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**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY,
Kennewick Public Hospital District,
Kennewick Irrigation District,
and Mercer Ranches,

Appellants,

v.

THE POLLUTION CONTROL HEARINGS BOARD,
an agency of the State of Washington, and
Confederated Tribes and Bands of the Yakama Nation,
Nez Perce Tribe, and
Confederated Tribes of the Umatilla Indian Reservation,

Appellees

**BRIEF OF AMICUS CURIAE
CENTER FOR ENVIRONMENTAL LAW & POLICY**

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TABLE OF CONTENTS

I. IDENTITY AND INTERESTS OF *AMICUS CURIAE* CELP 2

II. STATEMENT OF THE CASE 3

III. ARGUMENT 7

 A. The Consultation Requirement Guides Ecology And Limits Its Discretion By Ensuring That The Advice And Information That Has Been Garnered From The Consultation Is Incorporated Into The Decision Making Process. 8

 B. When Ecology Substantially Changed Its Position, Its Duty To Consult Was Re-Initiated Because The Consultees Had Not Been Given The Opportunity To Provide Advice And Information On The Revised ROEs. 10

 C. Contrary To KID’s Arguments, The Record Clearly Shows That There Is And Was A Real Threat To The Fish Runs Caused By Reducing Instream Flow.13

 D. Deference Should Be Given To An Agency’s Interpretation Of Its Own Rules Only When In Accord With Statutory Authority. 18

IV. CONCLUSION 20

**I. IDENTITY AND INTERESTS OF *AMICUS CURIAE*
CELP**

This brief is filed on behalf of the Center for Environmental Law and Policy (CELP), a non-profit organization dedicated to preserving and protecting the natural integrity of Washington’s rivers and streams for public use and enjoyment. As Washington’s “water watchdog,” CELP advocates for the public interest in the responsible management of the State’s freshwater resources.

In this brief, CELP will address the issue of whether the consultation and evaluation that occurred prior to the Department of Ecology’s (Ecology) approval of water right permits for Petitioners Kennewick Public Hospital District (KPHD), Kennewick Irrigation District (KID), and Mercer Ranches was proper, as required under WAC 173-531A-060 and 173-563-020(4).¹ CELP urges this Court to affirm the Pollution Control Hearings Board’s (PCHB) decision to remand the applications to Ecology so that the agency may engage in meaningful consultation and evaluation with the appropriate entities, including the Indian Tribes bringing this action. CELP also urges the Court not to accept the Kennewick Irrigation District’s request that the Court reach the merits of the question of impairment of fish life.

¹ See Appendix A to this brief for relevant text of WAC 173-531A-060 and 173-563-020(4)

II. STATEMENT OF THE CASE

In 1993, in response to the listings of twelve Columbia River salmonid species as threatened or endangered under the federal Endangered Species Act, the State of Washington established a moratorium on further appropriations of surface water from the main stem of the Columbia River. WAC 173-563-015(2). In 1997, Governor Locke signed a law that lifted the moratorium and directed Ecology to amend the applicable water allocation rules. ESHB 1110, 1997 Wash. Laws Ch. 439, Appendix B. These amended rules were to specifically address the crisis of declining salmon and steelhead runs and the need to protect instream flows, believed to be essential for the species' survival. In 1998, Ecology promulgated two rules at issue in this case—WAC 173-563-020 and WAC 173-531A-060.² These rules require Ecology to review each water right application on a case-by-case basis and evaluate it “for possible impacts on fish and existing water rights.” WAC 173-531A-060; WAC 173-563-020(4). Further, Ecology is required to “consult with appropriate local, state, and federal agencies and Indian tribes in making this evaluation.” *Id.*

After promulgating these rules, Ecology requested various government agencies and Indian tribes to consult about potential impacts

