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Division II  
State of Washington  
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No. 51547-4-II

**IN THE 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,

and

STATE OF WASHINGTON, POLLUTION CONTROL HEARINGS  
BOARD,

Respondent Below.

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**RESPONDENTS' OPENING BRIEF**

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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

Respondents American Waterways Operators, Cruise Lines International – North West & Canada, Northwest Marine Trade Association, Recreational Boating Foundation of Washington and UnCruise Adventures (collectively “American Waterways”) appealed an order of the Pollution Control Hearings Board dismissing American Waterways’ appeal of a Certificate of Need issued by the Washington Department of Ecology. *American Waterways v. Dep’t of Ecology*, PCHB No. 16-093, Order Granting Ecology’s Motion to Dismiss for Lack of Jurisdiction (Oct. 10, 2016) (“Board Decision”) (AR 000713-724)<sup>1</sup>. Thurston County Superior Court Judge Christopher Lanese reversed the Board Decision, holding that the plain language of RCW 43.21B.110(1)(d) grants the Board exclusive jurisdiction to hear American Waterways’ appeal. CP 12-13. The parties come before this Court on the Department of Ecology’s appeal of Judge Lanese’s order.

Under the Clean Water Act (CWA), American Waterways’ vessels must contain Marine Sanitation Devices (MSDs), which are extensively regulated by federal regulations. The CWA preempts any state regulation of MSDs. A state may, however, petition the U.S. Environmental Protection Agency (EPA) to completely prohibit discharges of both treated and untreated sewage from vessels in a designated No Discharge Zone, if

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<sup>1</sup> References to “AR” are to the Pollution Control Hearings Board certified administrative record, submitted by the Board to the Thurston County Superior Court on or about November 28, 2016, and amended on or about September 29, 2017.

the state determines that the protection and enhancement of the quality of the designated state waters require greater environmental protection than provided by the federal MSD standards and regulations. 33 U.S.C. § 1322(f)(3). A key required component of that determination is the state's official certification to EPA that the protection and enhancement of the waters described in the NDZ petition require greater environmental protection than the applicable federal standards. 40 C.F.R. § 140.4(a).

Ecology issued the required certification, titled "Certificate of Need," in support of Washington's petition to EPA for a Puget Sound NDZ. American Waterways appealed the Certificate of Need under the Board's jurisdictional statute, RCW 43.21B.110(1)(d), which grants the Board exclusive jurisdiction to hear administrative appeals of "any permit, certificate, or license" issued by Ecology. In rejecting American Waterways' appeal from the Certificate of Need, the Board rewrote RCW 43.21B.110(1)(d), ignoring the statute's plain language and adding language restricting the Board's jurisdiction that does not appear in the statute. The Board ignored its own past interpretation of the statute and practice of exercising jurisdiction over appeals from a broad range of Ecology-issued certificates and certifications. And it relied upon inapplicable cases involving allegations of agency inaction. The Board would grant Ecology unfettered authority to make a decision affecting every commercial and recreational vessel in Puget Sound without any review of that decision. Judge Lanese's order reversing the Board Decision should be affirmed.

## II. ASSIGNMENT OF ERROR

### A. Assignment of Error

1. The Board erred in entering its order of October 10, 2016, granting Ecology's motion to dismiss and dismissing American Waterways' appeal from the Certificate of Need on the grounds that the Board lacked jurisdiction to hear the appeal.

### B. Issue Pertaining to Assignment of Error

1. RCW 43.21B.110(1)(d) grants the Pollution Control Hearings Board exclusive jurisdiction to hear appeals from "any permit, certificate, or license" issued by the Department of Ecology. Ecology issued a Certificate of Need in support of Washington's Clean Water Act § 312(f)(3) petition to EPA for a Puget Sound No Discharge Zone. Does the Board have jurisdiction to hear American Waterways' appeal from the Certificate of Need pursuant to the plain language of RCW 43.21B.110(1)(d)? (Assignment of Error No. 1.)

## III. STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

#### 1. Federal Regulation of Marine Sanitation Devices

The Clean Water Act provides for the regulation of vessel Marine Sanitation Devices, and charges EPA with developing MSD standards designed to prevent the discharge of untreated or inadequately treated sewage into navigable waters. 33 U.S.C. § 1322(b)(1). EPA regulations set a tiered standard for MSDs. 40 C.F.R. part 140. The standard

prohibits any discharge of treated or untreated wastewater within inland freshwaters and non-navigable rivers. 40 C.F.R. § 140.3(a)(1). In all other waters, vessels must be equipped with MSDs, which treat sewage as generated. With some exceptions, in order to ensure the protection of water quality all MSDs must meet a bacteria standard of 200 cfu/100 mL and suspended solids no greater than 150 mg/L. 40 C.F.R. § 140.3(d).

The EPA performance standards are implemented through extensive U.S. Coast Guard MSD design, construction, installation and operation standards. 33 C.F.R. part 159. Coast Guard regulations also require Advanced Wastewater Treatment Systems for cruise ships operating in Alaska, which requirement overlaps with EPA's National Pollution Discharge Elimination System ("NPDES") Vessel General Permit. *See* 33 C.F.R. part 159 subpart E. In addition to these regulations and standards, no vessel may discharge untreated sewage within three nautical miles of the nearest land, under the Marine Pollution Convention ("MARPOL") Annex IV Regulation 11.1.

## 2. Designation of No Discharge Zones

Under the Clean Water Act, once EPA adopts federal MSD standards, states are prohibited from adopting or enforcing state statutes or regulations regarding the design, manufacture, or installation or use of any MSD on any vessel subject to the federal standards. 33 U.S.C. § 1322(f)(1)(A). "States are basically preempted from regulating vessel discharges" and imposing requirements on vessels more stringent than those adopted by EPA and the Coast Guard. 2 L. of Env'tl. Prot. § 13:145

(October 2017). Although states may not adopt or enforce state laws with respect to MSDs, states are authorized to enforce the federal MSD requirements. 33 U.S.C. § 1322(k).

