

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

U.S. ARMY CORPS OF ENGINEERS,

Appellant,

And

NORTHWEST RIVERPARTNERS,

Intervenor-Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

And

COLUMBIA RIVERKEEPER,
NORTHWEST SPORTFISHING
INDUSTRY ASSOCIATION, and
NATURAL RESOURCES DEFENSE
COUNCIL

Intervenor-
Respondents.

PCHB No. 20-043c

SUMMARY JUDGMENT ORDER

I. INTRODUCTION

Appellant U.S. Army Corps of Engineers (Corps) filed eight appeals (PCHB Nos. 20-043, 044, 045, 046, 047, 048, 049, and 050) with the Pollution Control Hearings Board (Board) on June 8-9, 2020, challenging the following State of Washington, Department of Ecology (Ecology) orders:

- 1 • Order No. 18143, The Dalles Lock and Dam (NPDES¹ No. WA0026701),
- 2 • Order No. 18144, McNary Lock and Dam (NPDES Permit No. WA0026824),
- 3 • Order No. 18147, Lower Granite Lock and Dam (NPDES Permit No. WA0026794),
- 4 • Order No. 18148, Lower Monumental Lock and Dam (NPDES Permit No,
- 5 WA0026808),
- 6 • Order No. 18150, Little Goose Lock and Dam (NPDES Permit No, WA0026786),
- 7 • Order No. 18149, Ice Harbor Lock and Dam (NPDES Permit No. WA0026816),
- 8 • Order No. 18146, Bonneville Project (NPDES Permit No, WA0026778), and
- 9 • Order No. 18145, John Day Project (NPDES Permit No. WA0026832).

10 After a prehearing conference on June 29, 2020, the Presiding Officer consolidated the
11 eight appeals into PCHB No. 20-043c. On July 29, 2020, Columbia Riverkeeper (Riverkeeper),
12 Northwest Sportfishing Industry Association (NSIA), and the Natural Resources Defense
13 Council (NRDC) moved for intervention in support of Ecology. Northwest Riverpartners
14 (NWRP) moved for intervention in support of the Corps on August 5, 2020. On August 25,
15 2020, the Presiding Officer granted both intervention requests.

16 On May 17, 2021, Ecology filed a Motion for Partial Summary Judgment on Legal Issues
17 1-3 and 7-9, and Intervenor-Respondents filed a Motion for Partial Summary Judgment on Legal
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¹ National Pollutant Discharge Elimination System.

1 Issues 1-2. The Corps filed a Motion for Summary Judgment on Legal Issues 1-9 on May 18,
2 2021.²

3 The Board deciding this matter was comprised of Board Chair Neil L. Wise, presiding,
4 and Board Members Carolina Sun-Widrow and Michelle Gonzalez. Assistant District Counsel
5 Michaela M. Murdock, Robert D. Eskildsen, Jr., and Leanne Holm appeared on behalf of the
6 Corps and Senior Counsel Thomas J. Young and Assistant Attorney General Phyllis J. Barney
7 appeared on behalf of Ecology. Attorney Jenna Mandell-Rice represented Intervenor-Appellant
8 (NWRP) and attorneys Todd True, Marisa Ordonia, and Miles Johnson represented Intervenor-
9 Respondents (Riverkeepers, NSIA, and NRDC).

10 In ruling on the Motions, the Board considered the following materials:

- 11 1. Notices of Appeal (*Corps Appeals*);
- 12 2. Respondent State of Washington, Department of Ecology's Motion for Partial
13 Summary Judgment on Issues 1-3 and 7-9 (*Ecology Motion*);
- 14 3. Declaration of Phyllis Barney in Support of Respondent State of Washington,
15 Department of Ecology's Motion for Partial Summary Judgment on Issues 1-3 and 7-
16 9 (*Barney Decl.*) with attached Exhibits A-C;
- 17 4. Declaration of Chand Brown in Support of Respondent State of Washington,
18 Department of Ecology's Motion for Partial Summary Judgment on Issues 1-3 and 7-
19 9 (*Brown Decl.*);

21 ² The Corps informed ELUHO staff of the attempt to file on May 17, 2021, but the email did not go through due to the large size.

- 1 5. Respondent Department of Ecology’s Reply in Support of Motion for Partial
2 Summary Judgment on Issues 1-3 and 7-9 (*Ecology Reply*);
- 3 6. Intervenor-Respondents Motion for Partial Summary Judgment on Issues 1 and 2
4 (*Intervenor-Respondent Motion*);
- 5 7. Declaration of Marisa Ordonia in Support of Intervenor-Respondents Motion for
6 Partial Summary Judgment on Issues 1 and 2 (*Ordonia Decl.*) with attached Exhibits
7 1-11;
- 8 8. Intervenor-Respondents’ Reply in Support of their Motion for Partial Summary
9 Judgment on Issues 1 and 2 (*Intervenor-Respondent Reply*);
- 10 9. Appellants’ Response in Opposition to Respondent’s and Respondent-Intervenor’s
11 Motions for Partial Summary Judgment (*Corps Response*);
- 12 10. Appellant Motion for Summary Judgment (*Corps Motion*);
- 13 11. Declaration of Daniel Ferguson Turner (*Turner Decl.*);
- 14 12. Declaration of Michaela Murdock in Support of Appellant’s Motion for Summary
15 Judgment (*Murdock Decl.*), with attached Exhibits A-P;
- 16 13. Respondent State of Washington, Department of Ecology’s Response in Opposition
17 to Motion for Summary Judgment (*Ecology Response*);
- 18 14. Intervenor-Respondents’ Response to U.S. Army Corps of Engineer’s Motion for
19 Summary Judgment (*Intervenor-Respondent Response*);
- 20 15. Appellants’ Reply in Support of Motion for Summary Judgment (*Corps Reply*); and,
- 21 16. The Board’s file on PCHB No. 20-043c.

1 **II. BACKGROUND**

2 The Corps operates and maintains eight federal dams on the Columbia and Lower Snake
3 Rivers: The Dalles, McNary, John Day, Bonneville, Lower Granite, Lower Monumental, Ice
4 Harbor, and Little Goose. These dams were constructed in the 1950s through the 1970s pursuant
5 to federal legislation. The federal laws direct the Corps to construct, operate, and maintain the
6 dams to accomplish multiple purposes, such as hydroelectric power generation, navigation, flood
7 control, and irrigation. *Murdock Decl.*, ¶ 5.

