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Re: **PCHB NO. 17-090**
MILLENNIUM BULK TERMINALS-LONGVIEW, LLC v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY
WASHINGTON ENVIRONMENTAL COUNCIL, CLIMATE SOLUTIONS, FRIENDS OF THE COLUMBIA GORGE, SIERRA CLUB, and COLUMBIA RIVERKEEPER, Intervenors

Dear Parties:

Enclosed is the Pollution Control Hearings Board's Order on Summary Judgment in this matter.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days. *See* Administrative Procedures Act (RCW 34.05.542) and RCW 43.21B.180.

You are being given the following notice as required by RCW 34.05.461(3): Any party may file a petition for reconsideration with the Board. A petition for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final decision. WAC 371-08-550.

If you have any questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,

Joan M. Marchioro, Presiding

JMM/le/P17-090
Encl.

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the attorneys of record herein.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED 8/15/18, at Tumwater, WA.

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent, WASHINGTON ENVIRONMENTAL COUNCIL, CLIMATE SOLUTIONS, FRIENDS OF THE COLUMBIA GORGE, SIERRA CLUB, and COLUMBIA RIVERKEEPER, Intervenor-Respondents.	PCHB No. 17-090 ORDER ON SUMMARY JUDGMENT

INTRODUCTION

Millennium Bulk Terminals-Longview, LLC (Millennium) filed a Notice of Appeal seeking review of the Department of Ecology's (Ecology) denial of a Clean Water Act (CWA) Section 401 Certification (401 Certification) for Millennium's proposed coal export terminal. Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra Club and Columbia Riverkeeper (WEC) were granted intervention as respondents. Millennium, Ecology, and WEC filed separate motions for summary judgment. BNSF Railway Company was granted leave to file an *amicus curiae* brief in support of Millennium.

The Board considering this matter was comprised of Board Chair Joan M. Marchioro, Presiding, and Members Kay M. Brown and Neil L. Wise. Attorneys Beth S. Ginsberg and Jason T. Morgan represented Millennium. Senior Counsel Thomas J. Young and Assistant Attorney General Sonia A. Wolfman represented Ecology. Kristen L. Boyles, Marisa C. Ordonia and Jan E. Hasselman represented Intervenor-Respondents WEC.

In rendering its decision, the Board considered the following submittals:

1. Millennium's Motion for Summary Judgment on Issues 3-10 and 12;

2. Declaration of Beth Ginsberg In Support of Millennium's Motion for Summary Judgment, with Exhibits A-C;

3. Respondent Department of Ecology's Response to Millennium's Motion for Summary Judgment on Issues 3-10 and 12;

4. State of Washington, Department of Ecology's Motion for Partial Summary Judgment on Legal Issue 2;

5. Declaration of Thomas J. Young In Support of Ecology's Response to Millennium's Motion for Summary Judgment on Issues 3-10 and 12 and In Support of Ecology's Motion for Summary Judgment on Issue 2, with Exhibits A-G;

6. Declaration of Loree' Randall In Support of Ecology's Response to Millennium's Motion for Summary Judgment on Issues 3-10 and 12 and In Support of Ecology's Motion for Summary Judgment on Issue 2, with Exhibits A-E;

7. Washington Environmental Council *et al.* Opposition to Millennium Motion for Summary Judgment on Issues 3-10 and 12 and Cross-Motion for Summary Judgment on All Remaining Issues;

8. Declaration of Marisa Ordonia In Support of Washington Environmental Council *et al.* Opposition to Millennium Motion for Summary Judgment on Issues 3-10 and 12 and Cross-Motion for Summary Judgment on All Remaining Issues, with Exhibits A-G;

9. Millennium's Reply In Support of Its Motion for Summary Judgment on Issues 3-10 and 12;

10. Second Declaration of Beth Ginsberg In Support of Millennium's Motion for Summary Judgment on Issues 3-10 and 12, with Exhibits A-B;

