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

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,

and

STATE OF WASHINGTON, POLLUTION CONTROL HEARINGS
BOARD,

Respondent Below.

RESPONDENTS' REPLY BRIEF

James A. Tupper Jr., WSBA No. 16873
Lynne M. Cohee, WSBA No. 18496
Bradford Doll, WSBA No. 38479
Tupper Mack Wells PLLC
2025 First Avenue, Suite 1100
Seattle, WA 98121
(206) 493-2300
tupper@tmw-law.com
cohee@tmw-law.com
doll@tmw-law.com
Attorneys for Respondents

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I. INTRODUCTION

The Washington Legislature created the Pollution Control Hearings Board to provide uniform and independent *de novo* review of actions taken by the Department of Ecology. The Board's broad jurisdictional statute grants the Board exclusive jurisdiction to hear appeals from "the issuance, modification, or termination of *any* permit, certificate, or license" issued by Ecology. RCW 43.21B.110(1)(d) (emphasis supplied). The Board has exercised that jurisdiction over appeals from multiple types of certificates and certifications issued by Ecology under state and federal law, including Clean Water Act § 401 water quality certifications, and has never limited its jurisdiction to hear appeals from Ecology-issued certificates.

Nevertheless, the Board in this appeal refused to review Ecology's Certificate of Need, which officially certified to EPA that Washington had made the required determination under Clean Water Act § 312(f)(3) that existing federal standards and regulations for vessel Marine Sanitation Devices (MSDs) provide inadequate environmental protection to Puget Sound, necessitating designation of a No Discharge Zone (NDZ) and a complete prohibition of both treated and untreated vessel discharges. 33 U.S.C. § 1322(f)(3); 40 C.F.R. § 140.4(a).

The Board's decision to dismiss American Waterways' appeal of the Certificate of Need ignores the plain language of RCW 43.21B.110(1)(d) and subverts the very purpose for which the Board was created. The Board does not have the authority to restrict its own

jurisdiction over appeals from certificates by rewriting the statute or applying an “objective standards” test. A Clean Water Act NDZ is a narrow exception to the Act’s explicit prohibition on state regulation of MSDs. 33 U.S.C. § 1322(f)(1)(A). The state certification of need is the key required predicate to establishment of an NDZ. The Board and Ecology would shield Ecology’s decision-making and grant Ecology unrestricted discretion to issue that certification whenever “it wants to,” “for any number of reasons,” without any Board review, in clear contravention of RCW 43.21B.110(1)(d) and the Clean Water Act. Judge Christopher Lanese’s order reversing the Board Decision should be affirmed, the Board Decision vacated, and American Waterways allowed to argue the merits of its appeal before the Board.¹

II. ARGUMENT

A. The Board Has Jurisdiction over American Waterways’ Appeal of the Certificate of Need Pursuant to the Plain Language of RCW 43.21B.110(1)(d).

This is a case of statutory interpretation. The Court’s duty is to ascertain and carry out the Legislature’s intended grant of jurisdiction to the Board in RCW 43B.21B.110. The scope of the Board’s authority is a question of law that the courts review *de novo*. *Rosemere Neighborhood Ass’n v. Clark County*, 170 Wn. App. 859, 872-74, 290 P.3d 142 (2012), *review denied*, 176 Wn.2d 1021 (2013). Although a reviewing court

¹ “American Waterways” refers to Respondents The American Waterways Operators, Cruise Lines International Association – Northwest & Canada, Northwest Marine Trade Association, Recreational Boating Association of Washington and Uncruise Adventures. References to “American Waterways Brief” are to Respondents’ Opening Brief.

generally accords substantial deference to agency decisions, courts do not defer to an agency the power to determine the scope of its own authority. *Lenander v. Washington State Dep't of Retirement Systems*, 186 Wn.2d 393, 409, 377 P.3d 199 (2016); *In re Registration of Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994). The interpretation of RCW 43.21B.110(1)(d) set forth by the Board and Ecology is therefore accorded no deference by this Court.

Where a statute's meaning is plain on its face, that plain meaning is an expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The words of the statute are to be ascribed their usual, ordinary and commonly accepted meaning. *Greenhalgh v. Dep't of Corrections*, 180 Wn. App. 876, 884, 324 P.3d 771, *review denied*, 181 Wn.2d 1016 (2014). Both the Board and Ecology ignore the plain language of RCW 43.21B.110(1)(d), which states that the Board *shall* have exclusive jurisdiction over appeals from *any* Ecology-issued "permit, certificate, or license."

Ecology does not dispute that where a statutory term such as "certificate" is undefined, courts give the term its ordinary meaning. *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 837, 399 P.3d 519 (2017) (citing *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010)). Nor does Ecology dispute that courts regularly look to dictionary definitions to interpret a term's ordinary meaning, and that in the only case in which it sought to define the term "certificate" the Board did precisely that. *See American Waterways Brief at 15*. Ecology does not challenge either

American Waterways' use of the Black's Law Dictionary definition of "certificate," or the definition itself. It does not dispute that Ecology's Certificate of Need fits squarely within that definition: it is the document by which Ecology formally and officially certified or attested that the state had satisfied the standard or requirement in CWA § 312(f)(3) and C.F.R. § 140.4(a)(1) of a determination that current federal MSD standards inadequately protect Puget Sound waters.²

Instead, Ecology attempts to argue that the Certificate of Need is not a certificate by mischaracterizing the Certificate itself. Ecology asserts that the certification required by 40 C.F.R. § 140.4(a)(1) is merely one "element" or "item" to be included in a state's NDZ petition. Ecology Response Brief at 17, 22. But the certification required by 40 C.F.R. § 140.4(a)(1) is not merely one factor among many that must be contained in the petition. The state certification of need is *the* essential required predicate for any CWA § 312(f)(3) petition.

Ecology's further effort to assert that the Board does not have jurisdiction because the appeal is from Ecology's petition rather than the certificate, is similarly misplaced. Ecology Response Brief at 1, 15.

² The fact that the term "determination" appears in CWA § 312(f)(3) and the term "certification" appears in 40 C.F.R. § 140.4(a)(1) does not render the Certificate of Need any less of a certificate. Clean Water Act § 312(f)(3), § 401 (33 U.S.C. § 1341), the Coastal Zone Management Act (16 U.S.C. § 1456), and the EPA implementing regulations use the terms "certification," "consistency certification," "consistency determination," "determination" and "certification/consistency determination" interchangeably. See 16 U.S.C. § 1456(c) ("certification"); 16 U.S.C. § 1456(c)(1)(C) ("consistency determination"); 15 C.F.R. § 930.57(a) ("certification"); 15 C.F.R. § 930.57(b) ("consistency certification"); 33 U.S.C. § 1341 ("certification"); 40 C.F.R. § 121.2 ("certification").

