BEFORE THE POLLUTION CONTROL HEARINGS BOARD
IN AND FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, CITIZENS AGAINST SEA-TAC EXPANSION, Intervenor/Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and PORT OF SEATTLE, Respondents.	PCHB No. 01-160 DECLARATION OF JEFF KRAY

JEFF KRAY hereby declares as follows:

I am over the age of 18 years and am competent to testify as to the matters contained herein, and that all statements made herein are based upon my own personal knowledge.

Attached are true and correct copies of the following documents:

1. Amended Final Findings of Fact Conclusions of Law and Order, *Public Utility Dist. No. 1 of Pend Oreille Cy. v. Dep't of Ecology*, PCHB Nos. 97-177, 98-043, and 98-044.

2. Order denying Petitioner's Motion for Discretionary Review, *Public Utility Dist. No. 1 of Pend Oreille Cy. v. Dep't of Ecology*, Supreme Court No. 67449-3.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 23rd day of January, 2002, at Olympia, Washington.

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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1, OF PEND OREILLE COUNTY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent, CENTER FOR ENVIRONMENTAL LAW AND POLICY, Intervenor.	PCHB NO. 97-177 PCHB NO. 98-043 PCHB NO. 98-044 AMENDED FINAL FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

A final hearing was held in this matter on January 25-27, 2000 in Lacey, Washington. Closing arguments were made in writing and filed on March 21, April 19 and May 10, 2000. The board is comprised of James A. Tupper, Jr., presiding, Robert V. Jensen and Ann Daley. Gene Barker & Associates of Olympia, Washington provided Court reporting services for the hearing.

The Public Utility District No. 1 of Pend Oreille County appeared by and through its attorney Jerry K. Boyd. The Department of Ecology appeared by and through Assistant Attorney General Deborah L. Mull. The Center for Environmental Law and Policy did not appear or participate in the hearing.

At the hearing the board heard sworn testimony from witnesses, received exhibits and the arguments of counsel. Based on this record, the board enters the following findings of fact, conclusions of law and order.

PROCEDURAL BACKGROUND

1. This consolidated proceeding involves three Department of Ecology (Ecology) orders. In PCHB No. 97-177 the Public Utility District No. 1 of Pend Oreille County (District) appeals a water quality certification issued pursuant to section 401 of the federal Clean Water Act. 33 U.S.C. § 1301(a)(1). In PCHB No. 98-043 the District appeals the denial of an application for a change in the point of diversion for a water right dating to 1907. In PCHB No. 98-044 the District appeals the denial of an application for change in point of diversion of a water right permit. On October 15, 1998, the board entered an amended summary judgment. Summary judgment was granted Ecology on its authority to regulate minimum instream flows under a water quality certification, the authority to impose stream flow conditions in granting a change, the application of RCW 90.03.380 to an undeveloped water right permit, the authority to consider the public interest when evaluating an application for change under RCW 90.03.380, compliance with the State Environmental Policy Act, and the authority to make tentative determinations of water right validity as part of its examination of an application for change under RCW 90.03.380. The District was granted summary judgment on the issue of whether the District had abandoned its water rights for failing to timely pay annual hydroelectric fees to Ecology. Summary judgment was denied on the issue of abandonment.

2. The parties sought direct review of our summary judgment order pursuant to RCW 34.05.518. The matter returned to the PCHB without further review and on July 28, 1999, the board entered the Fourth Prehearing Order. Five issues were reserved for hearing:

1. Was the imposition of the instream flow conditions arbitrary and capricious?
2. Are the monitoring and reporting requirements set forth in the Water Quality Certification as they relate to instream flow conditions reasonable?
3. Was the appellant afforded due process in the imposition of conditions to the subject Water Quality Certification relating to instream flow?
4. Was Ecology's determination that the appellant's water rights had been abandoned erroneous?
5. Has Ecology violated the District's state and federal constitutional rights?

The board otherwise fully incorporates its summary judgment order in these final findings of fact, conclusions of law and order.

FINDINGS OF FACT

3. The underlying facts in these consolidated appeals are not, as a general matter, in dispute. Our findings are grouped in terms of the District's actions from 1956 relating to the certificated water right relevant to the question of abandonment, the development of the instream flow regime set forth in the Water Quality Certification, and allegations of bias on the part of Ecology staff and employees of the Department of Fish and Wildlife.

Abandonment

4. In November 1994 the District filed an application with the Federal Energy Regulatory Commission (FERC) to amend an existing hydroelectric license, issued under the Federal Power Act, to develop the Sullivan Creek Hydroelectric Project.

