, it is

important to prevent problems in advance when dealing with the appropriation of a finite water resource.[6]

The Board's legal conclusion that Ecology has "discretion" to issue the water right in this case misapplies the law and erroneously gives discretion to Ecology when the legislature declined to do so. The cases cited by the Board stand for the unremarkable principle that Ecology has discretion to deny permits (for failure to meet the four tests) or limit previously issued permits. In *Ecology v. Theodoratus*, the court acknowledged Ecology's discretion to amend and add conditions to an existing permit in order to conform that permit to new legal requirements. 135 Wn.2d at 597. However, *Theodoratus* also clarified the limits of Ecology's discretionary authority, i.e., that it is must be exercised to "comply with all relevant statutes." *Id.* at 597. It goes without saying that the mandatory four-part test set forth in RCW 90.03.290(3) is a "relevant statute" that demands compliance. Nothing in *Theodoratus* stands for the principle that Ecology is empowered to waive or defer the four-part findings, or that Ecology has the discretion to issue a water right when it is without information to make a finding as to whether issuance of the water right will be detrimental to the public interest.

Similarly, *Schuh v. Ecology*, cited in *Theodoratus* and by the Board, involved Ecology's discretion to deny the transfer of an existing right, when the denial conformed to the statute governing transfers of groundwater permits. 100 Wn.2d 180, 185-86, 667 P.2d 64 (1983). In *Schuh*, Ecology concluded that approval of the transfer would not meet all statutory

[6] CP at 520 (SJO at 17) (citing *Black Star Ranch Neighborhood Ass'n v. Ecology*, PCHB No. 87-19 (Final Findings of Fact, Conclusions of Law & Order) (Feb. 19, 1988) ("The water codes are designed to prevent new appropriators from buying into this kind of trouble. Otherwise the permit system would have no function. All uses could simply be regulated on the basis of priority. Where there wasn't enough water to go around, those who guessed wrong would just have to suffer the consequences. The permit system is intended, to the extent possible, to head off such problems before they occur. In large measure, the state water agency's function is prevention, not enforcement.").

requirements, including that it would be detrimental to the public interest. *Id*. at 186. Again, the court stated that the approval of an amendment to a water right permit is a discretionary act, but acknowledged the bounds of Ecology's discretion, i.e., Ecology's discretion cannot be "exercised in a manner which was manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Id.*

But here, the Board erroneously extends Ecology's discretionary authority above and beyond what the law allows. The Board discussed two of its own decisions, *Black Star Ranch Neighborhood Assn. v. Ecology*,[7] and *Squaxin Island Tribe v. Ecology*,[8] to support its conclusion that Ecology has discretion to defer making an affirmative finding on the four-part test in violation of RCW 90.03.290. However, the Board erroneously interpreted and applied both of these cases. *See Pierce Cnty. Sheriff v. Civil Service Comm'n of Pierce Cnty.*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983) ("An agency's violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental.").

In *Black Star*, the PCHB affirmed Ecology's discretion to deny a water right permit for failure to meet each element of the four-part test. In *Black Star*, Ecology was engaged in a "focused study of the groundwater aquifers underlying the Black Rock area," and "began deferring permit decisions in the study area, awaiting the results of the study." PCHB No. 87-19

[7] PCHB No. 87-19 (Final Findings of Fact, Conclusions of Law & Order) (Feb. 19, 1988).
[8] PCHB No. 05-137 (Modified Findings of Fact, Conclusions of Law & Order) (Nov. 20, 2006),

at 5. The study was not complete by the time of the hearing, so "DOE was not able to conclude that water was available for appropriation in most of the study area."[9] *Id.* at 7.

Contrary to the Board's interpretation, *Black Star* does not affirm Ecology's discretion to defer a finding on the four-part test. CP at 520 (SJO at 17). Rather, *Black Star* holds that when Ecology is faced with a situation in which "incomplete information prevents answering" the statutory criteria, "the appropriate response is to deny the permit, and hold that in these circumstances the proposed use 'threatens to prove detrimental to the public interest.'" *Black Star*, PCHB No. 87-19 at 11, 13 ("Again, the lack of information brings into play the public interest criterion as grounds for denial.").

