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7 **POLLUTION CONTROL HEARINGS BOARD**
8 **STATE OF WASHINGTON**

9 ELECTRON HYDRO, LLC,
10
11 Appellant,

PCHB No. 21-043c
SETTLEMENT AGREEMENT

12 v.

13 STATE OF WASHINGTON,
14 DEPARTMENT OF ECOLOGY,
15 Respondent.

16 Respondent, State of Washington, Department of Ecology (Ecology), represented by
17 Sonia A. Wolfman; and Appellant, Electron Hydro, LLC (Electron), represented by Svend
18 Brandt-Erichsen, hereby submit this Settlement Agreement (Agreement) to the Pollution
19 Control Hearings Board (Board) as a full and final settlement of the above-referenced appeal,
20 and request that the Board dismiss the appeal with prejudice.

21 **I. BACKGROUND**

22 1. On June 8, 2021, Ecology issued Penalty No. 19488 (Penalty) in the amount of
23 \$501,000 to Electron for alleged violations of the Construction Stormwater General Permit
24 (CSWGP) and RCW 90.48.080. The Penalty was related to the alleged unauthorized use and
25 discharge of artificial turf and crumb rubber at Electron's hydroelectric facility on the Puyallup
26 River.

1 2. On June 8, 2021, Ecology issued Administrative Order No. 19624 (Order) to
2 Electron. The Order alleged potential violations of the turbidity water quality criteria and the
3 temperature water quality criteria from hydroelectric project operations unrelated to the
4 discharge of artificial turf and crumb rubber. The Order also alleged violations of the CSWGP,
5 some of which related to the discharge of artificial turf and crumb rubber. The remainder of the
6 alleged violations pertained to the CSWGP's requirements regarding Electron's Stormwater
7 Pollution Prevention Plan and Electron's failure to obtain permit coverage for an alleged
8 expanded area of soil disturbance. The Order required numerous corrective actions including
9 the requirement for Electron to prepare a Water Quality Management Plan and Hydroelectric
10 Operations Water Quality Monitoring Plan. Electron has been complying with the corrective
11 actions required in the Order.

12 3. On July 6, 2021, Electron appealed the Penalty and the Order to the Board. The
13 Board consolidated the two appeals as PCHB No. 21-043c.

14 4. Ecology and Electron have agreed to resolve the appeal of the Penalty and Order
15 through the settlement outlined below.

16 II. SETTLEMENT AGREEMENT

17 The parties desire to resolve the dispute herein and avoid the cost and time associated
18 with further litigation. This is a settlement of disputed facts and law. It is not an adjudication
19 regarding any allegations by Ecology or an admission related to those allegations on the part of
20 Electron.

21 A. Scope

22 This Agreement constitutes the entire agreement between the parties to this appeal, and
23 settles all issues raised by this appeal.
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1 **B. Resolution of the Penalty**

2 **1. Cash Payment of \$100,200**

3 Electron agrees to make a penalty payment to Ecology of \$100,200. Electron's payment
4 shall be by U.S. Mail or Federal Express, postage prepaid to Ecology and be postmarked within
5 sixty (60) calendar days of the date the Board dismisses this appeal. Electron shall make the
6 payment by check or money order directly payable to "Department of Ecology," make reference
7 to Penalty No. 19488, and shall send the payment to:

8
9 Department of Ecology

10 Attn: Cashiering Unit

11 P.O. Box 47611

12 Olympia, WA 98504-7611

13 If Electron's payment of \$100,200 is not sent within sixty (60) calendar days of the
14 Board's dismissal of this appeal, the full penalty amount of \$501,000 will become immediately
15 due and payable to Ecology without further right of administrative or judicial review, except as
16 provided in paragraph D of this Agreement.

17 **2. Supplemental Environmental Project (SEP) Payment of \$400,800**

18 Electron agrees to contribute \$400,800 to fund a supplemental environmental project
19 ("SEP") that will benefit water quality and increase instream habitat within the Puyallup River
20 watershed.

21 a. Within sixty (60) days of the Board's dismissal of this appeal, Electron shall
22 deposit \$400,800 into a segregated escrow account to be held for the purpose of paying for the
23 implementation of a SEP as described herein. Electron shall provide Ecology with

1 documentation of the deposit into the escrow account. The \$400,800 shall be disbursed from the
2 escrow account in accordance with paragraphs B(2)(c) and (h).

