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**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,

Petitioner,

v.

WASHINGTON DEPARTMENT OF
ECOLOGY, PUBLIC UTILITY
DISTRICT NO. 1 OF OKANOGAN
COUNTY, WASHINGTON,
WASHINGTON STATE POLLUTION
CONTROL HEARINGS BOARD,

Respondents.

No. _____

PETITION FOR REVIEW

Pursuant to RCW 34.05, the Washington Administrative Procedures Act,
the Center for Environmental Law & Policy, American Whitewater and North
Cascades Conservation Council (collectively "Petitioners") hereby petition this Court
for judicial review of the following decision of the Pollution Control Hearings Board
("PCHB"), Case No. 13-117: *Center for Environmental Law & Policy et al. v. Ecology
et al.*, PCHB No. 13-117 (Order on Motions for Summary Judgment) (June 24, 2014).

1
2 **I. PARTIES**

3 Petitioners: Center for Environmental Law and Policy, 911 Western Ave., Suite
4 305, Seattle, WA 98104; American Whitewater 3537 NE 87th Street, Seattle, WA
5 98115; North Cascades Conservation Council, P.O. Box 95980, Seattle, WA
6 98145-2980.

7
8 Petitioners' Attorneys: Andrea Rodgers Harris, Law Offices of Andrea K. Rodgers
9 Harris, 3026 NW Esplanade, Seattle, WA 98117; Rachael Paschal Osborn, P.O.
10 Box 9743, Spokane, WA 99209.

11 Action Agency: Pollution Control Hearings Board, Environmental and Land Use
12 Hearings Office, P.O. Box 40903, Olympia, WA 98504-0903.

13 Parties in PCHB Proceeding:

14
15 Center for Environmental Law & Policy, 911 Western Ave., Seattle, WA
16 98104

17 American Whitewater, 3537 NE 87th Street, Seattle, WA 98115
18 Columbia River BioRegional Education Project, 2055 Chesaw Road,
19 Oroville, WA 98844

20 North Cascades Conservation Council, P.O. Box 95980, Seattle, WA
21 98145-2980

22
23 WA Department of Ecology, Attn: Appeals Processing Desk, P.O. Box
24 47608, Olympia, WA 98504-7608

25 Public Utility District Number 1 of Okanogan County, P.O. Box 912,
26 Okanogan, WA 98840

1 **II. AGENCY ACTION AT ISSUE**

2 *Center for Environmental Law & Policy et al. v. Ecology et al.*, PCHB No.

3 13-117 (Order on Motions for Summary Judgment) (June 24, 2014) (Exhibit A).

4 **III. FACTS SUPPORTING JUDICIAL REVIEW**

5 **A. The Similkameen River and the PUD’s Water Right Application**

6 The Similkameen River runs about 122 miles from its headwaters in British Columbia
7 to the Okanogan River, near Oroville, Washington. In 1904, the 315 foot-long concrete Enloe
8 Dam (“Dam”) was constructed on the Similkameen River at river mile 8.8, three and half miles
9 east of Oroville. The PUD has owned Enloe Dam since 1945, but ceased generating power
10 from it in 1958.

11 Just 350 feet downstream of Enloe Dam are twenty-foot high natural waterfalls known
12 as Similkameen Falls. Since 1958, the Similkameen River has flowed naturally over
13 Similkameen Falls (“Falls”), creating an aesthetic waterfall feature. Natural flows over
14 Similkameen Falls typically range from about 500 to 7,000 cubic feet per second (“cfs”),
15 varying seasonally. Snowmelt-fed typical median flows in May and June exceed 6,000 cfs but
16 diminish during the dry season. Typical dry season median flows range from 514 in August to
17 764 cfs in September.

18 The PUD currently seeks to generate hydroelectric power from the Dam by diverting
19 up to 1,600 cfs from the Similkameen River at the site of the Dam (adding new crest gates to
20 raise the pool an additional five feet), passing it through a new 9 Megawatt powerhouse, and
21 discharging it below Similkameen Falls (“Enloe Hydroelectric Project,” or “Project”). The
22 Project will dewater a portion of the river and create a “bypass reach” that includes
23 Similkameen Falls. To compensate, the PUD “intends to provide a means of releasing water at
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1 the base of the dam to provide flows in the bypass reach as required by the 401 Water Quality
2 Certification.” The amount of water to be released in the bypass reach is the source of
3 controversy for this appeal, as well as an earlier 401 Certification appeal that bears on this
4 case. The Federal Energy Regulatory Commission (“FERC”) granted the PUD a final license
5 for the project, FERC No. 12569, on July 9, 2013.

6
7 Pursuant to the Water Resources Act of 1971, Ch. 90.54 RCW, and the Minimum
8 Water Flows and Levels Act of 1969, Ch. 90.22 RCW, Ecology adopted a minimum flow rule
9 for the Similkameen River in 1976. WAC 173-549-020(2). The minimum flow set for the
10 River varies seasonally. The minimum flow is 400 cfs in January-February; 425-450 cfs in
11 March; 510-640 cfs in April; 1100-3400 cfs in May and June; 1900-1070 cfs in July; 690-440
12 cfs in July; 400 cfs in September; 450-500 cfs in October; and 500-450 cfs in November-
13 December. WAC 173-549-020(2). These flows function as a water right for the river, and
14 prevent diversions from the river when flows are not actually achieved. RCW 90.03.247,
15 90.03.345.

16
17 On June 8, 2010, the PUD submitted four water rights applications to Ecology for the
18 Enloe Hydroelectric Project. Only one of those applications, S4-35342, is the subject of this
19 appeal. Application S4-35342 is for a new surface right of 600 cfs to divert water from the
20 reservoir behind the Dam, route it through the intake canal and penstocks, run it through the
21 powerhouse to generate hydropower, and then return it to the river below Similkameen Falls.
22 On May 18, 2011, the Center for Environmental Law & Policy (“CELP”), protested the PUD’s
23 four water rights applications in writing. CELP identified multiple errors and raised the
24 following concerns, including: that water was not available for the PUD’s consumptive
25 diversion; that the proposed diversion would impair instream flows and harm water quality
26

1 (including aesthetics values) in the Similkameen River; and that the proposed water rights
2 would be detrimental to the public interest. CELP also noted that the “[w]ater right decisions
3 must be linked with 401 Certification decisions.” Ecology did not revise the ROE in response
4 to CELP’s protest letter and issued a final ROE to the PUD on August 6, 2013. The ROE was
5 the subject of the appeal to the Pollution Control Hearings Board that is appealed herein.
6

7 **B. The Board’s 401 Certification Decision**

8 As required by the Clean Water Act (“CWA”), during the FERC relicensing process, the
9 PUD applied for a Section 401 Water Quality Certification for the Enloe Hydroelectric Project.
10 33 U.S.C. § 1341(a)(1). Ecology issued the 401 Certification to the PUD on July 13, 2012.
11 Ecology’s 401 Certification set forth a “minimum flow regime in the bypass reach of 10 cfs
12 year round and 30 cfs for mid-July to mid-September [,] otherwise known as the 10/30 flows . .
13 . .” In an earlier case, Petitioners to the instant case appealed the 401 Certification on the
14 grounds that the minimum instream flow requirement did not comply with Washington’s water
15 quality standard protecting aesthetic uses of rivers.
16

17 The Board agreed with Petitioners, finding that the 10/30 cfs minimum flow
18 requirement was deficient for lack of adequate analysis of aesthetic flows, as required by
19 Washington’s water quality laws. 401 Certification Decision at 32:13-15. Specifically:
20

21 The Board finds the Appellants met their burden that the aesthetic flow analysis
22 was not sufficiently completed to make a final determination of the flows that
23 will be protective of the aesthetic values.¹ The evidence is not sufficient to
24 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

25 ¹ The Board found that the water flowing over the Falls provides aesthetic values, which the
26 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 26:4-9.