The CWA provides a narrow exception to the federal preemption of MSD regulation. Under limited circumstances, a state may petition EPA for an NDZ designation. Pursuant to CWA Section 312(f)(3), states may completely prohibit discharges of both treated and untreated sewage from vessels in designated waters “if [the] state determines that the protection and enhancement of the quality of some or all of the waters within [the] state require greater environmental protection” than the applicable federal standards. 33 U.S.C. § 1322(f)(3).

A state’s CWA Section 312(f)(3) petition to EPA for an NDZ must include the following:

- (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) (emphasis added). The “applicable Federal standard” described in 40 C.F.R. § 140.4(a)(1) refers to the MSD standards contained in 40 C.F.R. § 140.3.

EPA has 90 days in which to act on a state’s petition for an NDZ. 33 U.S.C. § 1322(f)(3). EPA review is limited to confirming that the petition includes the materials required under 40 C.F.R. § 140.4(a), and determining that adequate pump-out facilities exist in the proposed NDZ. 33 U.S.C. § 1322(f)(3). EPA has no authority to address in its review of a Section 312(f)(3) petition whether the state’s certification of need for greater environmental protection of the designated waters is reasonable and based on evidence in the record. *See* 76 Fed. Reg. 55,668 (Sept. 8, 2011); 79 Fed. Reg. 35,347-01 (June 20, 2014). EPA must approve the state’s petition if the EPA Administrator determines that there are adequate facilities for the removal and treatment of sewage from all vessels. 33 U.S.C. § 1322(f)(3); 40 C.F.R. § 140.4(a).<sup>2</sup>

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<sup>2</sup> Alternatively, pursuant to CWA Section 312(f)(4)(A), rather than making its own certification of need in a CWA Section 312(f)(3) petition to EPA, a state may request that EPA issue a regulation designating an NDZ and prohibiting discharges into identified state waters. 33 U.S.C. § 1322(f)(4)(A). When EPA, rather than a state, is tasked with making the “protection and enhancement” determination, EPA will not impose an NDZ unless the record and information provided by the state supports “a finding that the waters listed in the application require a complete prohibition . . .” 40 C.F.R. § 140.4(b).

### 3. Regulation of Respondents' Vessels

Respondent American Waterways Operators (AWO) is the national trade association for the nation's inland and coastal tugboat, towboat, and barge industry. Notice of Appeal (AR 000001-000006) at 4.<sup>3</sup> The industry employs more than 33,000 American seamen and owns and operates over 5,000 tugboats and towboats and more than 27,000 barges throughout the country. *Id.* AWO represents the largest segment of the U.S.-flag domestic fleet. *Id.* Its 350 member companies carry more than 800 million tons of domestic cargo every year, operating vessels on the inland rivers, Atlantic Ocean, Pacific Ocean, the Gulf Coast, the Great Lakes, and in ports and harbors around the country, including Puget Sound. *Id.* AWO member vessels typically maintain Type II MSDs, subject to federal EPA and Coast Guard regulations. *Id.* at 5.

Respondent Cruise Lines International – North West and Canada (CLIA-NWC) represents 12 member cruise lines that operate vessels serving the Alaska summer cruise trade. *Id.* These cruise lines operate from both Seattle and Vancouver, traversing Puget Sound waters during regular Alaska voyages from Seattle as well as repositioning to and from the Northwest. *Id.* In a typical year there may be as many as 28 CLIA-NWC member vessels operating within Puget Sound. *Id.* In 2016, 15

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<sup>3</sup> Respondents recently notified the Board that the Amended Certified Administrative Record is missing pages 4 and 5 of the Notice of Appeal. Respondents anticipate that the Board will issue a second amended Administrative Record including the missing pages. For the Court's convenience a copy of the Notice of Appeal, including all pages, is attached as Appendix A to this brief.

member cruise line ships made 203 calls, with 11 using Seattle as their home port and weekly transits through Puget Sound. *Id.*

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

In 2009 EPA issued the NPDES Vessel General Permit (VGP), which was reissued in 2013. *Id.* CLIA-NWC member vessels are subject to the VGP, including the requirement to operate Advanced Wastewater Treatment Systems and meet bacteria effluent limitations. *Id.* at 5-6. Discharges under this effluent limit are not likely to cause or contribute to a violation of water quality standards. *Id.* at 6 (AR 000004).

B. Procedural Background

1. Ecology's Certificate of Need and American Waterways' Appeal to the Board

Pursuant to CWA Section 312(f)(3), on July 21, 2016, Ecology issued a Final Petition to Designate the Waters of Puget Sound as a No Discharge Zone to EPA ("Final Petition"). Board Decision at 5-6 (AR

000717-18); AR 000007-68. As required by CWA Section 312(f)(3) and 40 C.F.R. § 140.4(a), the Final Petition included a “Certificate of Need.” Board Decision at 6 (AR 000718); Final Petition at 6 (AR 000020).<sup>4</sup>

On August 18, 2016, American Waterways filed an appeal from Ecology’s Certificate of Need with the Board pursuant to RCW 43.21B.110(1)(d), which grants the Board exclusive jurisdiction to consider any administrative appeal of “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 supplied). AR 000001-06. American Waterways asserted that Ecology had not established in its Certificate of Need that Puget Sound waters need greater environmental protection than that provided by current federal standards for MSDs, as required by CWA Section 312(f)(3) and 40 C.F.R. § 140.4(a)(1). American Waterways alleged that Ecology had failed to provide a scientific or technical basis that federal MSD standards were inadequate to protect water quality standards and beneficial uses in Puget Sound. *Id.* Because Washington had submitted its Petition for an NDZ and Certificate of Need to EPA, American Waterways simultaneously filed a motion seeking a stay of the Certificate of Need pending Board review. AR 000069-292. Ecology opposed the motion to stay, and

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<sup>4</sup> Ecology had titled this section of its petition “Certification of Need” in its February 2014 draft petition. See <https://fortress.wa.gov/ecy/publications/documents/1410008.pdf> at 9.

brought a separate motion to dismiss, arguing that the Board lacked jurisdiction. Board Decision at 2 (AR 000714).