The Board's reliance on the *Squaxin Island Tribe* case for the proposition that it "is consistent with the determination that this is a discretionary decision for Ecology" is baffling. CP at 520 (SJO at 17). In *Squaxin Island Tribe*, as in *Black Star*, the PCHB vacated a water right because it failed to meet each element of the four-part test. *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137 (Modified Findings of Fact, Conclusions of Law & Order) (Nov. 20, 2006). Specifically, the Board found "that the proposed withdrawals violate the public interest portion of the four-part test contained in RCW 90.03.290" because the reduction in stream flow by the proposed appropriation would negatively affect fish. *Id*. at 49.

Nothing in the *Squaxin Island Tribe* decision supports the Board's conclusion "that this is a discretionary decision for Ecology." CP at 520 (SJO at 17). In fact, the word "discretion" does not even appear in the opinion. *Squaxin Island Tribe* actually contradicts the

[9] The only reason DOE processed the application was because in a prior appeal "the judge requested DOE to process the application and the agency agreed. Were it not for this agreement, DOE would have continued to hold the application in a pending status until the study provided the answers needed to act on it knowledgeably." *Id.* at 9. There is no assertion in this case of any similar agreement requiring action on the water rights permit.

Board's ruling and supports Petitioners' argument that Ecology cannot make a valid, affirmative public interest finding without understanding how the Project will affect instream flows in the bypass reach. In *Squaxin Island Tribe*, the Board acknowledged that information was lacking as to how the proposed groundwater withdrawals would affect adjacent surface waters. *Squaxin Island Tribe*, PCHB No. 05-137 at 54. The Board noted that "[w]ithout this information, it is difficult to see how Ecology can meet its obligations to protect fish and other environmental values under RCW 90.54.020(3)." *Id*. Furthermore, the Board recognized that "it is preferable to have questions regarding potential impacts answered before a project is allowed to proceed rather than to try and address issues that emerge after the fact."[10] *Id.* at 57. Similarly here, the Board has held that an aesthetic flow study is required; that study is needed in order to make a determination on the public interest tests.

In sum, none of the cases cited by the Board support the proposition that Ecology has discretion to *issue* a water right when it fails to meet the four-part test. Conversely, multiple appellate decisions and PCHB decisions hold just the opposite, i.e. there must be affirmative findings on the four tests before a water right shall issue. See cases cited, *supra* at p. 13. Indeed, Ecology has a statutory *duty to reject* a proposed withdrawal if any of the criteria set forth in the four-part test cannot be met. *Postema*, 142 Wn.2d at 95 (emphasis added) ("where a proposed withdrawal would reduce the flow in surface waters closed to further appropriations, *denial is required* because water is unavailable and withdrawal would be detrimental to the public welfare."). Therefore, while cases have held that Ecology has the discretion to approve water

[10] In its Summary Judgment Order, the Board erroneously states that it deleted this quotation emphasizing the need to find answers to questions before allowing water withdrawals in its modified decision issued on November 20, 2006. CP at 520 (SJO at 17 n.9). However, this quotation appears in both the October 16 and November 20 decisions.

right permits, *Schuh*, 100 Wn.2d at 186, the case law is clear that there are bounds to Ecology's exercise of discretion in this context. Ecology can only issue a permit *after* making the four affirmative findings required by law. RCW 90.03.290; *Lummi Indian Nation*, 170 Wn.2d at 252-53; *Squaxin Island Tribe*, PCHB No. 05-137 (Modified Findings of Fact, Conclusions of Law & Order) at 42 (emphasis added) ("Each of the four parts is a separate determination that *must be met before* a new water right can issue."). Similarly, Ecology is obligated to reject an application if it cannot make any of the four mandatory determinations. *Stempel*, 82 Wn.2d at 115 (discussing the duty to reject an application if Ecology finds the appropriation to "be to the detriment of the public welfare . . . ."); *Hubbard*, 86 Wn.App. at 124 (emphasis added ("Ecology *must reject* an application and refuse to issue a permit if . . . withdrawal will detrimentally affect public welfare.").

