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2 EXPEDITE
3 No Hearing set
4 Hearing is set
5 Date: April 3, 2015
6 Time: 1:30 p.m.
7 Judge: Honorable Gary R. Tabor

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

11 CENTER FOR ENVIRONMENTAL
12 LAW & POLICY, AMERICAN
13 WHITEWATER, and NORTH
14 CASCADES CONSERVATION
15 COUNCIL,

16 Petitioners,

17 v.

18 WASHINGTON DEPARTMENT OF
19 ECOLOGY, PUBLIC UTILITY
20 DISTRICT NO. 1 OF OKANOGAN
21 COUNTY, WASHINGTON, and
22 WASHINGTON STATE POLLUTION
23 CONTROL HEARINGS BOARD,

24 Respondents.

No. 14-2-01438-1

PETITIONERS' REPLY BRIEF

TABLE OF AUTHORITIES

Cases

Hillis v. Dep't of Ecology, 131 Wn.2d 373, 932 P.2d 139 (1997) 9, 10

Hubbard v. Dep't of Ecology, 86 Wn.App. 119, 936 P.2d 27 (1997) 10

Lummi Indian Nation v. State of Washington, 170 Wn.2d 247,
241 P.3d 1220 (2011) 9

Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68,
11 P.3d 726 (2000) 9, 14

Stempel v. Dep't of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973) 10

Swinomish Indian Tribal Cmty. v. WA Dep't of Ecology, 178 Wn.2d 571,
311 P.3d 6 (2013) 7, 12, 13

WA Dept. of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998) 9, 10

Administrative Decisions

Bucklin Hill Neighborhood Ass'n v. Dep't of Ecology & Island Util. Co.,
PCHB No. 88-177 (Final Findings of Fact, Conclusions of Law and Order)
(June 10, 1989) 9, 11

Concerned Morningside Citizens v. Ecology et al., PCHB No. 03-016
(Order Granting Summary Judgment) (October 31, 2003) 11

Ctr. for Env'tl. 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) 7, 8, 10, 11, 12

Porter v. Dep't of Ecology, PCHB No. 95-044 (Final Findings of Fact,
Conclusions of Law and Order) (March 19, 1996) 10

Squaxin Island Tribe v. Ecology, PCHB No. 05-137 (Modified Findings of Fact,
Conclusions of Law & Order) (Nov. 20, 2006) 12, 14

State Statutes

RCW 4.84.350 15

RCW 34.05.574 9, 15

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1 **I. INTRODUCTION**

2 The Center for Environmental Law & Policy, American Whitewater and North
3 Cascades Conservation Council (collectively “Petitioners”) hereby submit their reply brief in
4 their appeal of the following decision of the Pollution Control Hearings Board (“PCHB” or
5 “Board”): *Center for Environmental Law & Policy et al. v. Ecology et al.*, PCHB No. 13-117
6 (Order on Motions for Summary Judgment “SJO”) (June 24, 2014), Clerk’s Papers (“CP”) at
7 504-529. In their respective response briefs, the Washington Department of Ecology
8 (“Ecology”) and PUD No. 1 of Okanogan County (“PUD”) (collectively “Respondents”)
9 misrepresent many of Petitioners’ arguments and distort long-standing principles of Washington
10 water law. This case centers on Ecology’s responsibility to deny, or defer consideration of, a
11 permanent water right when the agency does not have the factual information needed to
12 determine the impact of the Project on the public interest.
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15 The provisions of the water code, specifically RCW 90.03.290, are clear that the four
16 affirmative, mandatory findings that Ecology must make prior to issuance of a water right be
17 based on actual, not hypothetical, information. When information is lacking, as it undeniably is
18 here, Washington law gives Ecology the discretion to deny or defer the water right application,
19 or issue a preliminary water right. As the PUD acknowledges, “the exact aesthetic effect [of the
20 Project] may not be known” and thus it is premature for Ecology to issue a Report of
21 Examination (“ROE”) to the PUD. PUD’s Resp. Br. at 17. The waters of this state belong to
22 the public and Ecology must adhere strictly to the parameters the legislature developed to
23 ensure that water is not appropriated in a haphazard fashion that is detrimental to the public
24 interest. RCW 90.03.010 (“Subject to existing rights all waters within the state belong to the
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1 public, and any right thereto, or to the use thereof, shall be hereafter acquired only by
2 appropriation for a beneficial use and in the manner provided and not otherwise . . .”).