American Waterways is not seeking review of the state's NDZ petition. Nor is American Waterways attempting to prevent Ecology from petitioning EPA for an NDZ. The Notice of Appeal identifies the "Decision Under Appeal" as the Certificate of Need. AR 000002.³ It asserts that Ecology has not established in the certification that Puget Sound waters require greater environmental protection than that provided by current federal standards for MSDs, as required by CWA § 312(f)(3) and 40 C.F.R. § 140.4(a)(1). AR 000003-3A, 000006. It seeks invalidation of the Certificate of Need for failure to meet those requirements. AR 000003A, 000007. The fact that the Certificate of Need is submitted to EPA as part of the state's NDZ petition does not make it any less of a certificate.

B. The Board and Ecology Ignore the Board's Statutory Role of Providing Independent *De Novo* Review of Ecology Actions.

Both Ecology's brief and the Board's decision are devoid of any discussion of the Legislature's purpose and intent in establishing the Board. The Board was specifically created to ensure that Ecology's actions are subject to review by an independent adjudicatory body. RCW 43.21B.010, which must be read together with RCW 43.21B.110, states that the Board's purpose is to "provide for a more expeditious and efficient disposition of designated environmental appeals as provided for

³ On February 1, 2018, the Board issued a Second Amended Certification of the Record including the two pages previously missing from the Notice of Appeal, now designated as bates numbered pages 000003A and 000003B. See American Waterways Brief at 7 n.3. A complete Notice of Appeal with proper bates numbers is attached as Appendix A to this brief.

in RCW 43.21B.110.” RCW 43.21B.010. *See also State ex rel. Martin Marietta Aluminum, Inc. v. Woodward*, 84 Wn.2d 329, 333, 525 P.2d 247 (1974) (legislature’s purpose in creating the Board is a uniform resolution of pollution control controversies by a tribunal possessing special expertise in the field).

As the state supreme court explained in *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 90 P.3d 659 (2004):

Traditionally, executive agencies have been unitary in structure [citation omitted]; agencies generally perform rule making, interpretive, enforcement, and adjudicatory functions. In 1970, the legislature created the PCHB, a quasijudicial body whose members must be “qualified by experience or training in pertinent matters pertaining to the environment.” RCW 43.21B.020. The legislature thus removed certain adjudicatory functions from Ecology and charged the PCHB with providing uniform and independent review of Ecology actions. *State ex rel Martin Marietta Aluminum, Inc. v. Woodward*, 84 Wn.2d 329, 333, 525 P.2d 247 (1974); RCW 43.21B.010. Rule making, interpretive, and enforcement functions remain with Ecology. . . .

Port of Seattle, 151 Wn.2d at 591-92. The supreme court further held that “reflection on the statutory role of the PCHB clearly indicates” that Board review of Ecology actions is *de novo*. *Id.* at 597.

Consistent with the Board’s role as independent reviewer of Ecology actions, its grant of jurisdiction from the Legislature is comprehensive. RCW 43.21B.110(1) contains 14 subsections detailing the wide range of agency decisions over which the Board “shall” have jurisdiction to hear and decide appeals. RCW 43.21B.110(1). RCW 43.21B.110(1)(d) broadly grants the Board jurisdiction over appeals from “the issuance, modification, or termination of *any* permit, certificate, or

license by [Ecology]. . . in the exercise of its jurisdiction. . . .” RCW 43.21B.110(1)(d) (emphasis added).

Courts and the Board have expansively interpreted this jurisdictional charge, holding that the term “certificate” in RCW 43.21B.110(1)(d) includes Board jurisdiction to decide appeals of Ecology CWA Section 401 water quality certifications (33 U.S.C. § 1341) and Coastal Zone Management Act (CZMA) determinations of consistency with the state coastal zone management program (16 U.S.C. § 1456). American Waterways Brief at 20-21.

Ecology fails to acknowledge that the courts and the Board have further interpreted the Board’s jurisdictional statute to include the *implied* authority “to do everything lawful and necessary to provide for the expeditious and efficient disposition of [Ecology] appeals.” *Rosemere*, 170 Wn. App. at 872-74 (explicit jurisdictional grant to Board to hear appeals from Ecology NPDES permit compliance orders included implied authority to consider related issues); *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 74, 110 P.3d 812 (2005) (statutory authority given to Board to hear and decide appeals from Ecology actions included implied authority to hear property owner’s equitable defenses); *Hagman v. Dep’t of Ecology*, PCHB No. 14-016c, 2014 WL 8514637 (Order on Motions, Dec. 3, 2014) at 13, *6 (emphasis in original) (Board statutory authority to hear appeals from “issuance, modification, or termination” of a permit, certificate or license included

implied authority to hear appeals from the *denial* of a permit, certificate, or license.)

The plain language of RCW 43.21B.110(1)(d), past expansive interpretation of the statute, and the very function of the Board, compel the conclusion that the Board has jurisdiction to hear American Waterways' appeal and conduct an independent review of Ecology's Certificate of Need.

C. The Board May Not Add Limiting Language to RCW 43.21B.110(1)(d) That Does Not Appear in the Statute.

Despite the fact that the Board has never so limited its jurisdiction in the past, Ecology and the Board would restrict the Board's jurisdiction to those certificates "which provide an authorization to an applicant that is required by law for the applicant to proceed with an activity." AR 000720. They seek to rewrite RCW 43.21B.110(1)(d) by adding language appropriated from the APA, which broadly defines a "license" as including a "certification." However, RCW 43.21B.110 — not the APA — is the statute governing the Board's jurisdiction. The terms "certificate" and "license" are listed separately in the Board's jurisdictional statute and thus are not interchangeable terms. *Durland v. San Juan Cty.*, 182 Wn.2d 55, 79, 340 P.3d 191 (2014) ("it is a basic rule of statutory construction that the legislature intends different terms used within an individual statute to have different meanings"). In order to be appealable to the Board a "certificate" does not also have to meet the APA definition of "license."

