

1 **POLLUTION CONTROL HEARINGS BOARD**  
2 **STATE OF WASHINGTON**

3 CENTER FOR ENVIRONMENTAL LAW  
4 & POLICY and WILD FISH  
5 CONSERVANCY,

6 Appellants,

7 v.

8 STATE OF WASHINGTON,  
9 DEPARTMENT OF ECOLOGY and  
10 UNITED STATES FISH & WILDLIFE  
11 SERVICES,

12 Respondent.

PCHB No. 17-109

ORDER DENYING MOTION TO  
DISMISS

13 Appellant Center for Environmental Law & Policy and Wild Fish Conservancy

14 (Appellants) filed an appeal with the Pollution Control Hearings Board (Board) on December 21,  
15 2017, challenging Washington State Department of Ecology's (Ecology) Clean Water Act  
16 Section 401 Certification for NPDES Permit No. WA 0001902 issued for the United States Fish  
17 & Wildlife Service (USFWS) Leavenworth National Fish Hatchery on November 22, 2017.  
18 Respondent USFWS moved to dismiss the appeal as moot. Appellants and Ecology oppose the  
19 motion to dismiss.

20 The Board is comprised of Members Kay M. Brown and Neil L. Wise<sup>1</sup>. Attorney Frank  
21 S. Wilson represented USFWS. Attorney Brian A. Knutsen represented Appellants. Assistant  
Attorney General Christopher H. Reitz represented Ecology.

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<sup>1</sup> Board Chair Joan M. Marchioro recused herself from this case.

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

- 2 1. U.S. Fish and Wildlife Service’s Motion to Dismiss (Motion), with five attachments<sup>2</sup>;
- 3 2. Appellants’ Response to U.S. Fish and Wildlife Service’s Motion to Dismiss;
- 4 3. Respondent State of Washington Department of Ecology’s Response in Opposition to
- 5 U.S. Fish and Wildlife Service’s Motion to Dismiss; and,
- 6 4. U.S. Fish and Wildlife Service’s Reply Regarding Motion to Dismiss.

7 Based upon the written record, the Board enters the following decision:

8 **BACKGROUND**

9 On December 16, 2016, the United States Environmental Protection Agency (EPA)  
10 issued a draft National Pollutant Discharge Elimination System (NPDES) Permit for the  
11 Leavenworth National Fish Hatchery’s discharges to Icicle Creek. Motion, Attachment 1. On  
12 July 28, 2017, Ecology issued a draft Clean Water Act (CWA) section 401 certification for the  
13 NPDES permit. Motion, Attachment 2. Both Ecology’s final section 401 certification  
14 (Certification) and the final NPDES permit (Permit) were issued on November 22, 2017.  
15 Motion, Attachments 3-5. On December 21, 2017, the Appellants appealed the Certification to  
16 this Board. The Permit was not appealed, and therefore took effect on January 1, 2018. Motion,  
17 Attachment 4, p. 1.

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<sup>2</sup> If, on a motion to dismiss, “matters outside the pleadings are presented . . . the motion shall be treated as one for  
21 summary judgment and disposed of as provided in rule 56.” CR 12(b) and (c). Accordingly, because the Board has  
considered materials outside the pleadings, the analysis will proceed in a manner similar to a motion for summary  
judgment.

1 USFWS now moves to dismiss the appeal of the Certification, contending that the appeal  
2 is moot because the Permit has already taken effect and that there is no effective relief the Board  
3 can provide.

#### 4 ANALYSIS

##### 5 A. Summary Judgment

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

12 The party moving for summary judgment must show there are no genuine issues of material  
13 fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title*  
14 *Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment  
15 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451,  
16 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the non-moving party must  
17 present evidence demonstrating that material facts are in dispute. *Atherton Condo Ass'n v. Blume*  
18 *Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), reconsideration denied (1991). In a summary  
19 judgment proceeding, all facts and reasonable inferences must be construed in favor of the non-  
20 moving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Once it is  
21 determined that no genuine issues of material fact exist, the court then analyzes which party is

1 entitled to judgment as a matter of law. *Skagit Hill Recycling v. Skagit Co.*, 162 Wn. App. 308, 318,  
2 253 P.3d 1135 (2011).

3 The Board concludes there are no issues of material fact pertaining to the question of whether  
4 this appeal is moot, and therefore this question is ripe for summary judgment.

5 B. CWA Section 401 certifications

6 Pursuant to Section 401 of the Clean Water Act (CWA), an applicant seeking a Federal  
7 permit for an activity that may result in discharges to navigable waters must obtain a certification  
8 from the state in which the discharge originates. 33 U.S.C. § 1341(a)(1). The certification is to  
9 confirm that any discharge from the activity will comply with certain provision of the CWA. *Id.*  
10 If the state denies the certification, the Federal permit cannot be granted. *Id.*

11 Certifications issued by a state under section 401 of the CWA must include appropriate  
12 limitations and monitoring requirements to assure that the applicant for the Federal permit will  
13 comply with applicable effluent limits, prohibitions, standards of performance and appropriate  
14 requirements of state law. 33 U.S.C. § 1341(d). Section 401 provides that conditions of  
15 certifications issued by a state shall become conditions of the Federal permit. 33 U.S.C. §  
16 1341(d); 40 C.F.R. § 124.55(a)(2).

17 EPA regulations provide that:

18 If there is a change in the State law or regulation upon which a certification is  
19 based, or if a court of competent jurisdiction or appropriate State board or agency  
20 stays, vacates, or remands a certification, a State which has issued a certification  
21 under § 124.53 may issue a modified certification or notice of waiver and forward  
it to EPA. If the modified certification is received before final agency action on  
the permit, the permit shall be consistent with the more stringent conditions which  
are based upon State law identified in such certification. If the certification or  
notice of waiver is received after final agency action on the permit, the Regional

1 Administrator may modify the permit on request of the permittee only to the  
2 extent necessary to delete any conditions based on a condition in a certification  
or agency.

