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**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

ARMY CORPS OF ENGINEERS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

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

Intervenor-Respondents.

PCHB No. 20-043c

(Consolidated with
PCHB Nos. 20-044, -045,
-046, -047, -048, -049, and -050)

INTERVENOR-RESPONDENTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON ISSUES 1 AND 2

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1 INTRODUCTION AND MOTION

2 Intervenor-respondents, Columbia Riverkeeper (Riverkeeper), Northwest Sportfishing
3 Industry Association (NSIA), and Natural Resources Defense Council (NRDC) (collectively
4 Riverkeeper), respectfully ask the Pollution Control Hearings Board (PBHC or Board) to grant
5 their Motion for Partial Summary Judgment on Issues 1 and 2 in these consolidated appeals by
6 the U.S. Army Corps of Engineers (Corps).

7 STATEMENT OF ISSUES

8 Riverkeeper moves the Board for summary judgment on Issues 1 and 2 as set forth in the
9 Pre-Hearing Order (July 1, 2020):

- 10 1. Whether the scope of the Clean Water Act (CWA) Section 401 Certifications
11 issued by Respondent, which attempt to impose conditions on the eight (8) federal
12 lower Snake River and lower Columbia River dams as a whole (e.g., flow, spill,
13 forebay, and reservoir conditions), and not just the point source discharges
14 (outfalls) addressed in the associated CWA Section 402 National Pollution
15 Discharge Elimination System (NPDES) permits, exceed Respondent's authority
16 under Section 401, or may interfere with Appellant's ability to operate and
17 maintain the federal dams for the multiple congressionally authorized project
18 purposes or comply with other applicable law, and thus is impermissibly broad,
19 unjust and/or unlawful?
- 20 2. Whether Water Quality Standards Attainment Conditions 8.2.a, 8.2.c, and B.2.d in
21 the 401 Certifications issued by Respondent, which require (respectively)
22 temperature control strategies to meet temperature Total Maximum Daily Load
(TMDL) allocations, development of a water quality attainment plan (WQAP),
and progress/summary reports, are intended to address water quality concerns
related to the existence of the federal dams (not the operation of those dams or
permitted point sources discharges) and, therefore, exceed Respondent's authority
under Section 401 of the CWA, or may interfere with Appellant's ability to
operate and maintain the federal dams for the multiple congressionally authorized
purposes or comply with other applicable law, and thus are impermissibly broad,
unjust and/or unlawful?

23 BACKGROUND

24 Development of the Columbia River and Snake River dams transformed a free-flowing
25 river system into a series of warm, slack-water reservoirs that bear little resemblance to a natural
26

1 river. Today, salmon and steelhead migrating down and up the Columbia and Snake rivers face
2 numerous obstacles because of the dams—including lethally hot water and oil spills—and
3 several populations are near extinction.

4 The eight federal dams have illegally discharged hot water, oil, and other pollutants into
5 the Columbia and Snake rivers for decades in violation of state water quality standards and
6 without a National Pollutant Discharge Elimination System (NPDES) permit. *See* 33 U.S.C. §
7 1311(a) (the discharge of any pollutant is unlawful unless authorized by an NPDES permit). In
8 2020, the U.S. Environmental Protection Agency (EPA) finally released draft NPDES permits
9 for these eight dams and requested CWA Section 401 certifications from the Washington State
10 Department of Ecology (Ecology). Declaration of Marisa Ordonia in Support of Intervenor-
11 Respondent’s Motion for Partial Summary Judgment on Issues 1 and 2 (Ordonia Decl.), Ex. 1.
12 Ecology’s Section 401 certifications for the Columbia and Snake river dams reasonably require,
13 among other things, the Corps to meet EPA’s own Total Maximum Daily Load (TMDL)
14 allocations for water temperature and develop temperature control strategies to meet state water
15 quality standards for salmon and steelhead.

16 I. OVERVIEW OF THE EFFECTS OF THE DAMS ON WATER QUALITY

17 The Columbia and Snake rivers are severely degraded by hot water and other pollutants
18 discharged by the rivers’ hydroelectric dams. Elevated water temperatures kill thousands of fish
19 annually and threaten the future of salmon and steelhead that rely on cool water for survival.
20 Toxic pollution in the region’s two largest rivers threatens the health of people who eat local fish
21 and jeopardizes an economy and cultures that are deeply rooted in fishing.

22 A. Temperature

23 Columbia and Snake river dams routinely and significantly impair the upstream
24 migration of adult salmon and steelhead, in large part due to the dams’ impacts on water
25 temperatures in fishways and reservoirs. The dams impound water that increases the impact of
26

1 solar radiation and ambient air temperature. The dams also discharge warm water that has been
2 used to cool a variety of dam components and materials, including cooling structures, turbines,
3 generators, transformers, sump pumps, and lubricating oils. EPA’s recent temperature TMDL
4 estimated the temperature impacts of dams and concluded that the dams are the primary
5 contributor to hot summer river temperatures, which regularly exceed state water quality
6 standards for salmon and steelhead—in some cases, for weeks at a time.¹

