

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

CITY OF NEWCASTLE,

Appellant,

v.

WASHINGTON DEPARTMENT OF
NATURAL RESOURCES, DALPAY
PROPERTIES LLC, and ERICKSON
LOGGING INC.,

Respondents.

PCHB No. 18-035

ORDER ON SUMMARY JUDGMENT
MOTIONS

Appellant City of Newcastle (City) filed an appeal with the Pollution Control Hearings Board (Board) challenging the Department of Natural Resources' (DNR) Forest Practices Application (FPA) No. 2420111. The FPA was submitted by Dalpay Properties LLC (Dalpay). The City filed a motion for summary judgment.

The Board hearing this matter was comprised of Members Joan M. Marchioro and Neil L. Wise, and Presiding Board Chair Kay M. Brown. Attorney Dawn F. Reitan appeared on behalf of the Appellant City of Newcastle (City). Assistant Attorney General Terence A. Fruit and Senior Counsel Philip M. Ferester appeared on behalf of DNR. Attorneys Maxwell Glasson, Ronald D. Allen and Adam R. Asher appeared on behalf of Respondent Dalpay Properties LLC.¹

In ruling on the motions, the Board considered the following material:

1. Appellant City of Newcastle's Motion for Summary Judgment (City's motion);

¹ Erickson Logging, Inc, the operator listed on FPA No. 2420111, did not participate in the motion practice.

- 1 2. Courtesy copies of the following declarations submitted in support of the City of
2 Newcastle's Motion for Temporary Suspension:
 - 3 a. Declaration of Robert Henry in Support of Motion for Temporary Suspension,
4 with attachments;
 - 5 b. Declaration of Rick Cottom in Support of Motion for Temporary Suspension,
6 with attachment;
 - 7 c. Declaration of Darcey B. Miller, PWS, in Support of Motion for Temporary
8 Suspension, with Exhibit 1-5;
- 9 3. Declaration of Dawn Reitan in Support of Appellant City of Newcastle's Motion for
10 Summary Judgment with Exhibits 1-10 ;
- 11 4. Second Declaration of Robert Henry;
- 12 5. Respondent Department of Natural Resources' Response to Appellant's Motion for
13 Summary Judgment, Cross-Motion for Summary Judgment, and Memorandum in
14 Support (DNR's response and motion);
- 15 6. Declaration of Eric Dasso in Support of Department of Natural Resources; Motion for
16 Summary Judgment with Exhibit A-E;
- 17 7. Declaration of Terence A. Pruit in Support of Respondent Department of Natural
18 Resources' Response to Appellant's Motion for Summary Judgment, and Cross-
19 Motion for Summary Judgment with Exhibits A and B;
- 20 8. Respondent Dalpay Properties, LLC's Opposition to Appellant's Motion for
21 Summary Judgment;
9. Declaration of Thomas Dalpay in Support of Respondent Dalpay Properties LLC's
 Response in Opposition to Appellant's Motion for Summary Judgment with Exhibits
 A-C;
10. Declaration of Jim Dalpay in Support of Respondent Dalpay Properties LLC's
 Response in Opposition to Appellant's Motion for Summary Judgment with Exhibits
 A-C;
11. Dalpay Properties, LLC's Joinder in the Washington Department of Natural
 Resources' Cross-Motion for Summary Judgment;

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12. Appellant City of Newcastle's: 1) Reply in Support of Motion for Summary Judgment; and 2) Response in Opposition to Department of Natural Resources' Cross Summary Judgment Motion and Dalpay Properties LLC's Joinder. e
 13. [Second] Declaration of Dawn Reitan in Opposition to Department of Natural Resources' Cross Motion for Summary Judgment and Dalpay Properties LLC's Joinder with Exhibits 11-17, including Declaration of David C. Williams in Support of Motion for Temporary Suspension with attachment;
 14. Declaration of Charlotte A. Archer in Support of Appellant City of Newcastle's Reply in Support of Motion for Summary Judgment with Exhibits A-G;
 15. Respondent Department of Natural Resources' Reply in Support of Summary Judgment; and,
 16. Supplemental Declaration of Terence A. Fruit in Support of Respondent Department of Natural Resources' Cross-Motion for Summary Judgment with Exhibit A.

