

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

COLUMBIA RIVERKEEPER and
CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA NATION,

Appellants,

v.

STATE OF WASHINGTON
POLLUTION CONTROL HEARINGS
BOARD,

Defendant,

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY and
FLOW POWER PROJECT 101 c/o
RYE DEVELOPMENT,

Respondents.

No. 88259-7-I

DIVISION ONE

PUBLISHED OPINION

MANN, J. — Under § 401 of the federal Clean Water Act (CWA), any applicant for a federal license or permit to conduct an activity that may result in any discharge into navigable waters, must provide a certification from the state where the discharge originates that any such discharge will comply with federally approved water quality standards. 33 U.S.C. § 1341. The Department of Ecology (Ecology) is the designated

state water pollution control agency tasked with implementing the CWA and § 401 in Washington. RCW 90.48.260(1).

On May 22, 2023, Ecology issued a § 401 water quality certification (§ 401 certification) to Free Flow Project 101 LLC (FFP) for the Goldendale Energy Storage Project (project), a proposed pumped-water storage hydropower system adjacent to, but off-stream of, the Columbia River. Columbia Riverkeeper (Riverkeeper) and the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) appealed the § 401 certification to the Pollution Control Hearings Board (PCHB). The PCHB affirmed the § 401 certification on January 27, 2025, issuing findings of fact, conclusions of law, and an order (final order).

Riverkeeper and the Yakama Nation appeal the PCHB's order and make several arguments, including that the § 401 certification fails to impose the necessary conditions and monitoring requirements to protect the water quality of the Columbia River.

We conclude that the PCHB erred in finding 16 of the final order—that any leakage from the project's tunnels would be monitored and reported. As a result, we set aside the § 401 certification on this limited issue. We remand for further proceedings for Ecology and the PCHB to impose monitoring and reporting requirements to detect leakage from the project's tunnels. We otherwise affirm the § 401 certification.

I. BACKGROUND

A. The Project

The project is a closed-loop hydroelectric power plant that generates electricity during times of greater energy needs by releasing water from an upper reservoir

downhill to a lower reservoir.¹ During periods of low energy demand, water would be pumped back up to the upper reservoir. The reservoirs would be off-stream of the Columbia River, with no river or stream impoundments, and vertically separated by 2,400 feet of elevation. Due to its closed-loop design, water would be drawn from an existing pump station to initially fill the system and additional water would be drawn as needed to offset any water loss.

The project area is approximately 681.6 acres. The lower reservoir would be located on the site of the former Columbia Gorge Aluminum smelter (CGA smelter). The CGA smelter is contaminated with sulfate and phosphate from the former smelter operations.

The project entails the construction of (1) the upper and lower reservoirs, (2) an underground conveyance system connecting the upper reservoir to the lower reservoir and passing through an underground powerhouse with generating and pumping facilities, (3) an access tunnel, (4) an underground and overhead transmission line, (5) a substation, and (6) accompanying facilities.

The project would affect Stream 7, Stream 8, and Swale Creek, which are specific locations within the construction area. FFP proposes to discharge reservoir water into Swale Creek to mitigate the project's impacts on Stream 7 and Stream 8.

B. Environmental Impact Statement

Ecology issued a Final Environmental Impact Statement (EIS) on December 21, 2022. The EIS evaluated potential impacts related to the construction and operation of

¹ The background is taken largely from the unchallenged findings of fact in the final order. We treat unchallenged findings as verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

the project on wetlands, regulated waters, water quantity, water quality, and water rights for both surface and groundwater. For water quality, the EIS stated that “yearly evaporative cycles would concentrate water quality constituent levels over time (e.g., heat, total dissolved solids, metals, nutrients, and bacteria), despite the annual addition of fresh make-up water from annual precipitation and purchases of water from the Columbia River.” The project’s upper and lower reservoirs would be constructed with a synthetic liner system with leak-detection capabilities meant to prevent leakage, such that “negligible seepage from the reservoirs is anticipated.” The “lower reservoir is anticipated to include a double liner system to further minimize any potential for leakage.” In addition, FFP plans to “include hydrologic/groundwater level monitoring as a component of the broader water quality and response plan.”

