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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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THE AMERICAN WATERWAYS OPERATORS, CRUISE LINES  
INTERNATIONAL ASSOCIATION NORTH WEST & CANADA,  
NORTHWEST MARINE TRADE ASSOCIATION, RECREATIONAL  
BOATING ASSOCIATION OF WASHINGTON,  
AND UNCRUISE ADVENTURES,

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant.

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**APPELLANT STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY'S BRIEF**

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ROBERT W. FERGUSON  
Attorney General

RONALD L. LAVIGNE  
WSBA # 18550  
Senior Counsel  
P.O. Box 40117  
Olympia, WA 98504-0117  
360-586-6751  
OID #91024

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERROR.....2

III. STATEMENT OF THE CASE .....2

    A. The Clean Water Act .....2

    B. Washington’s Petition to Designate the Waters of Puget Sound as a No Discharge Zone for Vessel Sewage .....5

    C. Respondents’ Attempt to Challenge the Petition Before the Board and the Board’s Conclusion That It Lacks Jurisdiction.....8

IV. ARGUMENT .....10

    A. Standard of Review.....10

    B. Federal Regulation of Vessel Sewage Is Inadequate .....12

    C. The Board Properly Concluded It Does Not Have Jurisdiction to Review the Certificate of Need Included in the Petition Ecology Submitted to EPA.....15

    D. The Board’s Exercise of Jurisdiction Over Certifications Ecology Issues That Are Required to Authorize Applicants to Proceed With Activities or Projects Does Not Establish Jurisdiction to Review the Certificate of Need Included in the Petition Ecology Submitted to EPA .....21

    E. Respondents’ Belief That the Board Is a More Advantageous Forum for Them Than the Superior Court Does Not Create Board Jurisdiction .....27

V. CONCLUSION .....29

## TABLE OF AUTHORITIES

### Cases

<i>Buechel v. Dep't of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).....	12
<i>City of Seattle v. Dep't of Ecology</i> , 37 Wn. App 819, 683 P.2d 244 (1984).....	18, 19
<i>Dep't of Ecology v. Campbell &amp; Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	17
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998).....	20
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	11, 28
<i>ITT Rayonier, Inc. v. Dalman</i> , 122 Wn.2d 801, 863 P.2d 64 (1993).....	17
<i>Pierce Cty. v. Dep't of Ecology</i> , Nos. 12-093c, 12-097c, 2014 WL 1262544, at *23 (Wash. Pollution Control Hearings Bd., Mar. 21, 2014) .....	28, 29
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	11, 12, 28
<i>Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep't of Ecology</i> , 146 Wn.2d 778, 51 P.3d 744 (2002).....	10, 11
<i>Sherman v. Moloney</i> , 106 Wn.2d 873, 725 P.2d 966 (1986).....	10
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	17
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	17

<i>Tapper v. Emp't Sec.</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	10
<i>Wash. Indep. Tel. Ass'n v. Wash. Utils. Transp. Comm'n</i> , 149 Wn.2d 17, 65 P.3d 319 (2003).....	11

**Statutes**

33 U.S.C. § 1251(a)(1).....	2
33 U.S.C. § 1251(b).....	3
33 U.S.C. § 1311(b)(1)(C).....	23
33 U.S.C. § 1314(a)(1).....	24
33 U.S.C. § 1322(f)(3).....	passim
33 U.S.C. § 1322(f)(4).....	25
33 U.S.C. § 1341.....	4
33 U.S.C. § 1341(d).....	23
33 U.S.C. § 1370.....	3
RCW 34.05.....	10, 20
RCW 34.05.010(1).....	19, 20
RCW 34.05.518(1).....	10
RCW 34.05.518(3)(a).....	10
RCW 34.05.570(1)(a).....	11
RCW 34.05.570(2).....	21
RCW 34.05.570(2)(c).....	8
RCW 34.05.570(3)(d).....	11

RCW 34.05.570(3)(i).....	11
RCW 34.05.570(4).....	9
RCW 34.05.570(4)(b).....	27
RCW 34.05.570(4)(c).....	27, 28
RCW 34.05.574(1).....	12
RCW 34.05.574(2).....	29
RCW 34.05.574(4).....	29
RCW 43.21B.....	18, 19, 20
RCW 43.21B.110.....	18
RCW 43.21B.110(1)(d).....	passim
RCW 43.21B.160.....	20
RCW 43.21B.230(3)(b).....	19
RCW 43.21B.310(4).....	19
RCW 90.48.010.....	5
RCW 90.48.030.....	5
RCW 90.48.260.....	5, 28
RCW 90.71.200.....	6

**Regulations**

15 C.F.R. pt. 930, subpart D.....	23
33 C.F.R. § 159.3.....	12, 14
40 C.F.R. § 121.2(a).....	4

40 C.F.R. § 131.11(a)(1).....	4, 24
40 C.F.R. § 140.4(a).....	4
40 C.F.R. § 140.4(a)(1).....	16, 24
WAC 173-201A-020.....	14
WAC 173-201A-210(2)(b) .....	14
WAC 173-201A-210(3)(b) .....	14
WAC 173-201A-240.....	13
WAC 371-08-340(2).....	9, 20