Based on its review of the record and foregoing pleadings, the Board enters the following ruling:

BACKGROUND

DNR approved FPA 2420111, which had been submitted by Dalpay on April 20, 2018. Reitan Decl., Ex. 2. The FPA authorizes Dalpay to harvest approximately 28 acres of timber and build 2,200 feet of forest road on timberlands which it owns. *Id.*, pp 4, 5. The site is located in King County, and partially within the City of Newcastle. Dasso Decl., ¶ 4. At the time it applied for the FPA, Dalpay submitted a 10-year management plan for the property and written assurance the property will not be converted from forestry for 10 years. *Id.*, Ex. B.

The site is bordered by Cougar Mountain Regional Wildlife Park to the north and east and other forestland to the west. Bordering on the site to the south is residential property and

1 May Valley Road. South of May Valley Road, and approximately 400 feet south of the southern
2 boundary of this site, is May Creek. Dasso Decl., ¶ 5.

3 The Newcastle 2035 Comprehensive Plan classifies May Creek as a Class I salmonid
4 stream and describes it as a stream that “floods routinely”. Second Reitan Decl., Ex. 11, pp. LU-
5 10. Flooding in May Creek has resulted in damage to property and homes, and put public health
6 and safety at risk in the May Creek Basin. *Id.*, Ex. 12. In 2014, King County expended
7 significant funds to complete an extensive sediment dredging and restoration project in May
8 Creek and its tributary Long Marsh Creek. *Id.*, Ex. 13.

9 The approved FPA is divided into two units. Reitan Decl., Ex. 2; Dasso Decl., ¶ 4. Unit
10 1, the larger unit to the north, is made up of a 35 acre block of land, of which 26 acres will be
11 harvested. Reitan Decl., Ex. 2, p. 5; Dasso Decl., ¶ 5. It ranges in elevation from over 1,100 feet
12 on the northern end to under 400 feet on the southern end. Dasso Decl., ¶ 6. All road building
13 on the site is to occur in Unit 1. Reitan Decl., Ex. 2, Enlarged forest practices activity map
14 (Forest Practices Map).

15 On the southern end of Unit 1 is a five acre residential parcel belonging to Robert Henry
16 and Lee Foote (Henry Parcel). Henry Decl., ¶ 4; Cottom Decl., ¶ 5. The Henry Parcel is
17 surrounded on three sides by Unit 1. Henry Decl., ¶ 4. Access to the Henry Parcel is through
18 150th Place SE, which was once a public road, but is now a private driveway. Henry Decl., ¶ 6,
19 Cottom Decl., ¶¶ 4, 5. The owners of the Henry Parcel have an easement from the landowner on
20 the east side of 150th Place SE, Rick and Christine Cottom, to use 150th Place SE. Cottom Decl.,
21

1 ¶ 5. The Cottom parcel is south of the Henry Parcel. Cottom Decl., ¶¶ 5, 6, and attached parcel
2 map.

3 The approved FPA identifies two wetlands and two streams in the southern portion of
4 Unit 1. Dasso Decl., ¶ 7, Exs. A, B. The two wetlands are labeled Wetland X and Wetland Z on
5 the Forest Practices Map. The two streams are labeled A and B. Stream A, also known as Long
6 Marsh Creek, is a fish-bearing stream that runs a short distance across the southeast corner of
7 Unit 1. It is adjacent to the harvest area and is contained in an inner gorge.² The FPA provides
8 an alternate plan to protect Stream A that establishes a no-cut buffer extending 101 feet from the
9 stream. Stream B is a small, non-fish bearing stream that begins on the Henry Parcel. *Id.*

10 Unit 2, which is south of Unit 1, is a 2.43 acre parcel of which two acres is approved for
11 harvest. Dasso Decl., ¶ 5; Reitan Decl., Ex. 2, p. 5. Unit 2 lies to the west of the Cottom parcel.
12 Cottom Decl., ¶ 4. 150th Place SE runs between Unit 2 and the Cottom parcel. Dasso Decl., Ex.
13 A; Cottom Decl., attached parcel map. The FPA does not authorize any road building on Unit 2,
14 nor does it identify any wetlands on Unit 2. Dasso Decl., Ex. A.

