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6 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
7 STATE OF WASHINGTON8 BARRISH & SORENSEN
9 HYDROELECTRIC COMPANY, INC.,

10 Appellant,

PCHB NO 94-193

11 v.

12 FINAL FINDINGS OF FACT,
13 CONCLUSIONS OF LAW, AND ORDER14 STATE OF WASHINGTON
15 DEPARTMENT OF ECOLOGY,

16 Respondent,

17 FRIENDS OF THE COWLITZ,
18 AMERICAN RIVERS, *et al.*,

19 Intervenors.

20 This matter, the appeal of a denial by the Washington State Department of Ecology of
21 a water quality certificate pursuant to § 401 of the Clean Water Act (33 U.S.C. §1341), came
22 on regularly for formal hearing on May 8, 1995 before the Pollution Control Hearings Board.
23 Seated for and as the Board were Robert V Jensen, Richard C Kelley, and James A. Tupper,
24 Jr. The Honorable William A. Harrison, Administrative Appeals Judge, presided. The
25 proceedings were electronically recorded and stenographically reported by Gene Barker &
26 Associates. Appellant, Barrish & Sorenson Hydroelectric Company, Inc. ("Barrish &
27 Sorenson") was represented by its counsel, Joel C. Merkel. Respondent, the State of
28 Washington, Department of Ecology ("Ecology") was represented by its counsel, Assistant
Attorney General Mark C. Jobson. Intervenors, Friends of the Cowlitz et al. ("Intervenors")

1 were represented by their counsel, Jonathan I. Feil (for Intervenor Friends of the Cowlitz) and
2 Brooke M. Drury (for remaining intervenors, American Rivers et al.).

3 Opening statements were heard. Witnesses called by Barrish & Sorenson were sworn
4 and testified. Exhibits were examined and admitted. After Barrish & Sorenson rested,
5 Ecology moved for dismissal of the appeal on the ground that upon the facts and the law,
6 Barrish & Sorenson had shown no right to relief and that a *prima facie* case had not been
7 made. The Board announced an oral decision on the motion, which is attached hereto. From
8 the testimony, evidence, and argument reviewed, the Board enters the following findings of
9 fact, conclusions of law, and order

10 FINDINGS OF FACT

11 1. Barrish & Sorenson Hydroelectric Company, Inc. is a Washington corporation.
12 On March 20, 1991, Barrish & Sorenson submitted to Ecology a request for a water quality
13 certificate required by §401 of the Clean Water Act, 33 U.S.C. §1341, in support of its
14 application to the Federal Energy Regulatory Commission (#10567-004) for a license to
15 construct a major new hydroelectric project on the Cispus River, a waterway located within the
16 state of Washington. Barrish & Sorenson's project is commonly known as the Cispus No. 4

17 2. On March 19, 1992, Ecology denied water quality certification on the basis
18 that Barrish & Sorenson's application failed to include information sufficient for Ecology to
19 certify and condition the project.

20 3. Barrish & Sorenson filed a second request for water quality certification on
21 August 10, 1992. On August 9, 1993, Barrish & Sorenson withdrew this second request and
22 concurrently resubmitted it. On July 27, 1994, Ecology denied Barrish & Sorenson's
23 resubmitted request for water quality certification. In its letter notifying Barrish & Sorenson
24 of the denial, Ecology stated that it had found "that the Cispus No. 4 hydroelectric project, as
25 proposed, would adversely alter the hydrologic conditions necessary for recreation and
26 navigation on the Cispus River and therefore degrade these beneficial uses. We further find

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1 that there is inadequate information to develop conditions to insure compliance with Chapter
2 173-201A WAC "

3 4 On August 26, 1994, Barrish & Sorenson appealed Ecology's decision to this
4 Board.

5 5 In the course of presenting its application to Ecology, Barrish & Sorenson
6 proposed certain water releases from its hydroelectric project for recreational boating. On the
7 record before the Board on this appeal, Barrish & Sorenson has not made a *prima facie* case
8 that anadromous fish and fish habitat of the Cispus River will be protected under this
9 proposal. To the contrary, the work done by Barrish & Sorenson's fisheries consultant, Dr.
10 Tim Hardin, was based on an earlier instream flow proposal for the affected reach of the
11 Cispus River, and did not establish that Barrish & Sorenson's recreational boating proposal
12 was consistent with the protection of fish resources

13 6. Evidence was also presented at the hearing that Ecology, in the course of
14 processing Barrish & Sorenson's application, requested additional information and studies
15 from Barrish & Sorenson, including information and studies directed to the issue of whether
16 Barrish & Sorenson's recreational boating proposal was consistent with the protection of fish
17 resources, in a letter dated September 23, 1993, which was introduced as Exhibit A-40 at the
18 hearing.