iii. Adaptive Management Cannot Be Used To Defer the Four Mandatory Findings

The Board may not substitute the §401 Certification's adaptive management process for explicit, affirmative findings on the four tests. The requirement to protect aesthetic flows found in RCW 90.54.020(3)(a) applies to both water rights and water quality permits. *Stempel*, 82 Wn.2d at 117-119 (finding that RCW 90.54 applies in the water right context and that "the department is obligated . . . to consider the total environmental and ecological factors to the fullest in deciding major matters."). In law, however, water rights and §401 Certifications are distinct permits issued pursuant to different statutory authority and standards. These distinctions highlight the flaws in the Board's decision to base its public interest findings on the outcome of the §401 Certification adaptive management process.

A §401 Certification is authorized under the federal Clean Water Act, 33 U.S.C. § 1341, and state Water Pollution Control Act, RCW 90.48.260, and is issued pursuant to the legal

standard that there be "reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3); *Port of Seattle*, 151 Wn.2d at 571. Water rights, on the other hand, are issued under the Water Code. RCW 90.03. A §401 Certification necessarily expires with the project or the associated federal permit. In this case, the license for the Enloe project will expire in fifty years. CP at 332 (FERC License at 44). A water right is a real property-based usufruct that exists in perpetuity and potentially can be transferred to other users. *Theodoratus*, 135 Wn.2d at 593 ("A vested water right is perpetual, operating to the exclusion of subsequent claimants."). Therefore, this case presents the very real risk of having the water right conditioned on a §401 Certification that will go away.

The Board's legal error in hitching the water right to the 401 Certification wagon is made more apparent when comparing the different legal standards applicable to each permit. The "reasonable assurance" legal standard presents a lower bar than the standards for issuance of a water right. Reasonable assurance "[s]omething more than a probability; mere speculation is not sufficient." *Port of Seattle*, 151 Wn.2d at 571. Therefore, it makes sense that "reasonable assurance" can be achieved using an adaptive management processes that leave compliance to future actions, because compliance only requires that "something is reasonably certain to occur." *See, e.g., Id.* at 676.

Not so with water rights. The Board correctly analyzed the role of adaptive management in the water right process when it reviewed its prior decisions involving saltwater intrusion into groundwater. There, adaptive management conditions were added to water right permits to address potential problems that may occur in the future, not as a means to defer one of the four findings. As the Board noted, adaptive management may not substitute for the

mandatory four-part affirmative findings, and did not do so in those cases. CP at 518-19 (SJO at 15-16, n.7). Yet that is exactly what the Board ordered here.

The Board erred in approving the permit's reliance on a future study to answer questions that the statute requires be answered *before* the permit may issue. Whether there are flows that ensure no detriment to the public interest is currently unknown. What is known is that a study needs to be done in order to ascertain what, if any, flows would ensure that the project does not harm aesthetic and recreational values of the Similkameen River, and thereby operate in a way that is detrimental to the public interest. Given these undisputed facts, Ecology does not have the discretion to issue a permanent and perpetual water right relying upon the use of adaptive management. Rather, as discussed in Section C below, Ecology only has the discretion to deny the application or issue a preliminary water permit to preserve the PUD's interest in its application while the necessary investigations go forward. Because the Board erroneously concluded that Ecology has the discretion to issue a permanent new water right "when information is incomplete on an aspect of the four-part test," the Board's order is outside of statutory authority. CP at 522 (SJO at 19); RCW 34.05.570(3)(b).

B. The PCHB erred in finding that the ROE was valid even though it does not comply with Similkameen River minimum flow rule.