2. The Board Decision Dismissing American Waterways' Appeal

On October 10, 2016, the Board granted Ecology's motion to dismiss, concluding that the Board's jurisdiction under RCW 43.21B.110(1)(d) to hear appeals from any "certificate" issued by Ecology did not include an appeal from Ecology's Certificate of Need. The Board concluded that the Board's jurisdiction to hear appeals from any Ecology-issued certificate is limited to certificates "which provide an authorization to an applicant that is required by law for the applicant to proceed with an activity." Board Decision at 7-8 (AR 000719-20). The Board also held that it was unable to consider American Waterways' motion for stay because it lacked jurisdiction. *Id.* at 11 (AR 000723).

3. The Superior Court Decision Reversing the Board Decision

American Waterways timely filed a petition for judicial review of the Board Decision, on October 20, 2016. CP 4-11. On November 22, 2016, the Board denied Appellants' request for a certificate of appealability allowing direct review to the Court of Appeals. *American Waterways v. Dep't of Ecology*, PCHB No. 16-093 (Certificate of Appealability (Denied), Nov. 22, 2016). On October 27, 2017, following briefing and oral argument, Thurston County Superior Court Judge Christopher Lanese vacated and reversed the Board Decision, holding that the Board has jurisdiction to consider and review the Certificate of Need.

CP 12-13. Judge Lanese remanded the matter to the Board. *Id.*

Ecology's appeal to this Court followed.

#### IV. ARGUMENT

##### A. Standard of Review

The APA, RCW Ch. 34.05, governs review of the Board's decision. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). This Court reviews the Board's action from the same position as the superior court, applying the APA standards directly to the record before the Board. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Ctr. For Env'tl. Law v. Dep't of Ecology*, 196 Wn. App. 360, 373, 383 P.3d 608 (2016), *review denied*, 187 Wn.2d 1021 (2017). The Court may overturn the Board's order based on any of the nine grounds enumerated in the APA. RCW 34.05.570(3). Relevant here, this Court may grant relief from the Board Decision if it determines that the Board erroneously interpreted or applied the law; the order is outside the Board's lawful authority; or the order is arbitrary and capricious. RCW 34.05.570(3)(b),(d), and (i). The party challenging an administrative order bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a).

Courts review an agency's legal determinations under the "error of law" standard, which allows the Court to substitute its view of the law for the agency's. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). Specifically, 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 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 Washington Supreme Court has defined arbitrary or capricious agency action as “action that is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Port of Seattle*, 151 Wn.2d at 589 (internal quotations omitted).

B. The Plain Language of RCW 43.21B.110(1)(d) Grants the Board Jurisdiction over American Waterways' Appeal of the Certificate of Need.

The Board was created simultaneously with Ecology, and is charged with providing uniform and independent review of Ecology actions. *Port of Seattle*, 151 Wn.2d at 591-2; RCW 43.21B.010; RCW 43.21B.110. The legislature created the Board by enacting RCW Ch. 43.21B, which states that the Board's purpose is to “provide for a more expeditious and efficient disposition of designated environmental appeals as provided for 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).

Agencies possess the powers expressly granted to them by statute, and powers necessarily implied from their statutory delegation of authority. *Rosemere*, 170 Wn. App. at 872-83 (quoting *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005)). As the scope of an agency's authority is set by legislative enactment, it is a matter of statutory interpretation. When interpreting a statute, the court's fundamental duty is to ascertain and carry out the Legislature's intent, and where the statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In determining what a statute means, words 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). Courts cannot add words to an unambiguous statute when the legislature has not included that language. *Id.*; *Durland v. San Juan County*, 174 Wn. App. 1, 23, 298 P.3d 757 (2012), review denied, 187 Wn.2d 1028 (2017).

The legislature broadly set out the Board's grant of jurisdiction in RCW 43.21B.110, which 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). Pursuant to RCW

43.21B.110(1)(d), agency decisions from which the Board shall have jurisdiction to hear appeals include the following:

Except as provided in RCW 90.03.210(2), the 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.

RCW 43.21B.110(1)(d). The statute thus specifically 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).

Clean Water Act Section 312(f)(3) designation of an NDZ requires a state determination that current federal standards are inadequate and that designated waters require a complete prohibition on discharges for their preservation or enhancement. 33 U.S.C. § 1322(f)(3). EPA regulations require that the 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). Ecology submitted such a “Certificate of Need” in its Final Petition to EPA.<sup>5</sup> The term “certificate” is not defined in RCW 43.21B.110. “When a statutory term is undefined, the words of a statute

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<sup>5</sup> Ecology appropriately views the terms “certification” and certificate” as interchangeable, labeling its CWA § 312(f)(3) certification a “Certificate of Need” in its Final Petition and a “Certification of Need” in its draft petition. *See supra* n. 3; AR 0000020.

are given their 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)). Under the plain language of the statute, appeal of the Ecology-issued “Certificate of Need” falls within the authority of the Board to hear appeals from “any . . . certificate” issued by Ecology.