Further, Ecology fails to acknowledge that the Board has not only lifted the “authorization required by law” language from the APA definition of license — the Board has gone a step further and inserted language for which the Board gave no source, limiting its jurisdiction to certificates which provide an authorization “to an applicant” that is required by law “for the applicant to proceed with an activity.” AR 000720. Ecology and the Board cannot simply concoct a definition out of thin air. The Board’s language does not appear in RCW 43.21B.110, the sole statute governing the Board’s jurisdiction. The Board may not rewrite its statutory grant of jurisdiction by adding limiting language not included in the statute by the legislature, and ignoring words that do appear in the statute. *See Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); *Carrera v. Sunheaven Farms*, 196 Wn. App. 240, 252, 383 P.3d 563 (2016), *aff’d*, 189 Wn.2d 297 (2017).

The Board has never before asserted that it lacked jurisdiction to hear an appeal from a certificate because it did not meet the APA definition of license. It has never before limited its jurisdiction to those certificates “which provide an authorization to an applicant that is required by law for the applicant to proceed with an activity.” Whether exercising jurisdiction over CWA § 401, CZMA, or water rights certificates, the Board’s practice has been to recognize the plain language of RCW 43.21B.110(1)(d) and hear appeals from *any* Ecology-issued certificate.⁴

⁴ Even if Board jurisdiction to hear appeals from certificates were limited to certificates which constitute an “authorization required by law,” Ecology’s Certificate of Need is just

D. Board Jurisdiction Is Not “Limited to Reviewing Ecology’s Adjudicative Proceedings.”

In its continued effort to evade *de novo* review of the Certificate of Need Ecology puts forth a new argument, asserting that the Board’s jurisdiction is “limited to reviewing Ecology’s adjudicative proceedings.” Ecology Response Brief at 18-21. Ecology argues that because the Certificate of Need is a “predicate to ‘law making’” rather than an adjudicative proceeding, it cannot be reviewed by the Board. *Id.* Ecology’s argument is flatly incorrect, and fundamentally misconstrues the respective roles of the agency and the Board.

American Waterways agrees that the Certificate of Need is not an adjudicative proceeding. But contrary to Ecology’s argument, Board jurisdiction cannot be limited to appeals from Ecology adjudicative proceedings, because Ecology does not conduct adjudicative proceedings. The Board statute specifically states that *Ecology does not have the authority to hold adjudicative proceedings* pursuant to the APA. RCW 43.21B.240. Such authority was taken away from Ecology and granted to the Board when it was created. *Port of Seattle*, 151 Wn.2d at 591-92, 597. The supreme court “has recognized that the PCHB, not Ecology, was appointed by the legislature to adjudicate proceedings arising out of Ecology actions.” *Id.* at 597 (citing *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 121, 11 P.3d 726 (2000)).

such an authorization. The certification is required by law – the CWA – before a state may designate an NDZ. It is a legally required component of the NDZ designation process outlined in CWA § 312(f)(3) and 40 C.F.R. § 140.4(a).

The Board *conducts* adjudicative proceedings. It does not *review* Ecology adjudicative proceedings. Ecology's references to the APA's definition of the term "adjudicative proceedings," and the Board statute providing that the Board has the powers granted in the APA to agencies engaged in adjudicative proceedings, are mere attempts to draw the court's attention away from the plain language of RCW 43.21B.110(1)(d).

Ecology's citation to *City of Seattle v. Dep't of Ecology*, 37 Wn. App. 819, 683 P.2d 244 (1984), does not support its argument. This case involved an attempted appeal to the Board from an instream flow regulation promulgated by Ecology. As the Court clearly stated, "this appeal presents a single, narrow issue. . . . We must determine whether the [Board] has jurisdiction to determine the validity of a rule promulgated by [Ecology]. We hold it does not." *Id.* at 820. Noting that the Board's jurisdiction does not extend to appeals from Ecology "law making" or "legislative activities" such as rulemaking, the Court held that the legislature intended that review of Ecology rules be governed exclusively by the APA, to be brought in superior court. *Id.* at 822, 824.

American Waterways agrees that the Board lacks jurisdiction to hear appeals from Ecology "law making" or "legislative" activities such as rulemaking. It is settled law that jurisdiction over challenges to Ecology rules lies with the superior courts pursuant to RCW 34.05.570(2). *See Inland Foundry Co., Inc. v. Spokane County Air Auth.*, 98 Wn. App. 121, 124, 989 P.2d 102 (1999). But American Waterways' appeal is from a certificate, not a rule. Ecology has never taken the position that its

issuance of the Certificate of Need constitutes rulemaking. Such a position would be completely inconsistent with Ecology's prior characterizations of the Certificate of Need, including its assertion that the Certificate of Need is an "other agency action" appealable pursuant to RCW 34.05.570(4). *See* Ecology Response Brief at 27-28. *City of Seattle* does not address in any way the Board's jurisdiction over appeals from Ecology-issued certificates, and is simply irrelevant to the Board's jurisdiction over American Waterways' appeal.⁵

Ecology next cites to RCW 43.21B.230(3), which sets out the required contents of a notice of appeal to the Board. Ecology asserts that the administrative review of Ecology orders, permits, licenses and decisions "fits squarely within an 'adjudicative proceeding' as that term is defined in the APA." Ecology Response Brief at 19. American Waterways certainly agrees that review of such Ecology decisions by the Board involves an adjudicative proceeding by the Board. That is the Board's very purpose. To the extent that Ecology may be asserting that the lack of the term "certificate" in RCW 43.21B.230(3)(b) divests the Board of jurisdiction over appeals from Ecology-issued certificates, such a position would be directly contrary to both the specific grant of

⁵ Ecology also refers to the Petition and the Certificate of Need as "the preliminary steps Ecology must take in order to regulate the discharge of vessel sewage into Puget Sound." Ecology Response Brief at 18. Ecology apparently has forgotten that states are preempted by the Clean Water Act from regulating vessel discharges already subject to federal MSD standards. 33 U.S.C. § 1322(f)(1)(A). Establishing an NDZ upon the required certification to EPA is a narrow exception to this federal preemption.

jurisdiction to the Board in RCW 43.21B.110(1)(d), and to the settled proposition that the Board has jurisdiction over such certificates.

Ecology also asserts, again for the first time, that the Certificate of Need cannot be appealed to the Board because Ecology did not include with the Certificate the required notice informing the public that it had thirty days in which to appeal. Ecology Response Brief at 19-20. *See* RCW 43.21B.310(4). The Board has specifically rejected this argument, holding that “the failure to include [the appeal] language is not dispositive of whether the agency action at issue is appealable to the Board. . . [T]he failure to include this language does not divest the Board of its jurisdiction or impact whether the decision may be appealed.” *Klineburger v. King County Dep’t of Dev. & Env’tl. Servs. Bldg*, 189 Wn. App 153, 170, 356 P.3d 223 (2015) (citing *Hagman*, 2014 WL 8514637 at *7 n.4). *Accord*, *Jones Local Improvement Dist. No. 1 v. Dep’t of Ecology*, PCHB No. 16-016, 2016 WL 10706610 at *5-6 (Order on Motion to Dismiss, May 10, 2016).