² See Appendix A for applicable WAC regulations

to fish as a result of Ecology issuing the water right permits. *See, e.g.*, Notice of Appeal (*Report of Examination for water application permit No. S4-30465*); PCHB Index 38, at 3 (Feb. 19, 2003)(hereinafter “KID ROE”). Those entities included Bonneville Power Administration (BPA), Federal Bureau of Reclamation (BOR), National Marine Fisheries Service (NMFS), Washington Department of Fish & Wildlife (WDFW), several counties including Benton and Chelan, the Yakama Nation, and Colville Tribes. *See id.* Neither the Nez Perce nor the Confederated Tribes of the Umatilla Indian Reservation (hereinafter “CTUIR”) were consulted by Ecology, even though both have treaty rights to fish at locations in the Columbia River system. Declaration of N. Kathryn Brigham, PCHB Index 16, at ¶ 12; App. 4. *See also* Declaration of Anthony Johnson, PCHB Index 16, at ¶ 19.

Most of the entities consulted recommended either denial of the applications or, in the alternative, approval if restrictive conditions were incorporated requiring the applicants to interrupt their water use whenever river levels dropped below certain “target flows”³ contained in a

³ These target flows, sometimes referred-to as the “2000 BiOp flows” or “2000 BiOp flow objectives” were established by the National Marine Fisheries Service in its 2000 Biological Opinion (BiOp). The NMFS “2000 BiOp,” issued in connection with the operation of the Federal Columbia River Hydrosystem, was triggered by the listing of 12 Columbia/Snake River salmon species as endangered or threatened under the federal Endangered Species Act. According to NMFS, its “policy on water withdrawals from the mainstem Columbia River is that ‘zero net impact’ should be permitted”, and that “instream flows are critical to the successful migration of juvenile salmonids. . . . NMFS

Biological Opinion issued in 2000 by NMFS pursuant to the Endangered Species Act.⁴ PCHB Order Granting and Denying Summary Judgment and Remand (Oct. 31, 2003), PCHB Index 1 at 15 (hereinafter” PCHB Order”). The consultees made these recommendations based on their concern that the proposed diversions would reduce flow levels in the Columbia River to the point of harming protected salmon. *See*, KID ROE, PCHB Index 38 at 21. Based on this consultation, Ecology issued draft Reports of Examinations (ROEs)⁵ to each of the petitioners in this case conditioning them on compliance with NMFS’ target flows. *See* KID ROE, PCHB Index 38 at 2. *See also* Notice of Appeal (*Report of Examination for water application permit No. S4-30584*); PCHB Index 36, at 2 (Feb. 19, 2003)(hereinafter “KPHD ROE”).

Prior to issuing the final ROEs, the Columbia-Snake River Irrigators Association (CSRIA) and Petitioner Kennewick Public Hospital District (KPHD) filed a lawsuit in December 2001 in Benton County Superior Court seeking to enjoin Ecology from issuing the permits conditioned on meeting NMFS’ target flows. The Benton County

recommends the agency ensure that no new state water rights are issued while the flow objectives are in place, unless the objectives are being satisfied.” KID ROE, PCHB Index 38, at 21.

⁴ Data indicate that from 1996 through 2001, the target flows were typically not met in July and August. PCHB Order at 10 (Factual background finding XII).

⁵ Reports of Examination (ROE) are decision documents providing Ecology’s rationale for issuing or denying water right permits.

Superior Court concluded that Ecology could not condition permits on federal target flows because the flows had not been developed through state rulemaking. *See Kennewick Public Hosp. Dist. v. Ecology*, Benton County Superior Court, No. 97-2-01041-9 & 00-2-02057-7 (June 6, 2002). For some fifteen months, Ecology defended its decision to condition the applicants' use of water to the NMFS target flows being met. PCHB Order, at 15. However, in November 2002, without engaging in any further consultation, Ecology reversed its position and agreed, via a settlement in the case, to abandon its position requiring adherence to target flow objectives. *Id.* Instead of conditioning the water permits on meeting the target flows, the settlement agreement allowed for the applicants to choose between one of two options: either pay \$10 per acre foot used per year into what Ecology called a 'mitigation fund' or to "accept interruptible rights conditioned on the 2000 BiOp flows according to the consultation process completed for each application." Voluntary Settlement Agreement, PCHB Index 16 (*Declaration of Richard K. Eichstaedt*), Ex. E, at 1 (Nov. 20, 2002). Ecology did not consult again with any of the tribes on this appeal before it changed its position.