5. Under the project, water will be released from the existing Sullivan Lake to a smaller existing reservoir known as the Mill Pond. A portion of the water from the Mill Pond will be diverted for approximately 3 miles via pipeline-penstock following an existing flume right-of-way to an existing tunnel to a power house near Metaline Falls, Washington. The water will then be returned to Sullivan Creek at the powerhouse. The bypass reach of Sullivan Creek from the Mill Pond to the powerhouse is approximately 3.25 miles.

6. The District holds disputed water rights in the amount of 550 cubic feet per second (cfs) on Sullivan Creek, Harvey Creek and Sullivan Lake. These rights include the right to store, divert, and use water for generation of hydroelectric power. 110 cfs of these rights has a priority date of June 26, 1907. In 1964, the point of diversion for the 110 cfs water right was changed from the Mill Pond to the confluence of Sullivan Creek and Outlet Creek by certificate approved by the predecessor agency to the Department of Ecology. This is the only water right at issue following our amended summary judgment order.

7. In conjunction with the FERC application, the District filed an application for a water quality certification under section 401 of the Clean Water Act with the Ecology on October 30, 1996. One year later on October 28, 1997, Ecology issued Order DE97WQ-E361 certifying that the District's project complies with the Clean Water Act and applicable state laws. The order included additional minimum in-stream flow requirements for Sullivan Creek in excess of those imposed under the 1980 water right permit.

8. The water quality certification, as further discussed below, imposes a year-round minimum instream flow on the proposed project. The flow requirements range from 75 cfs during the winter to 200 cfs during a portion of April and from May 1 through July 31.

9. On June 7, 1993, the District filed two applications to change the point of diversion for two of its water rights. The applications pertained to the 1907 right of 110 cfs and the 1980 permit for 550 cfs. The applications sought to change the point of diversion from a proposed dam on Sullivan Lake to the Mill Pond and move the diversion site approximately 7,500 feet down stream. On March 17, 1998, Ecology denied both applications. The application with respect to the 1907 right was denied on the grounds (1) the right had been abandoned, (2) the project supporting the right had been abandoned, and (3) approval would be detrimental to the public interest.

10. Ecology initially determined that it would defer action on the change applications until the District had completed its environmental review for the pending FERC application. The department apparently reversed itself on this view and issued the denials before environmental review under the National Environmental Policy had been completed.

11. Prior to 1956 the Portland Cement Company and Lehigh Portland Cement Company owned the Sullivan Lake Hydroelectric Project. These companies owned and operated manufacturing facilities in the town of Metaline Falls. The original Sullivan Lake project included the Sullivan Lake Dam and reservoir, which stored waters for later release to generate power. The project included the Mill Pond dam and diversion works, which diverted water into a wooden flume and canal system to a forebay. A penstock transported water from the forebay

down to the Sullivan Creek powerhouse. This system was used to generate electric power from 1910 until 1956. The District purchased the hydroelectric project in 1956. In 1958 and 1959 the Federal Power Commission (the predecessor agency to FERC) issued a license for the storage and release of waters in Sullivan Lake. The license contemplated the reestablishment of hydroelectric power in the Sullivan Lake Project. From 1956 to the present, the District has engaged in various applications and feasibility studies to redevelop the project up to the FERC application underlying the water quality certification at issue here.

12. Ecology contends that the long period of non-use of the water rights dating from 1956 establishes a presumption of abandonment under *O.W.L. v. Town of Twisp,* 133 Wn.2d 769 (1997). The department also points to the fact that a section of the flume collapsed in 1956 and that the non-generating license FPA granted the District in that year indicated that the Sullivan Lake Project had been abandoned. The District requested and obtained an amendment to the license modifying this language. In its application for a modification the District based this request on a desire to maintain its water rights. Ecology argues that these facts should be construed as evidence that the District was simply trying to hold the water rights for future speculation. Ecology also points to the 1965 application for a new federal license for the Sullivan Lake project. Maps accompanying the application indicate that the wooden flume had been abandoned. At the same time the District applied for and obtained a permit for additional water rights and a change in point of diversion. The state granted these applications.

13. By 1969 the District determined that it was not economically feasible to proceed with the 1965 development plan. With the exception of a short-lived contract in 1978 to sell power

from the Sullivan Project, there was no decision to move forward with the project until the 1994 application was filed with FERC. In the intervening years the District did, however, engage in a number of engineering studies related to the project. In 1980 the District obtained additional water rights from the department to support future development.