8 The dams release water from various outfalls into the rivers downstream of the dam. The
9 outfalls come from a variety of sources such as dewatering, drainage, spillway, and navigation
10 lock sumps, or turbine, fish unit, or transformer cooling water. Water released from the outfalls
11 may include heat, oil, grease, ammonia, and suspended solids. *Murdock Decl., Ex. E (Bonneville*
12 *NPDES Application)*. The Corps' NPDES applications seek authorization for discharges of
13 certain pollutants such as oil and grease from outfalls. *Corps Appeal, p.13*. These pollutants are
14 toxic to aquatic species. *Intervenor-Respondent Motion, pp. 5-6; Ordonia Decl., Ex. 9 (spill*
15 *emails)*.

16 Washington has identified portions of the Columbia and lower Snake Rivers as impaired
17 under Section 303(d) of the federal Clean Water Act (CWA) because of temperatures that exceed
18 the State's water quality standards.³ The temperature standards are designed to protect beneficial
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21 ³ Section 303(c) of the CWA requires states to establish water quality standards that identify each waterbody's
designated uses and the criteria needed to support those uses. Section 303(d) requires states to develop lists of
impaired waters that fail to meet the standards. *Barney Decl., Ex. A, p. 1*.

1 uses in those waters, the most sensitive of which are migrating and spawning salmon. *Barney*
2 *Decl, Ex. A (EPA’s Draft TMDL), p. 1; see also Intervenor-Respondent Motion, pp. 3-5.*

3 The concept of Total Maximum Daily Load analysis (TMDLs) comes from Section
4 303(d) of the CWA. TMDLs assign pollution limits to each pollution source, such that the total
5 amount of pollution in a waterway will not violate water quality standards. The EPA released a
6 temperature TMDL for the Columbia and Lower Snake rivers on May 18, 2020. *Barney Decl.,*
7 *Ex. A, pp. 1-2.* EPA recognized that even if all the allocations in its TMDL are implemented, it
8 is unlikely that the water quality standards will be met in all situations. *Id., p. 2.*

9 The lower Columbia and Snake River dams are run-of-river projects and river water will
10 pass through the reservoirs in one to eight days in the summer. *Turner Decl., p.3, ¶ 3.* With
11 these projects, the outflow temperature is mainly dependent on the inflow temperature, due to the
12 short residence time. *Id., p. 4, ¶ 4.* Therefore, these dams have difficulty addressing temperature
13 issues. However, the dams may be operated in such a way to mitigate some of these temperature
14 effects. Some of the upstream dams may actually be a source of cooler water or can spill water
15 from depths where the water temperature is lower. *Brown Decl., ¶¶ 3-5, 9; Barney Decl., Ex. B,*
16 *p. 2 (Corps Comment Letter).* Another example of temperature mitigation is the use of cooling
17 pumps and sprayers in adult fish ladders. *Id.*

18 Total dissolved gas (TDG) is a common water quality problem associated with the
19 operation of hydropower dams. Spilling water at a dam results in increased TDG levels in
20 downstream waters. *Turner Decl., p. 8, ¶ 1.* High TDG levels have detrimental impacts to
21 aquatic life in the river. Ecology and the Corps have worked together on gas abatement plans for

1 over 20 years and progress has been made. *Brown Decl.*, ¶¶ 6-7. The Corps has installed
2 spillway deflectors at seven of the dams to minimize TDG production. *Turner Decl.*, p.9, ¶ 3.
3 The Corps' operations generally comply with TDG standards, but there are certain situations that
4 cause exceedances of the TDG standards. *Corps Appeal*, pp. 7-8.

5 These consolidated appeals involve water quality requirements for the Columbia and
6 Lower Snake river dams. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of
7 any pollutant except in compliance with an NPDES permit issued under 33 U.S.C. § 1342.
8 Section 401 of the CWA provides that an applicant for a federal license or permit (including an
9 NPDES permit) must submit a water quality certification (401 Certification) from the applicable
10 State to the permitting agency.⁴ 33 U.S.C. § 1341(a); *Corps Appeal*, p. 3. On March 18, 2020,
11 the United States Environmental Protection Agency (EPA) issued draft NPDES permits for
12 discharge of pollutants from the eight dams.⁵ At the same time, EPA requested 401
13 Certifications from Ecology. *Corps Appeal*, p. 13. Ecology issued the final 401 Certifications
14 on May 7, 2020. *Id.*, at 14. The eight 401 Certifications contain largely identical conditions.
15 *Id.*, at 4. Following issuance of the 401 Certifications, EPA issued a temperature TMDL
16 determination for the Columbia and Lower Snake Rivers. *Murdock Decl.*, ¶ 9. The Corps filed
17 its Notices of Appeal on June 8-9, 2020. EPA published revised draft NPDES permits on
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20 ⁴ Ecology has been designated as the state water pollution control agency for all purposes of the CWA and issues
401 Certifications. RCW 90.48.260.

21 ⁵ Although EPA has delegated Ecology authority to issue certain NPDES permits, EPA has retained authority to
issue NPDES permits for federally owned facilities in Washington such as the dams in this appeal. *Corps Appeal*, p.
13.

1 January 15, 2021. As of the date of this Order, final NPDES permits incorporating the 401
2 Certification conditions have not been issued. *Id.*, at ¶ 10.

3 The draft NPDES permits included a Schedule of Submissions, Limitations and
4 Monitoring Requirements, Special Conditions, General Monitoring, Recording and Reporting
5 Requirements, Compliance Responsibilities, General Provisions, Definitions, and Appendices A
6 (Minimum Levels) and B (Best Management Practices Plan). Several of the Special Conditions
7 are relevant to this appeal:

- 8 • Special Condition II.A. requires a quality assurance plan (QAP) for all
9 monitoring required by the NPDES. The permittee must submit written
10 notice to the EPA and Ecology that the QAP has been developed and
11 implemented. Copies of the QAP must be kept on site and made available
12 to the EPA and/or Ecology upon request.
- 13 • Special Condition II.B. provides that the permittee shall develop and
14 implement a Best Management Practices (BMP) Plan which incorporates
15 objectives and specific requirements in the condition and Appendix B. The
16 permittee must submit written notice to the EPA and Ecology that the BMP
17 Plan has been developed and implemented. EPA may require modifications
18 to the Plan to meet minimum requirements. The Plan must also be retained
19 on-site and made available to the EPA and/or Ecology upon request. This
20 condition also requires annual reports.