Ecology concluded that “[t]hrough compliance with laws and with implementation of the mitigation measures described in [the EIS], there would be no significant and unavoidable adverse impacts related to water resources from construction or operation of the proposed project.” Nonetheless, the EIS also states that approximately 100 acre-feet of water per year (AFY) would leak from the project’s underground infrastructure (piping, etc.), which would represent return flow (or artificial recharge) into the basalt aquifer system. The EIS assumes that 70 percent of the underground leakage would enter the Columbia River tributaries watershed and 30 percent would enter the Swale Creek watershed.

C. § 401 Certification

Because FFP applied to the Federal Energy Regulatory Commission (FERC) for a federal hydropower license, it was required to seek a § 401 certification from Ecology.

33 U.S.C. § 1341(a)(1). Issuance of a § 401 certification affirms that discharges will comply with the water quality requirements of the CWA, including the federally approved water quality standards set by the State. 33 U.S.C. § 1341(a)(1). PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 707-08, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994).

When Ecology issued the § 401 certification for the project, Environmental Protection Agency (EPA) regulations—known as the 2020 rule—applied and constrained the scope of Ecology's analysis. Under the 2020 rule, the scope of Ecology's § 401 analysis "is limited to assuring that a discharge from a federally licensed or permitted activity will comply with water quality requirements." 40 C.F.R. § 121.3 (2020) (emphasis added).

The project's § 401 certification requires FFP to acquire additional permits, including a § 402 National Pollutant Discharge Elimination System (NPDES) permit before discharging any wastewater into the Swale Creek drainage. FFP must also obtain a surface reservoir permit and a construction stormwater general permit. FFP must conduct water quality monitoring in accordance with an established water quality monitoring plan (WQMP). FFP is also required to remove and dispose of the contents of a waste disposal site called the West Surface Impoundment (WSI), which is located within the former CGA smelter site. The cleanup process includes addressing any contaminated soils, as well as the decommissioning and replacement of 15 groundwater monitoring wells associated with the former CGA smelter. Cleanup at the WSI must be completed and approved by Ecology before conducting any ground disturbance construction activities at the former CGA smelter site.

D. Procedural History

On June 21, 2023, Riverkeeper filed a petition for review before the PCHB challenging the sufficiency of the § 401 certification in ensuring that the project would comply with Washington's water quality standards. That same day, the Yakama Nation filed a similar appeal with the PCHB. On August 24, 2023, the PCHB granted the parties' joint motion for consolidation of the appeals under WAC 371-08-390(9).

A prehearing order was entered on August 31, 2023, and on September 6, 2023, Riverkeeper and the Yakama Nation submitted their proposed legal issues. On February 8, 2024, Riverkeeper and the Yakama Nation stipulated that they "do not intend to pursue a claim that Ecology has failed to comply with [the State Environmental Policy Act (SEPA),] RCW 43.21C.060, and its implementing regulations, by deciding not to deny, or further mitigate or condition, the Certification." On February 14, 2024, the PCHB entered an amended prehearing order reflecting the stipulated changes to the legal issues in the case.

The parties filed several motions for summary judgment, which the PCHB resolved in two orders. In the first order, the PCHB affirmed that the 2020 rule applied to the § 401 certification and that Ecology's consideration was limited to whether any "discharge" would comply with federally approved water quality standards. As a result, the appellants' contentions concerning "withdrawal" of water from the Columbia River were dismissed. In the second order, the PCHB limited which smaller waterbodies qualified as "impacted waterbodies" for purposes of the § 401 certification.

An open record hearing on the remaining legal issues took place before the PCHB on September 23-26, 2024 (final hearing). And on January 27, 2025, the PCHB

issued the final order. In it, the PCHB found, inter alia, that (1) the project was designed to avoid leakage or seepage and (2) the § 401 certification included conditions to protect water quality in the unlikely event of a significant leakage. Based on that, the PCHB concluded that (1) the Columbia River was not an impacted waterbody for purposes of the § 401 certification and (2) the § 401 certification imposed sufficient conditions to ensure the project's compliance with all applicable water quality standards. The PCHB ultimately affirmed the project's § 401 certification.