14. The District has paid all annual licensing fees required for hydroelectric projects under RCW 90.16.060 for the 1907 water right.

Appearance of Fairness and Bias

15. The board has reviewed a voluminous record of correspondence, notes, memoranda and deposition transcripts dealing with the development of minimum instream flows as required in the water quality certification. The District contends that employees of the Washington Department of Fish and Wildlife (WDF&W) and Ecology, together with the United States Forest Service, met secretly, or at least without the participation of the District, in July 1994 to set minimum instream flows. Thereafter, the District contends, the state agencies never provided any objective evaluation of the stream flow needs or the stream flow regime proposed by the District and ultimately the FERC staff in its environmental evaluation published in April 1998.

16. It is not surprising that our attention is diverted from assessing the relative merits of the opposing instream flow proposals by a claim of bias. One particular employee of the WDF&W repeatedly used the most outrageous and unprofessional characterizations of the District and its consultants. This individual should be called out for his behavior. It represents a shame against his agency and greatly undermines the public's faith in the competence and

integrity of the agency in dealing with some of the most important environmental issues facing the state of Washington.

17. We are nonetheless confident that there is a sound scientific and technical basis for the stream flows required in the water quality certification. The principal witnesses on this issue were Hal Beecher, a fisheries biologist for the WDF&W, and John Blum, also a fisheries biologist and consultant to the District on stream flow requirements. Both of these gentlemen have testified before the board in previous proceedings and are highly regarded for their knowledge and understanding of stream flow requirements and fishery habitats. We do not associate the conduct of one WDF&W employee with the work of Dr. Beecher and do not find that it forms any basis for discounting his professional opinion underlying the water quality certification on appeal.

Minimum Instream Flows

18. The water quality certification as corrected by counsel for Ecology at the hearing requires the District to maintain an annual instream flow in Sullivan Creek of 75 cubic feet per second (cfs) from October 1 through March 31, 100 cfs from April 1 through April 7, 140 cfs from April 8 through April 14, 160 cfs from April 15 through April 21, 200 cfs from April 22 through July 31, and 125 cfs from August 1 through September 30. From May 1 through September 30, the required flows are those flows specified or the inflow into Mill pond, whichever is less.

19. The District proposes that instream flows be limited to those recommended by the FERC in 1998. Mr. Blum concluded that minimum stream flows should be set at 19 cfs for

winter trout rearing, 45 cfs for rainbow trout spawning, 25 cfs for summer rainbow trout rearing, and 45 cfs for brown trout spawning in the fall.

20. A critical assumption in the District and FERC stream flow recommendations is the quality of spawning habitat in the bypass reach. There does not appear to be meaningful dispute that the lack of spawning habitat is a significant limiting factor for fish in the bypass reach. This is a consequence of the District's dam on Sullivan Creek. The dam prevents gravel from washing downstream to replenish the bypass reach. As gravel is scoured out during higher flows, available spawning habitat is lost and not readily replaced. In light of this, it is not surprising that Sullivan Creek has been characterized as having relatively low productivity for fish compared to other streams in its region of the state.

21. The District contends that higher flows are not beneficial to spawning. This contention is supported by the weighted usable area (WUA) analysis performed by Mr. Blum with the extensive consultation of Dr. Beecher as part of an instream flow study conducted in support of the FERC application. An instream flow study is a means of comparing fish population data, flow data and physical conditions at various points or transects on river to model habitat quality and functions. In this case the study indicates that the WUA declines with increased flows for trout fry. The District additionally stresses results from the instream study indicating that the WUA peaks on stream flow curves at relatively low flows. From these conclusions the District and FERC staff recommend a lower flow regime within the bypass reach coupled with a spawning habitat enhancement program. The enhancement program, which has not been fully developed, would involve placement of gravel mid-channel to create additional

spawning areas during low flows associated with the power project.

22. Ecology relied principally on the work of Dr. Beecher in setting the instream flow requirements in the water quality certification. The department did conduct some independent evaluation of Dr. Beecher's conclusions. Beecher recommended flows that would protect existing, albeit limited, spawning gravel. The required flows are based on the WUA for spawning from the instream study. The minimum flows required in the water quality certification are designed to protect existing gravel from being dewatered during spawning seasons.