The Board erred in finding that the ROE did not violate the Similkameen River minimum flow requirements in WAC 173-549-020. The ROE, which authorizes a diversion of 600 cfs out of the river, has a priority date of June 8, 2010, several years later than the 1976 priority date of the instream flow rule. CP at 13 (ROE at 6). The Similkameen River instream flow is a form of water right that may not be impaired by later issued water rights, RCW

90.03.247,[11] and the Similkameen River rule specifically requires that the minimum flows will apply to later-issued consumptive water rights.[12] WAC 173-549-020(4), -027(2). Yet, the ROE does not condition the PUD's water right on the Similkameen River instream flows as required by law.

Instead, the Board authorized divergence from the instream flows on the theory that the PUD's water right qualified under an exemption to the automatic application of the rule's instream flows:

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

WAC 173-549-020(5); CP at 524-527 (SJO at 21-24).

Ecology contended, and the Board agreed, that the 10/30 cfs instream flow condition set forth in the ROE was "specifically tailored" to the particular project and stream reach impacted by Enloe Dam. *Id.* The Board found that "Ecology acted consistent with its authority and discretion under WAC 173-549-020 to apply the 10/30 flows as site-specific flows to the

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[11] *See Swinomish Indian Tribal Cmty v. WA Dept. of Ecology*, 178 Wn.2d 571, 593, 311 P.3d 6 (2013) ("[A] minimum flow or level cannot impair existing water rights and a later application for a water permit cannot be approved if the water right sought would impair the minimum flow or level."); *Hubbard*, 86 Wash. App. at 125 ("the minimum instream flow established in 1976 for the Okanogan River, WAC 173-549-020(2), has priority over subsequent water rights appropriators . . . ."); *Id*. ("[A]ny permit for beneficial use of surface waters must be conditioned to protect the minimum levels established by code for each river basin.").

[12] The "legislative intent" of Washington's instream flow program is described in *Swinomish,* where the Court recognized that "the Water Resources Act of 1971, discussed below, explicitly contemplates the value of instream resources for future populations: 'Adequate water supplies are essential to meet the needs of the state's growing population and economy. At the same time *instream resources and values must be preserved and protected so that future generations can continue to enjoy them.*'" 178 Wn.2d at 587 (citing RCW 90.54.010(1)(a)).

Enloe Dam Project . . . ." CP at 524 (SJO at 21). However, the Board's ruling on this point is consistent neither with its prior 401 Certification decision, nor with governing law, for three reasons.

First, the exception in subsection (5) should have been, but was not, narrowly construed. As a general rule, "exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions." *R.D. Merrill Co.*, 137 Wn.2d at 140; *Swinomish Indian Tribal Comm'y,* 178 Wn.2d at 582-85. In *R.D. Merrill,* the Court applied the "narrow construction" standard to interpret exceptions to the general "use it or lose it" rule for Washington water rights. In *Swinomish*, the Court utilized this standard to evaluate the Skagit River instream flow rule, finding that a statutory exemption to instream flows (known as the "overriding considerations of the public interest" or OCPI exception), must be narrowly construed as a basis for creating out-of-stream reserves. 178 Wn.2d at 588.

Here, the applicable general rule is that "[w]henever an application for a permit to make beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit *shall* be conditioned to protect the levels or flows." RCW 90.03.247 (emphasis added). This general rule is also codified in two separate subsections of the Similkameen instream flow rule. *See* WAC 173-549-020(4) ("Future consumptive water right permits hereafter issued for diversion of surface water from the . . . Similkameen River shall be expressly subject to minimum instream flows established in WAC 173-549-020 (1) through (3) . . . .") and 173-549-027(2) ("All future permits to appropriate water from . . . the Similkameen River . . . shall be subject to the required flows at all downstream control stations as established in WAC 173-549-020.").

As an exception to the state and local instream flow program codified by statute, subsection (5) must be narrowly construed because it operates to alter the priority-protected rule-based instream flows for projects such as Enloe Dam. *Swinomish Indian Tribal Comm'y*, 178 Wn.2d at 588. This exemption from fulfilling the public and state interest in the instream values of the Similkameen River provides an extraordinary benefit for water users such as Okanogan PUD, and the terms of the exception must be strictly followed.