**Other Authorities**

77 Fed. Reg. 11,401–02 (Feb. 27, 2012) .....	14, 25
77 Fed. Reg. 11,408 (Feb. 27, 2011) .....	25
77 Fed. Reg. 11,409 (Feb. 27, 2011) .....	26
81 Fed. Reg. 78,142 (Nov. 7, 2016).....	5
82 Fed. Reg. 11,218 (Feb. 21, 2017) .....	7, 21

## I. INTRODUCTION

In order to protect Puget Sound from the adverse impacts of poorly treated sewage from vessels, the state of Washington asked the Environmental Protection Agency (EPA) for permission to prohibit the discharge of vessel sewage into Puget Sound. EPA gave Washington approval to prohibit the discharge of vessel sewage into Puget Sound, and the Department of Ecology is finalizing a rule under the Administrative Procedure Act to establish a Puget Sound No Discharge Zone.

Respondents would like to continue discharging vessel sewage into Puget Sound, and they will be able to challenge the rule that establishes the Puget Sound No Discharge Zone. However, Respondents also want to challenge the petition Washington submitted to EPA asking for permission to establish a Puget Sound No Discharge Zone. Rather than seeking judicial review of Washington's discretionary decision to submit a petition to EPA, Respondents want review by the Pollution Control Hearings Board (Board). In particular, they want the Board to review the portion of Washington's petition that includes a certification that the protection and enhancement of Puget Sound requires greater environmental protection. They also want the Board to review EPA's determination that there are adequate pump-out facilities in Puget Sound.

In its well-reasoned Order Granting Ecology's Motion to Dismiss for Lack of Jurisdiction (Order) the Board employed appropriate rules of statutory construction to conclude that it lacked jurisdiction to review the portion of Washington's petition to EPA that certified that Puget Sound requires greater environmental protection. The Court should affirm the Board's conclusion that it lacks jurisdiction to review either Washington's petition to EPA requesting permission to prohibit the discharge of vessel sewage into Puget Sound or EPA's determination that there are adequate pump-out facilities available in Puget Sound.

## **II. ASSIGNMENT OF ERROR**

Ecology does not assign any error to the Board's Order.

## **III. STATEMENT OF THE CASE**

### **A. The Clean Water Act**

The Federal Water Pollution Control Act (Clean Water Act) declares a national goal to eliminate the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1). The Act allows a state to apply to EPA for permission to completely prohibit the discharge of sewage from vessels into some or all of a state's waters if the state "determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection." 33 U.S.C. § 1322(f)(3). Congress did not establish any

objective standards a state must consider in order to make that determination. This is consistent with Congress's decision to preserve the broad authority of states to control water pollution. *See* 33 U.S.C. § 1251(b) (expressing "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"). *See also* 33 U.S.C. § 1370 (preserving state authority to adopt "any standard or limitation respecting discharges of pollutants" so long as the standard or limitation is not "less stringent" than a standard or limitation required under the Clean Water Act). Under 33 U.S.C. § 1322(f)(3), a state cannot implement a no discharge zone unless EPA "determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply." EPA is required to make this determination within 90 days of a state's submission of an application for a no discharge zone. *Id.*

EPA adopted a regulation to implement 33 U.S.C. § 1322(f)(3). EPA's regulation directs a state to include seven items in its "written application" for permission to prohibit the discharge of sewage from all vessels into some or all of a state's waters:

- (1) A certification that the protection and enhancement of the waters described in the petition require greater

- environmental protection than the applicable Federal standard;
- (2) A map showing the location of commercial and recreational pump-out facilities;
  - (3) A description of the location of pump-out facilities within waters designated for no discharge;
  - (4) The general schedule of operating hours of the pump-out facilities;
  - (5) The draught requirements on vessels that may be excluded because of insufficient water depth adjacent to the facility;
  - (6) Information indicating that treatment of wastes from such pump-out facilities is in conformance with Federal law; and
  - (7) Information on vessel population and vessel usage of the subject waters.

40 C.F.R. § 140.4(a) (1–7).

While EPA decided that a state’s determination of the need for greater environmental protection under 33 U.S.C. § 1322(f)(3) needed to be in the form of a “certification,” EPA, like Congress, did not establish any objective standards a state must consider in making its “certification.” This was not an oversight by EPA. When EPA wants states to make decisions based on objective standards, EPA promulgates regulations saying so. *See* 40 C.F.R. § 121.2(a) (specifying contents a state “shall include” in a certification issued to an applicant under section 401 of the Clean Water Act, 33 U.S.C. § 1341), and 40 C.F.R. § 131.11(a)(1) (state water quality criteria developed under the Clean Water Act “must be based on sound scientific rationale.”).

In sum, neither the Clean Water Act nor EPA's implementing regulations require a state to use any specific criteria to determine that some or all of a state's waters need greater environmental protection from poorly regulated vessel sewage. To the contrary, the Clean Water Act recognizes the primary responsibility and right of states to prevent, reduce, and eliminate pollution, and it gives states broad discretion to make a determination that state waters need greater environmental protection.

**B. Washington's Petition to Designate the Waters of Puget Sound as a No Discharge Zone for Vessel Sewage**

Ecology is the state water pollution control agency for all purposes of the Clean Water Act. RCW 90.48.260. Ecology has jurisdiction to control and prevent the pollution of waters of the state of Washington. RCW 90.48.030. The Legislature has proclaimed a public policy of vigorously exercising state power to insure that water quality within the state is determined by the state of Washington rather than the federal government. RCW 90.48.010.