- 1 • Special Condition II.C. requires the permittee to select Environmentally
2 Acceptable Lubricants (EALs) for all oil to water interfaces at the dams,
3 unless technically infeasible. This condition also requires annual reports.
- 4 • Special Condition II.D. requires the permittee to develop a polychlorinated
5 biphenyls (PCB) Management Plan (PMP) and submit the plan to EPA and
6 Ecology. This condition also requires annual reports.
- 7 • Special Condition II.E. contains cooling water intake structure requirements
8 to minimize adverse impacts from impingement and entrainment. The
9 permittee is required to use Best Technology Available (BTA) for
10 minimizing adverse environmental impacts on fish in various life stages.
11 The permittee must also conduct regular visual inspections, maintain a copy
12 of the most current Fish Passage Plan on site, and submit annual reports.
- 13 • The Compliance section of the NPDES notifies the permittee that there are
14 administrative, civil, and criminal penalties for noncompliance.

15 *Corps Appeal, Att. 2 (Draft NPDES permit), pp. 12-18, 23-25.*

16 The 401 Certifications for the eight dams are substantially the same, with the exception
17 of the McNary Dam, which does not address cooling water intake structures. *Corps Motion, p.*
18 *7; Corps Appeals, p. 4.*

19 The 401 Certifications are triggered by and mirror the draft NPDES permits. The 401
20 Certifications contain conditions related to a QAP, BMP Plan, EALs, PMP, and cooling water
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1 intake structures. The 401 Certifications primarily add review and approval provisions to the
2 plans already required by the draft NPDES permits.

3 Section B of the Certifications includes the following requirements:⁶

- 4 • In addition to the draft NPDES requirements for temperature monitoring, the
5 permittee must implement temperature control strategies and meet TMDL allocations.
6 The permittee must also comply with state total dissolved gas standards. The
7 permittee must consult with Ecology and develop a water quality attainment plan
8 (WQAP). The WQAP must include a detailed strategy for achieving state water
9 quality standards for temperature and associated designated uses. Ecology must
10 approve the final WQAP and required progress reports. *Condition B.2.*
- 11 • Ecology must review and approve the NPDES QAP. *Condition B.3.*
- 12 • The BMP Plan must be subject to EPA review and approval.⁷ Sampling under the
13 Plan must quantify source identification and reductions to support an adaptive
14 management process. The sample design and data analysis must be included in the
15 QAP. The annual reports must include the adaptive management procedures that
16 were implemented based on the monitoring results. *Condition B.4.*
- 17 • EPA must review and approve all EAL annual reports. The initial EAL report must
18 be reviewed and approved by both EPA and Ecology to ensure that the permittee's
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20 ⁶ *Corps Appeal, Att. 1 (401 Certification).*

21 ⁷ The Corps argues that this type of condition impermissibly interferes with EPA's discretion. *Corps Motion, p. 22.* Ecology states that EPA has not objected to these conditions and that the Corps has no standing to raise that issue. *Ecology Response, p. 8.* The matter has not been included in the Legal Issues in this case, and the Board will not rule on this claim.

1 approach is comprehensive, accurate, and consistent with the state’s interpretation of
2 technical infeasibility. *Condition B.5.*

- 3 • EPA and Ecology must review and approve the initial PMP. Any annual updates
4 must be reviewed and approved by EPA. *Condition B.6.*
- 5 • EPA must review and approve the cooling water intake structure annual report. The
6 initial annual report must be reviewed by Ecology. The permittee must develop an
7 operation and maintenance manual. *Condition B.7.*

8 The 401 Certifications also contain several “reopener” clauses:

- 9 • Ecology can issue additional orders and retains continuing jurisdiction to make
10 modifications through supplemental orders. *Condition A.5.*
- 11 • In the event of changes to state water quality laws or standards, Ecology may issue an
12 amendment to the 401 Certifications. *Condition A.6.*
- 13 • EPA must include a re-opener clause in the final permit to incorporate TMDL
14 wasteload allocations. *Condition B.2.a.*
- 15 • Ecology reserves the right to modify the 401 Certifications to incorporate additional
16 compliance schedules for the WQAP. *Condition B.2.e.*
- 17 • Ecology reserves the right to reopen the 401 Certifications if the agency does not
18 agree with EPA’s BTA determination. *Condition B.7.c.*

19 The 401 Certifications require that EPA enforce the NPDES and 401 Certification
20 requirements. *General Condition A.3., Condition D.* The 401 Certifications also state that they
21 are based on the terms and conditions contained in the draft NPDES, and that if EPA does not

1 include all the 401 Certification requirements in the final NPDES, then the 401 Certification
2 request is deemed denied, and EPA must request a new 401 Certification. *401 Certification*
3 *Cover Page*.

4 III. ANALYSIS

5 A. Legal Standards

6 1. Summary Judgment

7 Summary judgment is a procedure available to avoid unnecessary trials where there is no
8 genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667,
9 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if
10 only questions of law remain for resolution, and neither party contests the facts relevant to a
11 legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d
12 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

13 The party moving for summary judgment must show that there are no genuine issues of
14 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
15 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
16 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
17 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). Summary judgment is subject to a burden
18 shifting scheme. If the moving party satisfies its burden, then the non-moving party must present
19 evidence demonstrating that material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev.*
20 *Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Tario v. Dep't of Ecology*, PCHB No. 05-091, p.
21 12 (March 2, 2006). In a summary judgment proceeding, all facts and reasonable inferences

1 must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291,
2 300, 45 P.3d 1068 (2002). However, the non-moving party must set forth specific facts in
3 opposition to the summary judgment motion, and not just bare allegations. *Anica v. Wal-Mart*
4 *Stores, Inc.* 120 Wn. App. 481, 487-88, 84 P.3d 1231 (2004). These facts must sufficiently rebut
5 the moving party's contentions and show that a genuine issue of material fact exists. The non-
6 moving party cannot rely on argumentative assertions, speculative statements, or conclusory
7 allegations to defeat summary judgment. *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App.
8 731, 736, 150 P.3d 633 (2007). Once it is determined that no genuine issues of material fact
9 exist, the court then analyzes which party is entitled to judgment as a matter of law. *Skagit Hill*
10 *Recycling v. Skagit Co.*, 162 Wn. App. 308, 318, 253 P.3d 1135 (2011).