15 DNR visited the site several times prior to approval of the FPA. Dasso Decl., ¶¶ 7, 8.
16 DNR conducted a pre-application review, walked the site, and examined Stream B and Wetlands
17 X and Z. DNR's licensed engineering geologist also conducted a geotechnical review of the
18 proposal. *Id.*, ¶8. DNR convened an interdisciplinary team (ID Team) on the site, which
19 included representatives from DNR, Washington State Department of Fish and Wildlife, the
20 Muckleshoot Tribe, King County, the City of Newcastle, and Dalpay. *Id.* At the ID Team visit,

21 ² "Inner gorges" are defined by the forest practices rules as "canyons created by a combination of the downcutting
action of a stream and mass movement on the slope walls." WAC 222-16-010.

1 DNR determined that 660 feet of the total 2,200 feet of road building is adjacent Wetlands X and
2 Z. *Id.*, ¶ 10, and Ex. C. On May 18, 2018, DNR approved the FPA. Dasso Decl., ¶ 4.

3 The City filed a timely appeal of the approved FPA. The following legal issues were
4 identified in the prehearing order and remain in the appeal³:

- 5
6 2. Whether the application should have been a Class IV-Special, requiring an
7 assessment of adverse environmental impacts under the State Environmental Policy
8 Act, RCW 43.21C (SEPA), because the proposal includes, or will result in, the filling
9 or draining of more than 0.5 acres of wetlands under WAC 222-16-050(1)(h).
- 10 3. Whether the application should have been a Class IV-Special, requiring an
11 assessment of adverse environmental impacts under the State Environmental Policy
12 Act, RCW 43.21C (SEPA), because the proposal has the potential for substantial
13 impact on the environment contrary to RCW 76.09.050(1), WAC 197-11-
14 305(1)(b)(i).
- 15 4. Whether the application was erroneously approved if it was based on facial
16 deficiencies, such as incomplete, inaccurate, and missing information relating to the
17 access road and landing construction, streams and wetlands on the properties,
18 pursuant to RCW 76.09.060; WAC 222-16-036(1), (2), and (4); WAC 222-20-010(8);
19 WAC 222-24-015; WAC 222-24-035; WAC 222-24-042; WAC 222-24-051; WAC
20 222-24-0511; WAC 222-30-020(7); and WAC 222-30-021(2)(b).
- 21 6. Whether "Stream B" was improperly typed as Ns instead of Np, creating the
following other errors: (a) lack of adequate buffering and other environmental
safeguards required under WAC 222-30-021(2)(b); (b) failure to follow the
requirements for culvert installation under WAC 222-24-042; (c) violation of WAC
222-20-017(5), which requires disapproval if a forest practices hydraulic project will
result in direct or indirect harm to fish life, unless adequate mitigation is assured or
the project is modified.
7. Whether the approved application failed to: (a) assure that there is no net loss of
wetland function; or (b) provide adequate wetland mapping and delineation required
by forest practices rules and consistent with the Board Manual, Section 8; or (c)

³ Issues 1 and 5, which were set out in the first prehearing order, were subsequently stricken based upon the agreement of the parties. See Third Amended Prehearing Order, issued December 14, 2018.

1 replace, substitute, or enhance lost wetland functions contrary to WAC 222-24-015,
222-16-036, 222-24-042, and 222-30-021.

2 8. Whether the application was unlawfully issued because it does not comply with
3 applicable adopted water quality standards under the Clean Water Act.

4 9. Whether the application was erroneously approved if it failed to include conditions
5 requiring compliance with local government permits and/or whether the approval
6 interfered with the City of Newcastle's regulatory authority over public health and
7 safety contrary to RCW 76.09.050(6) and RCW 76.09.240(6)(c).

8 The City filed a motion for summary judgment. DNR responded to the City's motion and
9 also filed its own cross motion for summary judgment. Dalpay opposed the City's motion, and
10 joined in DNR's cross motion for summary judgment.

11 ANALYSIS

12 A. Summary Judgment Standard

13 Summary judgment is a procedure available to avoid unnecessary trials where there is no
14 genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667,
15 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if
16 only questions of law remain for resolution, and neither party contests the facts relevant to a
17 legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d
18 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

19 The party moving for summary judgment must show there are no genuine issues of
20 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
21 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*

1 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
2 then the nonmoving party must present evidence demonstrating that material facts are in dispute.
3 *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Bare
4 assertions concerning alleged genuine material issues do not constitute facts sufficient to defeat a
5 summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014).
6 When determining whether an issue of material fact exists, all facts and inferences are construed
7 in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068
8 (2002).