To the extent that there is any question about whether a “certificate” is indeed a “certificate” this court may look to the dictionary definition of the terms “certificate” and “certification.” *Nissen v. Pierce County*, 183 Wn.2d 863, 881, 357 P.3d 45 (2015); *State v. Fuentes*, 183 Wn.2d 149, 160, 352 P.3d 152 (2015); *State v. Gonzalez*, 168 Wn.2d at 263. The relevant definition of “certificate” from Black’s Law Dictionary is “a document in which a fact is formally attested”, and a “certification” is “the act of attesting. . . the process of giving someone or something an official document that a specified standard has been satisfied.” BLACK’S LAW DICTIONARY 271, 275 (10<sup>th</sup> ed. 2014). In the only case in which the Board sought to define the term “certificate”, it turned to a similar dictionary definition: “a written or printed statement by which a fact is formally or officially certified or attested; specifically, a document certifying that one has met specified requirements.” *Lake Entiat Lodge, Assoc. v. Dep’t of Ecology*, PCHB No. 01-025, 2001 WL 1588910 (Findings of Fact, Conclusions of Law, and Order, Nov. 27, 2001) at COL

XIII.<sup>6</sup> The Certificate of Need issued by Ecology is just such a document: the document by which Ecology formally and officially certified or attested to EPA that the state had satisfied the specified standard or requirement in CWA § 312(f)(3) and C.F.R. § 140.4(a)(1) of a determination that current federal MSD standards are inadequate, and that designated waters require a complete prohibition on discharges for their preservation or enhancement.

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

Ignoring the plain language of RCW 43.21B.110(1)(d), the Board attempted to rewrite the statute by adding limiting language that does not appear in the statute. The Board would restrict its jurisdiction to hear appeals from Ecology-issued certificates to those certificates “which provide an authorization to an applicant that is required by law for the applicant to proceed with an activity.” Board Decision at 8 (AR 000720). The Board used the “authorization required by law” language contained in the definition of a different term, “license”, in a different statute, the Administrative Procedure Act, RCW Ch. 34.05. Unaccountably, in determining its statutory grant of jurisdiction in RCW 43.21B.110(1)(d) to hear appeals from certificates, the Board looked to the APA’s definition of “license” as “a franchise, permit, certification, approval, registration,

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<sup>6</sup> Due to a vacancy on the Board, the Board’s use of the dictionary definition of “certificate” in *Lake Entiat Lodge* appeared in an opinion that did not control the outcome of that case. Respondents cite to the case not for its precedential value, but rather as evidence that, in the only other instance in which the Board sought to define the term “certificate,” it relied upon a dictionary definition.

charter or similar form of authorization required by law.” RCW 34.05.010(9)(a). Board Decision at 7 (AR 000719). The Board then went a step further, adding language for which the Board gave no source, which would limit its jurisdiction to appeals from those certificates which provide an authorization “to an applicant” that is required by law “for the applicant to proceed with an activity.” Board Decision at 8 (AR 000720).

Whatever the source, the Board’s limiting language does not appear in RCW 43.21B.110, the sole statute governing the Board’s jurisdiction. To the contrary, the statute broadly provides that the Board has jurisdiction to hear appeals from **any** certificate issued by Ecology. The Board may not rewrite its statutory grant of jurisdiction by adding limiting language not included in the statute by the legislature. Courts must not add words where the legislature has chosen not to include them. *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).

Adding words restricting the Board’s jurisdiction over appeals from Ecology-issued certificates is also entirely inconsistent with the statute’s grant of jurisdiction over “any” such appeals, and would render the word “any” in RCW 43.21B.110(1)(d) superfluous. In construing a statute, all the statutory language must be given effect, “ ‘ with no portion rendered meaningless or superfluous.’ ” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep’t of Licensing*, 137 Wn.2d

957, 963, 977 P.2d 554 (1999)).<sup>7</sup> Finally, the Board’s appropriation of the APA’s definition of “license” in RCW 34.05.010(9)(a) to define the term “certificate” in RCW 43.21B.110(1)(d) implies that the two terms are interchangeable. However, the fact that the legislature set out the terms “permit”, “certificate” and “license” in a series in RCW 43.21B.110(1)(d) does not render the terms synonymous. To the contrary, it is a “basic rule of statutory construction that the legislature intends different terms used within an individual statute to have different meanings.” *Durland v. San Juan Cty.*, 182 Wn.2d 55, 79, 340 P.3d 191 (2014) (quoting *State v. Tracer*, 173 Wn.2d 708, 718, 272 P.3d 199 (2012)).

If the legislature had wanted to limit the Board’s jurisdiction over appeals from certificates to those certificates “which provide an authorization to an applicant that is required by law for the applicant to proceed with an activity” it could have included such language in RCW 43.21B.110(1)(d). It did not.<sup>8</sup>

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<sup>7</sup> Language in RCW 43.21B.110(1)(d) providing that the Board’s jurisdictional grant includes appeals from Ecology decisions regarding waste disposal permits does not support the Board’s interpretation of the statute. Board Decision at 7 (AR 000719). To the extent that this language is relevant, it serves only to clarify or expand upon the statute’s grant of jurisdiction to the Board. It certainly does not restrict that grant of jurisdiction.

<sup>8</sup> It is notable that in addition to setting out those appeals over which the Board shall have jurisdiction, RCW 43.21B.110 also specifies four types of hearings that “shall **not** be conducted” by the Board. RCW 43.21B.110(2) (emphasis supplied). Each such hearing has an identified alternative forum. *See, e.g.*, RCW 43.21B.110(2)(a) (hearings conducted by Shoreline Hearings Board); RCW 43.21B.110(2)(b) (hearings conducted by Ecology pursuant to the Clean Air Act); RCW 43.21B.110(2)(c) (water rights adjudications heard in superior court); RCW 43.21B.110(2)(d) (hearings conducted by Ecology to adopt, modify or

D. The Board Has Consistently Interpreted Its Jurisdiction under RCW 43.21B.110(1)(d) Broadly and Has Heard Appeals from Other Ecology Certifications

In past decisions, the Board has broadly interpreted its jurisdictional charge to hear appeals from any Ecology-issued permit, certificate, or license, expanding its reach beyond the literal language of the statute. As an example, RCW 43.21B.110(1)(d) grants the Board jurisdiction to hear appeals only from Ecology's "issuance, modification or termination" of a permit, certificate, or license. The Board, however, has consistently interpreted RCW 43.21B.110(1)(d) to provide the Board with the implied authority to also hear and resolve appeals of the **denial** of a permit, certificate, or license. *Hagman v. Dep't of Ecology*, PCHB No. 14-016c, 2014 WL 8514637 (Order on Motions, Dec. 3, 2014) at 13, \*6 (citations omitted) (emphasis in original).