On February 26, 2025, Riverkeeper and the Yakama Nation filed petitions for review of the final order in Thurston County Superior Court. After granting FFP's motion to intervene, the superior court certified the case for transfer to this court as a direct appeal.

II. POTENTIAL FOR DISCHARGE INTO THE COLUMBIA RIVER

Riverkeeper and the Yakama Nation first argue that Ecology and the PCHB erred in finding that the project would not leak into the groundwater, and then failed to analyze whether the leakage was directly connected to, and therefore would discharge into, the Columbia River.

A. Standard of Review

The court reviews orders from the PCHB under the Washington Administrative Procedure Act (APA), ch. 34.05 RCW. Port of Seattle v. Pollution Control Hr'gs Bd., 151 Wn.2d 568, 587, 90 P.3d 659 (2004). Our review is confined to the record before the PCHB, RCW 34.05.558, and "[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a). We may grant relief in three circumstances.

A PCHB's order may be invalidated under the APA if it is not supported by substantial evidence viewing the record as a whole. RCW 34.05.570(3)(e). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the matter. Port of Seattle, 151 Wn.2d at 588. The PCHB's factual findings may be overturned only if they are clearly erroneous, such that the court is "definitely and firmly convinced that a mistake has been made." Port of Seattle, 151 Wn.2d at 588 (quoting Buechel v. Dep't of Ecology, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)). The substantial evidence test does not allow reviewing courts to reverse the PCHB's findings because they would have ruled differently had they been the trier of fact. Honeywell v. Dep't of Ecology, 2 Wn. App. 2d 601, 613, 413 P.3d 41 (2017). Nor does the court weigh the credibility of witnesses or substitute its judgment for the PCHB's. Port of Seattle, 151 Wn.2d at 588.

The court may also grant relief if a PCHB's order has "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). The application of law to the facts is a question of law that we review de novo. Port of Seattle, 151 Wn.2d at 588. Likewise, where statutory construction is necessary, the court will interpret statutes de novo. Port of Seattle, 151 Wn.2d at 587. The court gives due deference to Ecology's specialized expertise on technical judgments, and substantial weight to the interpretation of the law it administers. Port of Seattle, 151 Wn.2d at 588, 594-95.

Lastly, the court may grant relief if a PCHB's order is "arbitrary or capricious." RCW 34.05.570(3)(i). An arbitrary or capricious action is one that is "willful and unreasoning and taken without regard to the attending facts or circumstances." Port of Seattle, 151 Wn.2d at 589. "Where there is room for two opinions, and the agency

acted honestly and upon due consideration, this court should not find that an action was arbitrary [or] capricious, even though this court may have reached the opposite conclusion.” Port of Seattle, 151 Wn.2d at 589. That is because the court should not “undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1).

B. Leakage from the Project

The core of Riverkeeper and the Yakama Nation’s appeal is that the PCHB erred in finding that the project will not leak polluted water into groundwater that is hydrologically connected to the Columbia River. Both appellants rely on the assumption in the EIS that the project would leak 100 AFY per year into groundwater. Riverkeeper and the Yakama Nation contend that Ecology cannot ignore the EIS, and that the PCHB failed to cite credible evidence in the record showing that the project will not leak. We disagree.

It is undisputed that the PCHB applies a de novo standard of review, deciding cases based on all evidence available at the time of the PCHB hearing. Port of Seattle, 151 Wn.2d at 598. In its final order, the PCHB found that the project is designed not to leak, and if it did, any leakage would be minimal based on considerable evidence.