11. Millennium Bulk Terminals-Longview's Opposition to Ecology's Motion for Summary Judgment on Issues No. 2;

12. Declaration of Kristin Gaines, with Exhibits A-D;

13. Declaration of Nicole LaFranchise;

14. Declaration of Glenn Grette;

15. Declaration of Jason T. Morgan in Opposition to Department of Ecology's Motion for Summary Judgment on Issue No. 2, with Exhibits A-F;

16. BNSF Railway Company's *Amicus Curiae* Brief In Support of Millennium Bulk Terminals Longview, LLC's Motion for Summary Judgment and In Opposition to Department of Ecology's Motion for Partial Summary Judgment;

17. Respondent Department of Ecology's Response to BNSF Railway Company's Amicus Curiae Brief;

18. State of Washington, Department of Ecology's Reply In Support of Motion for Partial Summary Judgment on Legal Issue 2;

19. Declaration of Sally Toteff In Support of Department of Ecology's Reply to Millennium's Response to Ecology's Motion for Summary Judgment on Issue 2;

20. Second Declaration of Loree' Randall In Support of Ecology's Motion for partial Summary Judgment on Legal Issue 2, with Exhibit A;

21. Declaration of Rebecca Rothwell, with Exhibit A;

22. Declaration of James DeMay;

23. WEC *et al.* Reply In Support of Cross-Motion for Summary Judgment;

24. Millennium Bulk Terminals-Longview, LLC's Sur-Reply In Opposition to Ecology's Motion for Summary Judgment on Issue 2; and

25. The Board's file in this matter.

The parties' motions address the following legal issues from the Prehearing Order previously entered by the Board:[1]

2. Whether there is reasonable assurance that the construction and operation of Millennium's proposed project will meet applicable water quality standards pursuant to 40 C.F.R. §121.2(a)?

3. Whether Ecology's Denial is *ultra vires* because it is based on concerns that are not related to water quality?

4. Whether Ecology's Denial is arbitrary, capricious, contrary to law and unsupported by substantial evidence?

5. Whether Ecology's application of RCW 43.21C.060 to support the Denial is overbroad?

6. Whether Ecology's application of RCW 43.21C.060 to support the denial is preempted by 33 U.S.C. §1341?

7. Whether Ecology's was precluded from denying the certification based on RCW 43.21C.060 when water quality certifications are exempt from SEPA pursuant to WAC 197-11-800(9)?

8. Whether Ecology waived its certification rights under 33 U.S.C. §1341?

9. Did Ecology have substantive authority under the State Environmental Policy Act (SEPA), RCW 43.21C.060, to deny the section 401 certification with prejudice, regardless of whether such authority existed under section 401?

[1] The Board previously granted summary judgment on Issue 1, concluding that it had jurisdiction to hear the appeal of the denial of a Clean Water Act Section 401 water quality certification under RCW 43.21B.110. *Millennium Bulk Terminals-Longview, LLC v. Ecology*, PCHB No. 17-090 (Order Granting Motion for Partial Summary Judgment on Legal Issue 1, Feb. 27, 2018).

10. Was Ecology authorized by the terms of section 401 to use its substantive SEPA authority to deny the section 401 certification?

10.1 Is Ecology's supplemental authority under SEPA (RCW 43.21C.060) an "other appropriate requirement of state law," under the Clean Water Act, section 401(d)?

10.2 Was Ecology's use of substantive SEPA authority to deny the certification authorized by section 401 of the Clean Water Act, when the exercise of that authority was based, in part, on impacts related to water quality?

11. Is Millennium barred from challenging the Final Environmental Impact Statement's findings and conclusions regarding the nine areas of significant, adverse, unmitigated impacts cited in Ecology's section 401 denial?

12. Did Ecology have authority to deny the section 401 water quality certification "with prejudice" upon concluding that Millennium failed to demonstrate reasonable assurance, or was Ecology required to deny the section 401 certification "without prejudice"?