In addition, the Board has exercised jurisdiction over Ecology determinations concerning satisfaction of specific requirements under a broad range of federal and state laws, whether described as a "certificate" or "certification," including CWA Section 401 state certifications that proposed actions will not cause or contribute to a violation of state water quality standards (33 U.S.C. § 1341(1)); and Coastal Zone Management Act determinations of consistency with the state coastal zone management program (16 U.S.C. § 1456).

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repeal rules). In contrast, American Waterways has no forum other than the Board in which to seek review of the Certificate of Need. *See infra* at 25-58.

Under CWA Section 401(1), a state certification is required for any application for a federal permit or approval that will result in a discharge to waters of the United States. 33 U.S.C. § 1341(1). The state must certify that there is reasonable assurance that the proposed action will not cause or contribute to a violation of state water quality standards, and the state may include conditions that the federal agency must include in the final approval. *Id.*; 40 C.F.R. § 121.2(a)(3).

Our state supreme court and the Board have held that the term “certificate” in RCW 43.21B.110(1)(d) includes Board jurisdiction to decide appeals of CWA Section 401 certifications issued by Ecology: *Port of Seattle*, 151 Wn.2d at 592; *Friends of the Earth v. Dep’t of Ecology*, PCHB Nos. 87-63 and 87-64, 1988 WL 161204 (Final Findings of Fact, Conclusions of Law, and Order, May 17, 1998); *Airport Communities Coalition v. Dep’t of Ecology*, PCHB No. 01-160, 2002 WL 1650490 (Order Granting Summary Judgment on Issue 14, March 14, 2002) (citing *Okanogan Highlands Alliance v. Dep’t of Ecology*, PCHB Nos. 97-146, 182, 183, 186, 99-019, 2000 WL 46743 (Final Findings of Fact, Conclusions of Law and Order, Jan. 19, 2000)). The Board has in fact characterized the appeal process from Section 401 certifications as “an integral part of the State of Washington water pollution control laws.” *Airport Communities Coalition v. Dep’t of Ecology*, PCHB No. 01-160, 2002 WL 1875280 (Findings of Fact, Conclusions of Law, and Order, August 12, 2002) at COL V.C.

As another example, the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456 et. seq., requires for all federal agency actions within the coastal zone a determination by Ecology that the proposed action is consistent with the state coastal zone management program. 16 U.S.C. § 1456(c)(1)(C). Just as with certifications of need under CWA § 312(f)(3), the consistency determinations required by the CZMA are described in EPA's implementing regulations as consistency "certifications." 15 C.F.R. § 930.57. The Board has interpreted its RCW 43.21B.110(1)(d) jurisdiction over appeals from Ecology-issued certificates to include determinations by Ecology of consistency with the state coastal zone management plan. *West v. Dep't of Ecology*, PCHB Nos. 07-115 through 07-118, 2007 WL 3391420 (Order Denying Stay, Nov. 6, 2007); *City of Burlington v. Puget Sound Energy*, PCHB No. 07-071, 2007 WL 3264227 (Order Denying Summary Judgment, Oct. 31, 2007); *Columbia River Alliance for Nurturing the Env't v. Dep't of Ecology*, PCHB No. 03-095, 2003 WL 22320974 (Order on Motion to Stay the Legal Effect of Ecology's 401 Certification and Coastal Zone Consistency Concurrence, Aug. 26, 2003).

In its decision dismissing American Waterways' appeal, the Board attempted to distinguish its exercise of jurisdiction over appeals from CWA Section 401 certifications and CZMA determinations by holding that it only exercised such jurisdiction because those certifications "require authorizations to applicants to proceed with activities." Board Decision at 8 (AR 000720). As explained above, this limiting language

does not appear in RCW 43.21B.110(1)(d). Moreover, the Board decisions exercising jurisdiction over appeals from Ecology CWA Section 401 certifications and CZMA determinations contain no discussion of whether the certifications required authorizations. The Board has never used the “authorization required by law” language from the APA definition of “license” in determining the scope of its jurisdiction to hear appeals from Ecology-issued “certificates”, let alone the “required authorization to applicants to proceed with activities” language put forth by the Board here.

Finally, the Board suggests that its exercise of jurisdiction over appeals from Section 401 and CZMA certifications are not relevant because certifications over which it has jurisdiction must be related to a specific individual or specific project. Board Decision at 9 (AR 000721). Again, the legislature put no such limitation on the Board’s jurisdiction. But even if it had, CWA Section 401 water quality certifications over which the Board has exercised jurisdiction are not limited to project or application-specific determinations by Ecology. Ecology routinely issues programmatic certifications for Nationwide Permits that at the point of issuance are not connected with any particular individual or any particular project. Ecology, for example, issued a programmatic Section 401 certification and CZMA consistency determination for the U.S. Army Corps of Engineers Nationwide Permits (NWPs) on June 8, 2012. Ecology expressly states in the document that “this Certification/Consistency Determination” is appealable to this Board

under the standard “Your Right to be Heard” provision used by Ecology in administrative actions subject to the Board’s jurisdiction. AR 000417-418, 000456-458.