9 **B. City's Motion for Summary Judgment**

10 The City's motion for summary judgment is based on the contention that Dalpay does not
11 own or have the legal right to use 150th Place SE to access Unit 1. In support of this position, the
12 City refers to and interprets the statutory warranty deeds for the Dalpay Parcel and the Cottom
13 Parcel, and also states that a property records search does not show any easement or recorded
14 right to use 150th Place SE. City's Motion, pp 4-7. The City then assumes that because Dalpay
15 cannot use 150th Place SE, it will construct a new access road through Unit 2, which would
16 impact wetlands.⁴ *Id.*, p. 7.

17 DNR responds that both the DNR and the Board lack authority to resolve property
18 disputes. DNR's response and motion, pp. 9-11. DNR contends that the City's assumption that
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20 ⁴ DNR urges the Board to reject the City's motion because it is not based on issues identified in the prehearing
21 order. DNR's response and motion, pp. 8-9. DNR argues, correctly, that the case is now limited to issues identified
in the Prehearing Order. WAC 371-08-435(2). The Board concludes, however, that Issue 4 sufficiently raises the
question of the ownership of the access road by its reference to "incomplete, inaccurate and missing information
relating to the access road". Therefore, the Board will address the City's motion.

1 an access road will be built through Unit 2 is speculative and unsupported by the evidence
2 because there is no road authorized in Unit 2 under the approved FPA. *Id.*, pp. 11-12.

3 Based on the declarations of Thomas and Jim Dalpay,⁵ it is clear that the right to use
4 150th Place SE is strongly in dispute. The Board has concluded in the past that it lacks
5 jurisdiction to resolve real property issues. *Nelson v. DNR*, FPAB No. 07-006, pp. 6-7 (April 16,
6 2009)(no jurisdiction to resolve trespass or real property ownership issues); *Kreger Lake*
7 *Homeowners' Assn v. DNR*, FPAB No. 95-020 (1995) at CL 18 (“Our jurisdiction does not
8 extend to resolving disputed private covenants concerning the use of land.”). The Board is an
9 administrative agency and may exercise only the power expressly granted to it by statute or
10 necessarily implied from the grant. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit*
11 *County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998); *Kaiser Aluminum & Chemical Corp. v.*
12 *Department of Labor & Industries*, 121 Wn.2d 776, 780, 854 P.2d 611 (1993). By statute, the
13 Board has authority to review forest practices decision made by DNR under RCW
14 43.21B.110(1)(j). The statute does not provide authority to hear real property disputes. Original
15 jurisdiction in all cases involving title or possession of real property lies with the superior courts.
16 Wash. Const. art IV, sec. 6.

17 Furthermore, the Board rejects the City’s contention that the FPA authorizes trespass.
18 The FPA does not create any legal right, separate from what already exists, to use 150th Place SE
19 for access to Unit 1. The question of whether Dalpay has that legal right must be resolved

20 ⁵“Dalpay adamantly disputes any allegation that it does not enjoy the right to use 150th Place SE. Dalpay alleges its
21 rights stem from “common law principles of necessity and prescription; statutory principles following the vacation
of this once public road; and/or through a private way of necessity.” Thomas Dalpay Decl., ¶ 9; Jim Dalpay Decl., ¶
9.

1 elsewhere. If Dalpay does not have that right it must reconfigure its forestry plans accordingly,
2 and apply to DNR for approval of a changed FPA. The City's contention that Dalpay will build
3 a new access road through Unit 2 is speculative, as is the City's contention that wetlands on Unit
4 2 will be filled. The approved FPA does not authorize any road building in Unit 2. If Dalpay
5 submits a new FPA for such a proposal, the FPA will go through the appropriate permitting
6 process at DNR, and the resulting decision will be subject to an appeal.

7 It is up to the Superior Court to determine if Dalpay has the legal right to use 150th Place
8 SE. The Board concludes it lacks jurisdiction to address the legal ownership, or legal right to use
9 150th Place SE and therefore, denies the City's Motion for Summary Judgment.