On May 31, 2018, the parties presented oral argument on the motions. Based on its review of the record and foregoing pleadings, and the arguments of the parties, the Board enters the following decision:

BACKGROUND

Millennium proposes to construct and operate a coal export terminal (the Project) on an existing industrial site in and adjacent to the Columbia River in Cowlitz County. The Project would be developed on 190 acres primarily within a 540-acre site leased by Millennium. Coal would be transported to the Project site by rail and stockpiled for eventual loading onto ocean-going vessels for transport to Asia via the Columbia River and Pacific Ocean. The completed Project would consist of "one operating rail track, eight rail tracks for storing rail cars, rail car unloading facilities, a stockyard for coal storage, and conveyor and reclaiming facilities. The

terminal would include two new docks (Docks 2 and 3) in the Columbia River, and shiploading facilities on the two docks. Dredging would be required to provide access to and from the Columbia River navigation channel (navigation channel) and for berthing at Docks 2 and 3." Young Decl., Ex. A at S-1.

Millennium intends to construct the Project in two stages. During Stage 1, Millennium would construct the two docks, two stockpile pads, railcar unloading facilities, the operating rail track and rail storage tracks, Project site area ground improvements, associated facilities and infrastructure. The Project's throughput capacity at the completion of Stage 1 would be 25 million metric tons of coal per year (MMTPY). Stage 2 facilities, construction of which would begin at the completion of Stage 1, consist of one additional ship loader on Dock 3, two additional stockpile pads, conveyors, and equipment necessary to increase throughput to 44 MMTPY. Young Decl., Ex. A at S-20-22.

The Project will impact more than 32 acres of wetlands and approximately six acres of ditches. Millennium proposes to mitigate for these impacts through the construction of a wetland mitigation site of approximately 100 acres. The Project will create new overwater coverage totaling 4.83 acres, the impacts of which will be addressed through the construction of an off-channel mitigation site. Ginsberg Decl., Ex. A at 3-4.

The Project is intended to operate 24 hours per day, seven days per week, and is designed for a minimum 30-year period of operation. Young Decl., Ex. A at S-8. The Project also requires the dredging of approximately 500,000 cubic yards of sediment from the Columbia River in order to provide site access from the river's navigation channel and berthing at Docks 2

and 3. *Id.*, Ex. A at 2-17. At full terminal operations, the Project would "bring approximately 8 loaded unit trains each day carrying coal to the project area, send out approximately 8 empty unit trains each day from the project area, and load an average of 70 vessels per month or 840 vessels per year, which would equal 1,680 vessel transits in the Columbia River annually." *Id.*, Ex. A at S-8.

Cowlitz County and Ecology served as co-lead agencies for environmental review of the Project under the Washington State Environmental Policy Act (SEPA), ch. 43.21C RCW. On September 9, 2013, Cowlitz County issued a revised Determination of Significance stating that the Project was likely to result in significant adverse environmental impacts and that an environmental impact statement (EIS) was required. Cowlitz County and Ecology elected to prepare a joint SEPA EIS. Young Decl., Ex. A at S-2.

On April 28, 2017, Cowlitz County and Ecology issued the final EIS (FEIS) for the Project. The FEIS identified unavoidable and significant adverse environmental impacts associated with construction and operation of the Project, as well as proposed mitigation measures. With respect to the significant adverse environmental impacts and mitigation, the FEIS stated:

> If the proposed mitigation measures were implemented, they would reduce but not completely eliminate significant adverse environmental impacts resulting from construction and operation of the [Project]. Unavoidable and significant adverse environmental impacts could remain for nine environmental resource areas: social and community resources; cultural resources; tribal resources; rail transportation; rail safety; vehicle transportation; vessel transportation; noise and vibration; and air quality.

Young Decl., Ex. A at S-41; *see also* S-41-44, S-46-60. The FEIS was not appealed.