Ecology submitted a Final Petition to Designate the Waters of Puget Sound as a No Discharge Zone (Petition) to EPA on July 21, 2016. 81 Fed. Reg. 78,142 (Nov. 7, 2016). The Petition contained the seven items identified in EPA's regulation, including a Certificate of Need. AR 000007-68 (Petition). The Petition noted that many of Puget Sound's

recreational and ecological functions are at risk, including thousands of acres of shellfish harvesting areas that are closed, swimming beaches that are annually closed, and large die-offs of marine life in several areas of Puget Sound. AR 000020. The Petition noted that discharges of vessel sewage pose a risk to Puget Sound water quality due in part to the fact that even treated sewage from vessels contains “fecal bacteria concentrations that are many times higher than state water quality standards.” *Id.* The Petition also discussed the variety of toxic contaminants present in treated vessel sewage, and the inadequate federal regulation of vessel sewage. AR 000020, 000039–40.

The Petition clearly explained why Puget Sound needs better environmental protection. It explained that Puget Sound is crucial to the economic vitality and cultural identity of the state, and “provides critical and unique habitat for a variety of species, ranging from orca whales to forage fish and native shellfish.” AR 000022–23. In addition, Puget Sound is home to 71 marine protected areas, which are “areas that are designated as requiring extra protection due to their fragile and unique habitats or species, or because they are culturally historic sites or they enhance fisheries abundance and biodiversity.” *Id.* Moreover, the Washington Legislature agrees that Puget Sound needs better environmental protection. *See* RCW 90.71.200 (finding that Puget Sound is a “national

treasure” that “is in serious decline” and “must be restored and protected in a more coherent and effective manner.”<sup>1</sup>

After Ecology submitted the Petition, EPA determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waters of Puget Sound. 82 Fed. Reg. 11,218 (Feb. 21, 2017). EPA noted that its determination “does not itself constitute the designation of a no discharge zone, rather, the State of Washington may now in its discretion finalize its proposed designation in accordance with state law and take the steps it deems appropriate to implement and enforce the discharge prohibition.” *Id.* at 11,218–19. Respondents did not challenge EPA’s determination. Following EPA’s determination, Ecology initiated a rulemaking process to implement a Puget Sound No Discharge Zone by filing a proposed rule on October 4, 2017, with a public comment period that ran through November 30, 2017.<sup>2</sup> Respondents submitted comments on the proposed rule, and will be able to challenge the rule if they believe the rule is

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<sup>1</sup> The Puget Sound Partnership, the agency leading the effort to restore and protect Puget Sound, identifies a Puget Sound No Discharge Zone as an important action for water quality. AR 000013. Ecology spent four years gathering information through research and an extensive stakeholder process before submitting the Petition to EPA. *Id.*

<sup>2</sup> Information regarding the rulemaking process is available at <https://ecology.wa.gov/Regulations-Permits/Laws,-rules,-rulemaking/Rulemaking/WAC-173-228#WeAreHere>

arbitrary or capricious, exceeds Ecology's statutory authority, or is otherwise unlawful. RCW 34.05.570(2)(c).

**C. Respondents' Attempt to Challenge the Petition Before the Board and the Board's Conclusion That It Lacks Jurisdiction**

After Ecology submitted Washington's Petition for a no discharge zone to EPA, Respondents appealed the certificate of need included in the Petition to the Board. AR 000001. Respondents contended that the inclusion of a certificate of need in the Petition constituted the issuance of a certificate pursuant to RCW 43.21B.110(1)(d), and was therefore subject to the Board's jurisdiction. AR 000003A. Respondents requested a declaratory order from the Board declaring that the certificate of need included in the Petition was "withdrawn and of no further force or effect for the purpose of a petition for a no discharge zone under Section 312(f) of the CWA." AR 000005. This request for relief was an attempt to prevent Washington from asking EPA for permission to prevent the discharge of vessel sewage into Puget Sound. One of the legal issues Respondents attempted to raise before the Board was whether there are "adequate pumpout stations and facilities available to Puget Sound vessel operators to support the proposed no discharge zone?" AR 000710. This issue was an attempt to challenge the determination EPA was required to

make under 33 U.S.C. § 1322(f)(3). However, Respondents did not make EPA a party to their appeal.

Ecology moved to dismiss Respondents' appeal on the grounds that the inclusion of the certificate of need in the Petition Ecology submitted to EPA was not the issuance of a certificate under RCW 43.21B.110(1)(d) and was therefore not within the Board's jurisdiction. AR 000298. In the alternative, Ecology argued the Board should dismiss Respondents' appeal because Respondents failed to comply with the Board's rules of procedure which require that "the person to whom the [appealed] decision is directed" be named as a party in every case. AR 000298-99 (quoting WAC 371-08-340(2)).