23. Dr. Beecher additionally concluded that the habitat enhancement program was too speculative and failed to account for conditions on the river during higher spring flows. In this analysis Dr. Beecher concludes that there is little mid-channel gravel and spawning due to the scouring effect of spring flows. This raises a concern that the proposed habitat enhancement program would further stress fisheries by encouraging mid-channel spawning that would simply be wiped out by higher seasonal flows. It does not appear that Mr. Blum analyzed specific daily flow data to assess this impact. Consideration of monthly average flows may not be sufficient to understand the potential impact on higher spring flows on any mid-channel enhancement effort. Mr. Blum does not dispute that the proposed enhancement proposal is relatively novel or that there is limited experience with such a proposal.

24. Ecology is additionally concerned about adequate flows during the winter from mid-December to mid-March when much of the water around Sullivan Lake is locked up in snow and ice. Some flow data indicates flows as low as 2 cfs in Sullivan Creek during this time of the

year. The 19 cfs winter flow proposed by the District may not be sufficient to protect freezing conditions that would be lethal for resident fish populations.

25. Dr. Beecher disagrees with the FERC rationale supporting lower instream flow requirements. FERC concluded that because there was no substantial difference between the optimum WUA and the WUA at a much lower flow, there was no justification for setting instream flows for the power on higher flows. In Dr. Beecher's view the instream study models are not precise enough to support such a conclusion. Rather, the inherent uncertainties in the methodology should drive more conservative requirements for minimum instream flows.

26. The instream proposal advanced by the District appears to be incomplete in important areas such as accounting for higher spring flows. We find that the requirements imposed by the state appear to be well supported by the facts and available studies. The state has reasonably required that the power project protect an already impaired stream, due in large part from the District's dam, from further habitat degradation.

27. Any conclusion of law deemed to be a finding of fact is hereby adopted as such.

Based on the foregoing findings of fact the board enters the following

CONCLUSIONS OF LAW

28. The board has jurisdiction in this matter under chapter 43.21B RCW. The matter was considered de novo. The District bears the burden of proof as to the reasonableness of the water quality certification conditions. Ecology bears the burden of proof as to the issue of abandonment.

Abandonment

29. Abandonment is the intentional relinquishment of a water right. *O.W.L. v. Town of Twisp,* 131 Wn.2d 769, 781 (1997). Under *Twisp,* the two critical elements of abandonment are non-use coupled with an intent to relinquish rights in water use. The burden of proof rests with the party asserting abandonment. Where, however, there is evidence of a long period of non-use, the burden may shift to the water right claimant to justify non-use. *Twisp,* 131 Wn.2d at 781. We conclude that there is questionable evidence to support a rebuttable assumption of abandonment in this case. Further, if a rebuttable assumption applies, then the District has established that it did not intend to relinquish the 1907 water right.

30. The facts here bear no resemblance to those in *Twisp.* In *Twisp,* a municipality had made no use of a surface water right for over 50 years. The diversion works were destroyed and never repaired. Moreover, the municipality had no institutional knowledge that it even held the subject water right. It was Ecology who found some record of the long abandoned water right in working with the community to develop solutions to a lack of sufficient water supply. In contrast, the District here acquired the right in 1956. Up to its acquisition the right had been continuously put to beneficial use. The District continued and continues to exercise the right for storage and release of water for downstream power generation. The District applied to the predecessor of FERC in 1959 to correct a non-generating license to clarify that it intended to retain its diversionary right to put the water under the 1907 right to use in power generation. In 1965, less than 10 years after the right was acquired, the District applied for a change in point of diversion to support a power project under application to FERC. While that project was

abandoned in 1969, the District continued to explore other options up to the application for changes in water rights now on appeal, and a new FERC license. In the meantime, the District has paid annual power licensing fees for the right. The facts here are so different than those in *Twisp,* that the board is not at all convinced that a presumption of abandonment should apply to the District.[1]

31. Ecology contends that the facts here are particularly close to those in *City and County of Denver v. Snake River Water District,* 788 P.2d 772 (1990). Unlike the District here, the municipality in that case more or less ignored two water rights that had been used for power generation over the course of 24 years. The actions taken with respect to the rights amounted to minor transfers of a portion of the rights to other parties as well as one licensing agreement for the use of a portion of the water rights. 788 P.2d 776-778. We can in fact draw from *Snake River* the important principle that diligent efforts to sell a water right are evidence of an intent to not abandon. 788 P.2d at 778; citing *People v. City of Thorton,* 775 P.2d 11, 19-22 (Colo. 1989), and *Beaver Park Water, Inc., v. City of Victor,* 649 P.2d 300, 302-303 (Colo. 1982). There is