E. The Board Erred in Relying on Inapplicable Agency “Failure to Act” Cases

The Board further erred by relying on a line of inapplicable cases holding that the Board does not have jurisdiction over cases involving allegations of Ecology inaction. Board Decision at 10-11 (AR 000722-723). The Board cited *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997) and *Preserve Our Islands v. Ecology*, PCHB No. 08-092, 2009 WL 451963 (Order Granting Summary Judgment to Respondents and Dismissing Appeal, Feb. 18, 2009) in holding that Ecology’s issuance of the Certificate of Need was a “discretionary decision” over which the Board had no jurisdiction. *Id.* However, rather than involving challenges to affirmative action taken by Ecology, as in the case at hand, both *Hillis* and *Preserve Our Islands* involve allegations that Ecology failed to exercise its discretionary authority to take action in the first place.

In *Hillis*, developers challenged Ecology’s inaction in processing pending water rights applications. *Hillis*, 131 Wn.2d at 381. The Court held that such “failure to act” cases were properly heard in superior court. *Id.* Similarly, in *Preserve Our Islands*, the Board held that its jurisdiction under RCW 43.21B.110(1)(d) to hear appeals from the “issuance, modification or termination of any permit” did not extend to review of Ecology’s discretionary refusal to reopen or modify a previously issued

CWA § 401 certification and NPDES general permit. *Preserve Our Islands* at 10-14; \*7.<sup>9</sup> The case at hand, however, does not involve allegations that Ecology failed to act or was unwilling to exercise its discretion to do so. Here, Ecology affirmatively acted in issuing the Certificate of Need. Such issuance of a certificate falls squarely within the jurisdictional grant in RCW 43.21B.110(1)(d).<sup>10</sup>

The Board has, in fact, made just such a distinction in its decisions regarding the reach of its RCW 43.21B.110 jurisdiction. In *Hagman v. Dep't of Ecology*, PCHB No. 14-016c, 2014 WL 8514637 (Order on Motions, Dec. 3, 2014), the Board rejected Ecology's assertions that Ecology's denial of a Notice of Termination of coverage under the Construction Stormwater General Permit was a "discretionary decision" over which the Board lacked jurisdiction. In holding that it did have jurisdiction under RCW 43.21B.110, the Board characterized Ecology's denial as "an affirmative action contemplated by the [permit]," distinguishing cases, including *Preserve Our Islands*, where the Board

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<sup>9</sup> The Board also misstates the *Preserve Our Islands* holding, leaving out the crucial word "not." The Board stated that "[i]n *Preserve Our Islands*, the Board declined to review Ecology's decision to modify its previously issued 401 Certification." Board Decision at 11:4-5 (AR 000723). In fact, in *Preserve Our Islands* the Board declined to review Ecology's decision **not** to modify its previously issued certification. *Preserve Our Islands* at 10-14; \*5-7. Again, the important distinction is that *Preserve Our Islands* is a "failure to act" case involving Ecology's failure to modify an existing certificate, rather than an appeal of an affirmative action taken by Ecology to issue a certificate.

<sup>10</sup> In contrast, had Ecology not issued the Certificate of Need, the Board would be without jurisdiction to take up a case asserting that Ecology had erred in failing to issue a certification, and requesting that the Board order Ecology to do so.

lacked jurisdiction over Ecology's discretionary decisions not to act. *See, Hagman* at 15; \*8, distinguishing *Preserve Our Islands* ("discretionary decision not to modify coverage under general NPDES permit or revise water quality certification"); *Lake Entiat Lodge, Assoc. v. Ecology*, PCHB No. 00-127, 2000 WL 33100033 (PCHB Order of Dismissal, Dec. 13, 2000) ("Ecology's failure to act on request to rescind order and amend water right report"); *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, PCHB Nos. 99-067, 99-069, 99-097, 99-102, 1999 WL 825750 (Order on Motions to Dismiss, Sept. 23, 1999) ("discretionary action not to revoke a solid waste permit").

F. American Waterways Has No Other Forum in Which to Pursue Review of Ecology's Certificate of Need

Board review of Ecology's Certificate of Need is critical because there is no other means of review of the certificate. As there is no possibility of EPA review of Ecology's Certificate of Need at the federal level, administrative and judicial review of the Certificate of Need is purely a matter of state law. The proper forum for that review is the Board pursuant to RCW 43.21B.110(1)(d).

The Board has never disputed that there is no possibility of EPA review of the certificate of need at the federal level. Under CWA Section 312(f)(3), EPA review of Ecology's certification is limited to confirming that adequate pump-out facilities exist in Washington and that Ecology included the specified application materials in its petition. 40 C.F.R. § 140.4(a). EPA has no authority to address in its review and approval of a

Section 312(f)(3) petition whether the Certification of Need is reasonable and based on evidence in the record. EPA's subsequent review and final notice of determination for the Puget Sound NDZ was, in fact, limited to ensuring the existence of pump-out facilities, and included no review or analysis whatsoever of Washington's certification of need. 81 Fed. Reg. 78,141 (Nov. 7, 2016); "Puget Sound No-Discharge Zone Response to Comments" (Jan. 19, 2017)<sup>11</sup>; 82 Fed. Reg. 11,218 (Feb. 21, 2017).<sup>12</sup>

Implicitly recognizing that American Waterways' only avenue for review of the Certification of Need is at the state rather than federal level, the Board erroneously suggested that American Waterways should have appealed the Certificate of Need directly to superior court as an RCW 34.05.570(4) "other agency action." RCW 34.05.570(4) actions, however, nearly always involve allegations of agency "failure to act," such as a failure to engage in rulemaking. *E.g., Squaxin Island Tribe v. Dep't of*

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<sup>11</sup>EPA's Puget Sound No-Discharge Zone Response to Comments is available on EPA's website at <https://www.epa.gov/sites/production/files/2017-02/documents/puget-sound-ndz-response-to-comments-01192017.pdf>