1 finds would occur if the Project caused shallow flows over the bedrock shelves.
2 Therefore, the § 401 Certification is deficient in this regard without further
3 conditions.

4 401 Certification Decision at 32-33:17-2.

5 To bring Ecology's 401 Certification into compliance with state water quality laws, the
6 Board directed Ecology to implement an aesthetic flow monitoring program to "provide for
7 management and control of alternative flows in the bypass reach that will provide opportunities
8 for review, monitoring and analysis of either actual minimum flows or development and
9 review of simulated flows." *Id.* at 34:12-14. After considering the evidence of aesthetic flow
10 analysis undertaken by the PUD and Ecology, the Board concluded:

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

15 *Id.* at 32:2-6.

16 Under the 401 Certification Decision, the minimum flows for the Project will not be
17 finalized for up to three years after Project operations begin. *Id.* at 35:2-3. The Board added a
18 condition to the 401 Certification:

19 10/30 cfs minimum instream flows over the Dam and Falls for the aesthetic
20 values shall be further monitored and evaluated by Ecology during initial
21 operation of the Project (within three years). After Ecology obtains additional
22 data and analysis of alternative flows over the Dam and the Falls, the 10/30 cfs
23 flow shall either be confirmed or revised as a condition of project operation and
24 the § 401 Certification. Ecology shall develop an aesthetic flow monitoring
25 program under the following guidelines:

26 1. The program shall 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.

2. Flows for aesthetic purposes as a condition of the § 401 Certification
shall not cause an increase in water temperature above the conditions that
currently exist prior to operation of the Project that would violate water quality

standards at any location in the Project area. A shallow flow across the bedrock shelves that would cause increases in the temperature should be avoided, and under no circumstances should the flows cause a violation of the water quality standards for salmonid spawning, rearing and migration.

3. Ecology and the PUD may utilize a focus group and shall consult with the Fish Advisory Work Group to assist and provide advice regarding the proper balance between aesthetic flows and protection of water quality of the river for the fishery resource.

4. The program shall be for a period of time that provides Ecology with sufficient data and information to review actual flow levels or simulated flows. However, the program must be completed within three years from the commencement of the operation of the Project.

As a result of the monitoring program, Ecology shall make a finding of the aesthetic flows that meet the water quality standards for aesthetic purposes and is consistent with this Order. At the completion of the monitoring program, the Project shall operate subject to those flows and the § 401 Certification shall be conditioned to reflect such flows, either confirming the current flow regime or revising it based on Ecology's findings.

Id. at 34-35 (emphasis added). To date, neither the PUD nor Ecology has undertaken the aesthetic flow analysis required in the Board's 401 Certification Decision or determined what modified flows would meet all applicable state water quality standards. Without this analysis or determination, the minimum instream flow levels set by rule for the Similkameen River remain in full effect. WAC 173-549-020(2) and (5).

C. PCHB Appeal of ROE No. S4-35342

On August 6, 2013, Ecology issued ROE No. S4-35342 to the PUD authorizing use of an additional 600 cfs to produce hydropower at Enloe Dam. The ROE acknowledges that the water right permit is consumptive within the bypass reach, and has a June 8, 2010 priority date. In setting alternative minimum flows in the Project's bypass reach, the ROE repeats the minimum flows from the original 401 Certification:

Time Period	Bypass Flows (cfs)
January 1-July 15	10 cfs
July 16-September 15	30 cfs
September 16 – December 31	10 cfs

These are the very flows that the Board found deficient in its 401 Certification Decision and directed Ecology to study further to determine appropriate aesthetic instream flows. 401 Certification Decision at 32:16, 11-13 (finding the 401 Certification to be “deficient” on the grounds 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.”). The ROE also directs the PUD to “comply with Ecology’s 401 Water Quality Certification [for the Enloe Project] and any subsequent updates.”

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.” No aesthetic analysis supports that statement. As part of its public welfare analysis, Ecology cites unnamed studies and documents submitted by the PUD during the FERC license application process. In the 401 Certification Decision, however, the Board found that the studies the PUD conducted during the licensing process “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 (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 (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

1 year.”). Moreover, since the 401 Certification Decision, Ecology has not conducted any
2 additional aesthetic flow analysis.

3 Despite this lack of data on minimum aesthetic flows, Ecology found that issuing a
4 permanent water right permit for the Project not to be detrimental to the public welfare, stating:

5
6 Given that this project will produce valuable electrical energy and will do so in
7 a sustainable manner, that the impacts on the bypass reach are reduced from
8 those under previous project scenarios, that minimum instream flows necessary
9 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.

10 Before the final ROE was published, the PUD commented on the draft to provide
11 “clarification and a request regarding the Bypass Flows”. In those comments, the PUD made
12 clear that:

13
14 By agreeing to these bypass flows [10/30 cfs], the District does not waive its
15 vested water rights that predate the Washington Water Code and the Clean
16 Water Act. The District reserves its right to object to any impairment of its
water rights on any and all legal ground [sic] *if at any time the Section 401
Water Quality Certification requires flows in excess of those shown above.*

17 On September 6, 2013, Petitioners Center for Environmental Law & Policy, American
18 Whitewater, Columbia River Bioregional Education Project,² and North Cascades
19 Conservation Council timely filed a notice of appeal of the final ROE. The issues raised in the
20 appeal were as follows:

21
22 Issue (1): Did Ecology violate the state water code and other applicable law by
23 determining that public interest and public welfare requirements set forth in RCW 90.03.290

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² Columbia River Bioregional Education Project is not a Petitioner in this appeal.

1 were met by incorporating the instream flow requirements in the District's 401 water quality
2 certification?

3 Issue (2): Did Ecology violate the state water code and other applicable law by
4 failing to condition the water right on the instream flow requirements in accordance with WAC
5 173-549-020(2)?

6 Issue (3): Did Ecology violate the state water code and other applicable law by
7 determining that the water right should be issued as a permanent water right as opposed to
8 being denied or issued as a temporary or preliminary water right?
9

10 On March 3, 2014, the PUD filed a Motion for Summary Judgment on all issues raised
11 in the appeal before the PCHB. On March 14, 2014, Ecology filed a Joinder in support of the
12 PUD's Motion for Summary Judgment. On March 31, 2014, Petitioners filed a Cross-Motion
13 for Summary Judgment and Combined Memorandum in Support of Summary Judgment and in
14 Response to Respondents' Motion for Summary Judgment. On June 24, 2014, the PCHB
15 issued its Order on Motions for Summary Judgment, granting summary judgment to Ecology
16 and the PUD on all legal issues raised in the appeal. *Center for Environmental Law & Policy*
17 *et al. v. Ecology, et al.*, PCHB No. 13-117 (Order on Motions for Summary Judgment) (June
18 24, 2014). The Board affirmed the ROE, except it required "that Ecology shall issue the
19 permit with a condition that sets forth the protocol for the aesthetic flow study in the same
20 language as the Board had ordered for the § 401 Certification, and upon completion of the
21 study the permit shall be amended specifying the aesthetic minimum instream flows that shall
22 be protected if it is other than the 10/30 flows." *Id.* at 24. The Board also ordered "[a] water
23 right certificate shall not issue prior to the completion of the study and the permit amendment."
24 *Id.* at 24-25.
25
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1 **IV. LEGAL BASIS FOR JUDIICAL REVIEW**

2 **A. Petitioners Have Standing to Bring this Appeal**

3 Pursuant to RCW 34.05.530, Petitioners have standing to obtain judicial review of
4 the PCHB’s decision because Petitioners are aggrieved and adversely affected by the PCHB’s
5 decision. Ecology’s ROE, granting the PUD a permanent water right without first conducting
6 the mandated aesthetic flow study to protect the public interest, is a specific and concrete
7 injury which harms Petitioners’ recreational and aesthetic interests in hiking, paddling and
8 viewing the Similkameen River. RCW 34.05.530(1), (2). Furthermore, a judgment in favor of
9 Petitioners would substantially eliminate or redress the prejudice caused by the underlying
10 agency action. RCW 34.05.530(3).
11