In order to construct the project, Millennium must obtain a CWA Section 401 water quality certification from Ecology. 33 U.S.C. §§ 1341. Millennium submitted a Joint Aquatic Resources Permit Application requesting a Section 401 water quality certification from Ecology. On September 26, 2017, Ecology issued Order # 15417 denying Millennium's request for a Section 401 water quality certification with prejudice. Ecology denied the 401 Certification on two bases: (1) the Project's significant, unavoidable adverse impacts identified in the FEIS conflicted with Ecology's SEPA policies in WAC 173-802-110; and (2) Ecology did not have reasonable assurance that the Project as proposed would meet applicable water quality standards and other appropriate requirements of state law. Ginsberg Decl., Ex. A. Millennium timely appealed Ecology's decision.

ANALYSIS

A. Summary Judgment Standard

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

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a

summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the nonmoving party must present evidence demonstrating that material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Bare assertions concerning alleged genuine material issues do not constitute facts sufficient to defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). When determining whether an issue of material fact exists, all facts and inferences are construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The Board will enter summary judgment for a non-moving party under appropriate circumstances. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

The parties contend that there are no material issues in dispute and this matter is appropriate for summary judgment. The Board concurs.

B. Ecology can use substantive SEPA to deny 401 certification (Issues 3, 4, 5, 6, 7, 9 and 10)

Millennium challenges Ecology's use of substantive SEPA authority to deny the 401 Certification. Millennium asserts that, pursuant to WAC 197-11-800(9), its 401 Certification request for the Project is categorically exempt from the requirements of SEPA. Millennium also contends that Ecology's use of substantive SEPA authority to deny the 401 Certification exceeded the scope of the agency's authority under Section 401 of the CWA.

Ecology and WEC disagree. Citing WAC 197-11-305(1)(b), they argue that because segments of the Project are not SEPA exempt, the 401 Certification is likewise not exempt. Ecology and WEC assert that because SEPA is supplementary to all other existing authorizations, an agency can use its substantive SEPA authority to deny a permit even though all criteria for the permit have otherwise been met. Finally, Ecology and WEC argue that no provision of the CWA precludes Ecology's use of substantive SEPA authority when acting on a 401 certification request.

As discussed below, the Board agrees with Ecology and WEC. Under the facts of this case, the 401 Certification is not categorically exempt from SEPA. Nor does Section 401 of the CWA preclude Ecology's use of substantive SEPA in this instance. The Board concludes that Ecology's use of substantive SEPA authority to deny Millennium's 401 Certification request was not clearly erroneous. Therefore, the Board grants summary judgment to Ecology and WEC on Issues 3, 4, 5, 6, 7, 9, and 10.

1. SEPA

With the enactment of SEPA in 1971, the legislature sought to bring an environmental consciousness into government decision making. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 91, 392 P.3d 1025 (2017). The stated purposes of SEPA are

> (1) To declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and [to] stimulate the health and welfare of human beings; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

RCW 43.21C.010 (alteration in original). SEPA recognizes the broad policy "that each person has a fundamental and inalienable right to a healthful environment." RCW 43.21C.020(3). The primary focus of SEPA is on the decision making process. SEPA seeks to ensure that environmental values are given appropriate consideration. *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973); *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). SEPA imposes a duty on the government agency to assemble and review full environmental information before rendering a decision. *Davidson Series & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 634-35, 246 P.3d 822 (2011).

SEPA requires an EIS only for "major actions having a probable significant, adverse environmental impact." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137 (2002); RCW 43.21C.031(1). "The primary function of an EIS is to identify adverse impacts to enable the decisionmaker to ascertain whether they require either mitigation or denial of the proposal." *Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990); WAC 197-11-400(2) ("An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation, that would avoid or minimize adverse impacts or enhance environmental quality.") The purpose of an EIS is to provide decision makers with "sufficient information to make a reasoned decision." *Citizens Alliance To Protect Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995).