The PCHB explained that FFP provided credible evidence at the hearing that the project was designed to avoid leakage.² For example, Dylan Stankus, the project manager and environmental engineer, testified as an expert in hydrological modeling and water quality monitoring. Stankus explained that FFP prepared an informational

² Once again, appellants did not assign error to the PCHB’s findings of fact and thus they are considered verities on appeal. We also note that each of the PCHB’s findings include citations to hearing testimony or exhibits—the evidence that the PCHB relied upon in making said findings.

presentation for Ecology with hydraulic engineers to discuss how the reservoirs would be lined to prevent leakage and seepage. Further, Shane McDonald, an expert in hydrogeology, testified that the lower reservoir (which would be located on the former CGA smelter site) would have two liners of geomembrane separated by a layer of sand—such that in the event that water leaked through the first layer, the second layer would capture it and pump it back into the project’s closed-loop system. That, McDonald explained, substantially minimizes the chances of leakage into groundwater.

The PCHB also found credible the expert testimony presented by FFP that the tunnels connecting the two reservoirs would not leak. Michael Wood, a professional geologist with 37 years of experience, testified as an expert on the geology of pumped storage hydropower projects. Woods explained that the standard practice for the construction of tunnels for hydropower projects incorporates specific steps to prevent leakage: (1) consolidation or pressure grouting around the tunnel, (2) the installation of a permanent liner system of reinforced concrete or steel, (3) drilling holes into the rock to inject grout to make the annular space around the tunnel between a monolithic impermeable mass, and (4) a process called contact grouting, whereby grout is injected between the final lining and the rock to seal any shrinkage that may have occurred when the concrete cured after the final lining is installed.

The PCHB also found that during the § 401 certification process, Ecology staff investigated and were satisfied that the project would not leak or seep a significant amount of water. For example, Loreé Randall, Ecology’s team lead for the project’s § 401 water quality certification process, testified that Ecology dedicated time to learn the applicable construction methods to determine whether the project was a closed system

that would not leak or seep. She explained that Ecology's intent was to make sure that the system would not leak from either the reservoirs or the tunnel, and that the reservoirs would be lined and include a leak detection system.

The PCHB found that the appellants did not provide evidence refuting FFP and Ecology's explanation that the project was not designed to leak. Rather than pointing to evidence refuting Ecology's and FFP's testimony about the project's design to avoid leakage, Riverkeeper and the Yakama Nation continue to rely on appeal on the early assumption in the EIS that the project would leak 100 AFY. The Yakama Nation relied on the testimony of witnesses that either referred to EIS leakage assumption specifically or contributed to the preparation of the EIS, but not to the § 401 certification process. For instance, Rachel Elena Ramirez Groszowski, a consultant for the Yakama Nation's Fisheries Department and the Department of Natural Resources, pointed to the assumption in the EIS that the project will leak 100 AFY when asked if she knew that the project was being designed with leak detention capabilities. Similarly, Sage Park, the SEPA official who issued the EIS, specifically referred to the 100 AFY leakage assumption during her testimony. Further, Heather Page, the EIS project manager, explained that she worked in the project's proposal stage only. Lastly, Daniel Haller, a water resources engineer who worked in the development of the EIS, including the initial draft, testified that he did not participate in the project's § 401 certification process.

The PCHB recognized that the 100 AFY described in the EIS—and relied upon by Riverkeeper and the Yakama Nation—was a conservative estimate used early in the permitting process. Erik Steimle, FFP's Chief Development Officer, testified that as part

of its FERC license application, FFP estimated that it would need to purchase 100 AFY from Klickitat County, and that this assumption was incorporated into the EIS.

The PCHB found that later work by FFP and Ecology—after the EIS, and during the § 401 certification process—established that the project would not leak or seep, or would otherwise seep at nominal amounts only. The PCHB’s finding was supported by witnesses directly involved in the § 401 certification process. For instance, Lori White, Ecology’s central region section manager for the Shorelands and Environmental Assistance Program, testified that Ecology has more information and a more refined understanding at the time of conducting a § 401 certification process compared to the scope of an EIS. Further, Damon Roberts, Ecology’s water quality section manager for the central region, testified that because the reservoirs would be double lined with leak detection, it was unlikely that they would leak or seep 100 AFY.

Ultimately, the PCHB found in an unchallenged finding that the testimony supported the determination in the § 401 certification that the project would not leak:

[T]he testimony from FFP’s experts supporting that the project would not leak was credible and more persuasive than the testimony offered by Appellants’ witnesses who principally relied on the assumption in the EIS that the project would leak or seep 100 AFY. At most, the evidence indicates there may be a nominal amount of seepage from the project. But the record does not support Appellants’ assertion that the project is likely to leak a significant amount of water and potentially diminish water quality.