The Board held that the context of the word "certificate" in the Board's jurisdictional statute, RCW 43.21B.110(1)(d), indicates that the Board has jurisdiction over certificates that "provide an authorization to an applicant that is required by law for the applicant to proceed with an activity." AR 000720. The Board noted that the certificates it has reviewed in the past involved authorizations required by law for an applicant to proceed with an activity. AR 000720-21. By contrast, under RCW 34.05.570(4) superior courts have jurisdiction regarding the performance of discretionary acts by an agency, such as Ecology's discretionary decision to ask EPA for permission to prohibit the discharge

of vessel sewage into Puget Sound. AR 000722. The Board concluded it did not have jurisdiction over Ecology's discretionary decision to submit a petition to EPA that included a certificate of need to provide better environmental protection for Puget Sound, and it dismissed Respondents' appeal. AR 000723–24.

Respondents appealed the Board's Order, and Thurston County Superior Court reversed the Board's Order. Ecology timely appealed to this Court.

#### IV. ARGUMENT

##### A. Standard of Review

An appellate court reviews administrative decisions on the record of the administrative tribunal, in this case the Board, rather than the record of the superior court. *Sherman v. Moloney*, 106 Wn.2d 873, 881, 725 P.2d 966 (1986). The Court reviews the Board's decision under the Washington Administrative Procedure Act (APA), chapter 34.05 RCW. *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep't of Ecology*, 146 Wn.2d 778, 789–90, 51 P.3d 744 (2002); *see also* RCW 34.05.518(1), (3)(a). The Court sits in the same position as the superior court and applies the standards of the APA directly to the record before the Board. *Tapper v. Emp't Sec.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The burden of demonstrating the

invalidity of the Board's decision is on Respondents, the parties asserting invalidity. RCW 34.05.570(1)(a).

The Court may grant relief if it determines that the Board has "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). Where statutory construction is necessary, a court will interpret statutes de novo. *Pub. Util. Dist. No. 1*, 146 Wn.2d at 790. However, if an ambiguous statute falls within the agency's expertise, the agency's interpretation of the statute is "accorded great weight, provided it does not conflict with the statute." *Id.* In this case, Respondents seek to reverse a decision that both Ecology and the PCHB agreed upon, and the Court should be "loath to override the judgment of both agencies, whose combined expertise merits substantial deference." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 600, 90 P.3d 659 (2004).

The Court may also grant relief if the Board's Order is "arbitrary or capricious." RCW 34.05.570(3)(i). Arbitrary or capricious agency action has been defined as action that "is willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n v. Wash. Utils. Transp. Comm'n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003) (quoting *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)). Where there is room for two opinions, and the agency acted honestly upon due consideration, the Court should not find

that an action was arbitrary and capricious, even though the Court may reach an opposite conclusion. *Port of Seattle*, 151 Wn.2d at 589 (citing *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)). A court should not “undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1).

**B. Federal Regulation of Vessel Sewage Is Inadequate**

Respondents allege that federal regulations regarding marine sanitation devices (MSDs) are extensive and include standards that EPA determined “were protective of water quality.” Respondents’ Opening Brief at 31. However, the federal regulations regarding MSDs only regulate two of the many pollutants present in vessel sewage. *See* 33 C.F.R. § 159.3 (establishing discharge standards for fecal coliform and suspended solids).

One of the studies Ecology relied on in developing the Petition to protect Puget Sound from vessel sewage was EPA’s 2008 Cruise Ship Discharge Assessment Report (Assessment Report). *See* Notice of Appeal, Exhibit at 50 (Final Petition to Designate the Waters of Puget Sound as a No Discharge Zone).<sup>3</sup> AR 000063A. EPA evaluated the pollutants present in both Type II MSDs, the type typically used by members of Respondent

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<sup>3</sup> A true and correct excerpt of Section 2 from EPA’s Assessment Report is attached as Exhibit A to the Declaration of Ronald L. Lavigne in Support of Department of Ecology’s Response to Appellants’ Motion for Stay. AR 000320–71.

American Waterways Operators, Respondents' Opening Brief at 7, as well as advanced wastewater treatment systems (AWTS), which are typically used by cruise ships. Treated sewage from Type II MSDs included fecal coliform, eight different metals (cadmium, chromium, copper, lead, mercury, nickel, silver, and zinc), 16 different volatile and semi-volatile organics, and ammonia at concentrations that exceed the ammonia concentrations in untreated domestic sewage and that greatly exceed Washington's water quality criteria for ammonia.<sup>4</sup> AR 000332–34 (Assessment Report). Advanced wastewater treatment systems did not fare much better. The treated effluent from AWTSs included fecal coliform, 12 metals (antimony, arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, thallium, and zinc), nine different volatile and semi-volatile organics, and ammonia at an average concentration of 36.6 milligrams per liter, comparable to untreated domestic sewage and well in excess of Washington's water quality criteria for ammonia. AR 000338–43.

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<sup>4</sup> The average ammonia concentration in treated effluent from Type II MSDs was 145 milligrams per liter and the average concentration of ammonia in untreated domestic wastewater is 12 to 50 milligrams per liter. AR 000334, Table 2-4. Washington's acute marine water quality criteria for ammonia is .233 milligrams per liter and Washington's chronic marine criteria for ammonia is .035 milligrams per liter. WAC 173-201A-240, Table 240 (2018).