10 **C. DNR's Motion for Summary Judgment**

11 1. Forest Practices and the State Environmental Policy Act (SEPA)

12 The Legislature has required the rulemaking body for forest practices, the Forest
13 Practices Board (FPB), to establish by rule which forest practices shall be included within each
14 of four classes of forest practices. RCW 76.09.050(1). The legislature goes on to provide that
15 "[f]orest practices under Classes I, II, and III are exempt from the requirements for preparation
16 of a detailed statement under the state environmental policy act." *Id.* In response to this
17 directive, the FPB has promulgated a rule that defines by category which applications are Class I
18 through Class IV. WAC 222-16-050. WAC 222-16-050(1) prescribes by category which forest
19 practices are Class IV-Special. WAC 222-16-050 (1). Class IV applications are subject to
20 SEPA. *Id.*

1 The City makes two arguments as to why the FPA, which was designated as Class III,
2 should have been classified as a Class IV-Special, and therefore, subject to SEPA.

3 a. Filling of more than 0.5 acres of wetlands (Issue 2)

4 Through Issue 2, the City contends that the FPA should be a Class IV-Special based on
5 WAC 222-16-050(1)(h) because it authorizes filling or draining of more than 0.5 acre of a
6 wetland. The City's contention is based on its assumption that an access road will be built
7 through Unit 2, which the City contends contains wetlands.

8 DNR moves to dismiss this issue on the basis that the FPA does not authorize any road
9 building in Unit 2. DNR has presented facts that establish that the authorized road building in
10 Unit 1 will result in the filling of less than 0.5 acre of wetland. The DNR forester explained that
11 only a small portion of the road to be built is located in the vicinity of Wetlands X and Z. Dasso
12 Decl., ¶ 10. That portion is 660 feet long and can be no wider than 20 feet based on the forest
13 practices rules. WAC 222-24-020(10). A road 660 feet long and 20 feet wide could fill no more
14 than 13,200 square feet (0.3 acre of wetland), even if the entire road were in the wetland which it
15 is not. Dasso Decl., ¶ 10. The City does not contest these facts.

16 The Board concludes that the FPA authorizes only the filling of wetlands needed for the
17 road construction in Unit 1. Based on uncontested facts, this road construction will result in the
18 filling of at most 0.3 acre of wetland. Therefore, the Board concludes that the FPA does not
19 constitute a Class IV-Special forest practice pursuant to WAC 222-16-050(1)(h). The Board
20 grants summary judgment to DNR on Issue 2.

1 b. Non-rule based Class IV-Special (Issue 3).

2 Through Issue 3, the City contends that the FPA should be classified as a Class IV-
3 Special even if no basis exists in WAC 222-16-050(1) because of the requirements of SEPA
4 itself, language in RCW 76.09.050(1) or SEPA rule WAC 197-11-305(1)(b)(i).⁶ DNR moves for
5 summary judgment on this issue on the basis that the Court of Appeals, in a 2006 decision,
6 resolved this question. *Alpine Lakes Protection Society v. Washington Forest Practices Board*
7 (*ALPS*), 135 Wn. App 376, 144 P. 3d 385 (2006), *as amended* (Feb. 27, 2007), *rev. denied*, 162
8 Wn. 2d 1014 (2008). The Board agrees.

9 In *ALPS*, the issue was whether statutory SEPA exemptions, such as Class I-III forest
10 practices, were potentially subject to SEPA review through WAC 197-11-305.⁷ The Court held
11 that the Class IV list in WAC 222-16-050(1) constitutes an exclusive closed list of circumstances
12 for which SEPA is required (*Id.*, at 399); that the FPB is given the sole authority to determine the
13 extent of the Class IV-Special list (*Id.*, at 396); and that the Department of Ecology (Ecology)
14 properly amended its SEPA rules to avoid statutorily exempt forest practices from being
15 included within the scope of WAC 197-11-305 (*Id.*, at 396). The Board concludes that *ALPS*
16 answers Issue 3, and that the FPA is not subject to SEPA because it is not within a category
17 prescribed in WAC 222-16-050(1) as Class IV. For the FPA to undergo SEPA review, the City
18 would have to prove that the FPA fit one of the categories in WAC 222-16-050(1) or
19 successfully challenge the validity of this regulation in superior court.