The Board did not consider or even acknowledge the "narrow construction" standard. Rather, the Board misconstrued Appellants' arguments regarding *Swinomish,*[13] finding that case applied only to rule amendments adopted under the OCPI exception. CP at 526-27 (SJO at 23-24). In so ruling, the Board committed legal error in neglecting to narrowly construe the exemption and instead ruling that Ecology had unfettered discretion to rely on a future site-specific study to deviate from the rule's mandatory minimum flow regime. CP at 527 (SJO at 24).

Second, the Board ruled in the appeal of the §401 Certification issued for the Enloe Dam Project that the 10/30 cfs flow regime was not supported by sufficient evidence or adequate analysis to confirm that it protected aesthetic values at Similkameen Falls, as the state water code requires. Nonetheless, the ROE (issued two weeks *after* the Board's §401 Certification order) explicitly referenced the §401 Water Quality Certification as the sole basis for the 10/30 cfs flows. This is confirmed in Ecology's response to a comment posed by CELP, where the ROE quoted the language of WAC 173-549-020(5) and then stated:

> Ecology worked with the WDFW to establish project specific minimum instream flows for the bypass reach which are a condition of the

[13] See CP at 256-58 (Apps' Cross Motion for Summary Judgment and Combined Memorandum in Support of Summary Judgment and in Response to Respondents' Motion for Summary Judgment, at 26-28).

> operation of this project, through the 401 Water Quality Certification such that the project will be required to maintain specified flows in the bypass reach throughout the year.
> . . .
> The question then becomes whether the diversion of water under this water right would impair instream values in the by-pass reach. This determination is being made as part of the 401 Water Quality Certification process and this application, if approved, will result in a permit that is conditioned upon satisfaction of the minimum instream flow requirements of the 401 Certification.

CP at 24-25 (ROE at 17-18). Thus, it is clear that the 10/30 cfs flow condition in the ROE has no scientific or analytical basis independent of the §401 Water Quality Certification, and is premised on the same agency analysis rejected as insufficient by the Board in the §401 Certification Decision. Nonetheless, the Board held that Ecology had authority "to apply the 10/30 flows as site-specific flows to the Enloe Dam Project." CP at 527 (SJO at 24). The Board's decision contains no analysis whatsoever to explain how the 10/30 cfs flows, which it had previously held to lack scientific foundation, could function as a "specifically tailored" flow that justifies departure from the instream flow rule.

Third, the yet-to-be-completed aesthetic flow study ordered by the Board does not satisfy the requirements of the exception that requires "specifically tailored" flows to substitute for the rule-based instream flows. Ecology's authority to create a site-specific flow as an alternative to a rule-based flow is not unlimited. The rule calls for Ecology to "specifically tailor" an alternative flow, which implies that there must be some basis to justify the alternative flow.[14]

[14] Webster's Third New International Dictionary (1986) defines the verb "tailor" to mean "to make or adapt to suit a special need or purpose." *See WA State Coal. for the Homeless*, 133 Wn.2d at 905 ("In the absence of a specific statutory definition, words used in a statute are given their ordinary meaning.").

Moreover, the exception cannot be read in isolation. It is a basic tenet of statutory construction that courts do not read a statute, or defer to an agency's reading of a statute, in a way that renders other provisions meaningless or superfluous. *Stone v. Chelan Cnty. Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988). Reducing the rule-based instream flow from between 400 and 3400 cfs to 30 or 10 cfs, *i.e.*, a 90-99% reduction in instream flows, is a radical reduction in the regulatory instream flow regime—to the point of virtually eliminating flows. The purpose of this instream flow regime is to retain "base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." WAC 173-549-015 (quoting RCW 90.54.020(3)(a)). The rule contemplates accommodation of both instream and out-of-stream uses. *Id.* But Ecology's exclusive reliance on flows that have been deemed in need of further study by the Board was not a "specific tailoring" to the project and stream reach. The rule explicitly contemplates a situation in which "studies are required to determine such reach- and project-specific flow requirements" and Ecology does not have the discretion to ignore this language in light of the Board's prior ruling that a study *is* required in order "to determine such reach- and project-specific flow requirements." WAC 173-549-020(5).