E. Ecology Does Not Have the Discretion to Issue a Certificate of Need for Whatever Reason It Wants.

Both Ecology and the Board contend that Ecology has unfettered discretion to certify to EPA that Puget Sound waters require greater environmental protection than provided by the current federal standards. Ecology takes the position that it can decide to petition EPA for an NDZ “for any number of reasons,” that it need not meet any standard whatsoever in issuing the Certificate of Need, and that the certification

need not have any scientific basis. Ecology Response Brief at 22-24.

Ecology then concludes that the Board does not have jurisdiction to hear American Waterways' appeal because there are no objective standards for the Board to use in reviewing Ecology's actions.

First, RCW 43.21B.110 does not contain an "objective standards" test, and there is no need for this Court to make any determination regarding the standards to be applied by the Board in an appeal from the Certificate of Need. Nothing in the statute limits the Board's jurisdiction to Ecology actions for which the Board first identifies some unspecified standard by which the action may be reviewed. The legislature has granted the Board jurisdiction to hear appeals from *any* permit, license or certificate issued by Ecology. The Board has never imposed an "objective standards" test in determining its jurisdiction to hear appeals from certificates, and it should not do so here.

Moreover, even if such a test did exist, the language of CWA § 312(f)(3) and its implementing regulation provide sufficient standards by which the Board can review the Certificate of Need. *See* American Waterways Brief at 29-31. Ecology's argument to the contrary fundamentally rests on a misstatement of the requirements for its Puget Sound NDZ. Ecology mistakenly asserts throughout its brief that CWA § 312(f)(3) allows a state to petition EPA for designation of an NDZ upon the mere determination that the designated state waters "require greater environmental protection." *See* Ecology Response Brief at 1, 2, 16, 23, 24, 25. This is not the language of the statute.

CWA § 312(f)(3) requires that the state determine that “protection and enhancement of the quality” of the waters requires greater environmental protection *than provided by the federal standards and regulations* promulgated pursuant to CWA § 312. 33 U.S.C. § 1322(f)(3). The EPA regulation accordingly requires that a state’s CWA § 312(f)(3) determination take the form of a “certification that the protection and enhancement of water described in the petition require greater environmental protection *than the applicable Federal standards.*” 40 C.F.R. § 140.4(a)(1) (emphasis added). Ecology conveniently leaves out the essential reference to the existing federal standards and would read those words out of the statute and regulation. The Act explicitly provides that states are preempted from regulating vessel discharges and imposing requirements on vessels more stringent than existing EPA and Coast Guard regulations. 33 U.S.C. § 1322(f)(1)(A). A CWA Section 312(f)(3) NDZ is a narrow exception to that federal preemption. The statute and its implementing regulation accordingly require that a state’s certification includes an assessment of the environmental protection currently afforded by federal standards, and a determination that *greater* environmental protection is necessary. *See American Waterways’ Brief at 32.*

Ecology’s position that it has complete discretion to make a CWA § 312(f)(3) determination for any reason that it wants also relies extensively on the EPA regulation establishing a California NDZ. Ecology Response Brief at 25-26. However, the California NDZ involved California’s request that EPA establish an NDZ pursuant to CWA

§ 312(f)(4)(A), where EPA, rather than the state, makes the determination that an NDZ is necessary. 33 U.S.C. § 1322(f)(4)(A). Both the statute and EPA's implementing regulations set out not only different procedures but also different standards for the two types of NDZs. Ecology has incorrectly conflated the two standards into one.

Unlike a CWA § 312(f)(3) NDZ, in establishing an NDZ pursuant to CWA § 312(f)(4)(A) EPA is not required to determine that the designated waters require greater environmental protection than is currently provided by the already extensive applicable federal standards. CWA § 312(f)(4)(A) contains no reference at all to existing federal standards and regulations. Nor does its implementing regulation, 40 C.F.R. § 140.4(b). And unlike a state, EPA is not required to make a certification of need. Rather, EPA need only determine that "the protection and enhancement of the quality" of specified waters within the state requires a complete prohibition of vessel discharge. 33 U.S.C. § 1322(f)(4)(A); 40 C.F.R. § 140.4(b). The differing standards set out in CWA § 312(f)(3) and § 312(f)(4)(A) are consistent with the fact that when EPA, rather than the state, makes the determination that an NDZ is necessary, issues of federal preemption are not implicated.⁶

⁶ Nearly all existing NDZs have been established pursuant to CWA § 312(f)(3). Only three CWA § 312(f)(4)(A) NDZs have been designated by EPA, and each has involved a water body of particularly significant environmental importance, such as the Boundary Waters Canoe Area and the Florida Keys National Marine Sanctuary. 40 C.F.R. § 140.4(b)(1) and (2). An additional difference between the two types of NDZs involves the assessment of adequacy of existing pumpout facilities. In a CWA § 312(f)(3) type NDZ, EPA must determine that adequate pumpout facilities exist. 33 U.S.C. § 1322(f)(3); 40 C.F.R. § 140.4(a). An NDZ pursuant to CWA § 312(f)(4)(A) requires no

Commentary in EPA's California NDZ regulation regarding the standard EPA must meet in its determination of need is specific to Section 312(f)(4)(A). 77 Fed. Reg. 11,401, 11,408 (Feb. 27, 2012). It does not support Ecology's position that all that is required for Washington's Section 312(f)(3) determination is for the state to send a certificate of need to EPA stating that Puget Sound possesses unique qualities and diverse resources. Ecology Response Brief at 26-27. Ecology cannot appropriate the less stringent language of CWA § 312(f)(4)(A) and ignore the actual language of CWA § 312(f)(3).⁷

The Board has a great deal of experience in refining standards by which to review Ecology's actions. It has done exactly that in its review of CWA § 401 and CZMA certifications. *See* American Waterways Brief at 31-33. The Board is fully equipped to do the same in reviewing the Certificate of Need, and RCW 43.21B.110(1)(d) mandates that it do so.

F. The Board Is the Only Forum for Review of the Certificate of Need.

This appeal is not about which forum is appropriate for review of the Certificate of Need. American Waterways does not seek review by the

such determination. 33 U.S.C. § 1322(f)(4)(A); 40 C.F.R. § 140.4(b). In other words, the necessity of protecting the waters in a CWA § 312(f)(4)(A) NDZ is so great that the NDZ may be designated even where existing pumpout facilities are not adequate.