12 **B. The PCHB’s Order Erroneously Interpreted And Applied the**
13 **Law.**

14 In issuing its Order on Summary Judgment, the PCHB erred as a matter of law in
15 resolving each of the three legal issues, quoted above, raised by Petitioners in their Notice of
16 Appeal to the PCHB. First, the PCHB erred in finding that the ROE did not violate, and instead
17 complied with, the public interest and public welfare requirements that comprise one of the “four
18 tests” for which affirmative findings are required before a water right may issue. RCW
19 90.03.290. The PCHB erroneously interpreted and applied the law by concluding that Ecology
20 has the discretion to waive, or defer, one of the four mandatory tests in the face of incomplete
21 information. Second, the PCHB erred in finding that the ROE did not violate, and instead
22 complied with, the Similkameen River minimum flow requirements of WAC 173-549-020,
23 including subsection (5) which allows exceptions under certain specific circumstances, none of
24 which apply in the instant case. Third, the PCHB erred in its interpretation of the applicability of
25
26

1 the preliminary water right permit statute, RCW 90.03.290(2)(a). Because Ecology was without
2 adequate information to determine that the ROE would not be detrimental to the public interest
3 and public welfare, Ecology's discretion was limited by the statutory choice to deny the permit
4 or issue a preliminary/temporary permit.

5
6 **C. The PCHB's Order Is Arbitrary & Capricious**

7 The PCHB decision and the Department of Ecology's underlying water right Report
8 of Examination decision are arbitrary and capricious because of their deliberate and unreasoned
9 disregard of facts and circumstances, including legal mandates set forth in RCW 90.03.290 and
10 WAC 173-549-020.

11 **V. JURISDICTION & VENUE**

12 This Court has jurisdiction over this matter pursuant to RCW 34.05.510. Venue is
13 proper in this Court pursuant to RCW 34.05.514(1).

14 **VI. BASIS FOR GRANTING RELIEF**

15 The Petitioners are entitled to relief in this matter pursuant to RCW 34.05.570(3) for
16 the following reasons, as discussed in more detail above:

- 17
18 (a) The PCHB's Order on Summary Judgment erroneously interpreted and applied the
19 law;
20
21 (b) The PCHB's Order on Summary Judgment is arbitrary, capricious and otherwise
22 contrary to law.

23 **VII. REQUEST FOR RELIEF**

24 For the reasons set forth herein, the Petitioners respectfully request that the Court
25 vacate and set aside the PCHB's Order on Motions for Summary Judgment and remand the
26 matter for further proceedings consistent with all applicable law. In addition, Petitioners

1 respectfully request that the Court grant such other relief as this Court deems appropriate.

2 RCW 34.05.574. Finally, Petitioners request that fees and costs be awarded pursuant to RCW
3 4.84.350 and other applicable law.
4

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7 Respectfully submitted this 24th day of July 2014,

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CERTIFICATE OF SERVICE


I hereby certify that on the 24th day of July, 2014 I served one true and correct copy of the foregoing Petition for Review on the following individuals via personal service:

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1 **POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 CENTER FOR ENVIRONMENTAL LAW
4 & POLICY, AMERICAN WHITEWATER,
5 COLUMBIA RIVER BIOREGIONAL
6 EDUCATION PROJECT, and NORTH
7 CASCADES CONSERVATION COUNCIL,

8 Appellants,

9 v.

10 STATE OF WASHINGTON,
11 DEPARTMENT OF ECOLOGY, and
12 PUBLIC UTILITY DISTRICT OF
13 OKANOGAN COUNTY, WASHINGTON,

14 Respondents.

PCHB No. 13-117

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

15 **INTRODUCTION**

16 Appellants Center for Environmental Law & Policy, American Whitewater, Columbia
17 River Bioregional Education Project, and North Cascades Conservation Council (collectively,
18 CELP) filed this appeal with the Pollution Control Hearings Board (Board) challenging the
19 Report of Examination issued by the Department of Ecology (Ecology) approving water right
20 application No. S4-35342¹ (ROE). The ROE was issued to Public Utility District No. 1 of
21 Okanogan County (PUD) for operation of the Enloe Dam Hydroelectric Project (Enloe Dam
Project or Project) on the Similkameen River near Oroville, Washington.

¹ There was some confusion in the briefing in regard to the document under appeal. CELP appealed Ecology's decision to approve the application and issue a water right permit based on the findings and conclusions in the ROE. The CELP appeal was filed prior to Ecology issuing a water right permit. Because of the appeal, a permit was not issued. The ROE is the document being challenged.

1 The parties agreed to the following three legal issues which were set out in the Pre-
2 hearing Order that governs the case:

- 3 1. Did Ecology violate the state water code and other applicable law by determining that
4 public interest and public welfare requirements set forth in RCW 90.03.290 were met
5 by incorporating the instream flow requirements in the District's 401 water quality
6 certification?
- 7 2. Did Ecology violate the state water code and other applicable law by failing to
8 condition the water right on the instream flow requirements in accordance with WAC
9 173-549-020(2)?
- 10 3. Did Ecology violate the state water code and other applicable law by determining that
11 the water right should be issued as a permanent water right as opposed to being
12 denied or issued as a temporary or preliminary water right?

13 *See Pre-Hearing Order (Sept. 27, 2013).*

14 On March 3, 2014, the PUD filed a motion for summary judgment on all three issues in
15 the case. Ecology joined in the motion. CELP opposed the motion and filed a cross-motion for
16 summary judgment on all issues.

17 The Board hearing this matter was comprised of Chair Tom McDonald, and Members
18 Kathleen D. Mix and Joan M. Marchioro. Administrative Appeals Judge Kristie C. Elliott
19 presided. Attorneys Craig Gannett, David Ubaldi, and Ame Wellman Lewis represented the
20 PUD. Assistant Attorney General Robin G. McPherson represented Ecology. Attorneys Andrea
21 K. Rodgers Harris, Suzanne Skinner, and Kristen J. Larson represented CELP. The Board
reviewed the following materials in deliberating on this motion:

- 1 1. Motion for Summary Judgment of Respondent Okanogan Public Utility District No. 1
2 (PUD Motion)
 - 3 a. Declaration of David Ubaldi with Exs. A-J (Ubaldi Decl.);
- 4 2. Respondent Department of Ecology's Joinder in Public Utility District No. 1's
5 Motion for Summary Judgment (Ecology Joinder);

- 1 3. Appellant's Cross-Motion for Summary Judgment and Combined Memorandum in
2 Support of Summary Judgment and in Response to Respondent's Motion for
3 Summary Judgment (CELP Cross-Motion);
 - a. Declaration of Andrea K. Rodgers Harris with Exs. 1-5 (Rodgers Harris Decl.);
 - b. Declaration of Jere Gillespie with Exs. A-B (Gillespie Decl.);
 - c. Declaration of Karl Forsgaard (Forsgaard Decl.);
 - d. Declaration of Thomas O'Keefe (O'Keefe Decl.);
- 4 4. Respondent Department of Ecology's Response in Opposition to Center for
5 Environmental Law & Policy's Cross Motion for Summary Judgment (Ecology
6 Response);
 - a. Declaration of Kelsey S. Collins (Collins Decl.);
- 7 5. Respondent Okanogan Public Utility District No. 1's Reply and Response to
8 Appellants' Cross Motion for Summary Judgment (PUD Response);
 - a. Second Declaration of David Ubaldi with Exs. 1-2 (Ubaldi Second Decl.);
- 9 6. Appellants' Reply to Department of Ecology's and PUD's Responses in Opposition
10 to Appellants' Cross Motion for Summary Judgment (CELP Reply).