In February 2003, the Respondent Tribes appealed the issuance of the ROEs to the PCHB arguing, among other things, that Ecology had not properly consulted as required under WAC 173-531A-060 and WAC 173-

563-020(4). *See e.g.*, Notice of Appeal, PCHB Index 38. The PCHB agreed, remanding the applications back to Ecology so that it may engage in meaningful consultation and evaluation with the Tribes and other governmental agencies prior to rendering a final decision on the water right applications. PCHB Order at 29.

III. ARGUMENT

This brief addresses the question of whether Ecology properly consulted with the appropriate federal agencies, local and state governments, and Indian tribes. Particularly, CELP will address whether the consultation that occurred was *meaningful* - did Ecology, as directed by law, properly communicate with, ask for and take into consideration the advice and information that it had received from the consultees and use that information to formulate individualized conditions before making a final decision on applications for consumptive water withdrawals from the Columbia River? The PCHB found that Ecology failed in this duty to meaningfully consult and CELP urges this Court to affirm the PCHB's finding and order of remand.

The issue raises important public policy questions about the interpretation of the State's duty to consult. Although CELP is not among the parties with whom consultation will take place under the regulations,

CELP and the public are benefited by the Court's recognition of a broad interpretation of Ecology's duty to consult. The public is benefited if the Court's interpret the duty to consult – in any context – broadly to encourage the full and fair exchange of views. The public is not benefited by an interpretation of a governmental duty to consult as a token, one-time contact by the government where the process for reaching the ultimate decision is hidden from public view and scrutiny.

A. The Consultation Requirement Guides Ecology And Limits Its Discretion By Ensuring That The Advice And Information That Has Been Garnered From The Consultation Is Incorporated Into The Decision Making Process.

In order for the regulatory requirement that Ecology consult with various entities to have meaning and value, it is logical that the results of such consultation must be incorporated into Ecology's decision making. If recommendations made through consultation are ignored, then the consultation becomes a wasteful exercise - it is merely procedural in form rather than substantive.

Ecology itself pointed out the importance of the evaluative aspect of the consultation process when it promulgated the very rules at issue in this case. In its Responsiveness Summary for Amendments to WAC 173-563 and WAC 173-531A, Ecology states that "the consultation is not just an 'aspect of procedural compliance' . . . *** [t]he consultation will be . .

. a key part of the basis for the decision to approve or deny a water right application . . . *** [t]his is the *explicit purpose of the consultation*.” App. D at. 27 (Resp. 43, emphasis added). It is from the advice and information acquired through the consultation process that Ecology is to ensure that fisheries and existing water rights are protected. *See* App. D, at 16 (Resp. 18 - “[W]e will rely on this expertise to make certain that fish flows and existing rights will be adequately protected *before* any new water rights might be approved”).

Most of the representatives contacted provided their perspectives as to the impacts that the applications would cause on fisheries and existing water rights. PCHB Order, at 10-13. Most consultees indicated Ecology should either deny the water right applications or condition them to allow water to be used only after the NMFS target flows were being met. *See, e.g.*, KID ROE, PCHB Index 38, at 3-4.

Ecology initially incorporated the consultees’ opinions, as demonstrated by the issuance in September 2001 of the draft ROEs. These draft ROEs recommended approval of the water applications, but only with the incorporation of restrictive conditions requiring the applicants to interrupt their water use whenever river levels dropped below the “target flows” established by NMFS’ 2000 Biological Opinion. *See, e.g.*, KID ROE, PCHB Index 38, at 3-4.

Hence, Ecology initially understood its responsibility to use the recommendations garnered through consultation as the basis for its decision regarding the Petitioners' water right applications. However, because these recommendations were discarded by Ecology at some point after it issued the draft ROEs, the requirement that consultation actually guide Ecology's decision making was ultimately ignored and the consultation became merely procedural rather than substantive. This result frustrates the intent of the rule requiring consultation—that consultation actually guide decision making. The PCHB's order remanding the applications to Ecology to engage in meaningful consultation should, accordingly, be affirmed by this Court.