(Citations omitted.)

Riverkeeper’s and the Yakama Nation’s arguments appear to be less about a lack of substantial evidence in the record and more about a difference of opinion with respect to the PCHB’s finding that the project was designed not to leak. And because

the court defers to the PCHB's determinations on witness credibility and conflicting evidence, insofar as Riverkeeper and the Yakama Nation invite us to weigh the evidence in the record and substitute our own judgment for the PCHB's, we decline the invitation.

In sum, we conclude that the PCHB's finding that the project is designed to avoid leakage is supported by substantial evidence in the record before it. And even though there may be room for two opinions, the PCHB's finding was not made without regard to the facts and evidence presented and thus cannot be labeled as arbitrary or capricious.

C. Groundwater Connection to the Columbia River

Based largely on the assumption that contaminated water from the project will leak into groundwater, Riverkeeper and the Yakama Nation next argue that Ecology failed to determine whether the project will discharge directly into the Columbia River.

The CWA requires a § 401 certification for activities that “may result in any discharge into the navigable waters.” 33 U.S.C. § 1341(a)(1). In County of Maui v. Hawaii Wildlife Fund, 590 U.S. 165, 183-84, 140 S. Ct. 1462, 206 L. Ed. 2d 640 (2020), the United States Supreme Court held that the CWA “requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.” (Emphasis added.) The Court also described a multifactorial test to determine when an indirect discharge is the functional equivalent of a direct discharge. The non-exhaustive list of factors included: “(1) [travel or] transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the

amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, [and] (7) the degree to which the pollution (at that point) has maintained its specific identity.” County of Maui, 590 U.S. at 184-85.

Notwithstanding, the Court clarified that “[t]ime and distance will be the most important factors in most cases, but not necessarily every case.” County of Maui, 590 U.S. at 185.

Riverkeeper and the Yakama Nation assert that any leakage from the project is tantamount to a direct discharge into the Columbia River under the test established in County of Maui. In contrast, Ecology and FFP argue that there is substantial evidence in the record that (1) the project is designed not to leak and (2) the water in the project reservoirs will not be contaminated, and thus the PCHB properly declined to perform a County of Maui analysis. We agree with Ecology and FFP.

As we explained above, substantial evidence in the record supports the PCHB’s finding that the project was designed to avoid leakage. Similarly, substantial evidence in the record supports the PCHB’s finding that reservoir contamination will not reach the Columbia River. As the PCHB summarized:

Appellants argue that leakage from the Project into groundwater should be considered the functional equivalent of a direct discharge to the Columbia River, relying on County of Maui, 590 U.S. 165. Appellants’ contention that the Project discharges constitute the functional equivalent of direct discharges, however, again relies on the incorrect assumption that the Project will leak millions of gallons of contaminated water into the underlying groundwater. Because the evidence does not show that the Project will result in leakage to groundwater, there is no basis for considering whether such discharge would be the functional equivalent of a direct discharge to the Columbia River under County of Maui.

(Citations omitted.) We agree. The PCHB did not err by declining to perform a County of Maui analysis and by subsequently not including the Columbia River as an impacted waterbody that Ecology had to consider under 33 U.S.C. § 1341.

III. CONDITIONS AND MONITORING

The CWA requires that § 401 certifications include discharge limitations and monitoring requirements necessary to ensure that the project complies with federal and state water quality limitations. 33 U.S.C. § 1341(d).³ Washington’s Supreme Court has held that “[m]onitoring and adaptive management provide a mechanism through which Ecology can mitigate [the] inherent uncertainty” in issuing a § 401 certification. Port of Seattle, 151 Wn.2d at 606. In the § 401 certification context, Ecology uses adaptive management with the goal of ensuring that Washington’s water quality standards are protected when the information on how to best “reduc[e] pollution and meet[] the water quality standards may be incomplete.” WAC 173-210A-320(6)(c). Specifically, adaptive management requires that “information is developed and used expeditiously to revise permit or program requirements,” and to “[i]nclude a plan that describes how information will be obtained and used to ensure full compliance with this chapter.” WAC 173-210A-320(6)(c)(i), (iii).