11 **2. CWA § 401 Certifications**

12 As stated earlier, if a project will result in a discharge into navigable water, Section 401
13 of the CWA requires that the project proponent obtain certification that state water quality
14 standards will not be violated. The 401 Certification must set forth limitations and monitoring
15 requirements necessary to assure that permit applicants will comply with state law. Federal
16 regulations require that the 401 Certification state there is a reasonable assurance that the activity
17 will be conducted in a manner which will not violate applicable water quality standards. The
18 401 Certification must contain any conditions which the certifying agency deems necessary or
19 desirable. *Port of Seattle v. Pollution Control Hrg's Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659
20 (2004) (citing federal statutes and regulations).

1 Ecology approaches the reasonable assurance requirement with a two-step analysis.
2 First, Ecology determines whether water quality standards can and will be met. Second, Ecology
3 addresses any areas of uncertainty by including measures that will remove or reduce the
4 uncertainty. *Id.* at 591.

5 Ecology has adopted specific water quality standards which are found in Chapter 173-
6 201A WAC. The standards consist of narrative criteria protecting the beneficial uses of state
7 waters, numeric criteria for conventional pollutants and toxic substances, and an antidegradation
8 policy. *Id.* at 590.

9 In this Board proceeding, the Corps bears the overall burden of proving by a
10 preponderance of the evidence that the 401 Certifications are not lawful. The scope and standard
11 of review is *de novo*. *Id.* at 592; WAC 371-08-485. The Board gives great weight to Ecology's
12 interpretation of the laws that it administers and defers to Ecology's expertise regarding the
13 CWA. *Id.* at 593-95, 604.

14 **B. Legal Issues**

15 The parties submitted and agreed to the following legal issues which governed the case:

- 16 1. Whether the scope of the Clean Water Act (CWA) Section 401 Certifications issued
17 by Respondent, which attempt to impose conditions on the eight (8) federal lower
18 Snake River and lower Columbia River dams as a whole (e.g., flow, spill, forebay,
19 and reservoir conditions), and not just the point source discharges (outfalls) addressed
20 in the associated CWA Section 402 National Pollution Discharge Elimination System
(NPDES) permits, exceed Respondent's authority under Section 401, or may interfere
21 with Appellant's ability to operate and maintain the federal dams for the multiple
congressionally authorized project purposes or comply with other applicable law, and
thus is impermissibly broad, unjust and/or unlawful.

- 1 2. Whether Water Quality Standards Attainment Conditions B.2.a, B.2.c, and B.2.d in
2 the 401 Certifications issued by Respondent, which require (respectively) temperature
3 control strategies to meet temperature Total Maximum Daily Load (TMDL)
4 allocations, development of a water quality attainment plan (WQAP), and
5 progress/summary reports, are intended to address water quality concerns related to
6 the existence of the federal dams (not the operation of those dams or permitted point
7 sources discharges) and, therefore, exceed Respondent's authority under Section 401
8 of the CWA, or may interfere with Appellant's ability to operate and maintain the
9 federal dams for the multiple congressionally authorized purposes or comply with
10 other applicable law, and thus are impermissibly broad, unjust and/or unlawful.
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- 12 3. Whether Condition B.2.b in the 401 Certifications issued by Respondent, which
13 would require total dissolved gas (TDG) measurements at the federal dams to never
14 exceed state TDG standards, imposes a practicable impossibility, was outside the
15 scope of the Environmental Protection Agency's (EPA) draft NPDES permits which
16 triggered these 401 Certifications, is intended to address water quality concerns
17 related to the existence of the federal dams (not the operations of those dams or
18 permitted point source discharges), or may interfere with Appellant's ability to
19 operate and maintain the federal dams for the multiple congressionally authorized
20 purposes, and thus is impermissibly broad, unjust and/or unlawful.
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4. Whether Condition B.4 in the 401 Certifications, which would require a more
quantitative approach to developing best management practices (BMPs) than is
included in EPA's draft NPDES permits, and the use of adaptive management
regarding such BMPs, is unnecessary, impermissibly vague, provides no standard to
determine compliance, and thus is unjust and/or unlawful.
5. Whether Condition B.5 in the 401 Certifications, which would add the requirement
that the feasibility of using environmentally acceptable lubricants (EALs) must be
consistent with the "state's interpretation of technical feasibility," which is not
defined, is unnecessary, impermissibly vague, provides no standard to determine
compliance, grants authority to a state entity with no technical knowledge of the
equipment, and thus is unjust and/or unlawful.
6. Whether Condition B.6 in the 401 Certifications, which would require Respondent to
review and approve an initial Polychlorinated biphenyls (PCB) management plan, is
unnecessary as the permitted outfalls do not include PCBs, is overly burdensome, and
thus is unjust and/or unlawful.