B. When Ecology Substantially Changed Its Position, Its Duty To Consult Was Re-Initiated Because The Consultees Had Not Been Given The Opportunity To Provide Advice And Information On The Revised ROEs.

Consultation also becomes meaningless when Ecology fails to continue to consult throughout its processing of a water right application, particularly when it radically changes its approach, as Ecology did in this case. In order for the regulatory requirement of consultation to have value and meaning, Ecology has a duty to continue consultation as it processes a water right application.

Though the rules at issue do not specifically speak to a duty to re-consult, the PCHB concluded that the shift in Ecology's decision - from issuing the draft ROEs conditioned on meeting target flow objectives to issuing uninterruptible permits based on an annual \$10 per acre foot of water used mitigation fee - equated to a change in position that renewed Ecology's requirement to consult with the appropriate federal, local and state governments, and Indian Tribes. PCHB Order, at 19.

This substantive shift in Ecology's decision making process occurred abruptly during private settlement discussions with the parties to the Benton Superior Court action, after Ecology diligently defended these draft ROEs in superior court for more than a year. Notice of Appeal, PCHB Index 38, App. 1 at 8 (Feb. 19, 2003). The idea of paying money into a mitigation fund rather than conditioning water permits to meet federal flow targets put significant new information on the table, to which the original consultees should have been able to consider and respond. Regardless of the context of Ecology's shift in decision making, in this case settlement discussions, Ecology had a duty to re-consult with the original consultees prior to issuing the final Reports of Examination. To conclude otherwise makes the original consultation pointless.

Robert Barwin, Section Manager for the Water Resources Program at Ecology's Central Regional Office in Yakima, and the Ecology official

signing the final ROEs, apparently believed that Ecology would condition the permits based, at least in part, on evidence coming out of the consultation when he stated that “I was working under a consultation rule that really required a very case-by-case evaluation to craft conditions ... I was *required to condition*, and the *origins of that came out of the consultation.*” Deposition of Barwin, PCHB Index 16 (*Declaration of Eichstaedt*), Ex. K, at 34.

The consultation requirement can be likened to the consultation requirements found in federal regulations under the ESA, which require re-initiation of consultation if an agency maintains discretionary control over the action and the action has been subsequently modified. 50 C.F.R. § 402.16(c).⁶ These ESA regulations are directly analogous to the situation in the present case, and should at least be instructive. After all, one of Ecology’s key objectives in developing a water resources management plan was to help “reduce the impacts of federal listings and recovery actions under the [ESA]” Responsiveness Summary, *supra*, App. D, at p. 5. and “keep authority for managing recovery of weak fish stocks – as well as overall water management – as much as possible at the state level ...” *Id* at p. 6.

⁶ See Appendix C for relevant text of 50 CFR §402.16(c)

Under the regulations at issue in this case, WAC 173-563-020(4) and 173-531A-060, Ecology must consult appropriate agencies and tribes regarding possible impacts to fisheries and existing water rights. The record in this case does not reflect that Ecology asked any of the appropriate entities whether an annual payment of \$10 per acre foot of water used into a mitigation fund adequately ensures protection for fisheries and existing water rights? The PCHB was correct in finding that, after Ecology changed its position about issuing water permits only if they were conditioned upon meeting target flows, Ecology had a duty to consult again with the appropriate entities about the alternative mitigation options and to evaluate the consultees' advice before issuing the permits. PCHB Order, at 18-20. Because Ecology failed to do so, the PCHB's order remanding the applications to Ecology to engage in meaningful consultation should be affirmed.

C. Contrary To KID's Arguments, The Record Clearly Shows That There Is And Was A Real Threat To The Fish Runs Caused By Reducing Instream Flow.

In their opening brief to this Court, Kennewick Irrigation District (KID) and Mercer Ranches (Mercer) argue that consultation is only required if "...there is something meaningful about which to consult..." and that "... consultation on public policy issues as to the proper balance between water for fish and other water uses would be meaningless." (KID

Opening Brief, at 37 (emphasis in original)). To reach the conclusion that there is nothing meaningful about which to consult, KID and Mercer assert that there is no proof of harm to fish and that the tribes submitted “no evidence that supported the factual premise of its claim and motion – that the proposed rights, cumulatively or individually, would in fact harm fisheries.” *Id.* at 37-38.

