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I. RELIEF REQUESTED

The Center for Environmental Law & Policy, by and through the below-signed counsel, respectfully requests that this court Strike the below-identified portions of plaintiffs’ Motion for Summary Judgment.

II. INTRODUCTION

This lawsuit is a declaratory judgment action that seeks to invalidate the Dungeness River Instream Flow Rule, WAC 173-518-010 *et seq.* On August 17, 2015, plaintiffs filed a “Motion for Summary Judgment on Legal Issues” (“MSJ”) relating to the issues of 1) whether the four-part test in RCW 90.03.290(3) was applicable to adoption of instream flows, 2) whether Ecology exceeded its statutory authority in using the “overriding consideration of the public interest” exception in adopting reservations of water in the Dungeness Rule, and 3) whether Ecology was required to determine the “maximum net benefits” associated with water use before adopting the Dungeness Rule. After an exchange of letters between the parties and the court, the court ultimately ruled in a September 25, 2015 email that it would allow summary judgment to be heard on the first issue (the four-part test) only.¹ Declaration of Dan J. Von Seggern (“Von Seggern Dec.”) at Ex. 4. In a second email, dated October 28, 2015, the court reiterated that it would hear only this issue. *Id.* at Ex. 8.

Per the court’s September 25 and October 28 rulings, the *only* issue now before the court is the question of whether or not Ecology must apply the four-part test of

1 RCW 90.03.290(3) when establishing an instream flow pursuant to RCW 90.22.020
2 and RCW 90.54.050.

3 On November 18, 2015, plaintiffs filed a second Motion for Summary Judgment
4 on Legal Issues.² Notwithstanding this court’s rulings, in this Motion plaintiffs persist
5 in arguing that RCW 90.54.020 requires Ecology to apply a “Maximum Net Benefits”
6 determination when setting an instream flow pursuant to RCW 90.54.040 or RCW
7 90.22.010. MSJ at 8-11. This argument is improper, assumes a conclusion on a
8 disputed issue not yet made by this court, and is contrary to this court’s prior decisions
9 cabining the issues to be decided on summary judgment. The portions of plaintiffs’
10 brief directed towards the MNB provisions³ should be stricken from the record and
11 disregarded by the court.
12

13 III. STANDARD OF REVIEW

14 A trial court’s decision on a motion to strike is reviewed for abuse of discretion.
15 *Engstrom v. Goodman*, 166 Wn. App. 905, 910, 271 P.3d 959 (2012). It may be
16 reversible error to not strike pleadings. *See Yousoufian v. Office of Ron Sims*, 168
17 Wn.2d 444, 469, 229 P.3d 735 (2010)(error to fail to strike citation to unpublished
18 court decisions).
19
20

21 ¹ For a full discussion of the procedural history of this case, see CELP’s Response to Plaintiffs’
22 Motion for Summary Judgment at 8-10.

23 ² It is this motion to which CELP responds, and all references to specific statements or text in
24 plaintiffs’ Motion refer to this document.

25 ³ From “Requiring the latter” (page 8, line 25). . . through . . . “at RCW 90.03.005” (page 9, line
26 10); the phrase “including the maximum net benefits analysis mandate at subsection (2)” (page
9, line 22); and from “RCW 90.54.020 does, however” (page 10, line 23) through “the MNB
directives in RCW 90.54.020 and RCW 90.03.005” (page 11, line 9).

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IV. ARGUMENT

A. Plaintiffs’ argument regarding the MNB standard is irrelevant and immaterial at this stage of the litigation.

Plaintiffs’ argument that the “maximum net benefits” (MNB) provisions of RCW 90.54.020 and RCW 90.03.005 apply to setting of instream flows is irrelevant and immaterial, given the posture of this litigation. See MSJ at 8-9; *Id.* at 10-11.

Plaintiffs’ reliance on the MNB requirement is premature. The question of whether MNB analysis applies to adoption of an instream flow is a contested issue in this litigation (indeed, one that was raised by plaintiffs), and this very question was part of their motion for summary judgment, filed August 17, 2015. Following an exchange of letters between the parties and the court, this court specifically ruled that the issue of whether MNB analysis was required would not be heard at this time. Von Seggern Dec. at Exs. 4; 8. It goes without saying, then, that the question has not been resolved in plaintiffs’ favor.

Despite this, plaintiffs argue that the MNB provisions are “part of the statutory scheme for allocation of water” that must be read together with other statutes regarding instream flow. MSJ at 9; 11. They further claim that the MNB standard requires that the four-part test be applied when setting instream flows. *Id.* at 9; 11. However, plaintiffs can cite no authority for this proposition, and indeed no court decision currently holds that MNB analysis is applicable to adoption of instream flows. As such, MNB analysis would only

1 be applicable for purposes of this litigation if and when this court decides that it
2 applies. There has been no such ruling, and at this point this argument is
3 meritless.