19 7. On appeal, Barrish & Sorenson presented a new proposal for recreational
20 boating water releases, which was summarized in Exhibit A-5, which was introduced by
21 Barrish & Sorenson and admitted in the hearing. Evidence was presenting during Barrish &
22 Sorenson's case in chief that it is critical to know whether planned water releases for boating
23 will have an adverse affect on fish. There has been no evidence presented which would
24 establish that Barrish & Sorenson's proposal in Exhibit A-5 addresses the effect on fishery
25 resources of Barrish & Sorenson's planned releases for boating flows, or that such issues have
26 been resolved. For that reason, Barrish & Sorenson has failed to make a *prima facie* case that
27 existing beneficial uses of the Cispus River will not be degraded by its proposed project.

8 Any conclusion of law which would be deemed a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal under RCW 43.21B.110
2. This Board has ruled in its Order Denying Motions for Partial Summary Judgment in this matter, that the federal and state water quality standards adopted pursuant to the Clean Water Act and Washington Water Pollution Control Act allow for and support base flows or minimum flows for recreation.

3. Both the Intervenors and Ecology raise as an issue in this appeal whether fish resources in the project area of the Cispus River will be adequately protected under Barrish & Sorenson's proposed hydroelectric project. The Board has previously decided in PCHB No. 86-118, that the state has included as a condition of water quality certification, in fulfillment of RCW 90.54.020(3)(a), that minimum stream flows be retained for fish and wildlife preservation. That order was affirmed by the Washington and United States Supreme Courts. Department of Ecology v. Public Utility District No. 1 of Jefferson County, 121 Wn.2d 179, 849 P.2d 646 (1993); Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology, ___ U.S. ___, 114 S.Ct. 1900 (1994).

4 Under RCW 43.21B.110 and WAC 371-08-183, this Board decides *de novo* whether Barrish & Sorenson's proposed project complies with Washington water quality standards. The Board must make a decision based on the proposed project as it is presented to the Board at this hearing. That proposal is set forth in Barrish & Sorenson's Exhibit A-5.

5 Barrish & Sorenson has failed to make a *prima facie* case that its present proposal in Exhibit A-5 is consistent with and will comply with water quality standards adopted by the State of Washington at WAC 173-201A. Barrish & Sorenson presented no evidence that the recreational flow releases proposed by Exhibit A-5 are consistent with protection of the anadromous fishery and fish habitat.

1 6 An opportunity was previously extended by Ecology, by way of the request for
2 additional information in Exhibit A-40, for Barrish & Sorenson to undertake further study or
3 present further information on the impact of its proposed recreational boating water releases
4 on the fisheries resources. Barrish & Sorenson failed to do so.

ORDER

6 Ecology's motion for dismissal is GRANTED, the appeal herein is hereby
7 DISMISSED; the denial by Ecology of Battish & Sorenson's August 9, 1993 application for
8 water quality certification is hereby AFFIRMED

DATED this 26 day of August, 1995.

POLLUTION CONTROL HEARINGS BOARD

Robert V. Jensen, Chairman

Richard C Kelley, Member

James A. Tupper, Jr., Member

Presented by

CHRISTINE O. GREGOIRE
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American Whitewater Affiliation, Friends
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Washington Kayak Club, and Rivers Council
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Copy Received; Approved as to Form,
Notice of Presentation Waived

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6 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
7 STATE OF WASHINGTON8 BARRISH & SORENSEN
9 HYDROELECTRIC COMPANY, INC.,