³ Section 401 provides:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations . . . of this title . . . and with any other appropriate requirement of State law set forth in such certification, and shall become a condition of any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1341(d).

A. “End-Result” Condition

Riverkeeper and the Yakama Nation argue that the project’s § 401 certification’s “vague” prohibition on violating water quality standards is insufficient to protect the designated uses and water quality of the Columbia River. Riverkeeper and the Yakama Nation focus their arguments on section C.1 of the § 401 certification, which prohibits FFP from exceeding “applicable water quality standards beyond the limits established in Chapter 173-201A WAC, except as authorized by [the § 401 certification].” Riverkeeper and the Yakama Nation argue that Ecology’s reliance on this “end-result” condition conflicts with the United States Supreme Court’s recent decision in City and County of San Francisco, California v. U.S. Environmental Protection Agency, 604 U.S. 334, 145 S. Ct. 704, 221 L. Ed. 2d 166 (2025). We disagree.

In that case, the City of San Francisco (City) operated a municipal treatment facility (facility) under a § 402 NPDES permit. In 2019, the facility’s NPDES permit was modified to include two new conditions. The first condition prohibited the facility from making any discharge that “contribute[s] to a violation of any applicable water quality standard” for receiving waters. The second condition provided that the City could not perform any treatment or make any discharge that “create[s] pollution, contamination, or nuisance as defined by California Water Code section 13050.” San Francisco, 604 U.S. at 343. The City challenged the “end-result” condition as overly burdensome.

The Court agreed and held that the EPA lacks the authority to impose “end-result” conditions in an NPDES permit because such provisions were too burdensome on permittees. The Court relied in part on the “permit shield” provision under § 402(k), which deems a permittee in compliance with the CWA if it follows all of the terms of its

permit. San Francisco, 604 U.S. at 350. The Court explained that the “end-result” conditions eviscerated the “permit shield” provision under § 402(k) by holding a permittee liable for violating the CWA even if it complied with all of the conditions of the NPDES permit. The Court explained:

Because of the harsh penalties for violating the terms of a permit, the permit shield is invaluable. Because of it, a discharger that complies with all permit conditions can rest assured that it will not be penalized. But the benefit of this provision would be eviscerated if the EPA could impose a permit provision making the permittee responsible for any drop in water quality below the accepted standard. A permittee could do everything required by all the other permit terms. It could devise a careful plan for protecting water quality, and it could diligently implement that plan. But if, in the end, the quality of the water in its receiving waters dropped below the applicable water quality levels, it would face dire potential consequences.

San Francisco, 604 U.S. at 351.

Riverkeeper and the Yakama Nation’s argument that condition C.1 conflicts with San Francisco fails. San Francisco addressed end-result conditions that were added to a § 402 NPDES permit and the resulting conflict with the “permit shield” provision under § 402(k). San Francisco is silent on whether such a requirement is consistent with § 401. Moreover, San Francisco does not hold that end-result conditions are insufficient or inadequate to provide reasonable assurance that water quality standards will not be violated—which was the question that Ecology and the PCHB evaluated.

B. Monitoring for Leakage

Riverkeeper and the Yakama Nation also argue that the PCHB erred in affirming the project’s § 401 certification because it fails to include conditions that require monitoring for leakage into groundwater. The appellants point specifically to the failure

to require monitoring for leakage from the tunnel system between the upper and lower reservoirs. We agree.

The PCHB's final order addressed monitoring for leakage from the project's tunnels in finding 16. Relying on the testimony of David Johnson, one of Ecology's witnesses, the PCHB rejected the appellants' contention that water could leak from the project's tunnels without being directly monitored. The PCHB explained:

This argument ignores the fact that, because the Project would be a closed-loop system, FFP would be able to detect if any water unexpectedly leaks from any part of the system. The only anticipated causes of water loss to the system are evaporation and discharge of water into a mitigation stream—both of which can be calculated. FFP would therefore be able to monitor leakage because it would cause an unexpected increase in water loss. And if seepage or leakage resulted in an increased movement of groundwater, an increase in water quantity or change in water quality also would be detected in the monitoring network.