Issuance of an EIS does not approve or deny a project. Rather, the EIS accompanies a proposal through the agency review process so that agency officials can use the document when making permitting decisions. RCW 43.21C.030(2)(d). "Any governmental action may be conditioned or denied" based on the adverse environmental impacts disclosed in an EIS. RCW 43.21C.060; WAC 197-11-660; *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 64, 578 P.2d 1309, 1312 (1978)("SEPA confers substantive authority to the deciding agency to act on the basis of the impacts disclosed"). The granting or denial of a Section 401 water quality certification is a governmental action within the meaning of RCW 43.21C.060. *See* WAC 197-11-704(2) ("actions" defined to include the licensing of a project). Ecology is the state agency authorized to issue or deny certifications under Section 401 of the CWA. RCW 90.48.260.

The policies and goals of SEPA are supplementary to "existing authorizations of all branches of government." RCW 43.21C.060. SEPA serves as an "overlay" on existing authority, making formerly ministerial decisions discretionary. *Polygon*, 90 Wn.2d at 65. Using SEPA substantive authority, a decision maker may deny a permit even if it meets all of the requirements for approval under permit criteria. *Polygon*, 90 Wn.2d at 63-65; *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986) ("under [SEPA], a municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions for issuance").

The denial of a proposal must be predicated "upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally

designated by the agency" or appropriate legislative body. RCW 43.21C.060; WAC 197-11-660(1)(a). In order to deny a proposal under SEPA, a decision maker must find that

> (1) The proposal would be likely to result in significant adverse environmental impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.

RCW 43.21C.060; WAC 197-11-660(1)(f). "The decision maker shall cite the agency SEPA policy that is the basis of any condition or denial under this chapter[.]" WAC 197-11-660(1)(b). Failure to sufficiently document compliance with these requirements can result in reversal of a SEPA-based denial.[2] *Cougar Mountain Assoc. v. King County*, 111 Wn.2d 742, 752-53, 765 P.2d 264 (1998).

2. Millennium's 401 Certification request not categorically exempt from SEPA

Certain actions are statutorily or administratively exempt from SEPA's threshold determination and EIS requirements. Statutory exemptions are set forth in chapter 43.21C RCW. As for administrative or categorical exemptions, the legislature directed Ecology to adopt rules identifying categories of governmental actions "not to be considered as potential major actions significantly affecting the quality of the environment." RCW 43.21B.110(1)(a). Additionally, "the rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review. An action that is categorically exempt under the rules adopted by the department may not be conditioned or denied under this chapter." *Id.*

[2] Millennium does not claim that Ecology's 401 Certification decision failed to comply with the requirements of RCW 43.21C.060 or WAC 197-11-660(1).

Reviewing this provision, the court of appeals stated that its plain language directed Ecology "(1) to develop its own list of government-action categories that are not major actions affecting the quality of the environment ('administratively-created' categorical exemptions), and (2) to create a rule-based exception that governs when a proposal potentially falling under an otherwise exempt government-action category may nonetheless require environmental review." *Alpine Lakes Prot. Soc'y v. Dep't of Ecology*, 135 Wn. App. 376, 391, 144 P.3d 385 (2006).

Carrying out the legislative directive, Ecology adopted a number of categorical exemptions. *See* WAC 197-11-305, -800 to -890. The SEPA regulations define "categorical exemption" as "the type of action, specified in these rules, which does not significantly affect the environment [.]" WAC 197-11-720. One such categorical exemption is the granting or denial of a Section 401 water quality certification. WAC 197-11-800(9). Addressing the directive to create an exception to exemption, the SEPA rules provide in relevant part that a proposal is not categorically exempt if "(b) [T]he proposal is a segment of a proposal that includes: (i) [a] series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not[.]"[3] WAC 197-11-305(1)(b)(i). Under the SEPA regulations, "proposal" means "a proposed action. A proposal includes both actions and regulatory decisions of agencies as well as any actions proposed by applicants." WAC 197-11-784.