3 40 C.F.R. § 124.55(b).

4 C. Mootness

5 In this case, the Permit was not challenged and has become final and effective. USFWS  
6 argues that because the Permit has not been appealed and is now final, 40 C.F.R. § 124.55(b)  
7 prohibits any changes to the Permit except at the request of USFWS to remove conditions  
8 invalidated by the Board. Therefore, USFWS argues, the Board's ruling on the Certification will  
9 not provide relief to the Appellants, and therefore the appeal is moot. A matter is moot if the  
10 Board cannot provide the relief sought or can no longer provide effective relief.

11 *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 350, 932 P.2d  
12 158, 160 (1997).

13 Both the Appellants and Ecology respond that USFWS' motion is based on the incorrect  
14 assumption that a 401 certification is only enforceable through the associated NPDES permit.  
15 Appellants and Ecology contend that a 401 certification is independently enforceable under the  
16 CWA's citizen suit provision. *See* 33 U.S.C. § 1365(a). They rely on a 2017 decision from the  
17 United States District Court of the District of Oregon that found that an environmental group  
18 could maintain a CWA citizen suit against a power company to enforce compliance with  
19 conditions of a state 401 certification, even where the environmental group did not seek to  
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1 enforce the associated federal license for the facility. *Deschutes River Alliance v. Portland*  
2 *General Electric Company*, 249 F. Supp. 3d 1182 (D. Or. 2017).

3 USFWS replies that Appellants and Ecology have missed the point of their argument.  
4 They assert that the key point is not whether the Certification can be enforced separately from  
5 the permit, but whether it can now be effectively altered through this appeal process. USFWS  
6 asserts that the point of 40 C.F.R. § 124.55(b) is to provide a permittee assurance that the appeal  
7 process cannot be used to add conditions to a permit after it has been issued. USFWS attempts  
8 to distinguish the *Deschutes River Alliance* case by pointing out that it does not deal with the  
9 factual pattern presented in this case, where the appeal decision might add new conditions to the  
10 Certification after the federal permit was issued.

11 Even if the goal of 40 C.F.R. § 124.55(b) may have been to provide a permittee assurance  
12 that the appeal process cannot be used to add conditions to a permit after it has been issued, it  
13 does not affect the enforceability of a 401 certification under the CWA. Contrary to USFWS'  
14 position, the Board agrees with the Appellants and Ecology that the key point here is whether a  
15 401 certification is independently enforceable. If it is, as the Appellants and Ecology contend,  
16 the changes to the Certification by this Board could provide relief to the Appellants.

17 USFWS presents no persuasive reason authority for its contention that a 401 certification  
18 is not independently enforceable under the CWA. The unpublished Minnesota court case it  
19 relies on does not directly address the independent enforceability of a section 401 certification.  
20 *See U.S. EPA Vessel Gen. Permit for Discharges Incidental to the Normal Operation of*  
21 *Commercial Vessels*, No. A08-2196, 2009 WL 2998058, at 4 (Minn. App. Sep. 22,

1 2009)(holding that a 401 certification appeal was moot because the plaintiffs sought to add  
2 conditions to a final NPDES permit, and that relief was prohibited by 40 C.F.R. § 124.55(b)). In  
3 contrast, the *Deschutes River Alliance* decision directly holds that a 401 certification is  
4 independently enforceable under CWA’s citizen suit provision.

5 USFWS’ attempt to distinguish the *Deschutes River Alliance* case is also unpersuasive.  
6 While it is correct that in the *Deschutes River Alliance* case the 401 certification was issued  
7 before the federal permit, it is not clear why this factual difference would affect the Court’s  
8 holding that a 401 certification is enforceable by citizens under the CWA. Interestingly, in  
9 response to an argument from the permit holder that allowing citizens to enforce conditions of  
10 the 401 certification, even if absent from the permit, could subject the permit holder to  
11 inconsistent obligations, the Court contemplated the exact situation presented here: that a state  
12 may add or change conditions for a certification after the license has been issued, and then those  
13 conditions may not always appear in the permit. 249 Fed. Supp. 3d at 1191. The Court opined:

14 If a citizen could challenge those conditions, despite their absence from the  
15 license or permit, a permittee or licensee might be subject to inconsistent  
16 obligations. The specter of inconsistent obligations is not sufficient to persuade  
17 the Court that [the permittee’s] construction of the statute is the correct one.

18 249 F. Supp. 3d 1182. Similarly in *Airport Cmty. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1214–  
19 18 (W.D. Wash. 2003), the United States District Court for the Western District of Washington  
20 noted that a federal permit and state 401 certification could result in two sets of different and  
21 conflicting requirements, and if the permittee wanted to have a single consistent set of

1 requirements, it would need to ask the federal permitting authority to incorporate the stricter state  
2 standards. *Id.* at 1216-17.

3 The Board concludes that the Certification is enforceable under the CWA citizen suit  
4 provision, independent of whether the Certification conditions have been incorporated into the  
5 Permit for this project. Therefore, the Board can provide relief to the Appellants and this appeal  
6 is not moot.

7 Based on the foregoing, the Board enters the following:

8 **ORDER**

9 United States Fish & Wildlife Services' Motion to Dismiss this appeal for mootness is  
10 denied.

11 SO ORDERED this 14 day of May, 2018.

12 **POLLUTION CONTROL HEARINGS BOARD**

13  
14 KAY M. BROWN, Presiding

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16 NEIL L. WISE, Member  
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