- 1 7. Whether Condition B.7 in the 401 Certifications (except McNary), which would
2 impose additional requirements related to cooling water intake structures (CWIS),
3 including allowing Respondent to concur with the Environmental Protection Agency's
4 (EPA's) best technology available (BTA) determination, providing a reopener
5 provision if Ecology does not agree with EPA's BTA determination (see A.9 below),
6 and requiring the development of an operation and maintenance manual, exceeds
7 Respondent's authority under Section 401 of the CWA, is not authorized under
8 Section 316(b) of the CWA, fails to specifically cite the CWA or State law upon
9 which the more stringent conditions are based (40 C.F.R. § 124.53(e)(2)), may
10 conflict with Appellant's legal requirements and adaptive management related to
11 compliance with the Endangered Species Act (ESA), or is unnecessary, and thus is
12 unjust or unlawful.
- 13 8. Whether Condition A.I in the 401 Certifications, which allows Respondent to retain
14 continuing jurisdiction and unilaterally modify the 401 certifications, exceeds
15 Respondent's authority under Section 401 of the CWA, is unnecessary, and thus is
16 unjust and/or unlawful.
- 17 9. Whether Condition B.7 in the 401 Certifications (except McNary), which affords the
18 Respondent "the right to reopen this certification in the event we do not agree with
19 EPA's BTA determination," exceeds Respondent's authority under Section 401, is
20 contrary to EPA Section 401 implementing regulations (40 C.F.R. §121.2(b) and
21 §124.55(b)), or is unnecessary, and thus is unjust and/or unlawful.

C. Summary Judgment Motions

14 The Board concludes that Ecology and the Intervenor-Respondents have met their burden
15 of showing no genuine issues of material fact regarding Legal Issues 1 and 2, and that they are
16 entitled to judgment as a matter of law on those issues. Further, the Board rules that there are no
17 genuine issues of material fact on Legal Issues 3, 7, 8, and 9 and that Ecology is entitled to
18 summary judgment as a matter of law on those issues. Finally, the Board has determined that

1 there are genuine issues of material fact regarding Legal Issues 4, 5, and 6 and that the Corps is
2 not entitled to summary judgment as a matter of law on any of the legal issues in this case.⁸

3 **1. Legal Issues 1, 2, 3, 7:⁹ (401 Certification Conditions B.2.a-d, B.7)**

4 **a. Scope of Certifications**

5 Legal Issues 1, 2, and 3 all contain subparts relating to the scope of Ecology's 401
6 Certification authority.

7 The Corps argued that the 401 Certification conditions could not include the dams as a
8 whole, but only the point source discharges. *Corps Response*, pp. 8-13. As argued by Ecology
9 and Intervenor-Respondents, this contention is contrary to the holding in *Jefferson Co. PUD v.*
10 *Washington Department of Ecology*, 511 U.S. 700 (1994). *Ecology Motion*, pp. 10-11;
11 *Intervenor-Respondent Motion*, pp. 11-12, 16-18. *Jefferson Co. PUD* involved Ecology's 401
12 Certification for a proposed hydroelectric project on the Dosewallips River. The 401
13 Certification included a condition requiring maintenance of minimum stream flows to protect
14 salmon and steelhead runs. Petitioners in the case argued that the minimum stream flow
15 requirement was unrelated to specific discharges and therefore beyond the scope of Section 401.
16 The U.S. Supreme Court held that Section 401(a)(1) relates only to discharges, but that Section

17 _____
18 ⁸ In its summary judgment motion, the Corps argued that: (1) compliance with certain of the 401 Certifications was
19 not feasible; (2) the 401 Certifications did not meet federal regulation requirements because some of them were not
20 necessary to assure compliance with water quality standards and the 401 Certifications failed to cite the requisite
21 legal authorities; and, (3) Ecology could not lawfully retain jurisdiction and/or reopen the 401 Certifications after
issuance. The Corps also raised an issue of sovereign immunity related to potential civil penalties. *Corps Motion*,
pp. 10-11, 29-30. However, the civil penalty issue was not included in the prehearing order and therefore the Board
does not consider it. *See* Prehearing Order from July 2020. In its summary judgment motion, the Corps did not
specify which legal issue was being addressed, which made coherent analysis of the arguments difficult.

⁹ Due to the complicated, compound, and repetitive nature of the parties' legal issues, the Board will analyze the
Legal Issues by their subparts.

1 401(d) expands the State’s authority to impose conditions and allowed additional conditions on
2 the activity as a whole once the discharge threshold was met. *Id.*, at 711-12.

3 The Corps attempts to distinguish the *Jefferson Co. PUD*, arguing that under the
4 circumstances of this case, the regulated activity is limited to the discharges. *Corps Response*,
5 pp. 8-12. The Board is not persuaded. The U.S. Supreme Court concluded that activities, and
6 not merely discharges, must comply with state water quality standards under Section 401(d), and
7 that the State could place restrictions on the activity as a whole. *Jefferson Co. PUD*, 511 U.S. at
8 711-12.

9 Following its logic that the 401 Certifications at issue in this case should only relate to
10 discharges, the Corps next argues that the 401 Certifications are limited by the scope of the
11 NPDES permits. *Corps’ Response*, pp. 12-13. Ecology and Intervenor-Respondents disagree.
12 *Ecology Motion*, pp. 10-11; *Intervenor-Respondent Motion*, pp. 14-15. This argument is also
13 contrary to *Jefferson Co. PUD* and *Port of Seattle*, which treated the 401 Certification as a
14 separate, independent authorization not limited to discharges covered by an NPDES permit.
15 *Jefferson Co. PUD*, 511 U.S. at 711-12; *Port of Seattle*, 151 Wn.2d at 603-04. In *Port of Seattle*,
16 Ecology issued both the 401 Certification and the NPDES permit. The court stated that where
17 “both a § 401 certification and an NPDES permit are necessary, Ecology will apply the two in a
18 nonduplicative and complementary manner.” *Id.*, at 603-04. The court also noted that “the
19 PCHB expressly stated that if a § 401 certification condition is not incorporated into a new
20 NPDES permit, that condition shall remain in effect as provided in the § 401 certification.” *Id.*,

1 at 604. These cases make it clear that issuance of the 401 Certifications and the NPDES permits
2 are lawful, independent exercises of authority.

3 The Board concludes that the 401 Certifications at issue in this case were within the
4 lawful scope of CWA authority. Therefore, the Board grants summary judgment in favor of
5 Ecology and Intervenor-Respondents on the subparts of Legal Issues 1, 2, and 3 relating to the
6 scope of 401 Certifications and denies summary judgment for the Corps on these subparts.

7 **b. Interference (Preemption)**

8 Legal Issues 1, 2, 3, and 7 all contain subparts alleging that the 401 Certifications
9 interfere with federal laws and duties. This argument is actually a form of a preemption claim.