3 b. If Electron fails to deposit \$400,800 into an escrow account as provided in
4 paragraph B(2)(a), \$400,800 will become immediately due and payable to Ecology without
5 further right of administrative or judicial review, except as provided in paragraph D of this
6 Agreement. This payment shall be made as specified in paragraph B(1).

7 c. The terms of the escrow shall provide that if Electron fails to comply with
8 paragraphs B(2)(d)-(h), any balance remaining in escrow shall immediately be paid to Ecology
9 in full satisfaction of the penalty, without further right of administrative or judicial review,
10 except as provided in paragraph D of this Agreement. This payment shall be made as specified
11 in paragraph B(1).

12 d. Electron shall submit a project proposal to Ecology for review and approval
13 within six months of the date the Board dismisses this appeal. In selecting a project, Electron
14 shall coordinate with an organization engaged in fish habitat enhancement or restoration that is
15 active in south Puget Sound. The project proposal shall identify the project proponent(s), and
16 shall include a conceptual design and projected implementation dates. The project proposal also
17 will include an explanation of the anticipated benefits of the project and relate the efforts
18 undertaken to obtain input, and a summary of the input received, from regional stakeholders
19 with an interest in fish habitat restoration and enhancement, and from the Puyallup Tribe of
20 Indians. To facilitate completion of a larger project, Electron may propose a project that also
21 would receive funding from a settlement of claims brought against Electron by the United States
22 in federal district court under Docket No. 2:20-cv-1746 (the "Federal Court Action"). In that
23 event, Electron must document that funding it provides for the project under the settlement of
24 the Federal Court Action is in addition to the SEP payment and that the SEP payment is not
25 being used to satisfy obligations under the Federal Court Action settlement. Alternatively, the
26

1 SEP payment may be combined with funds or funding commitments that the project proponent
2 has obtained from other sources.

3 e. The proposed project may have been identified in response to Electron's
4 inquiries, or it may be one that the project proponent already has designed or identified. If
5 engineering design and permitting is not already completed for the proposed project, then as
6 part of the project proposal submitted to Ecology, Electron shall provide a proposed budget for
7 engineering design and permitting for the project. Ecology's approval of the project plan shall
8 constitute authorization for the escrow agent to disburse escrowed SEP funds to the project
9 proponent in the amount budgeted for engineering design and permitting. Electron shall provide
10 Ecology's approval to the escrow agent, accompanied by a request to disburse the amount
11 budgeted for engineering design and permitting to the project proponent. Electron shall provide
12 documentation of the disbursement of escrowed funds to Ecology.

13 f. Electron shall submit engineering plans and construction schedule for the project
14 to Ecology for review and approval within one year of the date the Board dismisses this appeal,
15 along with an updated budget for project construction. If permits for the project have not been
16 issued within one year of the date the Board dismisses this appeal, then Electron shall provide
17 a report to Ecology on the status of permits no less frequently than the last business day of each
18 month until the permits have been issued, and shall submit the engineering plans and
19 construction schedule to Ecology within thirty (30) days after permits required for the project
20 have been issued. The project budget must not exceed an amount that would allow an amount
21 equal to at least ten (10) percent of the project budget to remain in the escrow account as a
22 contingency against unanticipated construction costs. Ecology's approval of the engineering
23 plans and project budget shall constitute authorization for the escrow agent to disburse escrowed
24 SEP funds to the project proponent in the amount of the project budget. Electron shall provide
25 Ecology's approval to the escrow agent, accompanied by a request to disburse the amount
26 budgeted for project construction to the project proponent. Electron shall provide

1 documentation of the disbursement of escrowed funds to Ecology. Any request for release of
2 the contingency funds that remain in escrow also must be approved by Ecology.