11 Based on the evidence and record before the Board on the motions, the Board enters the
12 following decision:

13 **FACTS**

14 The Enloe Dam (Enloe Dam or Dam) is a 315-foot long, 54-foot high concrete gravity
15 arch structure, located on the Similkameen River near the town of Oroville in Okanogan County,
16 Washington. The Dam was operated to produce hydroelectric power from 1922 to 1958. Since
17 that time, the river has flowed naturally over the Dam to produce an aesthetically pleasing
18 waterfall effect. A natural waterfall known as Similkameen Falls (the Falls) also exists
19 approximately 350 feet downstream of the Dam. Ubaldi Decl., Ex. B at 5, 9; *see also Center for*
20 *Environmental Law & Policy v. Ecology*, PCHB No. 12-082 (Findings of Fact, Conclusions of
21 Law and Final Order (As Amended Upon Reconsideration), Aug. 3, 2013) (§401 Final Order) at
FF 1-2, pp. 4-5; FF 19, p. 11.

1 The natural flow of the Similkameen River over the Dam ranges from a monthly median
2 of 500 to 7,000 cubic feet per second (cfs). Median flows are highest in spring (May – June) and
3 can reach in excess of 6,000 cfs, with lower median flows in summer (July – October) that range
4 from 514 to 764 cfs. The Falls below Enloe Dam are believed to be a natural barrier to fish
5 passage upstream, except for Pacific lamprey. Native fish species below the Falls include
6 summer-run Chinook salmon, sockeye salmon, Upper Columbia River steelhead, suckers and
7 other species. Native species above the Dam include suckers, whitefish, and various other
8 species. A small number of fish exist in the pool between the Dam and the Falls, probably by
9 virtue of being swept over the Dam during high flows. Steelhead, summer Chinook, and sockeye
10 salmon use the Similkameen River as thermal refuge until the Okanogan River cools to a level
11 that allows the salmon to swim upstream to spawn. Temperature and dissolved oxygen levels in
12 the river are water quality parameters of concern and present limiting factors for fish in the river,
13 with temperature being the primary concern. Ubaldi Decl., Ex. C at 4-5; *see also* §401 Final
14 Order at FF 2, 4, 5, pp. 4-6.

15 The PUD seeks to resume hydropower operations at the Dam under the Enloe Dam
16 Project. The Project includes construction of a new powerhouse for hydropower generation that
17 will be situated on the left (east) bank of the river, 460 feet upstream of the existing powerhouse,
18 thereby considerably shortening the length of the river that would be dewatered by diversion of
19 water into the powerhouse under historic operations. The height of the existing Dam will be
20 raised by five feet, and the size of the reservoir behind the Dam will be increased to 88.3 acres.
21 The Project will withdraw up to 1,600 cfs of water from the reservoir behind the Dam, diverting

1 the water around the Dam and through the new powerhouse. The diverted water will be returned
2 to the river 370 feet downstream of the Dam, directly below the Falls. This 370-foot stretch of
3 the river impacted by the diversion is referred to as “the bypass reach.” The PUD will provide
4 mitigation downstream of the Project to address potential impacts to aquatic life resulting from
5 the project. Mitigation includes gravel augmentation to make up for lost sediment transport and
6 the use of cooler groundwater to hydrate a side channel in summer months to address
7 temperature concerns downstream of the Project. Ubaldi Decl., Ex. B at 5-9, Ex. C at 1-2; *see*
8 *also* §401 Final Order at FF 12, 37, pp. 8, 19-20; FF 39, p. 21.

9 The PUD has received various federal and state permits or approvals for the Enloe Dam
10 Project. The Federal Regulatory Energy Commission (FERC) granted a final license for the
11 Enloe Dam Project (FERC No. 12569) under the Federal Power Act² on July 9, 2013. Ecology
12 granted a Section 401 Water Quality Certification (§401 Certification) for the Project under
13 authority of the federal Clean Water Act (CWA)³ on July 13, 2012. At approximately the same
14 time, Ecology approved four water right applications for the Project. Application No. S4-35342
15 was approved pursuant to the ROE that is the subject of this appeal. Ubaldi Decl., Ex. B at 5,
16 Ex. C at 1.

17 The same parties appealing the ROE in this case were also among the appellants in the
18 appeal of the §401 Certification (§401 appeal) issued by Ecology.⁴ In that case, the appellants
19 challenged whether the §401 Certification provided reasonable assurance that the Project would

20 ² 16 U.S.C. §791-828(c).

21 ³ 33 U.S.C. §§ 1313, 1341.

⁴ The Sierra Club also appealed the § 401 Certification but is not an appellant in the present case.

1 comply with water quality standards and other appropriate requirements of state law regarding
2 temperature, aesthetics, recreation, and salmonid spawning, rearing and migration. *See* §401
3 Summary Judgment Order at 1. The facts giving rise to that appeal and the Board's decisions,
4 which include both an Order on Summary Judgment (§401 Summary Judgment Order) and later
5 Findings of Fact, Conclusions of Law and Order (As Amended Upon Reconsideration) (§401
6 Final Order), are relevant to this appeal.

7 When it issued the §401 Certification in July 2012, Ecology found there was reasonable
8 assurance the Project would not violate applicable water quality standards, subject to certain
9 conditions.⁵ One condition was that the Project would be required to maintain a minimum flow
10 in the bypass reach of 10 cfs year-round and 30 cfs from mid-July to mid-September (the 10/30
11 flows). §401 Final Order at FF 36-37, pp. 19-20. Ecology initially developed the 10/30 flows
12 for protection of fish species other than listed anadromous fish, in the bypass reach, but not for
13 preservation of aesthetic values. Given continuing concern regarding the effects on aquatic life
14 from temperature and dissolved oxygen, Ecology required a monitoring program for the period
15 of the license, with a five-year adaptive management approach that required increasing and
16 resetting the minimum flows for any season in which water quality standards were violated.
17 Collectively, the 10/30 flows, monitoring and adaptive management approach required by the

18
19 ⁵ Section 401 of the CWA provides that any applicant for a federal license or permit to conduct an activity that may
20 result in a discharge into navigable waters must obtain a certification from the state that the activity will comply
21 with all applicable state and federal water quality standards and any other appropriate requirement of state law. 33
U.S.C. §1341(a)(1) and (d). As the designated agency for Washington State to issue the certification, Ecology must
find there is "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).

1 §401 Certification are referred to as the 10/30 flow regime. Ubalde Decl., Ex. C; *see, e.g.*, §401
2 Final Order at FF 27, pp. 14-15 (use of term).

3 In the §401 Certification, Ecology did not require that any minimum flow be maintained
4 over the Dam face for aesthetic purposes, but conditioned the Certification to require the 10/30
5 flow regime through the bypass reach and over the Falls to protect aesthetic values. Ecology
6 concluded that maintaining greater flows for aesthetic purposes over the face of the Dam would
7 increase water temperatures and impair fish habitat, because water flowing over the Dam
8 increases in temperature during lower flows in summer months. Water diverted and discharged
9 at the base of the Falls would not increase in temperature in this manner. No formal aesthetic-
10 flow study was conducted for the bypass reach, based on the assumption that flow releases would
11 be driven primarily by the biological needs of the listed fish species. Although Ecology
12 conducted some analysis of the aesthetics of flows through the bypass reach, the agency lacked
13 credible evidence of how the 10/30 flow would appear aesthetically through the bypass reach.
14 Ubalde Decl., Ex. C. at 9, 19; §401 Final Order at FF 13, p. 8; FF 28, p.15. *Center for*
15 *Environmental Law & Policy v. Ecology*, PCHB No. 12-082 (Order on Motions for Summary
16 Judgment, April 12, 2013) (§401 Summary Judgment Order) at 18.