3 **II. ARGUMENT**

4 **A. There Is No Legal or Factual Basis For Ecology’s Public Interest**
5 **Finding.**

6 The PUD misrepresents Petitioners’ argument that Ecology failed to make an adequate
7 public interest determination. Petitioners do not claim Ecology made no public interest finding
8 whatsoever. PUD Resp. Br. at 8. Rather, Petitioners recognize that Ecology made a finding that
9 issuance of the water right would not be detrimental to the public interest. Pet.’s Op. Br. at 14.
10 However, simply stating that this is so does not constitute compliance with Ecology’s obligations
11 under RCW 90.03.290. The legal error in this case is the Board’s holding that Ecology has
12 discretion to issue a water right when the agency “still needs additional information to make a
13 public interest determination in relation to the PUD water right.” CP at 519 (SJO at 16). As
14 discussed below and in Petitioners’ Opening Brief, there is no legal or factual basis for the public
15 interest finding, because the requisite aesthetic flow study is yet to be done. Therefore, Ecology
16 has no legitimate basis for finding that there is no detriment to the public interest.
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19 **i. The Board’s Public Interest Finding Is Invalid Because It Is Based Upon**
20 **Incomplete Information About Aesthetic Flows.**

21 Respondents do not dispute, nor can they, that it is unknown whether there is a flow
22 that appropriately balances the aesthetic, recreation and fisheries flow requirements that must be
23 protected under state water quality laws and evaluated under RCW 90.03.290. *See, e.g.*, CP at
24 519, 512 (SJO at 16, 20) (“Higher flows for aesthetic purposes may conflict with flows necessary
25 to protect the fishery resource in the Similkameen River.”). It is conceivable that, when aesthetic
26 flows are finally studied, Ecology may find that there is no instream flow that can satisfy all

1 requirements, and that operation of the project would violate Clean Water Act requirements. Or,
2 the aesthetic flow study could result in a flow that is so high it renders the project uneconomic
3 and thus unacceptable to the PUD. Or, the instream flow that is acceptable for fish may be
4 detrimental to aesthetic and recreational values. Petitioners agree with the PUD that aesthetic
5 values are only one part of the public interest determination and are not asking the Court to hold
6 otherwise. PUD Resp. Br. at 2. However, aesthetics are a part of the equation and must be
7 assessed as part of the public interest determination. The Water Resources Act requires that
8 rivers flows be maintained to protect both fish and aesthetic values. RCW 90.54.020(3)(a);
9 *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 594-95, 311 P.3d 6 (2013).¹
10 Ecology is not empowered to waive one use in favor of another, which is what the agency did
11 here by assuming aesthetic values would be protected even though the Board previously held
12 there is no basis for making such an assumption.
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15 Respondents claim that Ecology's public interest finding "balanced all relevant
16 factors," including hydropower production, fish protection and the aesthetic effects of reduced
17 flows. PUD's Resp. Br. at 1; Ecy's Resp. Br. at 4. Respondents continue to ignore the fact that
18 there has been no valid assessment of how aesthetics will be impacted by operation of the Project
19 because the data simply does not exist. *Ctr. for Env'tl. Law & Policy et al. v. Ecology et al.*,
20 PCHB No. 12-082 (Findings of Fact, Conclusions of Law and Final Order (As Amended Upon
21 Reconsideration) (Aug. 30, 2013) ("401 Certification Decision") at 16 ("there is no credible
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24 ¹ "The [Water Resources Act] statement of purpose recognizes utilization of state water resources for 'promotion
25 of public health and the economic well-being of the state and the preservation of its natural resources and
26 aesthetic values.' RCW 90.54.010(1)(a). This broad statement of overall goals—the public health, the state's
economic well-being, and *preservation of natural resources and aesthetic values*—shows the legislature
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." *Id.* (emphasis in original).