Federal regulation of vessel sewage not only fails to regulate most of the pollutants in vessel sewage, but is also woefully inadequate with respect to the two pollutants that are regulated. In fact, when EPA established a no discharge zone for the marine waters of California, the agency stated that under some circumstances, vessel sewage discharges treated by an MSD “may cause or contribute to water quality impairments and impacts to sensitive marine habitats.” 77 Fed. Reg. 11,401–02 (Feb. 27, 2012). The federal regulation for Type II MSDs allows treated vessel sewage to contain fecal coliform at up to 200 colonies per 100 milliliters. 33 C.F.R. § 159.3. By contrast, Washington’s water quality criteria for fecal coliform is 14 colonies per 100 milliliters for shellfish harvesting and primary contact recreation (swimming, water skiing, and skin diving), and 70 colonies per 100 milliliters for secondary contact recreation (wading, fishing, etc.). WAC 173-201A-210(2)(b), -210(3)(b), Table 210(3)(b), WAC 173-201A-020. In other words, federal regulations allow vessels to discharge sewage with fecal coliform levels that greatly exceed the levels that make it safe for Washington citizens to harvest shellfish, swim, wade, or fish in Puget Sound. The waters of Puget Sound clearly require greater environmental protection than provided by the inadequate federal regulation of vessel sewage.

**C. The Board Properly Concluded It Does Not Have Jurisdiction to Review the Certificate of Need Included in the Petition Ecology Submitted to EPA**

Respondents have never argued that the Board has jurisdiction to review Ecology's discretionary decision to submit the Petition to EPA to request permission to prohibit the discharge of vessel sewage into Puget Sound. However, Respondents are attempting to bring a de facto challenge to the Petition by narrowly focusing on the word "certification" in EPA's regulation and arguing that the Board has jurisdiction over this element of the Petition because it represents "the issuance" of a "certificate" by Ecology pursuant to RCW 43.21B.110(1)(d). AR 000719 (Board Order). *See also* AR 000005 (Notice of Appeal) (requesting an "order declaring the Certificate of Need in the Petition for No Discharge Zone for Puget Sound Water invalid, withdrawn and of no further force or effect for the purpose of a petition for a no discharge zone under Section 312(f) of the CWA."). Despite the fact that EPA is not a party to their appeal, Respondents are also attempting to use their appeal to challenge EPA's determination that there are adequate pump-out facilities in Puget Sound to support a Puget Sound No Discharge Zone. AR 000710, ¶ I.4.

Respondents' argument in support of Board jurisdiction boils down to arguing that EPA created Board jurisdiction when EPA elected to use different language in its no discharge zone regulation than Congress used

when it authorized states to apply for a no discharge zone in 33 U.S.C. § 1322(f)(3). As discussed above, Congress authorized a state to apply for permission to prohibit the discharge of vessel sewage if a state “determines” that some or all of its waters require greater environmental protection. *Id.* EPA’s regulation requires a “certification” that state waters require greater environmental protection. 40 C.F.R. § 140.4(a)(1). If EPA had used the same language as Congress and required a “determination,” Respondents would have no basis to argue that the Board has jurisdiction to review Ecology’s determination that Puget Sound needs greater environmental protection. As the Board correctly ruled, EPA’s decision to use “certificate” in its regulation rather than “determines” is “not determinative of the Board’s jurisdiction.” AR 000719. Instead, the Board properly interpreted the language in RCW 43.21B.110(1)(d) to conclude that it does not have jurisdiction to review the certificate of need included in the Petition.

RCW 43.21B.110(1)(d) gives the Board jurisdiction over:

[T]he issuance, modification, or termination of any permit, certificate, or license by the department or any air authority in the exercise of its jurisdiction, including the issuance or termination of a waste disposal permit, the denial of an application for a waste disposal permit, the modification of the conditions or the terms of a waste disposal permit, or a decision to approve or deny an application for a solid waste permit exemption under RCW 70.95.300.

It is a basic rule of statutory construction that “[s]tatutory provisions must be read in their entirety and construed together, not piecemeal.” *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). This is especially true for a statute like RCW 43.21B.110(1)(d) which uses the term “certificate” in series with other terms:

[A] single word in a statute should not be read in isolation. Rather, the meaning of a word may be indicated or controlled by reference to associated words. In applying this principle to determine the meaning of a word in a series, a court should ‘take into consideration the meaning naturally attaching to them from the context and . . . adopt the sense of the words which best harmonizes with the context.’

*State v. Flores*, 164 Wn.2d 1, 12, 186 P.3d 1038 (2008) (citations and internal quotation marks omitted) (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)).

In deriving the plain meaning of a statute, the “meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The Board properly applied these rules of statutory construction to conclude it does not have jurisdiction to review one element of the Petition just because EPA used the word “certification” in its regulation to describe one of the items required in a no discharge zone petition.

The word “certificate” in RCW 43.21B.110(1)(d) is used in series with “permit” and “license.” None of these words are defined in chapter 43.21B RCW. The Board properly referred to the definition of “license” in the APA to conclude that the context in which the word “certificate” is used in RCW 43.21B.110(1)(d) indicates that the type of certificates that the Board has jurisdiction to review “are akin to licenses and permits which provide an authorization to an applicant that is required by law for the applicant to proceed with an activity.” AR 000719–20. The certificate of need was not issued to an applicant. It was included in a petition Ecology submitted to EPA to request permission to designate Puget Sound as a no discharge zone for sewage from vessels. The Board properly concluded it does not have jurisdiction to review the Petition or the element in the Petition labeled a “Certificate of Need.” The Board’s conclusion properly recognizes that its jurisdiction is limited to adjudicative proceedings and does not extend to the preliminary steps Ecology must take in order to regulate the discharge of vessel sewage into Puget Sound.