10 The Corps argued that Conditions B.2.a-d and B.7 in the 401 Certifications interfere with
11 the Corps' ability to operate and maintain the dams and comply with other federal laws and
12 purposes. *Corps Motion, pp. 12-15*. Ecology and Intervenor-Respondents argue that there is no
13 interference. *Ecology Motion, p. 12; Intervenor-Respondent Motion, pp. 18-19*. This is
14 essentially a preemption argument and will be analyzed as such. Application of the preemption
15 doctrine presupposes as a threshold requirement some state action to be preempted by federal
16 law. *Dep't of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 192, 849 P.2d 646 (1993). The
17 Board construes the Corps' interference claim as follows: Ecology's action in setting the
18 conditions in the 401 Certifications is a state action preempted by federal law authorizing the
19 multiple purposes for which the dams at issue were constructed.

1 A 401 Certificate is a federal permit required under the CWA. *Dept. of Ecology v. PUD*
2 *No. 1*, 121 Wn.2d at 193. Section 401 federal authority has been delegated to Ecology. *RCW*
3 *90.48.260*. Therefore, when issuing 401 Certifications with conditions, Ecology is implementing
4 federal law. *Dept. of Ecology*, 121 Wn.2d at 193. Any conditions imposed in a 401 Certification
5 will normally become part of the final federal permit for which the certificate is required – in this
6 case, the final NPDES permits that will be issued by EPA. *Id. at 194*. Any implied claim of
7 federal preemption “does not apply in a context where a state is acting to fulfill its federally
8 mandated role” in the CWA’s comprehensive federal scheme. *Id. at 195*.

9 Even if the threshold requirement of state action is met, the Corps has not demonstrated
10 any conflict between Ecology’s action and any specific federal law. If there is an alleged conflict
11 between federal laws, the Board interprets those laws in a manner to effectuate both laws and
12 avoid conflicts. *National Wildlife Federation v. U.S. Army Corps of Engineers*, 384 F.3d 1163,
13 1178 (9th Cir. 2004) (when two statutes are capable of coexistence, it is the duty of the courts to
14 regard each as effective). When evaluating the Dosewallips Project at issue in *Dep’t of Ecology*
15 discussed above, the Washington Supreme Court found no inherent conflict between federal dam
16 operations and the 401 Certification. “[T]here is no actual conflict between Ecology’s action and
17 the [Federal Power Act (FPA)]. Compliance with Ecology’s streamflow condition and the FPA
18 is physically possible and fulfillment of that condition does not stand as an obstacle to the
19 accomplishment and execution of Congress’s purposes.” *Dept. of Ecology*, 121 Wn.2d at 197.

1 In the instant case, the Corps has not provided any specific examples or evidence of
2 interference or conflict between federal laws or purposes related to the dams and the relevant 401
3 Certificate conditions. The Board concludes that the conditions in Ecology’s 401 Certifications
4 are not preempted by federal law.

5 The Board rules in favor of Ecology and the Intervenor-Respondents on the preemption
6 subparts of Legal Issues 1, 2, 3, and 7. The Board denies summary judgment for the Corps on
7 these subparts.

8 **2. Legal Issues 2, 3 (Conditions B.2.a-d)**

9 The Corps argues that it cannot comply with the above conditions because any violations
10 of water quality standards results from the existence of the dams and not their operation, and that
11 there are no feasible methods to avoid these violations. *Corps Motion, p. 12; Corps Response,*
12 *pp. 14-18.*

13 For evidence, the Corps relies primarily on the Turner Declaration, which includes
14 conclusory statements on the impossibility of addressing temperature exceedances caused by the
15 dams. Turner’s opinion is inconsistent with the temperature mitigation initiatives referenced in
16 the Background section of this Order. Turner also does not discuss the options available through
17 Ecology’s regulations. While temperature mitigation at a single dam may be difficult, there is no
18 prohibition in Ecology’s regulations against coordinating individual dam plans to achieve a
19 system-wide approach to regulating temperature. *Ecology Response, p. 4.* The Corps cannot
20 rely on argumentative assertions, speculative statements, or conclusory allegations to defeat
21 summary judgment.

1 The Corps cites *National Wildlife Federation* for the principle that exceedance of a state
2 water quality standard does not constitute a violation of the CWA if there are no feasible
3 measures to avoid the exceedance and the exceedance is a result of the existence of the dam and
4 not the operation. *Corps Motion, pp. 12-14*. The Corps then argues that it is essentially
5 impossible for the agency to comply with the temperature requirements of the 401 Certifications
6 without undertaking impracticable or infeasible methods or taking actions that contravene
7 Congressionally mandated project purposes. *Id., pp. 14-17*. Ecology disagrees. *Ecology*
8 *Response, pp. 2-6*.

9 The *National Wildlife Federation* case is distinguishable for several reasons. First, it did
10 not involve a 401 Certification and lacks any analysis of the interaction between 401
11 Certification conditions and compliance with water quality standards. The Plaintiffs in that case
12 were challenging a Record of Decision issued by the Corps relating to compliance with water
13 quality standards. *National Wildlife Federation*, 384 F.3d at 1166. Second, one of the strategies
14 to comply with water temperature standards considered by the court in *National Wildlife*
15 *Federation* was dam removal, and the court ruled that it could not determine that the Corps was
16 arbitrary and capricious in not taking action that would nullify the purpose of the federal dams.
17 *Id. at 1178-79*. In this case, Ecology is not proposing dam removal. Finally, on the record
18 before the court 17 years ago, the court concluded that the Corps' determination that the
19 operations of the dams, as opposed to the existence of the dams, did not contribute to
20 temperature exceedances was not arbitrary and capricious, or contrary to law. In an area of

1 constantly evolving science, the Board is not persuaded that the operation vs. existence
2 distinction is still supported by the data or the current situation.

3 The Corps also claims it cannot produce a WQAP. *Corps Motion*, pp. 15-17. WQAPs
4 for dams are governed by WAC 173-201A-510(5). The WQAP is simply a plan that provides a
5 detailed strategy for achieving compliance with water quality standards. The plan must include
6 identification of all reasonable and feasible improvements that could be used to meet standards,
7 or if meeting the standards is not attainable, then to achieve the highest attainable level of
8 improvement. WAC 173-201A- 510(5)(b)(ii). If an applicable water quality standard is not met
9 by the end of the period provided in the WQAP, the owner must evaluate any new, reasonable,
10 and feasible technologies or propose an alternative to achieve compliance with the standards.
11 *Id.*, at 510(5)(g). The Corps has not offered any explanation why it cannot produce such a plan
12 or why a WQAP would not address its concerns regarding infeasibility.