1 evidence how the 10/30 flow regime will appear aesthetically through the bypass reach.”).
2 Indeed, the Board’s 401 Certification decision specifically held that “the evidence shows that the
3 10/30 cfs flows over the Falls with no flow over the Dam was initially selected as a minimum
4 flow *without first completing an analysis of whether the flows met the water quality standards*
5 *for the aquatic and aesthetics designated uses.” Id. at 26 (emphasis added).*
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7 The situation is different for other components of the public interest test such as
8 aquatic resources and the value of the hydroelectric power production. Ecology, in consultation
9 with the Department of Fish and Wildlife, gathered factual evidence and concluded that the
10 10/30 cfs flows would protect aquatic resources to the Board’s satisfaction. *Id.* Similarly, in the
11 401 Certification process, “Ecology considered the economics of the Project and concluded that
12 at an instream flow of 100 cfs or more the Project would be economically challenged,” and went
13 on to conclude that 10/30 flows would be economically acceptable to the PUD.² *Id. at 27.*
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15 But no similar analysis was ever conducted for aesthetics. According to the Board,
16 “any analysis of minimum flows for aesthetics was already defined and limited by the 10/30 cfs
17 flow regime established for aquatic resources and *failed to consider Project impacts on*
18 *aesthetics of the river flows based on existing conditions.” Id. at 26 (emphasis added).* The
19 Board made it clear that a proper balance of potentially competing instream values (which is
20 necessary when making a public interest determination) cannot be achieved until all of the data is
21 collected: “The aesthetic flows must be determined independently of the operation of the Project,
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23 ² While not at issue in this case, Petitioners note that Ecology admits that its “economic analysis” is based upon
24 one email from a PUD staff member to Ecology saying that “[i]n the judgment of the District, the projected
25 economic and social benefits for the Project would be greater than the cost of the Project.” CP 245 (Appellants’
26 Memorandum in Support of Cross-Motion for Summary Judgment & Response to Respondents’ Motion for
Summary Judgment) at 14 n.5. Ecology concluded that “[b]ased on this response [the email], there appears to be
no reason to suspect that this project is not economically feasible.” *Id.* Ecology further admits that it “did not
prepare any further studies or documents analyzing the economic[] feasibility of the Project.” *Id.*

1 and thereafter integrated, as Ecology’s Guidance provides, with needs for fish and other values.”
2 *Id.* at 27. Therefore, it is disingenuous as best to say that Ecology’s public interest determination
3 appropriately “balanced all relevant factors.” PUD’s Resp. Br. at 1.

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5 **ii. Ecology Does Not Have Discretion To Issue A Water Right When
Information Is Lacking To Make A Public Interest Determination.**

6 The PUD argues that Ecology has unfettered discretion to issue the ROE, even in the
7 face of incomplete information. However, the PUD recognizes, as it must, that the agency must
8 exercise its discretion “in accordance with law.” PUD’s Resp. Br. at 13 (quoting RCW
9 34.05.574(1); *Ecology v. Theodoratus*, 135 Wn.2d 582, 597, 957 P.2d 1241 (1998). Neither the
10 Board nor Ecology have the discretion to approve a water right when additional information is
11 needed to make one of the mandatory affirmative findings on the four-part test. While Ecology
12 has discretion to impose conditions on the future use of a water right *after* it concludes that each
13 of the four prongs of the test to appropriate has been fully met, *Bucklin Hill Neighborhood Ass’n*
14 *v. Dep’t of Ecology & Island Util. Co*, PCHB No. 88-177 (Final Findings of Fact, Conclusions of
15 Law and Order) (June 10, 1989) at 18, Ecology does not have the discretion to approve an ROE
16 in the face of missing information that is essential to satisfying the public interest component of
17 the four-part test in the first place. *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 384, 932 P.2d 139
18 (1997).