In *City of Seattle v. Dep’t of Ecology*, 37 Wn. App 819, 822, 683 P.2d 244 (1984), this Court held that “RCW 43.21B.110 quite obviously limits the board’s jurisdiction to appeals from ‘law applying’ or adjudicatory determinations, as contrasted with ‘law making’ or legislative

activities. That is to say, Board review is restricted to appeals of ‘contested cases,’ as that term is defined in the APA.” While the Legislature has amended both chapter 43.21B RCW and the APA since the *Seattle* decision, those amendments have not expanded the Board’s jurisdiction to include Ecology’s “law making” activities. The Board’s jurisdiction remains limited to reviewing Ecology’s adjudicative proceedings as that term is defined in the APA.

The Legislature has given the Board jurisdiction to review the “issuance” of a “permit, certificate, or license” issued by Ecology, RCW 43.21B.110(1)(d), but has also specified that any appeal filed with the Board must contain the “date and docket number of the order, permit, license, or decision appealed.” RCW 43.21B.230(3)(b). The administrative review of these orders, permits, licenses, or decisions issued by Ecology fits squarely within an “adjudicative proceeding” as that term is defined in the APA. RCW 34.05.010(1).

In addition, the Legislature has specified that a decision or order that is appealable to the Board “shall contain a conspicuous notice to the recipient that it may be appealed only by filing an appeal with the hearings board and serving it on the issuing agency within thirty days of the date of receipt.” RCW 43.21B.310(4). As Respondents acknowledge, the Ecology-issued certificates that the Board has previously reviewed

included this required language. Respondents' Opening Brief at 22–23 (discussing programmatic section 401 certifications and Coastal Zone Management Act certification that includes the required conspicuous notice of the right to appeal). This required language recognizes that decisions that are appealable to the Board are decisions issued to a recipient who has a right to a hearing “before or after the entry of an order by” Ecology. RCW 34.05.010(1).<sup>5</sup>

Finally, the Legislature has directed that the Board “shall be subject to all duties imposed upon and shall have all powers granted to, an agency by those provisions of chapter 34.05 RCW relating to adjudicative proceedings.” RCW 43.21B.160.<sup>6</sup>

The Board’s jurisdiction remains limited to adjudicative proceedings, and Ecology’s submission of a petition to EPA asking for permission to prohibit the discharge of vessel sewage into Puget Sound is not an adjudicative proceeding, but is a predicate to “law making.” As

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<sup>5</sup> The Board’s rules of practice and procedure also recognize the rights of recipients of appealable decisions by requiring that both the issuing agency “whose decision is being appealed and the person to whom the decision is directed shall be named as parties.” WAC 371-08-340(2). Respondents’ appeal to the Board failed to comply with this procedural requirement because the appeal neither identifies nor names as a party any recipient of the decision they attempted to appeal to the Board. AR 000001–02.

<sup>6</sup> “Proceedings before the Pollution Control Hearings Board are governed by the Administrative Procedure Act, RCW 34.05.” *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998). Respondents acknowledged that appeals to the Board are subject to the APA by bringing their appeal pursuant to both chapter 43.21B RCW and “Chapter 34.05 RCW.” AR 000001.

EPA explained when it determined that adequate facilities exist for the safe and sanitary removal and treatment of vessel sewage in the waters subject to the proposed no discharge zone, EPA's "determination does not itself constitute the designation of a no-discharge zone." 82 Fed. Reg. 11,218 (Feb. 21, 2017). Rather, EPA's determination simply allows Washington to move forward with adopting the regulation necessary to implement a Puget Sound No Discharge Zone, a regulation Respondents will have a right to appeal. RCW 34.05.570(2). Asking the federal government for permission to proceed with rulemaking is not an order, approval, or decision issued to an applicant, and it is not the predicate for an adjudicative proceeding under the APA. The Board properly concluded it does not have jurisdiction to review the certificate of need included in the Petition Ecology submitted to the EPA.

**D. The Board's Exercise of Jurisdiction Over Certifications Ecology Issues That Are Required to Authorize Applicants to Proceed With Activities or Projects Does Not Establish Jurisdiction to Review the Certificate of Need Included in the Petition Ecology Submitted to EPA**

Respondents argue that the Board has jurisdiction over the certificate of need included in the Petition Ecology submitted to EPA because the Board has exercised jurisdiction over Clean Water Act section 401 certifications and Coastal Zone Management Act consistency certifications. Respondents' Opening Brief at 19–23. However, as

Respondents acknowledge, these certifications are authorizations required by law for the applicant to proceed with an activity. Respondents' Opening Brief at 20 (section 401 certification "is required for any application for a federal permit or approval that will result in a discharge to waters of the United States"), and 21 (Coastal Zone Management Act consistency certification required for all federal agency actions within the coastal zone to ensure proposed action is consistent with the state's coastal zone management program). By contrast, no applicant requested that Ecology issue the certificate of need included in the Petition, no applicant was required to obtain the certificate of need, and no applicant was authorized by Ecology to proceed with an activity by the certificate of need. The certificate of need was simply one of the items EPA's regulation required Ecology to include in the Petition in order to request permission to make Puget Sound a no discharge zone for vessel sewage.<sup>7</sup>

Another important distinction between the certificate of need included as part of the Petition, and certifications issued by Ecology under section 401 of the Clean Water Act and Coastal Zone Management Act, is the lack of any objective standard for reviewing the certificate of need.