7 High summer and fall water temperatures in the Columbia and Snake rivers reduce the
8 survival of many salmon runs and threaten the future of these populations. In 2015, an estimated
9 96 percent of the endangered Snake River sockeye salmon run died before they passed Lower
10 Granite Dam (the furthest upstream of the eight Columbia and Snake River dams), and EPA
11 admitted that the death of these fish was “attributable primarily to warm water.” *See* Ordonia
12 Decl., Ex 2 at ¶ 3.² In 2017, NMFS estimated that passage through the hydrosystem killed 43
13 percent of returning adult endangered Snake River sockeye. *Id.*, Ex. 3. In 2018, NMFS
14 estimated that 15 percent of adult Snake River sockeye died between the Bonneville and McNary
15 dams on the lower Columbia; and ladder counts suggested that 28 percent of the remaining fish
16 died in the lower Snake River.³ In 2019, ladder counts suggested 75 percent mortality for
17 sockeye in the lower Snake River: 320 sockeye were observed at Ice Harbor Dam ladder (the
18 furthest downstream dam on the lower Snake River), but only 81 were observed in the ladder at
19

20 ¹ *See* EPA, *Columbia and Lower Snake Rivers Temperature Total Maximum Daily Load* (May
21 18, 2020), [https://www.epa.gov/columbiariver/tmdl-temperature-columbia-and-lower-snake-](https://www.epa.gov/columbiariver/tmdl-temperature-columbia-and-lower-snake-rivers)
22 [rivers](https://www.epa.gov/columbiariver/tmdl-temperature-columbia-and-lower-snake-rivers) (last visited Apr. 29, 2021).

23 ² *See also* John Harrison, *Warm Water Blamed for Huge Columbia River Sockeye Die-off*,
24 Northwest Power and Conservation Council (July 31, 2015),
<https://www.nwcouncil.org/news/warm-water-blamed-huge-columbia-river-sockeye-die>.

25 ³ Fish Passage Center, *Adult Returns for Columbia & Snake River Dams* Webpage,
https://www.fpc.org/webapps/adultsalmon/Q_adultcounts_dataquery.php (queried April 5,
26 2020).

1 Lower Granite Dam (the furthest upstream dam).⁴ These deaths too were most likely caused by
2 warm water that prevented the fish from successfully migrating upstream, trapping them in lethal
3 conditions.

4 In response to temperature-driven mass mortality events, EPA noted that “[t]he need to
5 lower water temperatures becomes more critical as the Pacific Northwest Region continues to
6 address and mitigate climate change.” Ordonia Decl., Ex. 4. The Fish Passage Center, which
7 provides technical assistance and information to fish and wildlife agencies, similarly concluded
8 that “under a climate change scenario, the long-recognized and largely unaddressed problem of
9 high water temperatures in the [Columbia and Snake rivers] becomes an ever-increasing threat to
10 the survival of salmon . . .” Ordonia Decl., Ex. 5. Snake River sockeye and steelhead are
11 perilously close to extinction now, and NMFS’s most recent science confirms that Snake River
12 spring Chinook salmon are very likely to become extinct by 2060 without major changes to
13 status quo river operations.⁵

14 The extended exposure of salmon and steelhead to elevated temperatures can
15 compromise their ability to reproduce successfully for a wide variety of reasons, from pre-
16 spawning mortality to poor fry condition in the next generation. Ordonia Decl., Ex. 4. Hatchery
17 observations of salmon have shown a variety of negative impacts on reproductive success (e.g.
18 increased pre-spawn mortality; decreased sperm volume and viability; decreased egg size,
19 fertility, and survival; and decreased embryo and juvenile survival) that generally intensify as
20 pre-spawning water temperatures increased from 50 to 68 degrees F. *See generally*, Ordonia
21 Decl., Ex. 6 at 76-77.

22
23
24 ⁴ *Id.*

25 ⁵ Lisa Crozier, et al., *Climate change threatens Chinook salmon throughout their life cycle*,
26 *Comm’n Biology* 4, 222 (2021), <https://www.nature.com/articles/s42003-021-01734-w#citeas>.

1 Moreover, migrating adult salmon and steelhead experience thermal stress cumulatively.
2 Ordonia Decl., Ex. 7 at 18 (explaining that cumulative thermal stress is “the primary predictor of
3 migration survival in endangered Snake River sockeye adults”). The Corps’ multiple dams,
4 fishways, and reservoirs on the lower Columbia and Snake Rivers create migration blockages
5 that likely cause adult fish to spend more days lingering in warm water. Ordonia Decl., Ex. 6 at
6 78 (explaining that “[f]orced delays in spawning, such as are frequently caused by difficulties in
7 passing dams, can cause decreases in reproductive success.”).⁶ Fish forced to hold in warm
8 water expend significantly more metabolic energy just to survive, and, because migrating adult
9 salmon do not feed and have a finite amount of “stored body energy,” Ordonia Decl., Ex. 6 at 75,
10 increasing the duration of exposure to warm water can drain energy stores and lead to negative
11 outcomes for survival and reproduction.⁷

12 B. Oil Spills and Other Pollutants

13 In addition to the dams’ effects on temperature in the rivers, the Corps’ eight
14 hydroelectric dams that are the subject of these appeals have a history of both acute spills and
15 chronic leaks of pollutants into the Columbia River and Snake River. Examples of acute oil spill
16 events include, but are not limited to:

17 ⁶ See also NMFS, 2019 Columbia River System Biological Opinion at 601 (noting high rates of
18 sockeye fall back and consequent migration delays at Lower Granite, The Dalles, and Bonneville
19 dams), https://media.fisheries.noaa.gov/dam-migration/final_crs_biop_3-29-19.pdf; see also
20 Ordonia Decl., Ex. 8, David Cannamela et al., *Letter to Northwest Policymakers re: Science-
based solutions are needed to address increasingly lethal water temperatures in the lower Snake
River* (October 22, 2019).