⁷ Moreover, in making its determination regarding the California NDZ EPA did, in fact, consider detailed information and data, not limited to information provided by the state to EPA, constituting much more than a statement that the designated waters possess "unique qualities and diverse resources." 77 Fed. Reg. 11,401. Based on such information and data, EPA limited the California NDZ to only two classes of large vessels, "because the information obtained by EPA did not show that extension of the rule to all vessels was required to protect and enhance the quality of the State's waters." 77 Fed. Reg. 11,405.

Board because the Board is an “advantageous forum.” American Waterways has no other forum in which to appeal the Certificate of Need. The Board’s ruling would preclude any substantive review.

Neither the Board nor Ecology disputes that there is no federal forum for review of the Certificate of Need. *See* American Waterways Brief at 25-26. Just as with state CWA § 401 water quality certifications, EPA is bound by the state’s NDZ certification. EPA has no authority to review and address whether the Certification of Need is reasonable and based on evidence in the record. *Id.* Review of the Certificate of Need is thus solely a matter of state law.⁸

Ecology seeks to defend the Board’s erroneous conclusion that American Waterways can only appeal the Certificate in superior court as an “other agency action” pursuant to RCW 34.05.570(4). Ecology acknowledges that the Board cited “failure to act” cases as support for this conclusion, rather than cases involving affirmative action by Ecology, and

⁸ Ecology notes that American Waterways has not appealed EPA’s February 2017 determination that adequate pumpout facilities exist in Puget Sound. Ecology Response Brief at 7. American Waterways may yet do so. But because EPA review is limited to the issue of adequacy of pumpout facilities, appeal of the rule will not afford American Waterways the opportunity to challenge the substance of the Certificate of Need. Ecology also charges American Waterways with attempting to appeal to the Board EPA’s determination that there are adequate pumpout facilities. Ecology Response Brief at 1, 8-9, 15. The Notice of Appeal is only from the Certificate of Need, does not challenge the information Ecology submitted to EPA regarding the adequacy of pumpout facilities, and was filed six months before EPA made its determination of adequacy. AR 000001-7. American Waterways did include the issue of the adequacy of pumpout stations and facilities in a subsequent submission to the Board of proposed legal issues. AR 000710. Because American Waterways recognizes that the determination of the adequacy of pumpout facilities is made by EPA, rather than Ecology, American Waterways intends to withdraw that legal issue from its appeal before the Board.

does not dispute that Ecology's action in issuing the Certificate of Need constitutes affirmative action rather than an alleged "failure to act." Ecology Response Brief at 27-28; American Waterways Brief at 23-27.

Ecology also does not dispute that the Board misstated the holding of the primary case relied upon by the Board, *Preserve Our Islands v. Dep't of Ecology*, PCHB No. 08-092, 2009 WL 451963 (Order Granting Summary Judgment to Respondents and Dismissing Appeal, Feb. 18, 2009). See American Waterways Brief at 24 n.9. Leaving out the crucial word "not" in describing the *Preserve Our Islands* holding, the Board cited the case as an example of the Board declining to review an affirmative decision by Ecology to modify a previously issued Section 401 certification. AR 000723. In fact, in *Preserve Our Islands* the Board declined to review Ecology's *failure to modify* the certification. *Preserve Our Islands* at 10-14; *5-7. The distinction is key. In *Preserve Our Islands*, the only relief the Board could grant would be to direct Ecology to take discretionary action to modify the § 401 certification. This was largely the basis upon which the Board held in that case that it lacked jurisdiction over the appeal. *Id.* In the case at hand — involving an appeal from Ecology's affirmative action in issuing the Certificate of Need — the Board is faced with no such issue. American Waterways seeks invalidation of the Certificate of Need. Granting American Waterways the relief it seeks would not in any way put the Board in the position of ordering Ecology to take a discretionary action.

The only case that Ecology cites to support its position is *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997). Ecology Response Brief at 28. *Hillis* involved a developer's challenge through a writ of mandamus to Ecology's failure to act in timely processing groundwater rights applications. 131 Wn.2d at 378. The Court held that Ecology's system of priorities in processing the applications was not arbitrary and capricious, but should have been enacted through rulemaking procedures. *Id.* at 401. The case did not involve any affirmative action by Ecology such as issuing a certificate, permit or license. The case does not stand for the proposition that an appeal of an Ecology issued certificate belongs in superior court as an "other agency action" rather than before the Board pursuant to RCW 43.21B.110(1)(d). *See American Waterways Brief* at 23.

Moreover, to be subject to judicial review pursuant to RCW 34.05.570(4), an "other agency action" must be final agency action. *Wells Fargo Bank, NA v. Dep't of Revenue*, 166 Wn. App. 342, 356, 271 P.3d 268 (2012). It is disingenuous for Ecology to characterize the Certificate of Need as merely one "element" or "item" of its NDZ petition, and the submission of the petition to EPA as merely a "predicate to 'law making'" — essentially arguing that the certificate *isn't* final action by Ecology — while at the same time arguing that an appeal of the Certificate of Need must be brought in superior court as a final agency action. *See American Waterways Brief* at 28 n.13. Ecology cannot have it both ways.

Most importantly, the Board’s decision that jurisdiction over American Waterways’ appeal of the Certificate of Need lies exclusively with the superior court, rather than the Board, would entirely subvert the very purpose of the Board. American Waterways Brief at 27-28. The intent of the legislature was to provide for uniform and independent *de novo* review of Ecology’s actions and prevent fragmented and uneven results that could result from decisions produced by various superior courts. *Martin Marietta Aluminum*, 84 Wn.2d at 333. See WAC 371-08-485. Unlike superior court “other agency action” review, Board proceedings are trial-like in nature, involving prehearing briefing, opening statements, presentation of evidence, examination of witnesses, and rulings on the admissibility of evidence. *Port of Seattle* at 597. See WAC 371-08-475. Proceedings are not limited to the record before Ecology; the parties before the Board are allowed to “present all relevant information for the Board to make a decision.” *Port of Seattle* at 597-98.