<sup>12</sup> EPA similarly has no authority to review the merits of state CWA Section 401 water quality certifications. A timely certification by the state is binding on EPA and other federal agencies. If a permit applicant wishes to challenge conditions included in a certification, the "only recourse is to challenge the state certification in state judicial proceedings." *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1<sup>st</sup> Cir. 1989). *See also Lake Carriers' Assoc. v. EPA*, 652 F.3d 1, 10 (D. C. Cir. 2011); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1<sup>st</sup> Cir. 1982) (noting that "the courts have consistently agreed. . . that the proper forum to review the appropriateness of a state's certification is the state court"); *American Rivers Inc. v. Fed. Energy Regulatory Comm'n*, 129 F.3d 99, 112 (2<sup>nd</sup> Cir. 1997); *Del Ackels v. EPA*, 7 F.3d 862, 867 (9<sup>th</sup> Cir. 1993). In Washington, that state review takes the form of an appeal of the Section 401 certification to the Board. *See supra* at 20-21.

*Ecology*, 177 Wn. App. 734, 312 P.3d 766 (2013) (appeal from agency failure to engage in rulemaking related to minimum instream flows); *Save Columbia CU Comm. v. Colombia Comty. Credit Union*, 150 Wn. App. 176, 206 P.3d 1272 (2009) (appeal from agency failure to take enforcement action against credit union). Both cases cited by the Board as support for its assertion that American Waterways could pursue a superior court appeal are “failure to act” cases inapplicable here. *See supra* at 23-24. Ecology took affirmative action in issuing the Certificate of Need. The Board has consistently held that where the appeal is from affirmative action by Ecology, the appropriate forum is the Board, not superior court. *See, e.g., Hagman v. Dep’t of Ecology*, PCHB No. 14-016c, 2014 WL 8514637 (Order on Motions, Dec. 3, 2014).

Importantly, an APA “other agency action” appeal to superior court pursuant to RCW 34.05.570(4) would be an “on the record” review, in which evidence would be limited, and Ecology accorded significant deference. RCW 34.05.558; RCW 34.05.570. In contrast, a hearing before the Board on American Waterways’ appeal from the Certificate of Need would be a trial-like adjudicative hearing with *de novo* review, and would include presentation of all evidence available at the time of the hearing. *Port of Seattle*, 151 Wn.2d at 592, 597; WAC 371-08-485. *See also Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 121, 11 P.3d 726 (2000) (WAC 371-08-485 allows “Ecology and all other parties to present all relevant information for the [Board] to make a decision”). The *de novo* review standard does not require that the Board accord

deference to Ecology's factual or legal determinations. *Beuchel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994). Limiting American Waterways to a superior court APA appeal would subvert the very intent of the legislature's creation of the Board to provide uniform and independent *de novo* review of Ecology's actions. *See Martin Marietta Aluminum*, 84 Wn.2d at 333.<sup>13</sup>

G. The Board Erred in Holding That There is No Objective Standard for Review of Ecology's Certificate of Need

The Board also based its ruling on the erroneous conclusion that there is no objective standard for, and thus no basis for review of, Ecology's Certificate of Need. The Board would grant Ecology nearly unfettered authority to certify to EPA that the protection and enhancement of waters described in an NDZ petition requires greater environmental protection than the applicable Federal standards. The Board held that "there is no objective standard that a state must meet" when including a certificate of need in an NDZ petition to EPA, that the Clean Water Act "provides Washington with the discretion to determine **that it wants to** protect and enhance the quality of its waters above the level provided under federal standards", and "**there are no provisions** in either the CWA or federal regulations **that restrict Ecology** in making its discretionary

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<sup>13</sup> In addition, "other agency action" must be final agency action, or it is not subject to judicial review. *Wells Fargo Bank, NA v. Dep't of Revenue*, 166 Wn. App. 342, 356, 271 P.3d 268 (2012). Had American Waterways attempted to appeal the Certificate of Need to superior court pursuant to RCW 34.05.570(4), Ecology would almost certainly have argued that its action was not yet final

determination that waters of the state need additional protection and enhancement.” Board Decision at 10 (AR 000722) (emphasis supplied).

The Board appears to take the surprising position that Ecology does not have to make any kind of determination that the current federal MSD standards are inadequate to protect Puget Sound waters, but instead “if it wants to” could simply send a certification letter to EPA to that effect without undergoing any analysis whatsoever in support of the certification, and further that if Ecology did so, its action would be completely unreviewable. From this, the Board concludes that it does not have jurisdiction over American Waterways’ appeal because there are no objective standards for the Board to use in reviewing Ecology’s actions.

There is no “objective standards” test contained in the legislature’s jurisdictional grant to the Board in RCW 43.21B.110(1)(d). The statute grants the Board jurisdiction over any appeals from Ecology-issued certificates, not just those for which the Board decides some unspecified level of objective standards exist. Again, the Board would add words to the statute restricting the Board’s jurisdiction that do not appear in the statute.

In addition, the Board’s position is inconsistent with CWA § 312(f) and 40 C.F.R. § 140.4. If a state may make a Section 312(f)(3) determination whenever it wants to, and upon no basis whatsoever, there would be no reason for the statute to even require such a determination, or for EPA’s regulations to require that a state officially certify to EPA that the protection and enhancement of the designated waters require greater

environmental protection than the applicable federal standards. The Board's position would render both CWA § 312(f) and its implementing regulation superfluous.