3 g. In entering into an agreement with any potential project proponent, Electron
4 shall require that the project be completed in accordance with the schedule as approved by
5 Ecology, including any schedule extension approved in accordance with this paragraph, and
6 include provision for recapture of unexpended SEP funds in the event that the approved
7 schedule for project completion, including any approved revision, is not met. Within two (2)
8 years of Ecology's approval of the engineering plans, Electron shall provide Ecology written
9 documentation that the project has been completed as specified in the engineering plans and
10 construction schedule. In the event that project completion is anticipated to be delayed beyond
11 two years, Electron shall provide advance notice to Ecology with a report from the project
12 proponent explaining the reason for the potential delay and provide a revised project
13 construction schedule, not to exceed one additional year. Should Ecology not agree to the
14 revised project schedule, then Ecology shall notify Electron of the disapproval and Electron
15 shall exercise the recapture provision described in this paragraph, providing notice to the project
16 proponent that it must return any unexpended SEP funds to the escrow agent. Electron shall
17 notify Ecology when recaptured funds have been returned to the escrow agent. The recaptured
18 funds and any funds remaining in the escrow account shall be paid to Ecology in accordance
19 with paragraph B(2)(c).

20 h. Should any funds remain in the escrow account upon completion of the project,
21 upon approval of Ecology, such funds may be disbursed to the South Puget Sound Salmon
22 Enhancement Group, or similar organization approved by Ecology, for use in water quality or
23 fish habitat projects in the Puyallup River basin.

24 **C. Remedies**

25 In the event that Electron violates the terms of this Agreement, Ecology may pursue all
26 remedies available by law. By entering into this Agreement, Electron shall have waived its right

1 of administrative or judicial review on the underlying merits of the Penalty. However, Electron
2 does not waive the right to contest whether violations of this Agreement have occurred. In any
3 action to enforce the terms of this agreement, the prevailing party shall be entitled to an award
4 of its reasonable costs and attorneys' fees incurred.

5 **D. Venue**

6 Electron agrees that the venue for any judicial action to enforce this Agreement and/or
7 to collect the Penalty, or any portion thereof, shall be in Thurston County Superior Court.

8 **E. Press Releases and Other Documents**

9 Any press release or other public statement issued by Electron regarding performance of
10 any term of this Agreement shall identify the same as resulting from a settlement with Ecology.
11 In addition, any sum paid to a third party, not a party to this Agreement, as a result of this
12 Agreement, shall be identified as resulting from a settlement with Ecology in any public
13 statement.

14 **F. Waiver of Appeal Rights**

15 Electron understands that it has the right to contest the Penalty by presenting evidence at
16 a Board hearing, and voluntarily waives its right to a hearing upon signature of this Agreement
17 by representatives for Electron and Ecology.

18 **G. Dismissal of Appeal**

19 The parties consent to the submission of this Agreement to the Board and request that,
20 based upon a full and final settlement having been reached, the Board dismiss this appeal with
21 prejudice. Both parties further agree to bear their own costs and attorneys' fees associated with
22 this appeal.

23 **H. Effective Date**

24 This Agreement shall become effective upon the date of issuance of the Board's order
25 dismissing this appeal.
26

1 **I. Signatories Authorized**

2 The undersigned representatives for Ecology and Electron certify that they are fully
3 authorized by the party whom they represent to enter into the terms and conditions of this
4 Agreement and to legally bind such party thereto.

5 **J. Execution**

6 This document may be executed in counterparts and may be executed by facsimile and/or
7 electronically, and each executed counterpart shall have the same force and effect as the original
8 instrument.

9
10 STATE OF WASHINGTON
11 DEPARTMENT OF ECOLOGY

12 

13 Laura Watson
Ecology Director

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15 Dated: 11/1/22

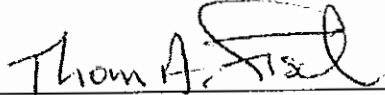
16 ROBERT W. FERGUSON
Attorney General

17 

18 Sonia A. Wolfman, WSBA #30510
19 Attorney for Department of Ecology
20 (360) 586-6764

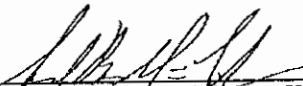
21 Dated: Nov. 1, 2022

ELECTRON HYDRO, LLC


By: THOM A. FISCHER
Its: MANAGER

Dated: OCT 31, 2022

NOSSAMAN LLP


Svend Brandt-Erichsen, WSBA #23923
Attorney for Electron Hydro, LLC
(206) 395-7630

Dated: October 14, 2022