13 In summary, the WQAP regulation demonstrates that Ecology is not imposing an
14 impossible standard on the Corps. Any measures to achieve compliance with the temperature
15 standards must be reasonable and feasible, and only have to achieve the highest attainable level
16 of improvement. If the initial measures are unsuccessful, then the Corps would only be required
17 to evaluate other alternatives.

18 Other options for achieving compliance with the above conditions are Water Quality
19 Offsets (WAC 173-201A-450), Site-Specific Criteria (WAC 173-201A-430), and Use
20 Attainability Analysis (WAC 173-201A-440). *Brown Decl.* ¶ 10; *Barney Decl.*, Ex. A, p. 2;
21 *Ecology Response*, p. 4; *Ecology Reply*, p. 6.

1 The Corps also claims that it cannot comply with the TDG requirements in the 401
2 Certifications, because the very existence of the dams and their federally required operations will
3 likely result in exceedances of the standards for dissolved gases. *Corps Motion, pp. 17-18;*
4 *Turner Decl., pp. 8-9, ¶¶ 1-3.* The WQAP and other options discussed above would also apply
5 to the TDG requirements and provide several options for compliance with Condition B.2b.

6 As stated earlier, the 401 Certifications mirror the draft NPDES permits and incorporate
7 their provisions. There are very few additional requirements imposed by the 401 Certifications
8 and the majority of those involve review and approval conditions. The Corps is not challenging
9 the draft NPDES permits in this proceeding and the Board is focusing on the additional
10 Certification requirements.

11 The Corp's feasibility/impossibility arguments are premature. The final requirements for
12 the temperature and TDG provisions have not been set. The WQAP is the vehicle to determine
13 what is feasible and what actions will finally be required. Also, there are various exceptions to
14 the general requirements that may benefit the Corps.

15 Based on the summary judgment record and arguments, the Board concludes that the
16 Corps has not met its burden to show that the 401 Certification conditions in Legal Issues 2 and 3
17 are infeasible or impossible, and denies the Corps' summary judgment motion on the relevant
18 subparts of those issues. The Board rules in favor of Ecology on Legal Issues 2 and 3, and the
19 Intervenor-Respondents on the same subparts of Issue 2.

1 **3. Legal issues 4, 5, 6, 7, 8, 9 (Conditions B.4-6, B.7)**

2 The Corps argues that the 401 Certifications do not comply with applicable federal
3 regulations (40 C.F.R. §§ 121 and 124). *Corps Response*, pp. 20-22; *Corps Reply*, p. 4. The first
4 regulation, 40 C.F.R. Part 121, is entitled State Certification of Activities Requiring a Federal
5 License or Permit and governs the issuance of 401 Certifications in general. The second
6 regulation, 40 C.F.R. Part 124, Subpart D, describes specific procedures applicable to NPDES
7 permits. In particular, Subpart D requires that the 401 Certification contain conditions which are
8 necessary to ensure compliance with the applicable provisions of the CWA and state law. This
9 subpart also requires that, for conditions that are more stringent than those in a draft NPDES
10 permit, the State agency shall cite the CWA or state law references upon which the condition is
11 based. Failure to provide the citations waives the right to certify with respect to that condition.
12 *40 C.F.R. § 124.53(e)(1),(2)*.¹⁰

13 The Corps argues that Part 124 of the regulations is more restrictive than Part 121 and
14 that Ecology is held to a higher standard when issuing 401 Certifications that involve NPDES
15 permits. *Corps Motion*, pp. 19-21. Ecology responds that the regulations do not impose
16 different standards and are compatible with each other. *Ecology Response*, pp. 7-8. The Board

17
18 ¹⁰ Section 316(b) of the CWA requires that, for cooling water intake structures, any standard shall reflect the best
19 technology available for minimizing adverse environmental impact. *33 U.S.C. § 1326(b)*. In accordance with the
20 statute, the draft NPDES permit requires that the design, location, construction, and capacity of the Corps' cooling
21 water intake structures reflect the best technology available (BTA) for minimizing adverse environmental impacts
from the impingement and entrainment of various life stages of fish. *Draft NPDES Permit*, pp. 18-19 (*Special
Condition E.*) The term "best technology available" is not defined in the draft permit. *See also, 40 C.F.R. §
125.94(c) and § 125.94(f)*. Ecology's 401 Certification reserves the right to reopen the Certification if Ecology does
not agree with EPA's BTA determination. *Condition 7(c)*. In its appeals, the Corps initially argued that Section
316(b) did not apply to hydropower projects, but did not brief this argument and the Board considers the argument
abandoned. *See Corps Appeals*, pp. 10-11.

1 agrees with Ecology, concluding that Part 124 does not impose a stricter standard for Ecology
2 and that the two regulations can be harmonized.

3 **a. Necessary (Conditions B.4, B.5, B.6, B.7)**

4 The Corps contends that Conditions B.3, B.4, B.5, B.6, and B.7¹¹ in the 401
5 Certifications are not necessary to ensure compliance with state water quality standards. *Corps*
6 *Motion, pp. 22-25; Corps Response, p. 20; Corps Reply, p. 4.*

7 The Board concludes that determining whether Conditions B.4 (BMPs), B.5 (EALs), and
8 B.6 (PCB plan) are necessary requires more factual development and is not suitable for summary
9 judgment. Whether a reopener clause or review and approval requirements are necessary in this
10 case requires more legal analysis and is not necessarily dependent on the factual context (Legal
11 Issues 7, 8, and 9). The remaining subparts of Legal Issue 7 are also primarily legal questions
12 that do not require any further factual development.

13 The Corps' necessity argument fails for two reasons. First, the Corps offers only
14 argument and no evidence that the conditions are not necessary to ensure compliance, and
15 second, the Board defers to Ecology's expertise in this area. *Port of Seattle*, 151 Wn.2d at 593-
16 95.