[3] Citing to WAC 197-11-305, the definition of "categorical exemption" states that the SEPA rules "provide for those circumstances in which a specific action that would fit within a categorical exemption shall not be considered categorically exempt [.]" WAC 197-11-720.

Millennium contends that its 401 Certification request is categorically exempt from SEPA. As such, pursuant to RCW 43.21C.110(1)(a) Ecology could not use substantive SEPA authority to deny the request. Millennium argues that by identifying a Section 401 water quality certification as an action categorically exempt from SEPA, Ecology determined that such action remains categorically exempt even if Millennium's proposal as a whole is subject to SEPA. According to Millennium, Ecology is incorrect in claiming that WAC 197-11-305(1)(b)(i) negates the categorical exemption status of its 401 Certification request. Millennium asserts that its reading of WAC 197-11-305(1)(b)(i) is supported by the court of appeals decision in *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 151 P.3d 1079 (2007).

Ecology and WEC argue that, under WAC 197-11-305(1)(b)(i), Millennium's 401 Certification request is not categorically exempt as it is part of a larger proposal where some actions are categorically exempt and others are not. They assert that this conclusion is consistent with Ecology's longstanding interpretation of its own regulation and, as such, it is entitled to deference. *See* Randall Decl., Ex. A at ¶ 4. Ecology and WEC contend that, because Millennium's 401 Certification request was not SEPA exempt, Ecology rightfully employed its SEPA substantive authority to deny 401 Certification for the Project. Finally, Ecology asserts that Millennium's reliance on *Clallam County Citizens* is misplaced as the court's reasoning in that case was unique and did not establish any binding precedent on this issue.

The Board concludes that Millennium's request for a 401 Certification is not categorically exempt from SEPA. The categorical exemption for Section 401 water quality

certifications does not apply to Millennium's 401 Certification request as it is undisputedly a segment of a proposal that includes "[a] series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not[.]" WAC 197-11-305(1)(b)(i); *Foster v. King County*, 83 Wn. App. 339, 348, 921 P.2d 552 (1996) (SEPA "categorical exemptions do not apply to actions that are a mixture of exempt and non-exempt activities").

This conclusion is consistent with Ecology's longstanding interpretation of its SEPA regulations. *See* Randall Decl., Ex. A at ¶ 4 (if project requires at least one SEPA non-exempt permit, Ecology requires compliance with SEPA for 401 certification). Ecology's interpretation of its own regulation is entitled to great weight, unless such interpretation conflicts with the statute's plain language. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004). The Board concludes that Ecology's interpretation does not conflict with RCW 43.21C.110, which specifically directs Ecology to develop a rule addressing those instances when an otherwise categorically exempt action would be subject to SEPA.

The Board disagrees with Millennium's assertion that *Clallam County Citizens* supports its position that WAC 197-11-305(1)(b)(i) does not apply. It is unclear precisely what proposal, if any, the Court of Appeals considered in its analysis when it summarily concluded that WAC 197-11-305(1)(b)(i) did not apply because the underlying action was categorically exempt from SEPA. *Id.* at 222. As a result, the decision in *Clallam County Citizens* lacks necessary clarity on the status of a SEPA categorical exemption in the context of a larger proposal. The Board does

not consider *Clallam County Citizens* to be helpful to its resolution of the categorical exemption issue raised in this case.

3. CWA Section 401 does not preclude use of substantive SEPA

Millennium asserts that the plain language of CWA Section 401(a)(1), 33 U.S.C. § 1341(a)(1), precludes Ecology's use of substantive SEPA authority when reviewing a request for a Section 401 water quality certification. According to Millennium, under Section 401(a)(1) Ecology can only consider whether a discharge meets the applicable provisions of the CWA set forth in that section, all of which relate to water quality. 33 U.S.C. § 1341(a)(1) (citing sections 1311, 1312, 1313, 1316, and 1317). In support of this assertion, Millennium relies on *Arnold Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986), where the Oregon court reversed the state's finding of non-compliance with land use regulations as the basis for denying a Section 401 water quality certification.