21 ⁷ Matthew L. Keefer, et al., *Thermal exposure of adult Chinook salmon and steelhead: Diverse
22 behavioral strategies in a large and warming river system*, PLoS ONE 13(9), pp. 16–17 (2018)
23 (“Warm conditions more rapidly exhaust finite energetic reserves, which salmon and steelhead
24 are simultaneously re-allocating to sexual maturation and depleting during migration, holding,
25 and spawning. At the same time, stress hormone production surges, organs atrophy, and immune
26 function is substantially reduced. These co-occurring processes allow the proliferation of
parasites and pathogens, many of which become more virulent as temperatures rise, significantly
increasing the likelihood of premature mortality.”),
<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0204274>.

- 1 • On March 15, 2020, the Corps reported that approximately 500 gallons of
2 hydraulic oil was discharged to the Fish Unit 2 gate slot from the hydraulic gate
3 system. The unit was shut down and isolated. Ordonia Decl., Ex. 9.
- 4 • In 2018, the Corps could not account for approximately 192 gallons of turbine oil
5 at The Dalles Dam and presumed that the oil discharged into the Columbia from
6 November 29 to December 18, 2018. Earlier that year, the Corps reported that
7 approximately 474 gallons of turbine oil was unaccounted for at The Dalles Dam
8 and discharged into the river for forty-five days from February 7 to March 22,
9 2018. *Id.*
- 10 • In 2017, a series of oil spills at Lower Monumental Dam resulted in the discharge
11 of over 1,600 gallons of oil into the Snake River.⁸
- 12 • In 2012 the Army Corps reported discharging over 1,500 gallons of PCB-laden
13 transformer oil at the Ice Harbor Dam on the Snake River.⁹

14 The oil from the Ice Harbor spill contained PCBs—a toxin that causes cancer and adverse health
15 effects on the immune, reproductive, nervous, and endocrine systems—at levels 14,000,000
16 percent greater than state and federal chronic water quality standards.

17 In addition to larger oil spills, the dams are constantly discharging pollutants through
18 their routine operation and maintenance. The dams utilize Kaplan turbines, which have variable
19 pitch blades that can be adjusted to increase the efficiency of power generation. The shaft and

21 ⁸ See Wendy Culverwell, “Up to 300 gallons of oil may have spilled into the Snake River from a
22 leaking dam turbine,” Tri-City Herald (Aug. 8, 2019, 5:54 PM, updated at 6:01 PM), Annette
23 Cary, “742 gallons of oil dripped into Snake River near Kahlotus,” Tri-City Herald (Aug. 8,
24 2017, 6:01 PM, updated 7:06 PM), [https://www.tri-
cityherald.com/news/local/article233682467.html](https://www.tri-cityherald.com/news/local/article233682467.html); [https://www.tri-
cityherald.com/news/local/article166171972.html](https://www.tri-cityherald.com/news/local/article166171972.html)

25 ⁹ Scott Learn, “Slow leaks at Ice Harbor dam spill 1,500 gallons of transformer oil into Snake
26 River,” The Oregonian (Jan. 27, 2012, updated Jan. 10, 2019),
https://www.oregonlive.com/environment/2012/01/slow_transformer_leaks_at_ice.html.

1 hubs of these turbines are filled with oil or another lubricant. This oil or lubricant leaks to surface
2 waters from certain locations, including the turbine blade packing/seals, especially when the
3 turbines are not properly maintained and/or operationally controlled. The dams also discharge
4 oils, greases, lubricants, and other pollutants collected from various sources through sumps,
5 including powerhouse drainage sumps, un-watering sumps, spillway sumps, navigation lock
6 sumps, and other systems. Wicket gates control the amount of water flowing through the
7 turbines at the dam and the wicket gate bearings are lubricated with grease or another lubricant.
8 This grease or lubricant is continuously fed into the bearings and discharged directly into surface
9 waters. These pollutants, in addition to oil spills and hot water, degrade water quality in the
10 rivers and harm salmon.

11 II. PROCEEDINGS LEADING TO THE SECTION 401 WATER QUALITY
12 CERTIFICATIONS AT ISSUE IN THESE APPEALS

13 These appeals are part of a longstanding controversy over the effects of federal
14 hydroelectric dams on the lower Snake and lower Columbia rivers on water quality and salmon.
15 While much of this controversy has played out in federal court under the requirements of the
16 Endangered Species Act (ESA), which protects many species of Columbia and Snake River
17 salmon and steelhead, a major aspect of the controversy has also involved the requirements of
18 the Clean Water Act. *See, e.g., Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204 (9th Cir. 2019)
19 (holding that EPA violated the CWA by failing to issue temperature TMDLs for Columbia and
20 Snake rivers); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861,
21 869-872 (D. Or. 2016) (summarizing history of ESA litigation).

22 In 2013, Riverkeeper sued the Corps for discharging oil and other pollutants from the
23 Columbia and Snake river dams without a NPDES permit in violation of the Clean Water Act.
24 The lawsuit addressed pollution at the following dams: Bonneville, The Dalles, John Day,
25 McNary, Ice Harbor, Lower Monumental, Little Goose, and Lower Granite. In 2014,
26

1 Riverkeeper and the Corps reached a settlement whereby the Corps agreed to apply to EPA for
2 NPDES permits. Ordonia Decl., Ex. 10. The Corps also agreed to account for and reduce oil
3 pollution from the dams while state and federal agencies developed pollution permits.