20 ⁶ The specifics of the City's argument on this issue are not clear because it did not respond to DNR's motion on this
issue.

21 ⁷ WAC 197-11-305 is an Ecology SEPA rule which provides that categorically exempt actions may still be subject
to SEPA review under certain circumstances.

1 Given clear case law directly on point, and no response from the City to this argument in
2 DNR's motion, the Board concludes that DNR is entitled to summary judgment on Issue 3.

3 2. Stream B (Issue 6)

4 Stream B starts from a spring on the Henry parcel which flows year round. Henry Decl.,
5 ¶ 12. It flows within a distinct channel on the Henry parcel and then enters Unit 1. *Id.* The FPA
6 locates Stream B on the Forest Practices Map and indicates that it is a non-typed water. Reitan
7 Decl., Ex. 2, Appendix A; Dasso Decl., Exs. A, D.

8 In Issue 6, the City contends that Stream B should have been typed as a non-fish bearing
9 perennial (Np) water, also referred to as a Type 4 under the interim water typing system.⁸ Np
10 waters (Type 4) are defined as follows:

11 *(4) "Type 4 Water" means all segments of natural waters within the bankfull
12 width of *defined channels* that are perennial nonfish habitat streams. Perennial
13 streams are flowing waters that do not go dry any time of a year of normal rainfall
and include the intermittent dry portions of the perennial channel below the
uppermost point of perennial flow.

14 WAC 222-16-031(4)(emphasis added).

15 To meet the definition of an Np (Type 4) water, among other requirements, a stream must
16 have a defined channel. Mr. Dasso, based on his direct observations, declares that Stream B is
17 not confined within a defined channel on Unit 1. Dasso Decl., ¶ 7. Therefore, according to Mr.
18 Dasso, Stream B cannot be an Np water. Based on this evidence brought forward by DNR in
19 support of its motion for summary judgment, DNR moves for summary judgment on Issue 6.

20 ⁸ As stated, Issue 6 is confusing. The issue asks whether Stream B "was improperly typed as Ns instead of Np", but
21 Stream B was *not* typed as Ns. On the FPA, Stream B is non-typed. The confusion is exacerbated by the lack of
briefing from the City in reply to DNR's motion on this issue. Therefore, the Board is left to peruse the record,
without help from the City, for factual material that may controvert DNR's motion.

1 Once the moving party has brought forward evidence on summary judgment, the burden
2 shifts to the responding party to controvert the evidence with admissible evidence. *SentinalC3*
3 *Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014). There are two pieces of evidence in the
4 record that may support the City’s contention that Stream B is confined in a defined channel on
5 Unit 1, and therefore should be type Np. The first is Ms. Miller’s declaration.

6 In her declaration, Ms. Miller quotes from a letter she refers to as the “Ziontz Chestnut”
7 letter which states:

8 “Stream B begins at a spring located on Mr. Henry and Ms. Foote’s property. The
9 spring runs year-round, and flows westerly onto Unit 1, where the flow is focused
in a defined channel.”

10 Miller Decl., ¶ 20.

11 The “Ziontz Chestnut letter” was written by Mr. Henry’s attorney on Mr. Henry’s behalf.
12 Archer Decl., Ex. C, attached letter from Wyatt Golding to DNR, dated May 2, 2018. The letter
13 from Mr. Henry’s attorney is hearsay. Even under the Board’s relaxed rules of evidence, an
14 advocacy letter from an attorney is not the type of information a reasonable prudent person
15 would rely upon to prove a scientific fact. WAC 371-08-500(1). Furthermore, an advocacy
16 letter from an attorney is not the type of information a scientist would typically rely upon to form
17 an expert opinion. While an expert can rely on information that is inadmissible, they can only do
18 so if this is the type of information that would be reasonably relied upon by experts in their field.
19 ER 703. The Board concludes that the portion of paragraph 20 in the Miller Declaration based
20 on a quote from Mr. Henry’s attorney is not admissible evidence and therefore does not
21 controvert the forester’s declaration.

1 Paragraph 20 of Ms. Miller's declaration goes on to state:

2 Stream "B" flows into the offsite wetland area and it is not known whether the
3 channel continues south. However, *a portion of a stream channel was observed
in/near Unit 1*, near the culvert under an abandoned driveway.