Moreover, the structure and language of the CWA do not support the Board's holding that Ecology can certify the need for an NDZ without a sound and reasonable technical or scientific basis. CWA Section 312(f)(3) requires that a state request for an NDZ be based on a determination that the protection and enhancement of the quality of some or all of the state's waters require greater environmental protection than is provided by the "initial standards and regulations promulgated" in the Act. 33 U.S.C. § 1322(f)(3). EPA regulations provide that this determination should be made by certificate, be specific to "the waters described in the petition", be curative of deficiencies in the federal standards relating to MSDs, with the result being "protection and enhancement" of the specified state waters. 40 C.F.R. § 140.4(a)(1).

Any assessment of whether "greater" protections are needed cannot logically be made without an accurate understanding of the protection currently afforded by federal law. Accordingly, the CWA's standard for an NDZ calls for states to (i) understand and compare the environmental benefits provided by federal law (ii) against the benefits provided by an NDZ (iii) in the context of specific state waters; and (iv) conclude that an NDZ would prove greater protection than is provided under federal law. Congress directed that EPA develop MSD standards, and further that such standards would preempt states from enacting their

own MSD standards. EPA then promulgated regulations and determined that its standards were protective of water quality across a range of vessel types and sizes, vessel discharges, and treatment systems. *See, e.g.* 33 C.F.R. part 159 (regulations governing design, construction, certification and operation of MSDs, consistent with EPA standards); 40 C.F.R. part 140 (setting performance standards for MSDs for protection of water quality). The Board would effectively allow a state to ignore these extensive federal regulations and evade the CWA's prohibition on state regulation of MSDs whenever the state decides that "it wants to," regardless of whether there was scientific or technical support for the state's certificate of need.

The Board's attempts to distinguish American Waterways' Certificate of Need appeal from appeals of CWA Section 401 and CZMA certifications are not only contrary to the requirements of CWA § 312(f)(3) and EPA regulations, but also ignore the Board's approach when hearing CWA and CZMA appeals. Board Decision at 8-9 (AR 000720-21). For example, the standard by which the Board reviews Section 401 certifications is whether there is "reasonable assurance" that the activity at issue will be conducted in a manner that will not violate applicable water quality standards. *Port of Seattle*, 151 Wn.2d at 592; *Mayflower Equities, Inc. v. Dep't of Ecology*, PCHB No. 13-006, 2014 WL 2986618 (Findings of Fact, Conclusions of Law, and Order, June 13, 2014) at \*8. Yet this standard, and the words "reasonable assurance" do not appear in the CWA itself, but rather only in EPA's implementing regulations. *See* 33 U.S.C. §

1341(a)(1); 40 C.F.R. § 121.2(a)(3). In addition, because the term “reasonable assurance” is not defined in the regulations, the Board has further refined the standard using the dictionary definition of “reasonable assurance.” See *Airport Communities Coalition v. Dep’t of Ecology*, PCHB No. 01-160, 2001 WL 1638639 (Order Granting Motion to Stay, Dec. 17, 2001) at \*3. The statute and regulations regarding Section 401 certifications provide no more in the way of objective standards than do the statute and regulations regarding NDZ certifications. The Board has, using language in the EPA regulations and the dictionary, developed a standard by which it reviews Ecology’s issuance of CWA § 401 certifications. It is equally capable of doing so with regard to review of an NDZ certification.

Board review of Ecology’s Certificate of Need would be similar in kind to its review of other certifications, including Ecology’s compliance with “the substantive requirements of the acts under which. . . certificates. . . are issued.” *Airport Communities Coalition v. Dept. of Ecology*, PCHB No. 01-160, 2002 WL 1875280 (Findings of Fact, Conclusions of Law, and Order, August 12, 2002) at \*45. Both CWA Section 401 and CZMA certifications involve assessments by Ecology of water quality standards and current water quality pursuant to the CWA and state law. There is no rational reason for the Board to exercise jurisdiction over Ecology certifications made pursuant to CWA Section 401 and the CZMA, and not to do so over an Ecology certification pursuant to CWA Section 312(f)(3). It is the role of the Board to utilize its specialized expertise to provide an

independent review of Ecology's decision-making in each case. *See Port of Seattle*, 151 Wn.2d at 591-92; *Martin Marietta Aluminum*, 84 Wn.2d at 333; RCW 43.21B.010; RCW 43.21B.110.

#### V. 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 2nd day of February, 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*

DECLARATION OF SERVICE

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

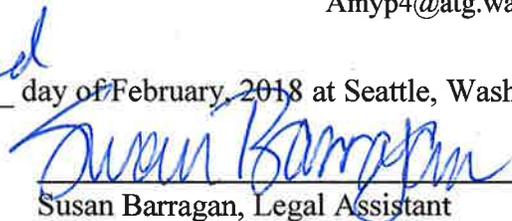
Ronald L. Lavigne, Jr.  
Attorney General's Office  
Ecology Division  
P. O. Box 40117  
2425 Bristol Ct SW Fl 2  
Olympia, WA 98504-0117

- 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;  
Amy4@atg.wa.gov

Executed this 2nd day of February, 2018 at Seattle, Washington.

  
\_\_\_\_\_  
Susan Barragan, Legal Assistant

## APPENDIX A

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

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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.

PCHB No. 16-  
NOTICE OF APPEAL

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY.

Respondent.

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 22<sup>nd</sup> Avenue NW  
Seattle, WA 98107  
Telephone (206) 257-4723

NOTICE OF APPEAL

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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.

IV. Grounds for Appeal

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

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

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

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

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

4.6 Ecology has not established in its Certificate of Need that Puget Sound waters 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.

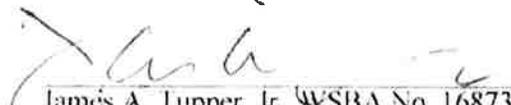
7 VII. Relief Sought

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

February 02, 2018 - 2:25 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51547-4  
**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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Sender Name: Susan Barragan - Email: Barragan@tmw-law.com

**Filing on Behalf of:** James A. TupperJr. - Email: tupper@tmw-law.com (Alternate Email: )

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