17 On cross-motions for summary judgment in the §401 appeal, the Board decided that the
18 §401 Certification provided reasonable assurance the Project would comply with applicable
19 water quality standards regarding temperature, recreation, and salmonid spawning, rearing and
20 migration. *Id.* at 20-25. Regarding aesthetics, the Board recognized that the river's natural flow
21 over the Enloe Dam had for decades created an aesthetic feature that required consideration in

1 the §401 Certification process, as did the amount of flow through the bypass reach and over the
2 Falls below the dam. *Id.* at 16-18. The Board recognized Ecology's authority to impose
3 minimum flows in a §401 certification, and that this authority encompasses the protections
4 afforded aesthetic values under both the state's Water Pollution Control Act, ch. 90.58 RCW,
5 and Water Resources Act of 1971, ch. 90.54 RCW. *Id.* at 12-14. However, the Board found
6 there were disputed issues of fact as to the need for and impact of aesthetic flows over the dam,
7 and whether the 10/30 flows provided reasonable assurance of compliance with applicable water
8 quality standards regarding aesthetic values. *Id.* at 18, 20. These issues became the subject of a
9 six-day hearing in the spring of 2013.

10 The Board issued a final decision in the §401 appeal on August 3, 2013. The Board
11 found that Ecology lacked sufficient evidence to determine that the 10/30 flows will protect
12 aesthetic values in the Similkameen River, even when balancing aesthetic values with those
13 directed at protecting fisheries. §401 Final Order at COL 17, p. 31-32. The 10/30 flows were
14 developed and accepted by Ecology prior to any analysis of the aesthetic values. The Board
15 concluded:

16 Because aesthetic values of the flows over the Dam and Falls was not raised until late in
17 the FERC and §401 application process, the evidence shows that the 10/30 cfs flows over
18 the Falls with no flow over the Dam was initially selected as a minimum flow without
19 first completing an analysis of whether the flows met the water quality standards for the
20 aquatic and aesthetics designated uses. Ecology was simply pleased to have an instream
21 flow in the bypass reach when the initial proposal was no flows. Caldwell Testimony.
The 10/30 flow regime was thereafter modeled for temperature, DO, and TDG which
showed that it is expected to meet water quality standards for the aquatic resources. *See*
§401 Certification, p. 13, ¶ 5.2(9); p. 9, ¶ 4.5; p. 19, ¶ 5.8, *Ex. R-92*. As a result, any
analysis of minimum flows for aesthetics was already defined and limited by the 10/30

1 cfs flow regime established for aquatic resources and failed to consider Project impacts
2 on aesthetics of the river flows based on existing conditions.⁵

3 ⁵The existing conditions are, as Ecology states, the decades of
4 natural flows over the Dam. As this Board found in its Order on
5 Motions for Summary Judgment, the river has been flowing
6 naturally over the Dam at the current rate since 1958, creating an
7 aesthetic feature on the River for many decades while there was no
8 diversion and power generation, and the aesthetic values of these
9 flows should be considered as a designated and beneficial use
10 under the §401 Certification. To the extent the impacts from the
11 pre-1958 operations are relevant, the Project will at a minimum
12 have a new impact of an additional 600 cfs diversion and loss of
13 water through the bypass reach when natural flows exceed 1,000
14 cfs.

15 §401 Final Order at COL 9, p. 26.

16 Modeling had been performed to assess the distribution of aesthetic flows at 20, 40, and
17 80 cfs, but the accuracy of this analysis was questionable on technical grounds. *Id.* at FF 23, pp.
18 12-13. Photo simulations of the views of the Falls from a newly developed trail had also been
19 provided, but these did not simulate the 10/30 flows. No analysis of actual flows had been
20 performed, because flows could not be manipulated under existing conditions. *Id.* at FF 24, p.
21 13. Other evidence did not assess the aesthetic value of the flows. *See, e.g., id.* at FF 25, p. 14
(assessing aesthetics of the Project facilities); FF 27-28, pp. 14-16 (assessing recreational aspects
of flows, but not how they appear aesthetically).

The Board affirmed Ecology's conclusion that increasing flows up to an unknown level
above 30 cfs, or maintaining a 30 cfs flow over the Dam, would increase water temperature and
impair salmonid fish habitat. However, Ecology had used the 10/30 flows as a baseline for this
assessment, resulting in a limited opportunity to review alternative flows and project impacts.

1 The Board held that aesthetic flows must be determined independently of the operation of the
2 Project (rather than considering the effect of aesthetic flows on the operation of the project), and
3 thereafter be integrated with the needs of fish and other beneficial values. *Id.* at COL 10, p. 27.

4 The Board recognized that there was uncertainty as to both the correct aesthetic flow
5 regime and those flows needed to protect the fishery resources. While Ecology had conditioned
6 the §401 Certification to require an adaptive management and monitoring approach to address
7 the fisheries resource protection issues, it had not done so with respect to aesthetic flows.
8 Accordingly, the Board found that the aesthetic flow analysis “was not sufficiently completed”
9 and concluded by saying: “The evidence is not sufficient to make a finding as to the flows that
10 would protect aesthetic values without impairing the quality of the water for the fishery resource,
11 which the Board finds would occur if the Project caused shallow flows over the bedrock
12 shelves.” *Id.* at COL 19, 20, p. 32-33. Although the Board concluded the aesthetic flow analysis
13 had shortcomings, the Board relied on its authority to add conditions to the §401 Certification in
14 order to bring the Certification into the realm of reasonable assurance.⁶ The Board affirmed the
15 §401 Certification, with added conditions as follows:

16 The §401 Certification is affirmed, subject to the additional condition that 10/30
17 cfs minimum instream flows over the Dam and Falls for the aesthetic values shall be
18 further monitored and evaluated by Ecology during initial operation of the Project (within
19 three years). After Ecology obtains additional data and analysis of alternative flows over
the Dam and the Falls, the 10/30 cfs flow shall either be confirmed or revised as a
condition of project operation and the §401 Certification. Ecology shall develop an
aesthetic flow monitoring program under the following guidelines:

20 _____
21 ⁶ The Board has authority to add conditions to a §401 certification on appeal in order to bring the certification into
the realm of reasonable assurance. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 601, 90
P.3d 659 (2004).

1 1. The program shall provide for management and control of alternative flows in
2 the bypass reach that will provide opportunities for review, monitoring and
3 analysis of either actual minimum flows or development and review of simulated
4 flows.

5 2. Flows for aesthetic purposes as a condition of the §401 Certification shall not
6 cause an increase in water temperature above the conditions that currently exist
7 prior to operation of the Project that would violate water quality standards at any
8 location in the Project area. A shallow flow across the bedrock shelves that would
9 cause increases in the temperature should be avoided, and under no circumstance
10 should the flows cause a violation of the water quality standards for salmonid
11 spawning, rearing, and migration.

12 3. Ecology and the PUD may utilize a focus group and shall consult with the Fish
13 Advisory Work Group to assist and provide advice regarding the proper balance
14 between aesthetic flows and protection of water quality of the river for the fishery
15 resource.

16 4. The program shall be for a period of time that provides Ecology with sufficient
17 data and information to review actual flow levels or simulated flows. However,
18 the program must be completed within three years from the commencement of the
19 operation of the Project.

20 As a result of the monitoring program, Ecology shall make a finding of the
21 aesthetic flows that meet the water quality standards for aesthetic purposes and is
consistent with this Order. At the completion of the monitoring program, the Project shall
operate subject to those flows and the §401 Certification shall be conditioned to reflect
such flows, either confirming the current flow regime or revising it based on Ecology's
findings.

Id. at pp. 33-34.

Shortly after the Board issued its final decision in the §401 appeal, Ecology issued the
ROE and ordered the approval of Water Right Permit No. S4-35342 (Water Right). The Water
Right will authorize the withdrawal of an additional 600 cfs from the Similkameen River behind
Enloe Dam. In the ROE, Ecology confirmed that the only affected reach in the river would be
the bypass reach, with flows in the river otherwise remaining unchanged. Ubaldi Decl., Ex. B at

1 14. Ecology thus considered the use of water to be non-consumptive, except with regard to the
2 bypass reach. *Id.* at 11.