First, however, KID and Mercer err in their understanding of the rules. WAC 173-531A-060 and WAC 173-563-020(4) both require that, when Ecology is considering any water right application from the Columbia River, Ecology *must consult* with appropriate local, state, and federal agencies and Indian tribes in evaluating the impacts on fish and existing waters rights that the application may cause.⁷ KID asserts that the tribes have to show evidence of harm to fish in order to trigger Ecology’s consultation requirement. (KID Opening Brief, at 2.) However, under the rules, Ecology has no discretion and must consult whenever it issues a water permit.

Second, there is clearly something meaningful about which to consult. CELP urges the Court to not reach the factual issues raised by KID for a number of reasons. It was not the subject of a trial before the PCHB but only comes up before this Court on summary judgment. The

⁷ See Appendix A for relevant text of the regulations

PCHB ruled that there were genuine issues of material fact requiring a hearing. PCHB Order at 14. KID now before this Court wants this Court to not only reverse the PCHB on this important issue of fact but decide that the PCHB should have granted summary judgment to KID. This Court should not accept KID's invitation to reverse the PCHB on this issue of importance to fish survival when the PCHB has decided there are issues of fact.

Most of the original comments by the consultees to the Reports of Examination expressed concern about reduction of flows. KID ROE, PCHB Index 38, at 3-4. The Bureau of Reclamation stated it would not oppose new uses of water only "...when the flows in the Columbia are in excess of flow objectives established for fish." Notice of Appeal (*Report of Examination for water application permit No. S4-29956*); PCHB Index 40, at 3 (Feb. 19, 2003)(hereinafter "LSID ROE"). The National Marine Fisheries Service recommended "... denial of the application unless flow objectives can be met." *Id.* at 4. "NMFS states that its '...policy on water withdrawals from the mainstem Columbia River is that 'zero net impact' should be permitted,...'" *Id.* The Washington State Department of Fish and Wildlife *recommended against* approval unless flow objectives can be met. Chelan County expressed a concern that "...new withdrawals may

have an impact on flows for fish or existing rights...” although it did not have information on these specific applications. *Id.* at 3.

KID cites to statements by certain biologists at depositions but ignores comments by others. In discussing these permits, Mr. Heinith, a biologist for Columbia River Inter-Tribal Fisheries Commission who KID ignored, stated as follows in response to questions:

“Q. Is there any diversion of water that you believe would not be harmful to anadromous fish?

A. Probably not.

Q. Has CRITFC ever supported any diversion of water form the Columbia River system?

A. No. Not to my knowledge.”

Dep. of Robert S. Heinith, PCHB Index 8 (*Decl. of Iller*), Ex. 8, at 82 (Aug. 20, 2003).

Additionally, the record reflects that the ROEs may cause adverse cumulative affects on flows and fish runs in the Columbia River, as supported by the scientific data and modeling such as the FLUSH model. *See* Dep. of Dale McCullough, PCHB Index 8 (*Decl. of Iller*), Ex. 6, at 19 (“[I]f we continue to reduce the flows, it’s going to aggravate a number of things”). *See also*, Tribes Brief (July 26, 2004) at p. 37 as corrected Nov. 2, 2004. The Endangered Species Act Biological Opinion for the

Columbia Basin has indicated that direct and indirect survival of listed species are improved by increasing flow levels including meeting "... flow objectives at Lower, Granite, Priest Rapids, McNary, and Bonneville Dams." Biological Opinion: Reinitiation of Consultation on Operation of the Federal Columbia River Power System, PCHB Index 16 (*Decl. of Eichstaedt*), Ex. A, at 9-53. The Biological opinion also called generally for obtaining additional water. *Id.* The Opinion also recommended specific flow objectives. *Id.* at 9-57. Although these are not necessarily sufficient, they do show that survival of the fish runs is correlated with instream flow.