The Board and Ecology would shield Ecology’s decision-making from independent *de novo* review — exactly what the legislature sought to avoid by splitting Ecology’s duties and creating the Board. American Waterways asks only that the Board exercise its jurisdiction and allow such review of Ecology’s action in issuing the Certificate of Need.⁹

⁹ Ecology also incorrectly asserts that appeal from the Ecology rule implementing the Puget Sound NDZ, pursuant to RCW 34.05.570(2), is a substitute for *de novo* review by the Board of the Certificate of Need. Ecology Response Brief at 7-8, 28-29. According to Ecology’s proposed rule, the rule will merely clarify requirements to implement EPA’s NDZ determination. Ecology Response Brief at 7 n.7. The rule would not give American Waterways the opportunity to challenge Ecology’s determination that the

G. Ecology May Not Argue the Merits of This Appeal.

This appeal will decide the threshold issue of whether the Board has jurisdiction to review the Certificate of Need and consider the merits of American Waterways' appeal. American Waterways' Notice of Appeal alleged the following:

- that Ecology has not demonstrated in its NDZ petition that Puget Sound waters need greater protection than the federal MSD standards (Notice of Appeal at 5 ¶ 5.3 (AR 000003B));
- that Ecology has never determined that properly treated effluent discharged by a Respondent Cruise Lines International (CLIA-NWC) member line pursuant to the Washington Memorandum of Understanding poses any threat to water quality (*Id.* ¶ 5.5);
- that discharges under the effluent water quality limitation in the currently effective Vessel General Permit are not likely to cause or contribute to a violation of water quality standards (*Id.* ¶ 5.6);
- that Ecology has failed to provide a scientific or technical basis that federal MSD standards are not adequate to protect water quality standards and beneficial uses in Puget Sound (Notice of Appeal at 6 ¶ 5.7 (AR 000004));
- that modeling conducted by Ecology's own consultant demonstrates that even if there were significant violations of the MSD standards, such discharges are not likely to cause or

protection and enhancement of Puget Sound waters require greater environmental protection than the applicable federal MSD standards.

contribute to a violation of water quality standards or adversely impact beneficial uses in Puget Sound (*Id.*);

- that Ecology has not identified any study, incident or other documentation that discharges from vessels have caused or contributed to a violation of state water quality standards, listing of a water body segment under CWA Section 303(d) or a closure or public health warning related to consumption of fish or shellfish at any location on Puget Sound waters. (*Id.* ¶ 5.8).

Ecology's motion to dismiss the appeal for lack of jurisdiction is subject to the standards of CR 12(b)(1). Ecology presented no factual evidence in support of its motion, and the Board made no findings of fact in its order of dismissal. Each of the above facts and allegations in American Waterways' Notice of Appeal are thus presumed true. *Wright v. Colville Tribal Enterprise*, 159 Wn.2d 108, 119, 147 P.3d 1275 (2006) (Madsen, C.J., concurring); *Outsource Serv. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 806-07, 292 P.3d 147 (2013).

Nevertheless, Ecology devotes a full three pages of its brief to arguing the merits of American Waterways' appeal. Ecology Response Brief at 12-14. Ecology cites throughout these pages to an Assessment Report it submitted in opposition to American Waterways' motion for stay. American Waterways submitted the motion to stay the Certificate of Need along with its Notice of Appeal, supported by four declarations and numerous exhibits. AR 000001-000292. It submitted an additional two declarations and more exhibits with its reply memorandum. AR 000459-

000694. As Ecology well knows, the Board refused to even consider the motion to stay because it held that the Board lacked jurisdiction over the appeal. AR 000723. Ecology's assertions defending the merits of the Certificate of Need based on selected evidence that it provided the Board in opposition to the motion for stay do not form part of the record below on the motion to dismiss, and may not be considered by this Court.¹⁰

Moreover, it is surprising that Ecology now attempts to put forth evidence going to the merits of American Waterways' appeal of the Certificate of Need, since both Ecology and the Board take the position that there are no objective standards by which the merits of the state's certification could be assessed. The fact that Ecology devotes pages in its brief to arguing the merits of American Waterways' appeal merely illustrates that facts and standards exist by which the Board may review the Certificate of Need. In addition, Ecology's effort here to argue the merits by citing solely to one study relied upon by Ecology, and the Petition itself, illustrates the need for full *de novo* review, which would include assessment by the Board of not only studies relied upon by Ecology, but also a full range of other relevant documents and expert

¹⁰ Pages 12 and 13 of § IV.B of the Ecology Response Brief consist entirely of citation to the Assessment Report, and should be stricken from Ecology's brief. In addition to inappropriately citing "evidence" not presented to the Board in connection with the motion to dismiss, Ecology's Response Brief also includes significant amounts of argument in its Statement of the Case, in violation of RAP 10.3(a)(5), (b). See Ecology Response Brief at 2-8.

testimony.¹¹ The adequacy of Ecology's decision-making, including the information it chose to rely upon in issuing the Certificate of Need, is precisely the issue upon which American Waterways seeks review.

III. CONCLUSION

For the foregoing reasons, American Waterways respectfully requests that this Court (1) affirm the Thurston County Superior Court October 27, 2017 Order Granting Petition for Judicial Review and Remand to Pollution Control Hearings Board, (2) reverse the Pollution Control Hearings Board October 10, 2016 Order Granting Ecology's Motion to Dismiss for Lack of Jurisdiction, and (3) remand this matter to the Board for a hearing on American Waterways' appeal from Ecology's NDZ Final Petition Certificate of Need.

Respectfully submitted this 4th day of April, 2018.

TUPPER MACK WELLS PLLC

By: 
James A. Tupper, Jr., WSBA No. 16873
Lynne M. Cohee, WSBA No. 18496
Bradford T. Doll, WSBA No. 38479

Attorneys for Respondents

¹¹ In contrast, a review of the Certificate of Need by superior court as an "other agency action" would be limited solely to whatever information – such as the study cited here – Ecology chose to consider in issuing the Certificate of Need.

DECLARATION OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this date the foregoing document was e-filed with the Court of Appeals, Division II, which e-filing will send true and correct copies to the following:

Ronald L. Lavigne, Jr.
Attorney General's Office
Ecology Division
P. O. Box 40117
2425 Bristol Ct SW Fl 2
Olympia, WA 98504-0117

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via Legal Messenger
- Facsimile
- Email to Ronaldl@atg.wa.gov

Dionne Padilla-Huddleston
Office of the Attorney General
800 Fifth Ave, Ste 2000
Seattle, WA 98104-3188

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via Legal Messenger
- Facsimile
- Email to DionneP@atg.wa.gov;
AmyP4@atg.wa.gov

Executed this 24th day of April, 2018 at Seattle, Washington.