3 In support of the ROE, Ecology found that the appropriation of water for the Project
4 would not be detrimental to the public welfare if flow requirements imposed by the §401
5 Certification were met. Ecology concluded that the §401 Certification conditions addressed
6 protection for both aesthetic values and the fishery resource. *Id.* at 15, 17. Ecology noted that its
7 “Water Resources and Water Quality Programs had worked collaboratively to determine the
8 flows that will be required throughout the year in the bypass reach in order to operate the
9 hydropower facility.” *Id.* at 6-7. The ROE required that “the minimum flows set forth in the 401
10 Water Quality Certification must be maintained in the bypass reach.” These numeric flows were
11 incorporated into a table (Table 2) in the ROE, which further stated that:

12 OKPUD will need to meet the bypass flows under the 401 Water Quality Certification,
13 which are currently identified in Table 2, or as the bypass flow requirement in the 401
Water Quality Certification may be amended in the future.

14 *Id.* at 6-7 and Table 2.

15 The ROE stated that “should the Water Quality Certification be modified in the future,
16 this water right will be subject to the terms and conditions of the revised Water Quality
17 Certification.” *Id.*

18 To date, the aesthetic flow study required by the Board in the §401 appeal has not been
19 performed. CELP Cross-Motion at 11; Rodgers Harris Decl., Ex. 4 at 5.

20 CELP timely filed this appeal to challenge Ecology’s issuance of the ROE.
21

1 ANALYSIS

2 **A. Summary Judgment Standard**

3 The summary judgment procedure is designed to eliminate trial when only questions of law
4 remain for resolution, and the facts relevant to the legal determinations at issue are not contested
5 by either party. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443
6 (1990), *review denied*, 117 Wn.2d 1004 (1991). The party moving for summary judgment bears
7 the initial burden to show there are no genuine issues of material fact and it is entitled to
8 judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182;
9 930 P.2d 307 (1997). A material fact is one that will affect the outcome under the governing
10 law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). The inquiry then shifts to the
11 party with the burden of proof at hearing. The appellant must make a showing sufficient to
12 establish that a triable issue of fact exists. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216,
13 225, 770 P.2d 182 (1989). All facts and reasonable inferences must be construed in favor of the
14 nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

15 The parties to this case agree that no genuine issues of material fact exist and this matter
16 can be resolved on summary judgment. The Board concurs and concludes that all issues may be
17 fully resolved on summary judgment.

18 **B. Ecology Properly Exercised its Authority and Discretion to Issue a Permanent New**
19 **Water Right for the Enloe Dam Project Conditioned on the 10/30 Flow Regime from**
20 **the Project's §401 Certification (Issues No. 1 and 3)**

21 CELP questions Ecology's authority to issue a new water right that is conditioned on the
10/30 flows from the §401 Certification, prior to completion of the study required to determine

1 whether those flows protect aesthetic values in the Similkameen River (Issue No. 1). Without
2 this information, CELP contends Ecology could only deny the application for a permanent new
3 water right, or issue a preliminary or temporary permit (Issue No. 3). Ecology and the PUD
4 argue there is no precedent for requiring that definitive numeric aesthetic flows first be
5 determined through study before a permanent new water right can issue, and that the condition to
6 meet the 10/30 flows as they may be modified is analogous to conditions placed on other
7 permanent water rights, previously upheld by the Board.

8 Ecology is authorized to issue permits for the appropriation of public water from rivers
9 and streams under the state Water Code, ch. 90.03 RCW. Before a permit is issued, “Ecology
10 must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an
11 appropriation will not impair existing rights, or (4) be detrimental to the public welfare.”

12 *Postema v. Pollution Control Hearings Board*, 142 Wn. 2d 68, 79, 11 P.3d 726 (2000); RCW
13 90.03.290(3). When a proposed new water right relates to power development, Ecology is
14 specifically directed to “hav[e] in mind the highest feasible use of the waters belonging to the
15 public” in determining “whether the proposed development is likely to prove detrimental to the
16 public interest.” RCW 90.03.290(1).

17 Ecology’s decision to issue a new water right under RCW 90.03.290 is a discretionary
18 act, and in exercising that discretion the agency has the authority to condition a permit to satisfy
19 public interest concerns provided it complies with all relevant statutes. *Ecology v. Theodoratus*,
20 135 Wn.2d 582, 597, 957 P.2d 1241 (1998); *Schuh v. Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64

1 (1983); *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 899, 602 P.2d 1172 (1979) (“the power
2 to disapprove necessarily implies the power to condition an approval.”).

3 In the Water Resources Act of 1971, the legislature declared that the preservation of
4 aesthetic values is a declared beneficial use of water and as a matter of public policy must be
5 considered in the allocation and management of the waters of the state. RCW 90.54.020(1), (3).
6 Specifically, the legislature directed that minimum flows be maintained in rivers and streams in
7 order to protect aesthetics, among other values:

8 Perennial rivers and streams of the state shall be retained with base flows necessary to
9 provide for preservation of wildlife, fish, scenic, aesthetic and other environmental
10 values, and navigational values. Lakes and ponds shall be retained substantially in their
11 natural condition. Withdrawals of water which would conflict therewith shall be
12 authorized only in those situations where it is clear that overriding considerations of the
13 public interest will be served.

14 RCW 90.54.020(3)(a) (emphasis added).

15 Where an application for a permanent new water right “does not contain, and the
16 applicant does not furnish sufficient information on which to base such findings, the department
17 may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant
18 to make such surveys, investigations, studies, and progress reports, as in the opinion of the
19 department may be necessary.” RCW 90.03.290(2)(a). Ecology may issue a temporary permit
20 that authorizes water to be put to beneficial use in the interim. RCW 90.03.250.

21 The PUD and Ecology correctly note that the Board has previously upheld the issuance of
permanent new water rights that were conditioned on further monitoring, adaptive management,
and/or potential corrective action. In the examples cited, however, information was available to

1 support Ecology in making an affirmative public interest determination and issuing the water
2 rights in question.⁷ In the §401 appeal, the Board found that additional monitoring and analysis
3 of actual minimum flows or review of simulated flows is necessary to assess the proper
4 protection of aesthetic values, as balanced against the quality of the water for the fishery
5 resource. Thus, as argued by CELP, Ecology still needs additional information to make a public
6 interest determination in relation to the PUD Water Right. §401 Final Order at COL 19, p. 32.

7 No case cited by the parties is directly on point, although *Black Star Ranch*
8 *Neighborhood Ass'n v. Ecology*, PCHB No. 87-19 (Final Findings of Fact, Conclusions of Law
9 and Order, Feb. 19, 1988) (Black Star Ranch) is instructive. The Board framed the issue on
10 appeal there similar to that presented here, *i.e.* “what to do when incomplete information
11 prevents answering” any part of the four-part test. *Id.* at COL V. CELP cites *Black Star Ranch*
12 for the Board’s recognition that “RCW 90.03.290 requires the issuance of a permit only if
13 [Ecology] can answer affirmatively concerning all the statutory criteria.” *See id.*; CELP Cross-
14 Motion at 19. The Board went on to clarify, however, that Ecology’s “duty to reject an
15
16
17

18 ⁷ *See, e.g., Bucklin Hill Neighborhood Ass'n v. Ecology*, PCHB No. 88-177 (Final Findings of Fact, Conclusions of
19 Law and Order, June 26, 1989) (groundwater withdrawal permit that was affirmed by the Board contained a
20 condition for monitoring that provided a mechanism for detection and correction of sea water intrusion, though
21 available data indicated no problem with sea water intrusion); *Citizens for a Sensible Development v. Ecology*,
PCHB No. 90-134 (Final Findings of Fact, Conclusions of Law and Order, May 22, 1991) (same); *Wilbert v.*
Ecology, PCHB No. 82-193 (Final Findings of Fact, Conclusions of Law and Order, Aug. 4, 1983) (groundwater
withdrawal permit conditioned on pumping limitations to prevent sea water intrusion was remanded by the Board
for incorporation of additional monitoring and other conditions as a preventative measure, but the Board affirmed
that available information showed the withdrawal would not cause or tend to cause sea water intrusion.).