4 In 2018, EPA developed draft NPDES permits for the Columbia and Snake rivers' federal
5 dams.¹⁰ On December 19, 2018, EPA requested CWA Section 401 certification for the federal
6 dams from the Washington Department of Ecology. The draft NPDES permits would authorize
7 discharges from the dams' cooling water, equipment, floor drains, sumps, facility maintenance
8 water, and other miscellaneous discharges.¹¹

9 On February 1, 2019, EPA abruptly withdrew its request for 401 certifications,
10 ECY00005945,¹² later stating that the permits needed "additional internal review," *see*
11 ECY00003123. EPA delayed issuance of the draft permits for over a year without disclosing to
12 the states, tribal nations, or the public any further rationale for delaying permit issuance. Finally,
13 in March 2020, EPA issued draft NPDES permits for the eight federal dams and requested 401
14 certifications from the Washington State Department of Ecology (Ecology). Ordonia Decl., Ex.
15 1. Ecology subsequently issued 401 certifications for each of the dams which are the subject of
16 this appeal. *See, e.g.*, Notice of Appeal, PCHB No. 20-049, Attachment 1 (Bonneville Project
17 401 Certification). The 401 certifications contain conditions that require the Corps to, among
18

19 ¹⁰ EPA initially requested preliminary certifications for federal dams in letters to Ecology dated
20 September 19 and 20, 2018, and October 4, 2018.

21 ¹¹ The Corps applied for NPDES permits for eight dams (the four lower Columbia and four lower
22 Snake) in 2015, and the U.S. Bureau of Reclamation applied for a NPDES permit for Grand
23 Coulee Dam in 2017.

24 ¹² In discovery, the Corps requested and Ecology provided "all documents used to support the
25 Department of Ecology's (Ecology) final decisions dated May 7, 2020 for Section 401 Water
26 Quality Certification of" the eight dams at issue in this case. Citations to that record are denoted
here by the Bates stamp used by Ecology. Riverkeeper has not provided copies of these
documents with this motion in an effort to avoid duplication but to the extent no other party
submits the documents that Riverkeeper cites, Riverkeeper can provide such copies.

1 other things, implement temperature control strategies to meet the load allocations in EPA’s
2 temperature TMDL, develop a water quality attainment plan, and submit progress and summary
3 reports. *Id.* To date, EPA has not issued the final NPDES permits for the dams.

4 III. STATE AUTHORITY UNDER THE CLEAN WATER ACT

5 If a federal project will involve a discharge into navigable waters, the Clean Water Act
6 requires it to have a federal NPDES permit that incorporates the requirements of a Section 401
7 water quality certification from the state where the discharge originates or will originate. 33
8 U.S.C. § 1341(a)(1). The Clean Water Act is clear that “[i]t is the policy of the Congress to
9 recognize, preserve, and protect the primary responsibilities and rights of States to prevent,
10 reduce, and eliminate pollution,” as well as “to plan the development and use (including
11 restoration, preservation, and enhancement) of land and water resources....” 33 U.S.C. §
12 1251(b); *see also* 33 U.S.C. § 1370 (“Except as expressly provided in this chapter, nothing in this
13 chapter shall [] preclude or deny the right of any State...to adopt or enforce...any requirement
14 respecting control or abatement of pollution...or [] be construed as impairing or in any manner
15 affecting any right or jurisdiction of the States with respect to the waters...of such States.”).
16 Ecology is the state agency charged with ensuring that Washington realizes the benefits of the
17 Clean Water Act and, as such, has authority to “take all action necessary” to meet the
18 requirements of the Act. RCW 90.48.260. Based on this authority, Ecology is responsible for
19 granting—with or without conditions—or denying Clean Water Act Section 401 certification for
20 federal projects or any federally-licensed activity. *See id.*; WAC 173-225-010.

21 A Section 401 certification is a statement by a state that the project proponent has
22 provided “reasonable assurance that the activity will be conducted in a manner which will not
23 violate applicable water quality standards.” 40 C.F.R. § 121.2(a)(3).¹³ In determining whether

24 ¹³ EPA issued new Section 401 regulations that eliminated this requirement. *See* 85 Fed. Reg.
25 42,210 (July 13, 2020). The new regulations do not apply to the certifications at issue here
26 because the certifications were issued prior to the regulations’ September 11, 2020 effective date.

1 reasonable assurance has been demonstrated, states must consider all aspects of state water
2 quality standards, including narrative and numeric water quality criteria and beneficial uses. *See*,
3 *e.g.*, *PUD No. 1 of Jefferson Cty. v. Dep't of Ecology*, 511 U.S. 700, 714-15, 114 S. Ct. 1900,
4 128 L. Ed. 2d 716 (1994) (*Elkhorn II*). States can deny or condition 401 certification because
5 “the construction and operation of the project as planned would be inconsistent with one of the
6 designated uses ... namely, salmonid and other fish migration, rearing, spawning, and
7 harvesting.” *Id.* Washington has broad authority to impose conditions on any grant of a Section
8 401 certification to ensure that the project or activity will comply with state water quality
9 standards. *See* 33 U.S.C. § 1341(d); 40 C.F.R. § 121.7(d).