Nico Schulz, Legal Assistant

APPENDIX A
to
Respondents' Reply Brief

Notice of Appeal filed by American Waterways, et al.
on August 18, 2016, in
***American Waterways v. Dep't of Ecology*, PCHB No. 16-093**
AR 000001-000006
(Second Amended Certificate of Record)

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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
IN AND FOR THE STATE OF WASHINGTON

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

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 16-096

NOTICE OF APPEAL

Pursuant to Chapter 43.21B RCW, Chapter 34.05 RCW, and Chapter 371-08 WAC, The American Waterways Operators, Cruise Lines International – North West & Canada, Northwest Marine Trade Association, Recreational Boating Foundation of Washington and UnCruise Adventures by and through their attorneys James A. Tupper, Jr., Bradford T. Doll and Tupper Mack Wells PLLC, hereby appeal the Certificate of Need in the Department of Ecology (Ecology) Final Petition to Designate the Waters of Puget Sound as a No Discharge Zone, dated July 21, 2016.

I. Appealing Parties

1.1 Appealing Parties:
Charles P. Costanzo
Vice President – Pacific Region
The American Waterways Operators
5315 22nd Avenue NW
Seattle, WA 98107
Telephone (206) 257-4723

NOTICE OF APPEAL

Tupper Mack Wells PLLC
2025 First Avenue, Suite 1100
Seattle, Washington 98121
TEL 206.493.2300 FAX 206.493.2310

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Greg Wirtz
President
Cruise Lines International Association – North West & Canada
100 – 1111 W. Hastings Street
Vancouver, B.C. V6E 2I3
Telephone (604) 681-9515

George Harris
President
Northwest Marine Trade Association
900 N. Northlake Way, #233
Seattle, WA 98103
(206) 634-0911

Paul Thorpe
President
Recreational Boating Association of Washington
P. O. Box 17063
Seattle, WA 98127

Cpt. Dan Blanchard
Chief Executive Officer and Owner
1301 Eastaugh Way, #B
Juneau, AK 99801

1.2 Representation:

James A. Tupper, Jr.
Bradford T. Doll
TUPPER MACK WELLS PLLC
2025 First Avenue, Suite 1100
Seattle, WA 98121
Telephone: (206) 493-2300 Fax: (206) 493-2310

II. Identification of Parties

2.1 The American Waterways Operators, Cruise Lines International – North West & Canada, Northwest Marine Trade Association and Recreational Boating Association of Washington, Appellants.

2.2 State of Washington, Department of Ecology, Respondent.

III. Decision under Appeal

3.1 The Certificate of Need set forth on pages 6 through 28 in the Department of Ecology (Ecology) Final Petition to Designate the Waters of Puget Sound as a No Discharge Zone publically released on July 21, 2016. A copy of the Final Petition is attached hereto.

17

IV. Grounds for Appeal

2 4.1 The Clean Water Act (CWA) provides for the extensive regulation of Marine
3 Sanitation Devices (MSD) and charges EPA to develop MSD standards. Section 312(b), 33
4 U.S.C. § 1322(b). Once EPA adopted federal MSD standards, no state or political subdivision of
5 a state may adopt or enforce a statute or regulation with respect to the design, manufacture or
6 installation or use of any MSD subject to the standards. Section 312(f)(1)(A), 33 U.S.C. §
7 1322(f)(1)(A).

8 4.2 Under limited circumstances a state may petition the Environmental Protection
9 Agency (EPA) for a no discharge zone designation under section 312(f)(3) of the federal Clean
10 Water Act. Under this section, a petition must be based on a state determination that the
11 protection of water quality within the state requires greater protection than is provided under the
12 standards for effluent discharges from marine sanitation devices. 33 U.S.C. 1322(f)(3).

13 4.3 EPA regulations governing a state petition for a no discharge zone require a
14 "certification that the protection and enhancement of waters described in the petition require
15 greater environmental protection than the applicable Federal standard." 40 C.F.R. § 140.4(a)(1).
16 The applicable Federal standard described in 40 C.F.R. § 140.4(a)(1) refers to the Marine
17 Sanitation Device Standards in 40 C.F.R. § 140.3.

18 4.4 Ecology has been granted authority under state law to be "the state water pollution
19 agency for all purposes" under the CWA. RCW 90.48.260(1). The grant of authority to Ecology
20 includes adopting an "appropriate relationship with...the administrator" of the EPA under the
21 CWA. RCW 90.48.260(1)(a).

22 4.5 Pursuant to its authority under RCW 90.48.260(1) and the requirements of section
23 312(f)(3) of the CWA and 40 C.F.R. § 140.4(a)(1), Ecology issued a Certificate of Need to
24 support its petition for a no discharge zone.

25 4.6 Ecology has not established in its Certificate of Need that Puget Sound waters
26 need greater environmental protection than that provided by current federal standards for Marine

1 Sanitation Devices as required under section 312(f)(3) of the CWA, 33 U.S.C. § 1322(f)(3), and
2 40 C.F.R. § 140.4(a)(1).

3 4.7 The Appellants are each aggrieved by the issuance of the Certificate of Need and
4 have standing to maintain this appeal to the Board.

5 4.8 The Board has exclusive jurisdiction to consider any administrative appeal of “the
6 issuance, modification or termination of any permit, certificate or license” by Ecology. RCW
7 43.21B.110(1)(d).

8 4.9 The Certificate of Need should be invalidated by the Board for failing to meet the
9 requirements of the CWA for a certification and determination that a NDZ is necessary because
10 federal MSD standards are not protective of state waters. The Board should additionally reverse
11 and remand the Certificate of Need on the basis that it is unreasonable, not based on substantial
12 evidence in the record and because it is arbitrary and capricious.

13 V. Statement of Facts

14 5.1 The American Waterways Operators (AWO) is the national trade association for
15 the nation’s inland and coastal tugboat, towboat, and barge industry. The industry employs more
16 than 33,000 American seamen and owns and operates over 5,000 tugboats and towboats and
17 more than 27,000 barges throughout the country. AWO represents the largest segment of the
18 U.S.-flag domestic fleet. Its 350 member companies carry more than 800 million tons of
19 domestic cargo every year, operating vessels on the inland rivers, Atlantic Ocean, Pacific Ocean,
20 the Gulf Coast, the Great Lakes, and in ports and harbors around the country, including Puget
21 Sound.