1 application appears to arise upon answering about any of these same criteria in the *negative*.”

2 *Black Star Ranch* at COL V (emphasis added).⁸

3 The Board in *Black Star Ranch* affirmed Ecology’s denial of a new permit because the
4 available information had shown the risk of impairment was high. *Id.* Importantly, the Board
5 considered the decision whether to issue a new water right when information is incomplete on an
6 aspect of the four-part test, to be a matter of discretion for Ecology. As the Board explained:

7 The water codes are designed to prevent new appropriators from buying into this
8 kind of trouble. Otherwise the permit system would have no function. All uses could
9 simply be regulated on the basis of priority. Where there wasn’t enough water to go
10 around, those who guessed wrong would just have to suffer the consequences. The permit
11 system is intended, to the extent possible, to head off such problems before they occur. In
12 large measure, the state water agency’s function is prevention, not enforcement.

[Ecology’s] task invariably involves a degree of prediction using data that is not
totally complete. It is a delicate task to determine when there is enough information to
allow decisions which minimize perceived risks. The choice essentially is a matter of
discretion. We see nothing inappropriate in the agency’s exercise of discretion here. See,
Schuh v. Department of Ecology, 100 Wn.2d 180, 667 P.2d 64 (1983).

13 *Id.* at COL VI.

14 *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137, also cited by CELP, is consistent
15 with the determination that this is a discretionary decision for Ecology.⁹ In *Squaxin Island*, the

17 ⁸ See also *Hubbard v. Ecology*, 86 Wn. App. 119, 124, 936 P.2d 27 (1997) (similarly noting that “Ecology must
reject an application and refuse to issue a permit if there is no unappropriated water available, withdrawal will
conflict with existing rights, or withdrawal will detrimentally affect public welfare.”).

18 ⁹ CELP cited the Board’s initial decision in *Squaxin Island* that vacated and remanded the permits to Ecology for
issuance of preliminary permits, in which the Board had stated that “[i]t is preferable to find answers to these
19 questions before the withdrawals for the development are allowed to proceed, rather than attempt to find solutions to
problems that emerge after-the-fact.” See CELP Cross-Motion at 19, 21, citing *Squaxin Island*, PCHB No. 05-137
(Findings of Fact, Conclusions of Law, and Order, October 16, 2006). The Board subsequently modified its
20 decision to instead vacate (but not remand) the permits, and deleted the language to which CELP cites. See *Squaxin*
Island, PCHB No. 05-137 (Modified Findings of Fact, Conclusions of Law, and Order, November 20, 2006) at p.
21 56-57, COL 127. The Board had weighed “widely divergent results” produced by the experts’ groundwater models
to also reach the conclusion that water was unavailable for appropriation, which left open the possibility that actual

1 evidence showed that the four-part test (including the public interest portion) was not met, and
2 the Board held that Ecology erred in finding otherwise. *Id.* at COL 112, p. 49; COL 124, p. 55.
3 In particular, the Board found that the proposed withdrawals would “likely lower the stream
4 flow” of certain creeks and negatively impact salmon. On this basis, the Board explicitly
5 concluded that “[t]he proposed withdrawals violate the public interest portion of the four-part
6 test in RCW 90.03.290.” *Id.* at p. 49, COL 112.

7 Relying on its interpretation of RCW 90.03.290, CELP argues this is a question of
8 Ecology’s authority to act in the face of incomplete information. According to CELP, use of the
9 term ‘may’ in RCW 90.03.290(2)(a) regarding preliminary permits means Ecology lacks
10 authority to issue a permanent new water right when information necessary to answer any part of
11 the four-part test is incomplete. Under those circumstances, Ecology may only issue a
12 preliminary permit. *See* CELP Cross-Motion at 25-27. The Board finds this provision to be
13 unambiguous. *See State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001) (“The courts do not
14 engage in statutory interpretation of a statute that is not ambiguous”). Rather than limiting
15 Ecology’s authority to issue a permanent new water right, the plain language of the statute
16 provides Ecology with authority to issue a different kind of permit (a “preliminary permit”) that
17 ensures the application can remain in good standing while the applicant undertakes “such
18 surveys, investigations, studies, and progress reports, as in the opinion of the department may be

19
20 data could prove otherwise. In its modified decision, the Board merely noted this conclusion would not preclude
21 Ecology from issuing a preliminary permit under RCW 90.03.290(2)(a) and allowing the applicant to resubmit an
application at a later time based on evidence that assessed “the actual affect” of groundwater withdrawals on the
surface waters in question. *Id.* All references above to the *Squaxin Island* case are to the Board’s final modified
decision in that case.

1 necessary.” RCW 90.03.390(2)(a). The decision whether to issue a preliminary permit in lieu of
2 a permanent new water right, when information is incomplete on an aspect of the four-part test,
3 is still a choice that remains within Ecology’s discretion.

4 The Board finds that Ecology was not required to issue a preliminary or temporary
5 permit. This case is unique because the §401 Certification has already been approved with a
6 condition for a study to determine the aesthetic flows. *CELP v. PUD and Ecology*, PCHB No.
7 12-082 (Final Order). Ecology will be developing these aesthetic flows in compliance with the
8 Water Resources Act of 1971, ch. 90.54 RCW, which requires the protection of designated
9 beneficial uses such as aesthetics, and using the authority of the water code for issuing water
10 rights and the CWA for issuing a §401 Certification. *CELP v. PUD and Ecology*, PCHB No. 12-
11 082 (Order on Summary Judgments) at 13. In their appeal of the ROE, the Appellants specify
12 that they “do not seek additional aesthetic analysis outside of the 401 Certification Process or
13 challenge the sufficiency of the aesthetic flow-monitoring program required in the PCHB’s 401
14 Certification decision.” CELP Reply at 2. Under these circumstances, Ecology properly
15 exercised its discretion to authorize the permit and address the public interest requirements of
16 preserving aesthetic values with similar requirements in the §401 Certification.

17 Further, unlike *Black Rock* or *Squaxin Island*, this is not a case in which available
18 information shows that the applicant cannot meet some aspect of the four-part test for a water
19 right. Rather, the Board concluded that some additional assessment is needed to finalize the
20 appropriate level of aesthetically protective flows on the Similkameen River in the area of the
21 project. However, in approving and conditioning the §401 Certification, the Board also provided

1 Ecology a basis upon which to conclude that there was no “detriment to public welfare” as
2 required by the four-part test of RCW 90.03.290.

3 The aesthetic flow study may well confirm that the 10/30 flows are protective of aesthetic
4 values in the Similkameen River. Even if proven unprotective, the 10/30 flows may not be
5 subject to change based solely on aesthetic values. Aesthetic flows “are not necessarily a priority
6 of use when competing with flows for other beneficial uses of water...” §401 Final Order at FF
7 30, p. 16. Higher flows for aesthetic purposes may conflict with flows necessary to protect the
8 fishery resource in the Similkameen River. The Board focused the inquiry for the required
9 aesthetic flow study on what flows “would protect aesthetic values without impairing the quality
10 of the water for the fishery resource...” See §401 Final Order at COL 19, pg. 32. In light of
11 these circumstances, the Board gives deference to the discretionary decision made by Ecology to
12 approve the application.