10 The Congressional Record for Section 401 explains that state certifications were meant to
11 address the broad range of pollution:

12 No polluter will be able to hide behind a Federal license or permit as an excuse
13 for a violation of water quality standard[s]. No polluter will be able to make major
14 investments in facilities under a Federal license or permit without providing
15 assurance that the facility will comply with water quality standards. No State
water pollution control agency will be confronted with a fait accompli by an
industry that has built a plant without consideration of water quality requirements.

16 116 Cong. Rec. 8984 (1970); *see also S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S.
17 370, 380, 126 S. Ct. 1843, 164 L. Ed. 2d 625 (2006) (Section 401’s “terms have a broad reach,
18 requiring state approval any time a federally licensed activity ‘may’ result in a discharge, and its
19 object comprehends maintaining state water quality standards”) (internal citations omitted); *see*
20 *also Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963, 971 (D.C. Cir. 2011) (recognizing
21 that “the Supreme Court construed States’ § 401 certification authority broadly to admit few
22 restrictions on a State’s authority to reject or condition certification”) (*citing S.D. Warren Co.*,
23 547 U.S. at 386).

24 Importantly, because the requirements of a Section 401 certification are issued pursuant
25 to the requirements of the CWA and must be incorporated into an NPDES permit for the federal
26

1 facility, the terms and conditions of the certification become requirements of federal law, co-
2 equal with any other requirement of federal law. *See* 33 U.S.C. § 1341(d); *see also Dep't of*
3 *Ecology v. PUD No. 1 of Jefferson Cty.*, 121 Wn.2d 179, 193-94, 849 P.2d 646 (1993) (*Elkhorn*
4 *I*), *aff'd sub nom. Elkhorn II*, 511 U.S. 700 (1994) (Section 401 conditions become part of a
5 federal license; as such, 401 conditions are “a part of federal law”). Indeed, the U.S. Supreme
6 Court has “declared that state water quality standards ‘are part of the federal law of water
7 pollution control’ at least insofar as they affect issuance of permits in other states.” *Elkhorn I*,
8 121 Wn.2d at 194 (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 110, 112 S. Ct. 1046, 117 L. Ed.
9 2d 239 (1992)).

10 STANDARD OF REVIEW

11 Courts grant summary judgment when the issue requiring resolution is a question of law,
12 or when there is no genuine issue of material fact. *Magula v. Benton Franklin Title Co., Inc.*,
13 131 Wn.2d 171, 182, 930 P.2d 307 (1997); *see also The Log Foundation v. City of Seattle Dep't*
14 *of Planning and Dev.*, SHB No. 15-003c (Order on Motions for Partial Summary Judgment,
15 Aug. 17, 2015) (*citing Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977)). A material
16 fact is one affecting the outcome under the governing law. *Id.* (*citing Eriks v. Denver*, 118
17 Wn.2d 451, 456, 824 P.2d 1207 (1992)). Summary judgment is appropriate here as this motion
18 raises purely legal issues.

19 ARGUMENT

20 I. ECOLOGY ACTED WITHIN THE SCOPE OF ITS SECTION 401 AUTHORITY
21 WHEN IT IMPOSED CONDITIONS TO ADDRESS ALL OF THE EFFECTS OF THE
22 DAMS ON WATER QUALITY.

23 The state’s broad authority under CWA Section 401 allows Ecology to impose conditions
24 on any aspect of the federal hydroelectric facilities at issue in these consolidated appeals—not
25 just on specific outfalls—to ensure compliance with Washington’s water quality standards.
26 *Elkhorn II*, 511 U.S. at 711-12; *see also id.* at 714 (“pursuant to § 401, States may condition

1 certification upon any limitations necessary to ensure compliance with state water quality
2 standards.”). The U.S. Supreme Court squarely addressed this question in *Elkhorn II* and held
3 that “§ 401(d) is most reasonably read as authorizing additional conditions and limitations on the
4 activity as a whole once the threshold condition, the existence of a discharge, is satisfied.” *Id.* at
5 712; *see also PUD. No. 1 of Pend Oreille Cty. v. Dep’t of Ecology*, 146 Wn.2d 778, 809-10, 51
6 P.3d 744 (2002) (“once the threshold condition of existence of a discharge exists, then § 401(d)
7 authorizes additional conditions and limitations on the applicant's activities as a whole.”) (citing
8 *Elkhorn II*, 511 U.S. at 711-12). The *Elkhorn II* Court noted that while Section 401(a) “refers to
9 a state certification that a ‘discharge’ will comply with certain provisions of the Act,” Section
10 401(d) “refers to the compliance of the applicant, not the discharge.” *Id.* at 711 (emphasis
11 added). The threshold condition of a discharge is met in this case, so Section 401(d) “allows the
12 State to impose ‘other limitations’ on the project in general to assure compliance with various
13 provisions of the Clean Water Act and with ‘any other appropriate requirement of State law.’”
14 *Id.*

15 While the U.S. Supreme Court relied on a plain reading of the Clean Water Act in
16 determining the scope of Ecology’s authority under Section 401(d), the Court also noted that
17 EPA’s regulations support the Court’s reading. *Id.* at 712 (citing 40 C.F.R. § 121.2(a)(3)
18 (1993)). The Court held that “EPA's conclusion that *activities*—not merely discharges—must
19 comply with state water quality standards is a reasonable interpretation of § 401, and is entitled
20 to deference.” *Id.* (emphasis in original). Moreover, the Court found that “ensuring compliance
21 with § 303 [of the CWA] is a proper function of the § 401 certification.” *Id.*

22 Under the Clean Water Act, Ecology can only grant a 401 certification if it has
23 reasonable assurance that the project will not violate state water quality standards. *Elkhorn I*,
24 121 Wn.2d at 187 (“[S]ection 401 requires states to certify compliance with state water quality
25 standards.”); 33 U.S.C. § 1341; 40 C.F.R. § 121.2(a)(3). Where, as here, Ecology has
26

1 determined that certain conditions are required to provide such reasonable assurance, the Clean
2 Water Act requires Ecology to impose those conditions in the 401 certifications. *Id.*; *see also*
3 *Elkhorn II*, 511 U.S. at 713-14.