Millennium further asserts that Section 401(a) preempts Ecology's use of SEPA substantive authority to deny the 401 Certification. Millennium states that its use of the word "preempt" is intended to mean "to prevent from happening or taking place" and it is arguing that Ecology's denial was *ultra vires*, not that there is field or conflict preemption. Millennium Reply at 8. Millennium contends that Ecology acts under federal law when deciding whether to issue a Section 401 water quality certification and the agency "cannot use state law authority to expand the scope of federal certification requirements under 33 U.S.C. § 1341(a)." Millennium Mot. for S.J. at 13 (emphasis omitted). Millennium asserts that, by using substantive SEPA authority, Ecology is improperly attempting to graft an additional criterion into Section

401(a)(1). Millennium argues that the 401 Certification denial must be set aside as Ecology did not limit its denial to water quality effects of the discharge under the CWA sections identified in Section 401(a)(1).

Rejecting Millennium's reading of Section 401, Ecology argues that the text of the statute does not prescribe what the agency may consider when denying a Section 401 water quality certification. Ecology and WEC note that SEPA is supplementary to all other authorizations and assert that, in order for it not to apply to Section 401, it must be preempted. Millennium did not engage in a preemption analysis, choosing instead to simply cite the text of Section 401. Ecology and WEC contend that the CWA does not preempt SEPA and Ecology can use substantive SEPA to deny Millennium's 401 Certification request even if the Project meets all of the standards in Section 401.

Ecology and WEC assert that Millennium's reliance on *Arnold* is misplaced as Oregon does not have a statutory equivalent to SEPA. Ecology contends that, contrary to Millennium's assertion, the state Supreme Court's citation of *Arnold* in *Dep't of Ecology v. PUD No. 1 of Jefferson Cy.*, 121 Wn.2d 179, 849 P.2d 646 (1993) lends no support to its argument that Section 401 "supersedes" state law. Rather, the state Supreme Court cited *Arnold* only for the proposition that Section 401(d) provides a state with broad authority to condition a project. Ecology and WEC further contend that *Arnold* and other out-of-state cases cited by Millennium are inapplicable as they dealt with hydroelectric projects subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) and governed by the Federal Power Act. Unlike the CWA, the Federal Power Act preempts state and local law. According to Ecology and WEC,

absent preemption of SEPA by the CWA, Ecology was not precluded from using its SEPA substantive authority in denying Millennium's 401 Certification request.

The Board concludes that the text of CWA Section 401 does not preclude Ecology's use of substantive SEPA authority when acting on a Section 401 water quality certification request. As detailed above, SEPA's policies and goals are supplementary to "existing authorizations of all branches of government." RCW 43.21C.060. SEPA serves as an "overlay" on existing authority, making formerly ministerial decisions discretionary. *Polygon*, 90 Wn.2d at 65. A decision maker can use SEPA substantive authority to deny a permit even if it meets all of the requirements for approval under permit criteria. *Polygon*, 90 Wn.2d at 63-65; *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986). Pursuant to RCW 43.21C.060, "[a]ny governmental action may be conditioned or denied" under SEPA. *See* WAC 197-11-660; *Polygon*, 90 Wn.2d at 64. There is no dispute that the granting or denial of a Section 401 water quality certification constitutes a governmental action within the meaning of RCW 43.21C.060. *See* WAC 197-11-704(2). The Board concludes that Ecology lawfully employed its SEPA substantive authority to deny Millennium's 401 Certification request based on the significant adverse environmental impacts identified in the FEIS.