13 The Board finds that Ecology properly exercised its authority and discretion under RCW
14 90.03.290 to issue the approval of the application under the ROE conditioned on the 10/30 flow
15 study protocol in the Project’s §401 Certification, and grants summary judgment to the PUD and
16 Ecology on Issues No. 1 and 3. The Board does not, however, agree with the decision by
17 Ecology to not require that the water right permit be amended, as is required for the §401
18 Certification, when Ecology makes a final determination of the aesthetic flows based on the
19 aesthetic flow study. Mere reference to the §401 Certification is not sufficient. Ecology is
20 directed to place in the permit when issued the same protocol for the study that is in the §401
21 Certification, and upon completion of the aesthetic flow study, the permit shall be amended to

1 incorporate any changes to the 10/30 flow regime prescribed by the study. This ensures that any
2 change to the 10/30 flow regime becomes an enforceable provision of the PUD's permit. The
3 Board orders Ecology to issue the permit with the specific language that requires the PUD to
4 complete the aesthetic flow study, specifying the same protocol as in the §401 Certification, and
5 upon completion of the aesthetic flow study, to amend the permit to incorporate as a condition
6 any prescribed change to the 10/30 flow.

7 **C. Ecology Acted Consistent with its Authority and Discretion under WAC 173-549-020 to**
8 **Apply Site-Specific Flows to the Enloe Dam Project (Issue No. 2)**

9 The Minimum Water Flows and Levels Act of 1967, ch. 90.22 RCW, authorizes Ecology
10 to establish minimum instream flows for rivers or other public waters “for the purposes of
11 protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said
12 public waters whenever it appears to be in the public interest to establish the same.” RCW
13 90.22.010. As explained by the Washington State Supreme Court, “a minimum flow set by rule
14 is an existing water right that may not be impaired by subsequent withdrawal or diversion of
15 water from a river or stream.” *Swinomish Indian Tribal Community v. Dep’t of Ecology*, 178
16 Wn.2d 571, 585, 311 P.3d 6 (2013) (*Swinomish*).

17 Ecology established minimum instream flows in 1976 for the Similkameen River and the
18 mainstem Okanogan River under ch. 173-549 WAC (Okanogan Instream Flow Rule or Rule).
19 The minimum flows established for the Similkameen River vary numerically by month with a
20 low of 400 cfs in winter, increasing to a high of 3,400 cfs in summer. WAC 173-549-020(2).
21 The Rule specifies that future consumptive water rights are to be conditioned on these flows.

1 WAC 173-549-020(4). The Rule also contains the following provision regarding future projects
2 that would reduce the flow in a portion of a stream's length:

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

10 WAC 173-549-020(5).

11 The parties disagree on the interpretation of the Okanogan Instream Flow Rule. CELP
12 contends that Ecology abrogated the Rule and exceeded its authority by approving the
13 application without conditions to protect the minimum flows established for the Similkameen
14 River in WAC 173-549-020(2). According to CELP, until the aesthetic flow study is complete,
15 "the minimum instream flow levels set by rule for the Similkameen River remain in full effect."
16 CELP Cross-Motion at 12; Reply at 22-23. The PUD and Ecology contend that WAC 173-549-
17 020(5) exempts the Project from application of the minimum instream flows set by WAC 173-
18 549-020(2), which otherwise apply to limit future consumptive rights under the rule.¹⁰

19 The Board finds the Okanogan Instream Flow Rule is subject to only one reasonable
20 interpretation. See *Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wn.
21 App. 592, 599 (2007) (as with a statute, where a regulation is unambiguous a court will not look
beyond its plain language). WAC 173-549-020(5) explicitly excludes those projects that reduce

¹⁰ The PUD also contends that the imposition of different instream flows in a state water right would be federally preempted. See PUD Motion at 12-13. Because the Board decides this case on other grounds, the Board does not reach the question of federal preemption.

1 the flow in only a portion of a stream's length, including hydroelectric projects that bypass a
2 portion of a stream, from compliance with the minimum instream flows established by WAC
3 173-549-020(2). Such projects are considered consumptive only in that portion of the stream in
4 which the flow is reduced. The Rule provides Ecology the authority to tailor flows for a portion
5 of a stream's length specifically for hydroelectric projects, as was done in this case. As a result,
6 the minimum instream flows established for the Similkameen River in WAC 173-549-020(2) do
7 not apply to the Enloe Dam Project, unless Ecology decides in its discretion to apply those flows
8 under WAC 173-549-020(5).¹¹

9 The Board does not consider *Swinomish*, as argued by CELP, to be instructive on this
10 point or to counsel for a different interpretation. In *Swinomish*, appellants challenged an
11 amendment to an existing instream flow rule, through which Ecology created several
12 reservations of water for future year-round consumptive uses. The reservations authorized the
13 appropriations of water that would impair the minimum instream flows based on Ecology's
14 finding that the uses of the water from the reservations were "overriding considerations of the
15 public interest" (OCPI) under RCW 90.54.020(3). The Washington Supreme Court held that
16 Ecology's determination of OCPI was significantly flawed and the rule amendment was
17 inconsistent with RCW 90.54.020(3)(a), which provides for maintenance of protective base
18 flows, and with "the statutory context and entire statutory scheme" governing water use and
19 management in Washington. 178 Wn.2d at 585, 602. This appeal does not raise the question of
20 whether Ecology may amend an existing rule in a manner that exempts uses of water that might

21 ¹¹ See §401 Final Order at FF 3, p. 5 (consistent interpretation of the Rule that "hydro projects will be subject to only those minimum flows specified by Ecology," though interpretation of the Rule was not directly at issue).

1 impair senior minimum flows previously established by rule. The issue, instead, is whether the
2 Okanogan Instream Flow Rule both sets minimum flows and contains an exception from their
3 application for hydroelectric projects with limited in-stream impact. The Board finds that it
4 does.

5 The Board also does not read the language in WAC 173-549-020(5) that addresses
6 “[w]hen studies are required” to constrain Ecology’s authority to apply site-specific flows if
7 further study is necessary. This language simply provides Ecology with authority to require that
8 a project proponent complete any studies determined to be necessary. Here, the flow study
9 required by the Board in the §401 appeal may confirm that the 10/30 flows are protective of
10 aesthetic values in addition to the fishery resource, in which case the flows need not change, or it
11 may trigger amendment of the flows in the §401 Certification and the PUD permit. Applying the
12 same flow regime to the Project through both §401 Certification and the PUD permit ensures
13 consistency in how the Project is regulated under both state water quality and water resource
14 laws.

15 The Board finds Ecology acted consistent with its authority and discretion under WAC
16 173-549-020 to apply the 10/30 flows as site-specific flows to the Enloe Dam Project, and grants
17 summary judgment to the PUD and Ecology on Issue No. 2.

18 **ORDER**

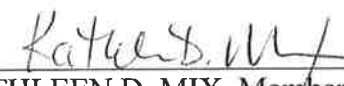
19 Summary Judgment is GRANTED to the PUD and Ecology on all legal issues in this
20 case. Ecology’s approval of the application based on the terms and conditions of the ROE is
21 AFFIRMED on all substantive grounds, with the exception that Ecology shall issue the permit

1 with a condition that sets forth the protocol for the aesthetic flow study in the same language as
2 the Board had ordered for the §401 Certification, and upon completion of the study the permit
3 shall be amended specifying the aesthetic minimum instream flows that shall be protected if it is
4 other than the 10/30 flows. A water right certificate shall not issue prior to the completion of the
5 study and the permit amendment.

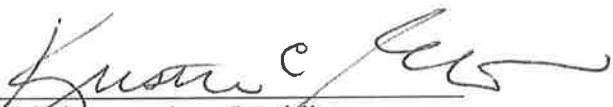
6 SO ORDERED this 24th day of June, 2014

7 **POLLUTION CONTROL HEARINGS BOARD**

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9 
10 _____
TOM MCDONALD, Chair

11 
12 _____
KATHLEEN D. MIX, Member

13 
14 _____
JOAN M. MARCHIORO, Member

15 
16 _____
Kristie C. Elliott, Presiding
Administrative Appeals Judge