[1] This is particularly true in light of the 1967 Relinquishment Statute. Under that statute no right claimed for power purposes where annual fees have been paid may be subject to relinquishment. RCW 90.14.140(2). In *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 758 (1997), the court stated, "[a] challenge to...a water right based on nonuse after 1967 must rely on the statutory standards for relinquishment." In *Twisp,* 133 Wn.2d at 784, the court held that the conclusion in *Acquavella* that the Relinquishment Statute codified the common law was dicta. The court further held that abandonment and relinquishment are separate actions. In *Twisp* this meant that the city could not rely upon the exemption under RCW 90.14.140 for municipal water supplies to avoid common law abandonment. The court ruled that the statute did not apply to claims of nonuse before 1967. We are not certain under this case law if the statute applies to a claim of abandonment for nonuse after 1967.

considerable evidence that the District here engaged in a continuing effort to develop and market a power project utilizing the water right.

32. Ecology nonetheless argues that the sum of these efforts amounts to an impermissible speculation in a water right. For this proposition the department cites *In re Clark Fork River Drainage*, 908 P.2d 1353 (Mont. 1995); and *Southeastern Colorado water Conservancy District v. Twin Lake Associates, Inc.*, 770 P.2d 1231 (Colo. 1989). In *Clark Fork,* the subject water right for mining had not been used at all since 1913. The defense to abandonment rested on the cyclical nature of mining economics under which one could reasonably expect long periods of non-use of a water right. The court rejected this argument that the potential for future profitability of a mining right to justify non-use as nothing more than a "gleam-in-the-eye-philosophy" tantamount to speculation. 908 P.2d at 1357. The facts in *Twin Lakes* are similar. There, in 1912, a mining company was enjoined from continuing a placer mining operation that was creating a nuisance in the form of water pollution for a downstream community. 770 P.2d at 1234. From 1912 there was no beneficial use of the water rights. As in *Twin Lakes,* the court rejected a defense to abandonment based on mining economics: "Nonuse resulting from present economic difficulties, coupled with an expectation of a more favorable economic climate for future use, will not constitute justifiable excuse [to rebut a presumption of abandonment]." 770 P.2d at 1238. We are not persuaded that these principles apply here where the District was continuously engaged in some affirmative effort to put the diversionary water right to beneficial use.

32. Ecology contends that the standards for "future determined development" under RCW 90.14.140, as developed by the court in *R. D. Merrill v. PCHB*, 137 Wn.2d 118 (1999), support a conclusion that the District's activities have amounted to no more than impermissible speculation in the water right. This is not, however, an appropriate application of the Relinquishment Statute. In *Twisp,* the court was clear that the statutory exemptions to relinquishment do not apply to claims of abandonment before 1967. 133 Wn.2d at 784. The court also stated in *R. D. Merrill* that the statutory exemptions under chapter 90.14 RCW are to be narrowly construed to give effect to the policies of the act. 137 Wn.2d at 140. In contrast, Washington law is clear that courts will not lightly decree abandonment of a water right. *Acquavella*, 131 Wn.2d at 757; *Jensen v. Department of Ecology,* 102 Wn.2d 109, 115 (1984); *Miller v. Wheeler,* 54 Wash. 429, 435 (1909). It must also be considered that the authority of the department and, by derivation this board, is only to render a tentative decision on the abandonment issue. *R. D. Merrill,* 137 Wn.2d at 127; *Twisp, 133 Wn.2d at 779; Rettkowski v. Department of Ecology,* 122 Wn.2d 219, 228 (1993)("These determinations necessarily implicate important property rights. It is because of the complicated nature of such inquiries, and their far-reaching effect, that the Legislature has entrusted the superior courts with responsibility therefor."). In a case such as *Twisp*, where there is virtually no evidence to rebut a presumption of abandonment, it is not difficult to make a tentative determination of abandonment. It appears inconsistent with this authority, however, to sift the voluminous business records of the District offered by Ecology to divine an intent to abandon. A more cautious approach is required. In considering the entire record, we conclude as a matter of law, that the 1907 water right was not

abandoned by the District. The Findings of Fact and Order issued by Ecology on March 17, 1998, denying a change based on abandonment should accordingly be remanded for further consideration consistent with the ruling of the board.