4 A. Sovereign Immunity Does Not Bar Ecology From Imposing 401 Conditions on
5 the Federal Dams.

6 Federal facilities must comply with any applicable Clean Water Act requirements that
7 might exist “to the same extent as any nongovernmental entity.” 33 U.S.C. § 1323(a). This
8 includes Section 401 conditions that “shall become a condition” of the dams’ federal NPDES
9 permits. 33 U.S.C. § 1341(d); *see also Nat’l Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 132
10 F. Supp. 2d 876, 889 (D. Or. 2001) (noting that “the Ninth Circuit has repeatedly concluded that
11 the Clean Water Act requires federal facilities and federal activities to comply with state water
12 quality standards.”).

13 Despite clear language in the Clean Water Act, the Corps’ notices of appeal suggest that
14 sovereign immunity somehow relieves it from having to comply with the 401 conditions. *See*
15 Notice of Appeal, PCHB No. 20-049, at 7 (Bonneville Project) (citing *In re Operation of*
16 *Missouri River Sys. Litig.*, 418 F.3d 915, 917 (8th Cir. 2005). The case the Corps cites does not
17 discuss the role or nature of a Section 401 certification and is inapposite. Instead, it holds that
18 states cannot directly enforce their water quality standards against the federal government. *In re*
19 *Missouri River*, 418 F.3d at 917. Here, the state is not pursuing its own direct enforcement
20 action against the Corps. Rather, Ecology has acted under its congressionally granted authority
21 by conditioning the state 401 certifications, as it must, to ensure compliance with state water
22 quality standards. *See Elkhorn I*, 121 Wn.2d at 194-95 (Ecology fulfills its obligation under
23 federal law when conditioning 401 certification to ensure compliance with “state laws integrated
24 into the Clean Water Act”); *see also Keating v. F.E.R.C.*, 927 F.2d 616, 622 (D.C. Cir. 1991)
25 (“One of the primary mechanisms through which the states may assert the broad authority
26 reserved to them is the certification requirement set out in § 401 of the [Clean Water Act].”). To

1 the extent, if any, that the state may be prohibited from bringing a later direct enforcement
2 action, it is that much more important that the state be able to address compliance with its water
3 quality standards through the Section 401 process.

4 B. Section 402 of the Clean Water Act Does Not Limit the Scope of Section 401.

5 The U.S. Supreme Court is clear that Ecology can impose conditions on the project “as a
6 whole once the threshold condition, the existence of a discharge, is satisfied,” *Elkhorn II* at 712,
7 and the Corps’ suggestion that Ecology’s Section 401 certification authority is circumscribed in
8 the Section 402 NPDES context is erroneous. *See* Notice of Appeal, PCHB No. 20-049, at 5-6
9 (Bonneville Project) (citing *Port of Seattle*, 151 Wn.2d 568, 612, 90 P.3d 659 (2004)). First,
10 there is no textual support for this notion in either Section 401 or Section 402 Clean Water Act.
11 *See* 33 U.S.C. § 1341, *id.* § 1342. Second, *Port of Seattle* does not—directly or impliedly—limit
12 the scope of Ecology’s authority to impose conditions in a 401 certification for NPDES permits.
13 *See Port of Seattle*, 151 Wn.2d at 603 (“the NPDES permitting system and the § 401 certification
14 share a purpose; both must ensure compliance with state water quality standards”). Rather, *Port*
15 *of Seattle* affirms Ecology’s (and the PCHB’s) authority to impose 401 conditions to provide
16 reasonable assurance that Washington’s water quality standards will be met. *Id.* at 591-93.

17 In *Port of Seattle*, the Washington Supreme Court held that the PCHB, in addition to
18 Ecology, could add conditions to a 401 certification if necessary to ensure that state water quality
19 standards will be met but it did not address the scope of Ecology’s 401 authority with regard to
20 Section 402 NPDES permits. *See* 151 Wn.2d at 579-84. Among the many questions the Court
21 addressed in that case was whether the PCHB appropriately overruled Ecology’s approval of a
22 low flow offset proposal in order to impose the PCHB’s own low flow conditions in the 401
23 certification for construction of a third runway at SeaTac Airport. *Id.* at 611-12. The Court
24 examined the state water quality standards—specifically, Ecology’s antidegradation policy—and
25 determined that the “policy contemplates offset of the impact of the project at issue, rather than
26

1 restoration to pristine conditions,” and that Ecology’s initial approval of the low flow offset plan
2 was consistent with the antidegradation policy. *Id.* at 611. ¹⁴ Because the PCHB required the
3 Port to do more than what the water quality standards required, the “PCHB erroneously
4 interpreted and applied the law when it required that the Port do more than offset the impact of
5 the third runway.” *Id.* at 612.