By deviating from the minimum instream flows set by administrative rule without the study the Board held was legally required, Ecology has effectively prioritized hydroelectric development over instream flows, a result that is impermissible. In *Swinomish Indian Tribal Community*, the Washington Supreme Court stressed that the legislature has "continued to recognize that retention of waters instream is as much a core principle of state water use as the other goals, including economic well-being." 178 Wn.2d at 594. For these reasons, the Board erred in holding that the PUD's water right qualified under the exception to the instream flow

regulation. Further, the Board's order was arbitrary and capricious in that it lacked any reasoning to explain the use of a scientifically unsupported instream flow condition.

C. The PCHB erred in interpreting the applicability of the preliminary permit statute.

The Water Code explicitly contemplates and provides a solution for the very situation in which the Okanogan PUD finds itself. When a water right application does not provide sufficient information to allow affirmative findings on the four tests, Ecology "may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary." RCW 90.03.290(2)(a); *Postema*, 142 Wn.2d at 110-122 (discussing use of preliminary permits when information was insufficient to determine impacts of proposed water rights on instream flows); *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137 (Modified Findings of Fact, Conclusions of Law & Order) (Nov. 20, 2006) at 2-3 ("The Board's conclusion that [two of the four tests are not met] does not preclude Ecology from issuing a preliminary permit to allow Miller to further assess the actual affect [sic] of groundwater withdrawals on the Woodland Creek basin.").

It is undisputed that Ecology was without information to determine that the ROE would not be detrimental to public interests because it is unknown whether the 10/30 cfs flow will protect aesthetic values of the Similkameen River or whether there is an instream flow that will comply with water quality standards. As such, Ecology's discretion was limited by statute and precedent to either deny the permit because it could not make the affirmative four findings (RCW 90.03.290), issue a preliminary permit (RCW 90.03.290(2)(a), or defer processing the application (*Squaxin Island Tribe*). The Board's fundamental legal error was its conclusion that,

in the face of uncertainty about whether a water right application meets the four tests, Ecology may go ahead and issue a water right. CP at 522 (SJO at 19) ("[t]he decision whether to issue a preliminary permit in lieu of a permanent new water right, when information is incomplete on an aspect of a four-part test, is still a choice that remains within Ecology's discretion."). Appellants do not contend that Ecology is mandated to use its preliminary permit authority. The choice to issue a preliminary permit is, by the terms of the statute, a discretionary one.[15] However, when the information to make an affirmative finding on one of the four tests is lacking, a preliminary permit, or application deferral, is the only mechanism for the permit application to move forward. *Postema*, 142 Wn.2d at 101, 107.

V. CONCLUSION & REQUEST FOR RELIEF

For the reasons set forth herein, the Petitioners respectfully request that the Court vacate and set aside the Board's Order on Motions for Summary Judgment and remand the matter for further proceedings consistent with all applicable law. In addition, Petitioners respectfully request that the Court grant such other relief as this Court deems appropriate. RCW 34.05.574. Finally, Petitioners request that fees and costs be awarded pursuant to RCW 4.84.350 and other applicable law.

Respectfully submitted this 16th day of January, 2015.

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[15] *State ex rel. Beck v. Carter*, 2 Wn.App. 974, 977, 471 P.2d 127 (1970) ("The general rule of statutory construction has long been that the word 'may' when used in a statute or ordinance is permissive and operates to confer discretion.").

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2015 I served one true and correct copy of the foregoing Petitioners' Opening Brief on the following individuals via e-mail service:

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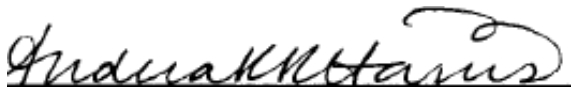

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