Appearance of Fairness

33. The District's claim of due process violations is without merit. Ecology is prohibited by law from conducting administrative adjudications under the Administrative Procedures Act, chapter 34.05 RCW. RCW 43.21B.110. The appearance of fairness doctrine does not apply to issuance of a decision by the department on a water right change application or a water quality certification. The doctrine only applies in the context of a quasi-judicial proceeding. *Side v. City of Cheney*, 37 Wn. App. 199, 201 (1984). To the extent the District alleges that employees of Ecology or the WDF&W were biased, that consideration is relevant only to the particular weight the board should give to the testimony of a witness. *E.g., Alston v. Blythe*, 88 Wn. App. 26, 41 (1997).

Instream Flow Requirements

44. In order to obtain a FERC license, the District must have a water quality certification. Section 401(a)(1) of the Clean Water Act provides:

> Any applicant for a federal license or permit to conduct any activity, including but not limited to, the construction or operation of facilities which may result in any discharge into navigable waters, shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of §1311, §1312, §1313, §1316 and §1317 of this title.

33 U.S.C.§1301(a)(1). Water quantity is an element of water quality regulation under this provision. *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology (Elkhorn)*, 511 U.S. 700 (1994). Under the authority of section 401(d) to impose "other limitations" Ecology may condition the project use of water and not only a specific discharge to achieve compliance with narrative water quality standards. 511 U.S. at 715. The Court made clear that this authority extends to the quantity of water employed under the proposed use:

> In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as a "man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. 33 U.S.C. §1362(19). This broad conception of pollution – one which expressly evinces Congress' concern with the physical and biological integrity of water – refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality."

511 U.S. at 719. The quantity of water use may therefore constitute pollution and be regulated as an "other limitation" under section 401.

45. The issue then is whether Ecology acted reasonably and in a manner consistent with its statutory responsibilities in setting the minimum instream flows contained in the water quality certification. Consistent with the above findings we conclude as a matter of law that the instream flow requirements in the water quality certification are reasonably calculated to protect the existing fisheries habitat in Sullivan Creek within the bypass reach. It is clear that Sullivan Creek is impaired for spawning habitat due primarily to the existing dam structure. While the District has advanced an interesting proposal for habitat enhancement the project itself will be

devastating to existing spawning habitat. The enhancement plan additionally fails to account for higher spring flows and need for sufficient flows to avoid freezing conditions in the winter. Finally, the department is justified in interpreting the instream study in a manner that is more conservative than the District which results in higher minimum instream flow requirements.

46. In our amended Summary Judgment we ruled Ecology could condition a change application based upon the public interest. The instream flow conditions under the water quality certification would constitute reasonable requirements in granting any change of use of the 1907 water rights to protect the public interest under the Water Code.

47. Any finding fact that is deemed to be a conclusion of law is hereby adopted as such.

Based on the foregoing findings of fact and conclusions of law the board enters the following

ORDER

IT IS HEREBY ORDERED that the appeal of the water quality certification is DENIED;

IT IS FURTHER ORDERED that the appeal of the denial of an application to change the point of diversion for the 1907 water right is GRANTED and the subject order is remanded for further consideration consistent with the foregoing ruling; and

IT IS FURTHER ORDERED that all issues have been resolved and that the above captioned appeals are dismissed consistent with the foregoing ruling and the rulings of the board in the Amended Summary Judgment entered on October 15, 1998.

DONE this 15th day of August, 2000.

POLLUTION CONTROL HEARINGS BOARD

JAMES A. TUPPER, JR., Presiding

ANN DALEY, Chair

ROBERT V. JENSEN, Member

PCHB 97-177 Final

THE SUPREME COURT OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, et al.,

Respondents.

ORDER

No. 67449-3

Pend Oreille County No. 98-0-00243-0

Department II of the Court considered this matter at its April 6, 1999, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That Petitioner's Motion for Discretionary Review is denied because the decision of the Pollution Control Hearings Board is not final, RCW 34.05.518(1).

DATED at Olympia, Washington this 7th day of April, 1999.

CHIEF JUSTICE

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
IN AND FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, CITIZENS AGAINST SEA-TAC EXPANSION, Intervenor/Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and PORT OF SEATTLE, Respondents.	PCHB No. 01-160 CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on January 23rd, 2002, I caused to be served Ecology's Memorandum Opposing ACC's Application for Certificate of Appealability of the Board's Order on Motion for Stay, Declaration of Jeff Kray, and this Certificate of Service, in the above-captioned matter to be served upon the parties herein, as indicated below:

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the foregoing being the last known business addresses.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of January, 2002, in Olympia, Washington.

Diana MacDonald

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