6 In reaching its conclusion, the *Port of Seattle* court did not discuss whether Ecology can
7 impose 401 conditions on a project as a whole—*Elkhorn II* is clear that Ecology has such
8 authority if the project may cause a discharge—rather, the *Port of Seattle* court remarked on the
9 permissible extent of those conditions. *See id.* The Board should reject the Corps’ invitation to
10 infer from *Port of Seattle* any limitation on Ecology’s authority to impose conditions on NPDES
11 permits in the first instance when such conditions are necessary to meet state water quality
12 standards.

13 II. ECOLOGY PROPERLY IMPOSED CONDITIONS ON THE DAMS IN ITS SECTION
14 401 CERTIFICATIONS TO ENSURE COMPLIANCE WITH ALL RELEVANT
15 STATE WATER QUALITY STANDARDS.

16 Ecology’s Section 401 certification conditions properly apply to the dams’ effects on
17 water quality. *See Elkhorn I*, 121 Wn.2d at 192 (“a section 401 water quality certificate may
18 include conditions to enforce all state water quality-related statutes and rules, including, but not
19 limited to, state water quality standards”). The question before the Board is whether Ecology’s
20 401 conditions are necessary to provide reasonable assurance that the Corps’ activities will meet
21 state water quality standards. *Port of Seattle*, 151 Wn.2d at 592-93. To answer this question, the
22 Board must determine “whether the record contains a sufficient quantity of evidence to persuade

23 ¹⁴ When the Section 401 certification in that case was issued, the antidegradation policy stated:
24 “Existing beneficial uses shall be maintained and protected and no *further* degradation which
25 would interfere with or become injurious to existing beneficial uses shall be allowed.” *Port of*
26 *Seattle*, 151 Wn.2d at 611 (quoting WAC 173-201A-070(1) (repealed 2003)) (emphasis in
original).

1 a fair-minded person of the truth or correctness of the order.” *Id.* at 588-89 (internal quotations
2 omitted); RCW 34.05.570(3). The Board’s review is de novo, “giving deference to Ecology’s
3 expertise in administering water quality laws on technical matters and complex scientific issues.”
4 *Mayflower Equities v. Ecology*, PCHB No. 13-006, (Findings of Fact, Conclusions of Law, and
5 Order, June 13, 2014), 2014 WL 2986618 at *8 (citing *Port of Seattle*, 151 Wn.2d at 593-94).

6 Ecology acted to “fulfill its obligations under federal law” by adding conditions to the
7 dams’ 401 certifications to ensure compliance with state water quality standards. *See Elkhorn I*,
8 121 Wn.2d at 194. Federal regulations required Ecology’s certifications to include a statement
9 of “reasonable assurance that the activity will be conducted in a manner which will not violate
10 applicable water quality standards;” and “[a] statement of any conditions which the certifying
11 agency deems necessary or desirable with respect to the discharge of the activity.” 40 C.F.R. §
12 121.2(a)(3)-(4). Accordingly, Ecology issued 401 certifications with conditions that, using its
13 expert judgment, Ecology determined were necessary to achieve compliance with state water
14 quality standards. *See, e.g.*, Notice of Appeal, PCHB No. 20-049, Attachment 1 (Bonneville
15 Project 401 Certification) (“this Certification establishes conditions necessary to protect water
16 quality in river flow, including the dam forebay and pool, spill and generation tailrace water, and
17 flow through fish passage structures”).

18 A. Ecology’s 401 Conditions Properly Address Operation of the Dams.

19 Agencies regularly issue 401 certifications with conditions to ensure that the operation of
20 existing dams complies with state water quality laws. *See, e.g., S.D. Warren*, 547 U.S. at 375
21 (state agency issued 401 for renewal of federal licenses for five hydroelectric dams);
22 ECY00001269-1333 (Ecology’s 401 certification for relicensing of the Wells Hydroelectric
23 Project on the Columbia River). Ecology has been clear that it is subjecting the dams to the
24 same standards as other dams in the state. *See, e.g.*, ECY00006256 (communications plan),
25 ECY00003820 (email to Ecology Water Quality listserv); ECY00002237 (Ecology Twitter
26

1 statement). The Corps' attempts to segregate, as a matter of law, the effects on water quality
2 from the existence of the dams as opposed to the operation of the dams is misguided. It also
3 involves only a legal issue, not a dispute about material facts and it cannot excuse the Corps from
4 the need to comply with the conditions of a federal permit.

5 First, the conditions in the 401 certifications are addressed to the operation of the dams.
6 These conditions include requiring "the Permittee [to] implement temperature control strategies
7 and meet the load allocations in the Columbia and Lower Snake Rivers Temperature Total
8 Maximum Daily Load once issued," *See, e.g.*, Notice of Appeal, PCHB No. 20-049, Attachment
9 1, Condition 2.a. (Bonneville Project 401 Certification), and requiring the Permittee to develop a
10 water quality attainment plan that "must include a detailed strategy for achieving Washington's
11 water quality standards for temperature and associated designated uses, including but not limited
12 to, conditions in fish bypass systems of the dam," *id.*, Condition 2.c. The 401 conditions also
13 require that "[t]he Permittee must comply with total dissolved gas standards in WAC 173-201A-
14 200(1)(f) or any future modification to the standards thereof." *Id.*, Condition 2.b. These
15 conditions are clearly aimed at the operation of the dams in that they require the Permittee to
16 operate the dams in a manner that will comply with state water quality standards.