The Board further concludes that court's reasoning in *Arnold* does not apply to this case. Unlike Washington, Oregon does not have a statute comparable to SEPA. In addition, *Arnold* involved a FERC permit governed by the Federal Power Act, which preempts state and local laws. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181-82 (1946) (Federal Power Act establishes comprehensive federal scheme for regulating hydroelectric power projects on

navigable waters and thus preempts state law by occupying the field). Contrary to Millennium's claim, the text of Section 401 does not support the conclusion that Ecology is precluded from employing SEPA in the review of a Section 401 water quality certification request.

4. Ecology's denial of 401 Certification not clearly erroneous

Unless otherwise required by law, the Board's scope and standard of review shall be de novo. WAC 371-08-485(1). SEPA does not prescribe the scope or standard of review on appeal. Deferring to case law, the Board reviews the exercise of SEPA substantive authority to condition or deny a proposal under the "clearly erroneous" standard of review. *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *see also McQuarrie v. Seattle*, SHB No. 08-033 (Findings of Fact, Conclusions of Law, and Order, Aug. 5, 2009) ("review of an agency's exercise of substantive SEPA authority (i.e. the content of agency action, such as mitigation or conditions) is also under the clearly erroneous standard"). Under this standard, the Board "does not substitute its judgment for that of the administrative body and may find the decision clearly erroneous only when it is left with the definite and firm conviction that a mistake has been committed." *Polygon*, 90 Wn.2d at 69 (*quoting Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969)) (internal quotations omitted).

There are no material issues of fact in dispute that preclude the granting of summary judgment. In this case, Ecology relied on the unchallenged FEIS in exercising its SEPA substantive authority to deny the 401 Certification. Millennium does not dispute the factual findings in the FEIS. The Board will not substitute its judgment for that of Ecology when reviewing under a clearly erroneous standard of review. Based on the Board's review of the

FEIS, and the FEIS's conclusion that the Project will have unavoidable and significant adverse impacts, the Board is not left with the definite and firm conviction that Ecology made a mistake when it denied Millennium's request for a 401 Certification under the agency's substantive SEPA authority. The Board grants summary judgment to Ecology and WEC on Issues 3, 4, 5, 6, 7, 9 and 10 and dismisses Millennium's appeal.

C. Remaining Issues (Issues 2, 8, 11, and 12)

The remaining issues ask whether there was reasonable assurance that the Project would meet water quality standards, whether Ecology waived its certification rights under Section 401,[4] whether Ecology had authority to deny the 401 Certification with prejudice, and whether Millennium was barred from challenging the FEIS. Because the Board concludes that the 401 Certification is not exempt from SEPA and Section 401 of the CWA does not preclude Ecology's use of substantive SEPA to deny a certification request, it need not reach Issues 2, 8, 11, and 12.

[4] Section 401(a)(1) of the CWA provides that if a state certifying agency "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," the state agency waives its right to issue a certification. 33 U.S.C. § 1341(a)(1). Millennium asserted that, although Ecology acted on the certification request within the one year time period, Ecology's actions in denying certification were "tantamount to a refusal or failure to act in the manner contemplated by section 401, and the Board should declare and adjudge that Ecology has waived its opportunity to certify the project." Millennium Mot. for S.J. at 22. While the Board need not reach the issue, it does note that Section 401 by its unambiguous terms limits the finding of waiver to a determination of whether the certifying agency acted within the prescribed time period. There is no dispute that Ecology acted within one year of receiving Millennium's 401 Certification request. No legal basis exists for the Board to take the action advanced by Millennium.

ORDER

The Board GRANTS summary judgment to Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra Club and Columbia Riverkeeper, and the State of Washington, Department of Ecology on Issues 3, 4, 5, 6, 7, 9 and 10 and AFFIRMS the Department of Ecology's denial of the Clean Water Act Section 401 Certification requested by Millennium Bulk Terminals-Longview, LLC.

SO ORDERED this 15th day of August, 2018.

POLLUTION CONTROL HEARINGS BOARD

JOAN M. MARCHIORO, Presiding

KAY M. BROWN, Member

NEIL L. WISE, Member