Furthermore, as the PCHB noted, there is a disputed issue of fact as to the impairment of the rights at issue and protection of the public interest. PCHB Order, at 26. Moreover, there are enough questions regarding possible cumulative impacts of these applications such that the PCHB determined that these issues required a hearing. *Id.* at 27-30. Significantly, KID does not dispute the PCHB's ruling that Ecology must consider cumulative impacts in making its water allocation decision. *Id.* The deposition testimony cited by KID is not inconsistent with the PCHB's ruling that there is a need to consider cumulative impacts. *Id.*

KID argues that it is useless to remand this matter for consultation based upon a few quotes out of context from depositions that ignore the

rest of the record and the other pending applications. As the PCHB noted, “The fact that the application will cause an insignificant harm to fish habitat, for example is not decisive: rather the issue is whether the cumulative effects of the application and other similar future proposals will cause significant harm to fish habitat.” PCHB Order, at 28 (quoting with approval *In the Matter of Appeals From Water Right Decisions of the Department of Ecology*).

Ecology simply had no lawful authority to reverse the results of its original consultation process and, without further consultation and evaluation, issue water right permits containing substantially different conditions that were not developed through a proper case-by-case evaluation.

D. Deference Should Be Given To An Agency’s Interpretation Of Its Own Rules Only When In Accord With Statutory Authority.

Though deference is due an agency’s interpretation of the laws and regulations it administers, that deference is due to the agency’s unique expertise in regards to those laws and regulations. *Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 672 (2004). In the *Port of Seattle* case, the deference given Ecology was due to the specialized technical knowledge and expertise of the administrative agency, not because Ecology was legislatively assigned the duty of administering the

laws or regulations. *Id.* Here, Ecology’s technical expertise is not required to define the word “consultation.” Accordingly, Ecology’s interpretation of its consultation obligation, as construed by its actions of disregarding the consultees’ recommendations and failing to continue to consult after it changed its position regarding how to issue the water permits in this case, should not be given deference in this case

In addition, an agency’s interpretation of its rules must not be in conflict with its statutory duty. *Postema v PCHB*, 142 Wn.2d 68, 77; 11 P.3d 726 (2000). Under Ch. 90.54 RCW, Ecology is given authority to manage the state’s water resources. However, the Legislature directs that to ensure proper management “all citizens of Washington” must have the “opportunity to *work together to plan and manage* [the water].” RCW 90.54.010(b)(emphasis added).⁸ The Legislature further states, “[W]ater resources issues are best addressed through *cooperation and coordination* among the state, Indian tribes, local governments, and interested parties.” RCW 90.54.010(d)(emphasis added). Therefore, Ecology’s statutory duty is to work in cooperation and coordination with the people of the State to manage the water resources and, the consultation requirement of Chs. 173-563 and 173-531A WAC logically envisions this same joint effort.

⁸ See Appendix E for relevant text of Ch. 90.54 RCW.

By effectively defining consultation as a superficial procedural mechanism - requiring only solicitation of advice without any inclusion of that information into the decision-making process - Ecology is in direct conflict with its statutory duty to work in cooperation with the people of the State.

IV. CONCLUSION

WAC 173-531A-060 and WAC 173-563-020(4) both require Ecology to consult with the appropriate agencies and tribes in evaluating possible impacts to fish and existing water rights before approving water diversions from the Columbia River. So that these requirements are meaningful, Ecology has a duty to actually incorporate the advice it receives from consultees into its final decision. Furthermore, consultation is not a single event, but rather a process that must be followed throughout the process of issuing a water permit. This is particularly critical when, as in this case, Ecology significantly changes its approach to issuance of a water permit. In this case, in order for the consultation to be proper and meaningful, Ecology should have re-consulted with consultees after it decided to issue Petitioners' water permits without conditioning their water use on meeting the federal flow targets, in complete contradiction to Ecology's original position.

Based on the foregoing, *amicus curiae* CELP respectfully requests this Court affirm the PCHB's finding that Ecology failed to meaningfully consult with the appropriate parties prior to issuing the water permits and remand to Ecology for proper consultation.

Submitted this ____ day of December, 2004.

RESPECTFULLY,

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