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<sup>7</sup> Respondents' reliance on certifications Ecology has issued to the Army Corps of Engineers for Nationwide Permits does not change this analysis. Respondents' Opening Brief at 22–23. As the Board correctly explained, Nationwide Permits are a type of general permit that may cover a broader geographic area than an individual permit and may cover multiple projects, but is still a project-focused permit. AR 000721 n.4.

AR 000721–22. Certifications issued under section 401 of the Clean Water Act must “assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations [including limitations to meet water quality standards under 33 U.S.C. § 1311(b)(1)(C)].” 33 U.S.C. § 1341(d). Certifications issued under the Coastal Zone Management Act must comply with the National Oceanic and Atmospheric Administration’s detailed regulations governing a state’s development of its consistency certification. 15 C.F.R. pt. 930, subpart D. In reviewing these certifications, the Board can use its specialized expertise to evaluate the conditions in the certifications and determine whether the conditions comply with applicable federal and state environmental laws.

By contrast, neither Congress nor EPA has established any objective criteria a state must comply with in order to request permission to prohibit the discharge of vessel sewage into some or all of a state’s waters. Congress simply required that a state “determines that the protection and enhancement” of some or all of its waters require greater environmental protection. 33 U.S.C. § 1322(f)(3). EPA’s regulation requires that this determination take the form of a “certification that the protection and enhancement” of waters described in a no discharge zone petition require greater environmental protection but, like Congress, EPA

set no objective standards a state must satisfy to make this certification. 40 C.F.R. § 140.4(a)(1). This lack of objective criteria differs from other Clean Water Act provisions and regulations that direct EPA and states to make decisions based on “the latest scientific knowledge,” or a “scientific rationale.” *See, e.g.*, 33 U.S.C. § 1314(a)(1) (EPA shall develop “criteria for water quality accurately reflecting the latest scientific knowledge”); 40 C.F.R. § 131.11(a)(1) (states must adopt water quality criteria “based on sound scientific rationale”).

When Congress and EPA want states to make water pollution decisions based on objective criteria, they know how to direct states to do so. But neither Congress nor the EPA has established any objective criteria a state must consider to support a determination that some or all of its waters require greater environmental protection. That fact demonstrates that a state’s decision to petition EPA for permission to prohibit the discharge of vessel sewage into some or all of a state’s waters is a discretionary decision that states are free to make for any number of reasons. In fact, EPA has specifically rejected the suggestion that a determination of need has to be based on science-based evidence that vessel sewage discharges are impacting specific waters or a demonstration that a no discharge zone is needed to attain applicable water quality standards for the specific waters to be protected.

The Clean Water Act provides two avenues for implementing a no discharge zone. Under Clean Water Act section 312(f)(3), 33 U.S.C. § 1322(f)(3), if a state determines that some or all of the state's waters need greater environmental protection, that state can implement a no discharge zone if EPA determines there are adequate facilities for the safe and sanitary removal and treatment of vessel sewage. This is the approach Washington is using to establish a Puget Sound No Discharge Zone. Under Clean Water Act section 312(f)(4), 33 U.S.C. § 1322(f)(4), a state asks EPA to determine that specified waters need greater environmental protection, and the state can implement a no discharge zone upon EPA's determination of the need for greater environmental protection and adoption of a no discharge zone regulation. This is the approach California opted to use to establish a no discharge zone for the marine waters of California. 77 Fed. Reg. 11,401 (Feb. 27, 2012).

In making its determination that the coast of California requires greater environmental protection, EPA specifically rejected the suggestion that its determination of need required "science-based evidence that vessel sewage discharges are impacting specific waters," or a demonstration that a no discharge zone "is needed to attain applicable water quality standards for the specific waters to be protected." 77 Fed. Reg. 11,408 (Feb. 27, 2011) ("Contrary to what was suggested by commenters, nothing in the

statute requires a demonstration focused on specific state water quality standards.”). EPA ultimately determined that the presence of “unique qualities and diverse resources” justified a no discharge zone (NDZ) encompassing all California marine waters, without site-specific evaluations to determine the impact of vessel sewage discharges on those waters.

In light of the extensive array of important marine resources located throughout California’s coastal waters, their connection to the California Current system, and the presence of the two covered classes of large vessels in many parts of these waters having the potential to discharge 22.5 million gallons of sewage per year, EPA does not believe that Section 312(f)(4)(A) requires it to divide the proposed NDZ into individual segments and conduct site-specific evaluations of these segments to determine the extent to which vessel sewage discharges are impacting each. . . . The information provided in the State’s application, the proposed rule and supporting comments demonstrate that an NDZ encompassing all California marine waters is required to protect and enhance the quality of California marine waters which warrant special protection under CWA Section 312(f)(4)(A) because of their unique qualities and diverse resources.

*Id.* at 11,409.