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21 Ecology contends that it “conditioned the water right to protect the public interest *in*
22 *the future* by meeting any flow conditions that are established as a result of the aesthetic flow
23 study process.” Ecy’s Resp. Br. at 7 (emphasis added). Herein lies the problem. Ecology’s
24 legal obligation is to make the four affirmative findings *before* it authorizes a water right; not
25 after-the-fact. RCW 90.03.290; *Lummi Indian Nation v. State of Washington*, 170 Wn.2d 247,
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1 252-53, 241 P.3d 1220 (2011); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 101,
2 107, 114, 11 P.3d 726 (2000); *Theodoratus*, 135 Wn.2d at 590-91; *Hillis*, 131 Wn.2d at 384, 932;
3 *Stempel v. Dep't of Water Resources*, 82 Wn.2d 109, 115, 508 P.2d 166 (1973); *Hubbard v.*
4 *Dep't of Ecology*, 86 Wn.App. 119, 124, 936 P.2d 27 (1997). Petitioners do not question
5 Ecology's authority to condition water rights, *Theodoratus*, 135 Wn.2d at 597, but a permit
6 condition cannot be used as a means to demonstrate that issuance of the water right will not be
7 detrimental to the public interest in the first place, when there is no information supporting that
8 finding at the time the ROE is issued.

10 Respondents can point to no legal authority justifying the notion that an after-the-fact
11 permit condition can serve as the basis for the public interest determination. The case cited by
12 Ecology, *Porter v. Dep't of Ecology*, PCHB No. 95-044 (Final Findings of Fact, Conclusions of
13 Law and Order) (March 19, 1996), actually supports Petitioners' position. In *Porter*, a
14 significant amount of data was collected to undergird Ecology's finding that the proposed
15 groundwater withdrawal would not cause seawater intrusion leading to the impairment of
16 neighboring wells, and thus detrimental to the public interest. *Id.* at 5, 8 (emphasis added) ("*the*
17 *data proves* that the Wrights' well does not increase the risk of seawater intrusion – even during
18 the summer – so that the application does not impair existing rights or run afoul of the public
19 interest."). Therefore, unlike the situation here, where the Board has already held that there is a
20 "lack of evidence regarding how the 10/30 flow would appear aesthetically,"³ in *Porter*, the data
21 was collected in advance to support Ecology's public interest determination. *Id.* at 7
22 ("Moreover, while DOE initially lacked any information on seasonal fluctuations of chloride
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26 ³ 401 Certification Decision at 28.

1 levels in the Wrights' well, the Wrights cured that deficiency [before issuance of the ROE] by
2 submitting chloride readings.”).

3 The other case cited by Ecology, *Bucklin Hill Neighborhood Ass'n v. Ecology et al.*,
4 PCHB No. 88-177 (June 10, 1989) (Final Findings of Fact, Conclusions of law and Order),
5 similarly supports Petitioners' arguments. In *Bucklin Hill*, Ecology undertook an investigation of
6 a proposed groundwater withdrawal that was “unusually thorough,” and included the collection
7 of data from existing well logs, groundwater data, logs and pump test reports prepared for the
8 proposed wells, and water use data. *Id.* at 20, 6-7. Ecology required numerous permit conditions
9 but, contrary to Ecology's reading, the permit conditions were not the basis for the Board's
10 holding that the public interest test was satisfied. *Id.* at 11; Ecy's Resp. Br. at 7. Instead, “the
11 monitoring conditions of the permit provide a mechanism for detection and correction.” *Id.* at 19.
12 Ecology's public interest finding was deemed adequate because “[p]resently available data does
13 not indicate a problem with sea water intrusion on Bainbridge Island” and no “data developed to
14 date demonstrate a likelihood that the [] groundwater development, as approved, will induce sea
15 water intrusion.” *Id.* Here, on the other hand, there is no data as to how the Project will affect
16 aesthetic flows, other than the fact that it will reduce existing flows by 90-99%, to serve as a
17 basis for Ecology's public interest determination.⁴