4 **B. The arguments referring to MNB should be stricken as**
5 **immaterial and as a violation of this court’s order.**

6 Any references to MNB should be stricken for two reasons. First, it is
7 irrelevant and immaterial. Civil Rule 12(f) provides that “the court may order
8 stricken from any pleading any . . . immaterial . . . matter.” The plain meaning
9 of “material” is “relevant,” or “pertinent.” *State v. Cervantes*, 87 Wn. App.
10 440, 448, 942 P.2d 382 (1997) (citing Webster’s Third New Int’l Dictionary
11 1392 (princ. copyr. 1961; reprinted 1981). A statute that is not applicable to
12 the matter at hand can only be irrelevant and immaterial.⁴

14 Whether or not MNB analysis applies to adoption of instream flows is a
15 live issue in this litigation, and this court has not yet ruled on the question.
16 Absent a ruling that MNB is applicable, plaintiffs’ assertion that it *should* apply
17 does not mean that it *does* apply. And absent a ruling that MNB applies, it is
18 irrelevant and immaterial to the question at issue: whether or not adoption of
19 instream flows is subject to the four-part test.
20

21 Second, this line of argument is an obvious attempt to put the question
22 of MNB before the court, in an end-run around the court’s September 25 and
23

24 ⁴ Analogously, evidence is “relevant” if it has any tendency to make the existence of any fact that is of
25 consequence to the termination of the action more or less probable.” ER 401.

1 October 28 decisions that only the single issue of the four-part test would be
2 heard. This court has the authority to govern the conduct of this proceeding in
3 this manner. CR1. It did exactly that when it ordered by the September 25,
4 2015 letter that the MNB issue would not be heard. The impropriety of
5 plaintiffs' argument for application of MNB, in flat defiance of this court's
6 order that the issue not be heard, is obvious, and their disclaimer that "this
7 motion does not include Plaintiffs' Issue 3 regarding the MNB directive," while
8 at the same time arguing that MNB should be applied, can most charitably be
9 described as disingenuous.

11 **V. CONCLUSION**

12 The sections of plaintiffs' brief arguing for application of MNB should
13 be disregarded by the court and stricken from the record. A proposed Order is
14 being filed with this motion.
15

17 Respectfully submitted this 28th day of December, 2015.

18 /s/ Dan J. Von Seggern /s/
19

20

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26 Attorney for Intervener

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December, 2015 I served one true and correct copy of the foregoing Motion To Strike Improper Argument From Plaintiffs' Motion For Summary Judgment on the following individuals via e-mail service per the parties' agreement:

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/s/ Dan J. Von Seggern /s/

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MOTION TO STRIKE

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EXPEDITE
 No hearing is set
 Hearing is set:
Date: January 8, 2016
Time: 9:00 AM_
Judge/Calendar: Hon. Gary R. Tabor

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON**

MAGDALENA T. BASSETT;
DENMAN J. BASSETT; JUDY
STIRTON; and OLYMPIC
RESOURCE PRESERVATION
COUNCIL,

Petitioners,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

and

CENTER FOR ENVIRONMENTAL
LAW & POLICY,

Intervener

No. 14-2-02466-2

**[PROPOSED] ORDER STRIKING
IMPROPER ARGUMENT FROM
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

CLERK'S ACTION REQUIRED

ORDER

The Court, being familiar with the filings and pleadings in this matter, and having heard the arguments of the parties and having reviewed the following documents:

- 1. Plaintiffs’ Motion for Summary Judgment on Legal Issues, filed August 17, 2015;
- 2. Plaintiffs’ Motion for Summary Judgment on Legal Issues, filed November 18, 2015;
- 3. Declaration of Dan J. Von Seggern and attached Exhibits, filed December 28, 2015;
- 4. Intervener Center for Environmental Law & Policy’s Motion to Strike Improper Argument from Plaintiffs’ Motion for Summary Judgment;
- 5. Plaintiffs’ Response, if any;
- 6. Center for Environmental Law & Policy’s Reply, if any;
- 7. _____;
- 8. _____;
- 9. _____; and
- 10. _____

NOW, THEREFORE, IT IS HEREBY DECREED, ADJUDGED, AND ORDERED THAT:

The sections of Plaintiffs’ Motion for Summary Judgment arguing that the Maximum Net Benefits analysis should be applied to establishment of instream flows, specifically the text from: “Requiring the latter” (page 8, line

1 25). . . through . . . “at RCW 90.03.005” (page 9, line 10), the phrase “including
2 the maximum net benefits analysis mandate at subsection (2)” (page 9, lines 22-
3 23); and the text from: “RCW 90.54.020 does, however” (page 10, line 23)
4 through “the four-part test of RCW 90.03.290” (page 11, line 9), shall be
5 stricken from plaintiffs’ brief and shall not be part of the record in this matter.
6

7 It is further ordered that

8 _____;
9 _____;
10 _____;
11 _____; and
12 _____.
13

14
15 Signed this ____ day of _____, 2016

16 _____
17 Hon. Gary R. Tabor, Judge

18 Presented by

19 /s/ Dan J. Von Seggern /s/

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Approved as to form, notice of presentation waived

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December, 2015 I served one true and correct copy of the foregoing Proposed Order Striking Improper Argument From Plaintiffs’ Motion For Summary Judgment on the following individuals via e-mail service pursuant to the parties’ agreement:

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