Missing from the PCHB's finding, however, is any discussion of whether the conditions in the § 401 certification require tunnel leakage monitoring, and whether any unexpected leakage would have to be reported to Ecology and how.

Johnson's testimony similarly assumed that monitoring and reporting of leakage to Ecology would be required:

A project of this scale that—you know, the reservoir of, you know, hundreds of acres with thousands of linear feet of a very broad 29-foot-diameter tunnel will have some seepage. You know, it's acknowledged that there will be seepage.

The design intention of both the reservoirs themselves and the tunnel is to minimize the amount of seepage to the extent that it can be minimized.

And so there's gonna be—there are measures for the reservoirs. So there's gonna be measures for the tunnel to minimize to the extent that engineering feasibility that seepage can be minimized.

Seepage is also going to be part of the ongoing monitoring in the sense of we'll be able to understand seepage long-term from the sense of it's a closed-loop reservoir. So on any time period that we want, whether it be monthly, semi-annually, annually, or you know, biannually or what frequency—whatever Ecology sets, we'll be able to basically measure the evaporation. That's the net loss of this closed system.

The only other loss really to the system is seepage, or what could be mitigation discharge that's going to be well understood.

So, we'll be able to monitor this seepage. It will be monitored both from that rough calculation standpoint, be required to be monitored. It will be required to be monitored down at the lower reservoir for its potential understanding of impact to the aquifer where the WSI was, both from a water quality standpoint and quantity standpoint.

While Johnson's testimony explains that Ecology will be able to monitor for seepage from the tunnels or other unexpected water loss, neither the § 401 certification nor the WQMP explicitly impose such monitoring conditions. For instance, while the § 401 certification requires water quality monitoring of the reservoir water discharged into Swale Creek, as well as the water quality monitoring described in the WQMP, it does not require monitoring or reporting of any change in water quantity either from the closed-loop system or the downgradient monitoring wells. Similarly, while the WQMP identifies both short- and long-term monitoring parameters, it only requires sampling from the powerhouse at the project's penstock and from the intake into the lower reservoir on a semiannual basis. The WQMP does not require monitoring or reporting of any change in water quantity from either monitoring location or downstream wells.

Given that the project's § 401 certification does not explicitly require monitoring and reporting to determine whether there is any leakage or seepage from the closed-loop system—including the tunnels—the PCHB's finding 16 is not supported by substantial evidence in the record before it.

IV. SEPA

Riverkeeper and the Yakama Nation finally contend that Ecology erred in considering information collected after the publication of the EIS to issue the project's § 401 certification. Riverkeeper argues that Ecology undermined SEPA's purpose by relying on information obtained after the EIS was issued, none of which was available to the public for commenting. Similarly, the Yakama Nation argues that when Ecology received the additional information, it was "encouraged to make that information available to the public before" making its decision. WAC 197-11-655(c). Said differently, while conceding that Ecology could rely on information other than the EIS in making its § 401 certification decision, the Yakama Nation nevertheless asserts that Ecology was required to use the EIS unchanged, except in the scenario where there [were] substantial changes to a proposal requiring preparation of a supplemental EIS under WAC 197-11-600(3)(a)-(c).

But even assuming that Ecology was required to prepare a supplemental EIS for public comment, the issue was not raised below, and accordingly we decline to address it. RAP 2.5(a); RCW 34.05.554.

V. CONCLUSION

Finding 16 in the PCHB's final order—that leakage from the project's tunnels would be monitored and reported—was not supported by substantial evidence in the record before it. As a result, we set aside the § 401 certification on this limited issue. We remand for further proceedings for Ecology and the PCHB to impose monitoring and reporting requirements to detect leakage from the project's tunnels. We otherwise affirm the § 401 certification.

Marm, J.

WE CONCUR:

Díaz, J.

Smith, J.