4 Miller Decl., ¶ 20 (emphasis added).

5 The Board will assume, for purposes of summary judgment, that this statement is based
6 on Ms. Miller's own observation⁹ and that by "stream channel" Ms. Miller observed a defined
7 channel.

8 The second piece of evidence in the record is Mr. Henry's declaration. In his declaration,
9 Mr. Henry states:

10 The stream depicted as Stream "B" on the FPA originates at a spring on my
11 property. The spring is our water source. The water flows from the spring year
12 round. From the spring, the water flows *within a distinct channel across our
property and enters "Unit 1"*.

12 Henry Decl., ¶ 12 (emphasis added).

13 Mr. Henry's declaration does not state whether or not Stream B is in a distinct channel on
14 Unit 1. The fact that Stream B is in a distinct channel when it enters Unit 1 creates the inference
15 that it may be in a defined channel on Unit 1.

16 Construing the facts and inferences in favor of the nonmoving party the Board concludes
17 that there is controversy in the facts regarding whether or not Stream B is confined within a
18 defined channel on Unit 1. Therefore, the Board denies summary judgment on Issue 6.¹⁰

19
20 ⁹ Because the sentence is written in passive voice, it is not clear that Ms. Miller is the observer.

21 ¹⁰ DNR also argues that even if there is a contested issue of fact regarding the typing on Stream B it is immaterial because Np and Ns streams are treated the same for purposes of the questions identified in Issue 6 (buffers, culvert requirements or the hydraulic project approval (HPA) requirements). The problem with this argument is that Stream

1 3. Wetlands (Issue 7).

2 Issue 7 questions whether wetlands on the site were adequately identified and protected
3 as required by the forest practices rules. The Board has concluded above that based on
4 undisputed facts, less than 0.5 acre of wetland will be filled to allow the authorized road
5 construction in Unit 1, and therefore the application was not a Class IV-Special pursuant to
6 WAC 222-16-050(1)(h). However, there are other factual disputes related to wetlands on this
7 site.

8 One disputed fact is whether there are wetlands in Unit 2. The City's expert Darcey
9 Miller, a Senior Wetland Scientist for Shockey Planning Group, Inc., reviewed several
10 documents including the FPA and the City of Newcastle 2005 Wetland Inventory (Wetland
11 Inventory). Miller Decl., ¶ 5. Ms. Miller also attended the ID Team meeting on site. *Id.*, ¶ 5.
12 Ms. Miller opines that there may be approximately one acre of wetland present on the 2.4 acre
13 parcel that contains Unit 2, and that the wetland is likely part of Wetland MC-19, a 27 acre
14 Category 1 wetland identified in the Wetland Inventory. Miller Decl., ¶ 13. Since Unit 2 is only
15 2.4 acres in total area, and the FPA authorizes 2 of those acres for harvest, the City argues that it
16 is a mathematical certainty that harvest will occur on the wetland.

17 In direct conflict with the evidence from Ms. Miller, there are no wetlands identified in
18 Unit 2 on the FPA. Dasso Decl., Ex. A.

19 Whether or not there are wetlands in Unit 2 is a material fact, even though there is no
20 authorized road construction in this unit, because there are rule based requirements for timber

21 B is currently a non-typed water on the FPA. The briefing does not address the effect of a change from non-typed to
Ns.

1 harvesting in and near wetlands. WAC 222-30-020. There may also be wetland mapping and/or
2 delineation requirements. See WAC 222-16-035, 222-16-036, and WAC 222-30-020.

3 A second area of disputed facts regarding wetlands pertains to the size and type of
4 Wetlands X and Z. The FPA states that Wetland X is 0.7 acre and Wetland Z is 0.1 acre. Reitan
5 Decl., Ex. 2, p. 4. Both wetlands are shown on the Forest Practices Map. Dasso Decl., Exs. A,
6 D. The DNR forester elaborates further that Wetland X is part of a larger wetland, and that both
7 wetlands are primarily forested wetlands with small areas of Type B wetlands in the interior.
8 Dasso Decl., ¶ 7. Ms. Miller, on the other hand, opines that Wetlands X and Z are not sized or
9 drawn accurately on the FPA, and are not separate wetlands. Miller Decl., ¶ 11.