10 Appellant,

11 PCHB NO. 94-193

12 v.
13 STATE OF WASHINGTON
14 DEPARTMENT OF ECOLOGY,15 ORDER DENYING MOTIONS FOR
16 SUMMARY JUDGMENT

17 Respondent,

18 FRIENDS OF THE COWLITZ,
19 AMERICAN RIVERS, *et al*,

20 Intervenors.

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22 The Board has considered the Motion for Partial Summary Judgment, filed by
23 appellant Barrish & Sorenson Hydroelectric Company, Inc. ("Barrish & Sorenson") on March
24 15, 1995, and the Cross-Motion for Summary Judgment, filed by respondent State of
25 Washington, Department of Ecology ("Ecology") on April 4, 1995. Together with the
26 motions, the Board has considered the declaration of Ted Sorenson, the exhibits thereto, and
27 Barrish & Sorenson's memorandum filed in support of its motion; the affidavit of Jeff Marti,
28 the exhibits thereto, and Ecology's memorandum in opposition to Barrish & Sorenson's
motion and in support of Ecology's cross-motion; the declarations of Brooke M. Drury and
Michael G. Deckert, the exhibits thereto, and the Intervenors' opposition to Barrish &
Sorenson's motion, Barrish & Sorenson's reply; and the files herein.

1 Oral argument was held on the motions on April 12, 1995 in Lacey, Washington. The
2 Board entered an oral ruling at the conclusion of the hearing on April 12, 1995, a copy of
3 which is attached to this order.

4 For the reasons stated in the oral ruling, which are hereby entered as conclusions of
5 law, the Board has determined that Barrish & Sorenson's motion should be denied, that
6 summary judgment should be awarded to Ecology as the non-moving party with respect to the
7 issues of recreation and rulemaking which were the subject of Barrish & Sorenson's motion,
8 and that Ecology's cross-motion for summary judgment should be denied as untimely.

9 The Board therefore enters this:

ORDER

11 Barnish & Sorenson's motion for partial summary judgment is DENIED. Ecology's
12 motion for summary judgment is DENIED as untimely. Summary judgment is GRANTED to
13 Ecology as non-moving party with respect to the following issues:

14 (1) The federal and state water quality standards adopted pursuant to the Federal
15 Water Pollution Control Act, 33 U.S.C. §1251 et seq., the Washington Water Pollution
16 Control Act, RCW 90.48, and the Water Resources Act, RCW 90.54, protect existing
17 beneficial uses including recreation, commerce and navigation.

18 (2) The Washington Department of Ecology also has authority under the State
19 Water Resources Act of 1971, RCW 90.54, to establish minimum river flows for navigational
20 values including recreation and recreational boating, RCW 90.54.020(3)(a).

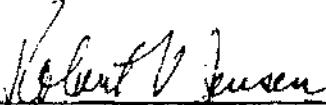
21 (3) The Washington Department of Ecology is authorized to impose base flows or
22 minimum flows to protect recreation and recreational boating in a water quality certificate for
23 a federally-licensed hydropower project, under the authority of the Federal Water Pollution
24 Control Act, 33 U.S.C. §1251 et seq.

(4) Base or minimum flows in a water quality certificate are license conditions rather than permanent appropriations.

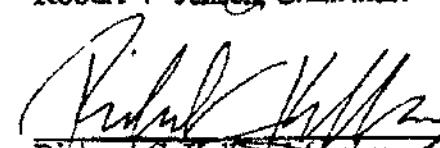
1 (5) Such flows are specific to the project and to the site and do not constitute a
2 numerical standard of general applicability.

3 DATED this 26 day of August 1995

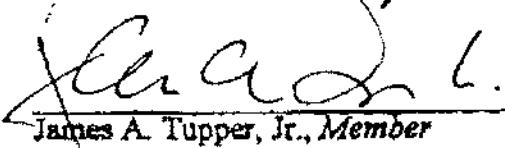
4 POLLUTION CONTROL HEARINGS BOARD

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6 Robert V. Jensen

7 Robert V. Jensen, Chairman

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9 Richard C. Kelley

10 Richard C. Kelley, Member

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12 James A. Tupper, Jr.

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17 Presented by:

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2 *Brooke M. Drury by Jif*

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5 American Whitewater Affiliation, Friends
6 of the Earth, Gifford Pinchot Task Force,
7 Washington Kayak Club, and Rivers Council
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9
10 Copy Received; Approved as to Form;
11 Notice of Presentation Waived

12 CAINE McLAUGHLIN P S.

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14 Joel C. Merkel (WSBA #4556)
15 Attorneys for Appellant, Barrish & Sorenson
16 Hydroelectric Company, Inc.

17 ~~cc: C. V. REED, M. R. DELISPLA~~