During its lengthy process to develop Washington’s Petition, Ecology identified “unique qualities and diverse resources” that demonstrate that Puget Sound warrants the special protection provided by a no discharge zone. AR 000023 (“Puget Sound provides critical and unique habitat for a variety of species, ranging from orca whales to forage

fish and native shellfish.” Seventy one marine protected areas are located in Puget Sound.). The Petition also identifies the important economic, recreational, and ecological resources of Puget Sound that are at risk due to declining water quality in Puget Sound. AR 000020. The unique qualities and diverse resources of Puget Sound, like the unique qualities and diverse resources of California’s marine waters, are sufficient to support Washington’s Petition.

Neither Washington’s Petition asking EPA for permission to prohibit the discharge of vessel sewage into Puget Sound, nor the certification included in the Petition, are subject to the Board’s jurisdiction. Accordingly, the Board correctly ruled that it does not have jurisdiction to review Ecology’s discretionary decision to request permission to make Puget Sound a no discharge zone for vessel sewage.

**E. Respondents’ Belief That the Board Is a More Advantageous Forum for Them Than the Superior Court Does Not Create Board Jurisdiction**

Under the APA, as the Board correctly held, superior courts have jurisdiction in actions involving the performance of discretionary acts by an agency, as well as the failure of an agency to perform a duty required by law. AR 000722 (citing RCW 34.05.570(4)(b) and (c)). While the Board cited “failure to act cases,” RCW 34.05.570(4)(c) explicitly applies to an agency’s “exercise of discretion” as well as an agency’s failure to

perform a duty required by law. *Hillis*, 131 Wn.2d at 394–95 (applying RCW 34.05.570(4)(c) to review Ecology’s discretionary decision to conduct watershed assessments prior to acting on water right applications).

In this case, Respondents are attempting to prevent the state of Washington from asking EPA for permission to prohibit the discharge of vessel sewage into Puget Sound. As discussed above, Washington has broad discretion to make this request, and the proper forum for reviewing the exercise of this broad discretion is in superior court pursuant to RCW 34.05.570(4)(c).

Respondents would prefer Board review over superior court review because they believe the Board is a more advantageous forum. Respondents’ Opening Brief at 27–28. But their preference for the Board does not confer jurisdiction on the Board. And just because superior court review is deferential to Ecology does not mean that the Board’s Order leaves Respondents with “no other means of review of the certificate.” Respondents’ Opening Brief at 25.<sup>8</sup> In addition to challenging the Petition

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<sup>8</sup> While Respondents argue the Board would not give any deference to Ecology’s exercise of discretion in asking for permission to prohibit the discharge of vessel sewage into Puget Sound, Respondents’ Brief at 27–28, the Supreme Court has held that Ecology’s interpretation of the laws it administers is entitled to “great weight” because the Legislature designated Ecology, rather than the Board, as the “water pollution control agency with regard to the Clean Water Act.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593–94, 90 P.3d 659 (2004) (citing RCW 90.48.260). Accordingly, the Board would be required to give deference to Ecology’s discretionary decision to ask EPA for permission to prohibit the discharge of vessel sewage into Puget Sound. *See, e.g., Pierce Cty. v. Dep’t of Ecology*, Nos. 12-093c,

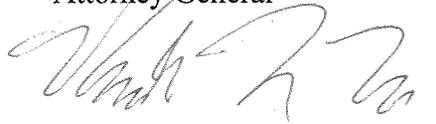
as other agency action under RCW 34.05.574(4), Respondents will be able to appeal the rule that implements the Puget Sound No Discharge Zone pursuant to RCW 34.05.574(2).

## V. CONCLUSION

The Board properly concluded it does not have jurisdiction to review Ecology's discretionary decision to request permission to protect Puget Sound from poorly regulated vessel sewage. For the reasons discussed above, the Court should affirm the Board's Order Granting Ecology's Motion to Dismiss for Lack of Jurisdiction.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of March, 2018.

ROBERT W. FERGUSON  
Attorney General



RONALD L. LAVIGNE, WSBA #18550  
Senior Counsel  
Attorneys for State of Washington  
Department of Ecology  
P.O. Box 40117  
Olympia, WA 98504-0117  
360-586-6751  
*ronaldl@atg.wa.gov*

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12-097c, 2014 WL 1262544, at \*23 (Wash. Pollution Control Hearings Bd., Mar. 21, 2014) (under *Port of Seattle*, Board gives deference to Ecology's expertise in administering water quality laws).

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the state of Washington that on March 9, 2018, I caused to be served Appellant Department of Ecology's Brief in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

JAMES A. TUPPER, JR.  
LYNNE COHEE  
TUPPER MACK WELLS PLLC  
2025 FIRST AVENUE, SUITE 1100  
SEATTLE WA 98121

By Email: tupper@tmw-law.com;  
cohee@tmw-law.com; schulz@tmw-law.com

DIONNE PADILLA-HUDDLESTON  
ASSISTANT ATTORNEY GENERAL  
LICENSING & ADMINISTRATIVE  
LAW DIVISION.  
800 FIFTH AVENUE, SUITE 2000  
SEATTLE, WA 98104

By Email: dionnep@atg.wa.gov;  
amyp4@atg.wa.gov

DATED this 9<sup>th</sup> day of March, 2018, in Olympia, Washington.

  
DONNA FREDRICKS, Legal Assistant

**ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION**

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