18 Ecology explicitly contradicts the Board's findings in the 401 Certification Decision
19 that the 10/30 flows are unsupported when it claims that “[t]he process to date has provided
20 ample assurance that the [10/30] flows will be protective.” Ecy's Resp. Br. at 11. But that is
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25 ⁴ The PUD also cites *Concerned Morningside Citizens v. Ecology, et al.*, PCHB No. 03-016 (Order Granting
26 Summary Judgment) (Oct. 31, 2003), in support of its argument. This case is irrelevant to the issues raised herein,
and merely stands for the unremarkable, and undisputed, proposition that there are multiple factors that must be
analyzed as part of Ecology's public interest determination.

1 not what the Board held. 401 Certification Decision at 16 (“there is no credible evidence how
2 the 10/30 flow regime will appear aesthetically through the bypass reach.”); *Id.* at 28 (“There is
3 little, if any, evidence of flows above the 10/30 flow regime that, as Ecology’s Guidance
4 provides, will optimize both designated uses [i.e. aesthetics and fisheries].”). In fact, evidence
5 presented to the Board showed “that the flows over the Dam would likely have aesthetic value,
6 and the 10/30 flow regime would most likely not be considered adequate as an aesthetic flow if
7 a separate and independent aesthetic study or analysis was completed.”⁵ *Id.* at 29-30. The
8 PUD attempts, unsuccessfully, to distinguish *Squaxin Island Tribe v. Ecology*, PCHB No. 05-
9 137 (Modified Findings of Fact, Conclusions of Law & Order) (Nov. 20, 2006), on the grounds
10 that in that case there was information showing that the proposed groundwater withdrawals
11 would “likely lower the stream flow,” thereby causing a detriment to the public interest.
12 PUD’s Resp. Br. at 16. But that is no different than the situation here where it is unknown that
13 the project will affect (in a potentially detrimental manner) one part of the public interest.⁶

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16 **B. The Similkameen Rule “Hydropower Bypass” Exception Requires A**
17 **Scientific Basis to Deviate from Established Instream Flows.**

18 Ecology misstates Petitioners’ argument regarding application of the “hydropower
19 bypass” exception in the Okanogan River rule. WAC 173-549-020(5). Petitioners do not ask
20 the Court to read the exception into superfluity. Ecy’s Resp. Br. at 10-12. However, exceptions
21 to the Similkameen River instream flows, just as the OCPI reserves in the Skagit River rule at
22 issue in *Swinomish Indian Tribal Community*, must still satisfy the statutory mandate that
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24 ⁵ Other evidence showed that “the 10/30 flows would be aesthetically pleasing, but there is very limited evidence
to support this opinion.” *Id.* at 30.

25 ⁶ Respondents misrepresent Petitioners arguments by claiming that Petitioners demand that numeric aesthetic
flows must always be determined before an ROE is approved. PUD’s Resp. Br. at 10; Ecy’s Resp. Br. at 9.
26 Petitioners have never made this argument. The point is not that specific aesthetic flows be calculated, but that
Ecology investigate aesthetic impacts so that there is a rational basis for Ecology’s public interest determination.