17 The federal regulations require Ecology to determine what conditions are necessary to
18 achieve compliance with the State's water quality standards. 40 C.F.R. §§ 124.53(e)(2),
19 121.2(a)(4). Ecology has made its determinations and in this appeal it is the Corps' burden to
20

21 ¹¹ Condition B.3 was not included in the Prehearing Order's list of Legal Issues and is therefore not at issue in this case.

1 provide sufficient evidence that those conditions are not necessary to achieve compliance. The
2 Corps has made several arguments why the conditions are not necessary, but has not provided
3 any evidence to support its claims.

4 Ecology is the agency that administers the 401 Certification program in Washington. If
5 Ecology determines that a condition is necessary and the Corps fails to meet its burden in
6 challenging that determination, the deference due Ecology will further tip the balance in favor of
7 Ecology. The Board rules in favor of Ecology on the necessity subpart of Legal Issues 7, 8, and
8 9 and denies the Corps' motion on the same subpart of these issues.

9 **b. Citations to Authority**

10 The Corps also argues that Ecology failed to cite the proper authorities for its conditions
11 and therefore waived its right to certify. *Corps Response, pp. 21-22; Corps Reply, p. 4.*

12 In its 401 Certifications, Ecology cites the following federal and state laws:

- 13 • CWA Sections 301, 302, 306, 307
14 • RCW 90.48.010, 90.48.080, and WAC 173-201A.

15 *Corps Appeal, Att. 1; Ecology Response, p. 8.*

16 The Board considers these citations sufficient to comply with 40 C.F.R. § 124.53(e)(2).
17 The Board rules in favor of Ecology on this aspect of Legal Issues 7, 8, and 9 and denies the
18 Corps' motion on this subpart of these issues.

1 **4. Legal Issues 7, 8, and 9 (Reopeners)**

2 The Corps maintains that the 401 Certifications' reopener clauses are unlawful.¹² *Corps*
3 *Motion*, pp. 28-29; *Corps Response*, pp. 18-20; *Corps Reply*, pp. 4-5. Ecology responds that
4 reopeners are common clauses in all the State's 401 Certifications. *Ecology Motion*, pp. 14-16;
5 *Ecology Response*, p. 9; *Ecology Reply*, pp. 6-7.

6 The Corps' position is contrary to relevant caselaw and to ensuring continued compliance
7 with state water quality standards in the face of changing conditions. In *American Rivers v.*
8 *FERC*, 129 F.3d 99, 111 (2d Cir. 1997), the Second Circuit concluded that there was no federal
9 statutory authority supporting FERC's arguments that the Federal Power Act prohibited
10 reopeners as 401 Certification conditions. The Supreme Court of Maine determined that Section
11 401 reopener conditions were consistent with the plain language of Section 401(d) and the U.S.
12 Supreme Court's interpretation of that section in *Jefferson County PUD. S.D. Warren Co. v. Bd.*
13 *of Env'tl. Prot.*, 868 A.2d 210, 218 (Me. 2005).

14 Oregon's administrative rules provide that the State's 401 Certification may be modified
15 under specified circumstances, such as changes in conditions that might affect compliance with
16 water quality standards or if the standards themselves have changed. OAR 340-048-0050.

17 In summary, courts in other jurisdictions have upheld similar reopener provisions in 401
18 Certifications, and at least one state expressly authorizes reopeners similar to the ones at issue by
19 regulation. The reopener provisions at issue are appropriate and further the goal of 401

20 _____
21 ¹² Specifically, Conditions A.5., A.6, B.2.a., B.2.e., and B.7.c. The Corps' list of legal issues included Condition
A.1 (Legal Issue 8), which is apparently a typographical error and should have referred to Conditions A.5 or A.6
relative to reopeners.

1 Certifications to ensure continued compliance with water quality standards as circumstances
2 change.

3 Therefore, the Board concludes that reopener conditions in 401 Certifications are allowed
4 under the relevant laws and grants Ecology’s Motion for Summary Judgment on the reopener
5 subparts of these issues. The Board denies the Corps’ motion on these subparts.

6 **D. Corps’ Motion (Legal Issues 4, 5, 6)**

7 The Corps also moved for summary judgment on Legal Issues 4, 5, and 6, arguing that
8 Conditions B.4., B.5., and B.6. are unnecessary and lack proper citations to CWA or state water
9 quality law. *Corps Motion, pp. 22-24.* Ecology opposes the Corps’ motion. *Ecology Response,*
10 *p. 2.*

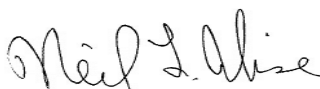
11 These three Legal Issues are the most fact-intensive of the issues and the Board concludes
12 that genuine issues of material fact prevent granting summary judgment to the Corps on these
13 issues. There are issues of fact related to the meaning of “quantitative approach,” what
14 requirements would be included in Best Management Practices, and what standards would be
15 applied (Legal Issue 4). Also, the Board requires more factual development on the properties of
16 the available EALs, the Corps’ and Ecology’s interpretation of feasibility, and the level of
17 Ecology’s expertise in this area (Legal Issue 5). Finally, there are issues of fact related to the
18 presence and source of PCBs in the dams’ outfalls, and the practical burden of preparing a
19 management plan to address PCB discharges (Legal Issue 6).

1 **IV. ORDER**

2 The Motion for Partial Summary Judgment filed by Ecology on Legal Issues 1-3 and 7-9
3 and the Motion for Partial Summary Judgment filed by Intervenor-Respondents on Legal Issues
4 1 and 2 is **GRANTED**. The Motion for Summary Judgment filed by the Corps is **DENIED**.
5 Legal Issues 1, 2, 3, 7, 8, and 9 are **DISMISSED**. Legal Issues 4, 5, and 6 shall proceed to
6 hearing.

7 SO ORDERED this 3rd day of November, 2021.

8 **POLLUTION CONTROL HEARINGS BOARD**

9 

10 _____
NEIL L. WISE, Presiding

11 

12 _____
CAROLINA SUN-WIDROW, Member

13 

14 _____
MICHELLE GONZALEZ, Member