22 5.2 The initial cost of compliance with the NDZ for Washington-based AWO
23 members would be approximately \$15 million with significant additional ongoing operational
24 costs to the towing industry. In many cases, compliance with NDZ rules would require
25 retrofitting and re-certification of vessels by the United States Coast Guard in order to operate
26 with holding tanks. Additionally, vessel operators would need to alter vessel operations and

1 crewing to comply with pump-out requirements. At this point Ecology has acknowledged that
2 there are insufficient commercial pump-out stations for AWO vessels which means the member
3 vessels will face the considerable expense of retrofitting with no assurance that necessary
4 infrastructure will exist to support operations in Puget Sound waters.

5 5.3 AWO member vessels typically maintain Type II MSDs which provide treatment
6 aeration, clarification and disinfection. A Type II MSD must also achieve an effluent limitation
7 of 200 fc/100mL under 40 C.F.R. § 140.3. Ecology has not demonstrated the waters of Puget
8 Sound need greater protection than the federal MSD standards.

9 5.4 Cruise Lines International – North West & Canada (CLIA-NWC) represents
10 twelve member cruise lines that operate vessels serving the Alaska summer cruise trade. These
11 cruise lines operate from both Seattle and Vancouver traversing waters of the proposed NDZ
12 during regular Alaska voyages from Seattle as well as repositioning to and from the Northwest.
13 In a typical year there may be as many as 28 CLIA-NWC member vessels operating within the
14 proposed area of the NDZ. In 2016, fifteen member line cruise ships will make 203 calls, with
15 eleven using Seattle as their home port and weekly transits through Puget Sound.

16 5.5 Since 2003, CLIA-NWC members have been a party to and have operated under
17 the requirements of the Washington Memorandum of Understanding (MOU). The MOU is a
18 multiparty agreement between CLIA-NWC, Ecology and the Port of Seattle. The MOU provides
19 for the development of limitations on discharge effluent quality and treatment system
20 effectiveness on CLIA-NWC vessels. The MOU is not intended to impose an outright ban on
21 vessel discharges and Ecology has never determined that properly treated effluent discharged by
22 a CLIA-NWC member line vessel poses any threat to water quality in the state of Washington.

23 5.6 In 2009 EPA issued the Vessel General Permit (VGP) and reissued the VGP in
24 2013. CLIA-NWC member vessels are subject to the VGP including the requirement to operate
25 Advanced Wastewater Treatment Systems (AWTS) and meet bacteria effluent limitations of 20
26 fecal colonies (fc)/100 mL based on a 30-day geometric mean with no more than 10% of the

1 samples exceeding 40 fc/100mL. Discharges under this effluent limit are not likely to cause or
2 contribute to a violation of water quality standards.

3 5.7 Ecology has failed to provide a scientific or technical basis that federal MSD
4 standards are not adequate to protect water quality standards and beneficial uses in the waters of
5 Puget Sound. It is apparent that Ecology has relied on unlawful grounds for the certification of
6 need including the potential for vessels to violate the federal standards, alleged lack of federal
7 enforcement capacity and the lack of state enforcement of the federal standards. To bolster its
8 position following the issuance of a draft Certificate of Need in February 2014, Ecology engaged
9 a consultant to conduct water quality modeling of assumed vessel discharges at several locations
10 on Puget Sound waters. The modeling for Ecology and an independent review of that modeling
11 on behalf of the Appellants clearly demonstrates, within a large margin of safety, that vessels
12 operating under the MSD standards are not likely to cause or contribute to a violation of state
13 water quality standards for bacteria. The modeling demonstrates that even if there were
14 significant violations of the MSD standards, such discharges are not likely to cause or contribute
15 to a violation of water quality standards or adversely impact beneficial uses in Puget Sound
16 waters.

17 5.8 Ecology has not identified any study, incident or other documentation that
18 discharges from vessels have caused or contributed to a violation of state water quality standards,
19 listing of a water body segment under section 303(d) of the CWA or a closure or public health
20 warning related to consumption of fish or shellfish at any location on Puget Sound waters.

21 VI. Request for Stay

22 6.1 Appellants are separately filing a request to stay the Certificate of Need under
23 RCW 43.21B.320 and WAC 371-08-415. Appellants request that the Board provide early
24 consideration of the request in order to preserve any meaningful review of the certification by the
25 PCHB. The Petition for a NDZ and the Certificate of Need is now before the EPA but EPA will
26 not review or consider any comments on the Certificate of Need. Under 40 C.F.R. 140.4(a) EPA

1 is required to determine within 90 days of the petition only whether there are adequate facilities
2 for safe and sanitary removal and treatment of sewage from vessels. EPA will not consider
3 whether the proposed NDZ or a lesser area of the Puget Sound waters is appropriate for a NDZ.
4 If the request for stay cannot be considered on an expedited basis, Appellants request that the
5 Board enter a temporary stay of the Certificate of Need until the request for a stay can be fully
6 considered and ruled on by the Board.

7 VII. Relief Sought

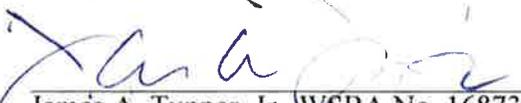
8 Wherefore, Appellants respectfully request that the Board grant the following relief:

9 1. An order declaring the Certificate of Need in the Petition for No Discharge Zone
10 for Puget Sound Water invalid, withdrawn and of no further force or effect for the purpose of a
11 petition for a no discharge zone under Section 312(f) of the CWA.

12 2. Such other and further relief as the Board deems appropriate under the
13 circumstances of this case.

14 Respectfully submitted this 18th day of August, 2016.

15 TUPPER MACK WELLS PLLC

16 
17 James A. Tupper, Jr., WSBA No. 16873
18 Bradford T. Doll, WSBA No. 38479
19 Attorneys for Appellants

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DECLARATION OF SERVICE

I declare on oath that on this date I filed the foregoing Notice of Appeal with the Pollution Control Hearings Board by delivering a copy via electronic mail, and by sending the original and four (4) copies, via U.S. mail, postage prepaid, addressed as follows:

Pollution Control Hearings Board
1111 Israel Rd. SW, Ste 301
Tumwater, WA 98501

I further declare that I caused copies of the foregoing Notice of Appeal to be served on the Department of Ecology by mailing the same via first-class mail, postage prepaid, addressed as follows:

Department of Ecology
Appeals Coordinator
P. O. Box 47608
Olympia, WA 98504-7608

Signed at Seattle, Washington, this 18th day of August, 2016.



Susan Barragan

4850-6934-4309, v. 2

TUPPER MACK WELLS

April 04, 2018 - 3:07 PM

Transmittal Information

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Appellate Court Case Title: American Waterways Operators, et al, Resp v. Pollution Control Hearings Board,et al, App
Superior Court Case Number: 16-2-04285-3

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