10 It is unclear to the Board whether there is any timber harvest approved in the area of Unit
11 1 that contains the wetlands. If there is timber harvest approved in this area, the question of the
12 size and location of these wetlands is material to any restrictions on the timber harvest required
13 by the rules.

14 Because of the presence of disputed and unclear facts, the Board denies summary
15 judgment to DNR on Issue 7.

16 4. Clean Water Act (Issue 8)

17 Issue 8 asks whether the FPA is unlawful because it does not comply with the Clean
18 Water Act. DNR moves for summary judgment, arguing that for a non-conversion¹¹ forestry
19 proposal such as authorized by this FPA, compliance with the Forest Practices Act and forest

20 _____
21 ¹¹ The City would have authority to regulate a forest practices conversion under its land use development code provisions, including its stormwater provisions. RCW 76.09.240(6)(a). But the FPA does not authorize a conversion from forest practices.

1 practices rules is designed to ensure compliance with the federal and state clean water act
2 requirements. The City makes no response to this argument.

3 The Forest Practices Act, ch. 76.09 RCW, lists as one of its primary purposes, the
4 achievement of compliance with all applicable requirements of federal and state law with respect
5 to nonpoint sources of water pollution from forest practices. RCW 76.09.010(2)(g). The Forest
6 Practices Act and forest practices rules, adopted by the FPB “shall be utilized to satisfy the
7 planning and program requirements of sections 208, 209, and 305 of the federal Water Pollution
8 Control Act, as regards silvicultural activities, unless it is determined by the department of
9 ecology that extraordinary conditions exist which make forest practices regulations unsuitable to
10 satisfy such federal requirements.” RCW 90.48.425. No such determination has been issued by
11 Ecology.¹²

12 The Legislature goes even further, in RCW 90.48.420(3), by prohibiting the requirement
13 of a water quality discharge permit for non-point sources of pollution arising from forest
14 practices conducted in compliance with the applicable provisions of the Forest Practices Act and
15 forest practices rules and directives from the DNR. As the Legislature has stated, and the
16 Washington Court has repeated, adoption of forest practices rules pertaining to water quality by
17 the FPB shall be accomplished “so that compliance with such forest practice[s] rules will achieve
18 compliance with water pollution control laws.” RCW 90.48.420 (1); *Kettle Range Conservation*
19
20

21 ¹² Furthermore Ecology, which implements the State’s delegated authority under the Clean Water Act, has a seat on the FPB and must acquiesce in all water-quality related rules. RCW 76.09.030(1)(d); RCW 76.09.040(1)(b); and RCW 90.48.260.

1 *Grp. v. Washington Dep't of Nat. Res.*, 120 Wn. App. 434, 457, 85 P.3d 894, 906 (2003), as
2 amended on reconsideration (Mar. 16, 2004).

3 The Board concludes that compliance with the Clean Water Act cannot be raised as a
4 separate challenge to the FPA, and therefore DNR is entitled to summary judgment on this issue.

5 5. Scope of Issue 4

6 DNR argues that Issue 4 should be dismissed because if read narrowly it challenges only
7 the completeness of the application. Since at hearing the Board can consider information
8 presented by the parties on what may be missing from the application, DNR argues that the
9 Board's *de novo* review process can overcome most deficiencies in the application based on
10 missing information. DNR's description of the Board's *de novo* review authority is correct.
11 However, the Board concludes that limiting Issue 4 to just process constitutes an overly technical
12 reading of the issue, and rejects DNR's request to do so. The Board concludes that Issue 4 raises
13 substantive challenges.

14 This does not mean, however, that the City can broaden Issue 4 beyond the potential
15 violations listed in the issue.¹³ While the City may offer evidence to prove substantive violations
16 of the rules it lists in Issue 4, it cannot offer evidence of material damage to public resources
17 separate from rule requirements. A challenge based on material damage constitutes a major
18 expansion of Issue 4. If the City wants to add an issue alleging material damage to public
19 resources from the approved FPA, the City must move to amend the issues based on a showing
20 of good cause. WAC 371-08-435(2).

21 _____
¹³ Much of the substance of Issue 4 overlaps with Issue 7.