17 Second, while the Corps may contend that Ecology's certifications are barred by *National*
18 *Wildlife Federation v. U.S. Army Corps of Engineers*, 384 F.3d 1163 (9th Cir. 2004) (*NWF*), that
19 case involved different facts and circumstances than those presented in these appeals. In that
20 case, the court emphasized its view that, on the record before it, there was a binary choice
21 between absolute compliance with state water quality standards at all times (on the one hand)
22 and removal of the dams (on the other hand). From this perspective, and because the court
23 concluded that removal of the dams would not always achieve complete compliance with water
24 quality standards, it found that the Corps' decision not to remove the dams was not arbitrary. *Id.*
25 at 1173 ("[n]one of the alternatives evaluated would completely control water temperature").
26

1 Based on this analysis, the court held that “the Corps was not arbitrary and capricious, and did
2 not act contrary to law, in declining to adopt the ‘natural river operation’ method.” *Id.*

3 The Corps’ options for meeting the requirements of Ecology’s Section 401 certifications
4 are not constrained by the *NWF* court’s binary view of the record in that case. While Ecology’s
5 Section 401 certification conditions detail what is necessary to meet “reasonable assurances” as
6 required by the CWA, the conditions are written broadly and allow the Corps great flexibility.
7 Indeed, as the dissent in the *NWF* case noted, even at that time, the majority opinion’s framing of
8 the choice the Corps faced to address water quality standards (dams in or dams out) was not
9 accurate and obscured the real issue that required a rational analysis: what actions could the
10 Corps take to ensure that the dams do not cause or contribute to violations of state water quality
11 standards. *Id.* at 1180-85 (McKeown, J., dissenting) (“[c]ompliance with the CWA and the
12 continued presence of the dams are not mutually exclusive options”). This case is different
13 because removal of the dams is not the only action available to the Corps to provide the required
14 “reasonable assurances” that the dams will meet the conditions of the Section 401 certifications
15 and state water quality standards.

16 B. The Corps Has Not Actually Alleged that Compliance with Ecology’s 401
17 Conditions Will Conflict with Its Ability to Comply with Other Federal Laws.

18 The Corps has failed to make any specific or concrete allegation that it cannot actually
19 comply with the requirements of Ecology’s Section 401 certifications. Instead, at every turn, the
20 Corps has carefully and consistently hedged its allegations with language of possibility. *See,*
21 *e.g.,* Notice of Appeal, PCHB No. 20-043, at 4 (The Dalles Lock and Dam) (“*to the extent that*
22 *the 401 certifications prevent the Corps from continuing to operate and maintain the dams in*
23 *accordance with federal law, the 401 certifications conflict with federal law and are therefore*
24 *unjust and unlawful*”) (emphasis added); *id.* at 7 (“*To the extent conditions B.2.a [requiring*
25 *temperature control strategies to meet load allocations in temperature TMDL], B.2.c [requiring*
26 *Corps to develop a water quality attainment plan], and B.2.d [requiring progress and summary*

1 reports] violate these or other principles of federal law, including without limitation the CWA,
2 they are unjust and unlawful”) (emphasis added).

3 The Corps cannot credibly assert that *every* available measure to comply with the action
4 401 certification conditions and applicable water quality standards somehow requires eliminating
5 the existence of the dams or violating some unspecified “other principle[] of federal law.” Given
6 the available evidence, the choice is plainly not so stark. In fact, it is not clear that there is *any*
7 actual conflict at all between the requirements of the Section 401 certifications and the Corps’
8 vague and hypothetical invocation of potential conflicts with what it views as its other legal
9 obligations or the existence of the dams. Indeed, in its comments on EPA’s temperature TMDL
10 for the Columbia and lower Snake rivers, the Corps admitted that there are in fact measures it
11 could take to address temperature. *See, e.g.*, U.S. Army Corps of Engineers Comments on Total
12 Maximum Daily Load (TMDL) for Temperature in the Columbia and Lower Snake Rivers (July
13 21, 2020) at 2 (“passageways within the structures such as fish bypass channels and fish ladders
14 can be influenced by project operations when the river is thermally stratified.”). *Ordonia Decl.*,
15 *Ex. 11* at 2. Moreover, because the 401 conditions provide the Corps with considerable
16 flexibility, the Corps can explore a broad range of options for complying with Washington’s
17 water quality standards, including drawing down certain reservoirs at certain times, the timing of
18 cold water releases from up-river dams, increasing water spilled over the dams at certain times,
19 improvements to the fish ladders, and strategic streamside habitat improvements.

20 Until the Corps actually develops a water quality action plan to comply with terms of the
21 401 certifications and meet what it believes are its other statutory duties, and Ecology reviews
22 and reject it as inadequate, there can be no actual conflict between the conditions in the 401
23 certifications and the existence of the dams or any other legal obligation of the Corps. Should
24 such a conflict arise in the future, after the Corps has made every effort to meet the conditions of
25 the water quality certifications, the Corps can seek relief at that time.

1 CONCLUSION

2 For the reasons stated above, Riverkeeper respectfully asks the Board to grant its Motion
3 for Partial Summary Judgment on Issues 1 and 2.

4 Respectfully submitted this 17th day of May 2021.

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1 **CERTIFICATE OF SERVICE**

2 I certify under penalty of perjury under the laws of the state of Washington that on May
3 17, 2021, I served a true and correct copy of the *INTERVENOR-RESPONDENTS' MOTION*
4 *FOR PARTIAL SUMMARY JUDGMENT ON ISSUES 1 AND 2* on the following via Email:

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