1 “[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide
2 for preservation of . . . aesthetic . . . values.” RCW 90.54.020(3)(a). Ecology may have
3 discretion to vary the flows, but it does not have the authority to waive the statutory standards
4 protecting instream values altogether. Indeed, RCW 90.54.020(3)(a) specifies that the only way
5 Ecology can waive the Okanogan rule instream flows is by invoking the “overriding
6 considerations of the public interest” exception. *Swinomish Indian Tribal Cmty.*, 178 Wn.2d at
7 593-97 (describing evolution of state instream flow laws and their relationship to out-of-stream
8 water rights). Ecology has not explicitly done so here. Ecology is wrong to suggest that it may
9 issue a water right that will impair the established Similkameen River instream flow simply
10 because the “hydropower bypass” exception was adopted contemporaneously with the instream
11 flow rule. Ecy Br. at 12.

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14 In 1976, Ecology determined that the Similkameen River requires between 400 and
15 3,400 cfs (depending on season) to satisfy the statutory standards protecting instream values.
16 Ecology could not, in 2013, invoke the rule-based exception to reduce those flows to 10 and 30
17 cfs without first ensuring that such flows still retain the instream values set forth in RCW 90.54.
18 As discussed in Petitioners’ opening brief and above, Ecology and the PUD have not done their
19 homework. The Board has held that the 10/30 cfs regime is not supported by science or any
20 study at all with respect to their propriety to protect aesthetic values. Until such time as Ecology
21 and the PUD undertake appropriate scientific studies that demonstrate that instream values, i.e.,
22 aesthetic use of the river, are not impaired, Ecology may not implement the Okanogan instream
23 flow rule exception to reduce Similkameen River instream flows.
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1 **D. Petitioners Are Not Attempting To Re-litigate The 401 Certification.**

2 In an attempt to concoct a “collateral estoppel argument,” Respondents assert that
3 Petitioners seek to “re-litigate” the quantity of instream flows that are appropriate in the bypass
4 reach for the Enloe Hydroelectric Project. That is not the issue raised in this appeal. Petitioners
5 do not seek additional aesthetic analyses or challenge the sufficiency of the aesthetic flow-
6 monitoring program required in the PCHB’s 401 Certification decision. It is preposterous for the
7 PUD to claim “Petitioners are litigating the same finding and the same legal standard that was
8 resolved in the 401 Appeal.” The cases involved appeals of different final agency decisions,
9 under different standards of review, and for vastly different legal reasons. The PUD takes one
10 sentence from Petitioners’ Petition for Reconsideration filed in the 401 Certification appeal
11 completely out of context. Petitioners have not “change[d] their position on the 401
12 Certification.” PUD’s Resp. Br. at 18. Indeed, Petitioners are litigating this appeal to uphold,
13 not undercut, the PCHB’s ruling in the 401 Certification Decision that a flow study is required in
14 order to ascertain the aesthetic impacts of the Project.
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17 **C. Ecology’s Discretion is Limited to Issuing a Preliminary Permit, Denial or**
18 **Deferral.**

19 In its response brief, Ecology does not address the merits of Petitioners’ arguments
20 that, when a water right application does not provide sufficient information to allow affirmative
21 findings on the four tests, Ecology can only deny or defer the application, or issue a preliminary
22 permit. RCW 90.03.290(2)(a); *Postema*, 142 Wn.2d at 110-122; *Squaxin Island Tribe*, PCHB
23 No. 05-137 at 2-3. Petitioners do not dispute that issuance of a preliminary permit is within
24 Ecology’s discretion. However, under the circumstances of this case, issuance of a preliminary
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1 permit was the only option available to Ecology, other than denial or deferral of the permit
2 application.

3 **III. CONCLUSION & REQUEST FOR RELIEF**

4 Petitioners respectfully request that the Court: vacate and set aside the Board's Order
5 and remand the matter for further proceedings consistent with all applicable law, grant such
6 other relief as this Court deems appropriate, RCW 34.05.574, and that fees and costs be
7 awarded pursuant to RCW 4.84.350 and other applicable law.
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9 Respectfully submitted this 27th day of February, 2015.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 27th day of February, 2015 I served one true and correct
3 copy of the foregoing Petitioners' Reply Brief on the following individuals via e-mail service:
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