

Consolidated Cases Nos. 05-72739 and 05-74060

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IN THE UNITED STATES COURT OF APPEALS
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SNOQUALMIE INDIAN TRIBE,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

and

PUGET SOUND ENERGY, INC.

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

**Petition for Review from an Order of the Federal Energy
Regulatory Commission**

PUGET SOUND ENERGY, INC.'S REPLY BRIEF

Mark W. Schneider
Markham A. Quehrn
Kristine R. Wilson
PERKINS COIE LLP
10885 NE 4th Street, Suite 700
Bellevue, WA 98004-5579
Telephone: (425) 635-1400
Facsimile: (425) 635-2400

Attorneys for Petitioner Puget Sound Energy, Inc.

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I. INTRODUCTION

As set forth below and in the Petitioner Puget Sound Energy, Inc.'s ("PSE's") Opening and Intervenor Brief, years of careful and collaborative analysis preceded the Federal Energy Regulatory Commission's ("FERC's") issuance of a relicensing decision for the Snoqualmie Falls Hydroelectric Project (the "Project") on June 29, 2004 (the "License Order"). FERC's License Order struck a balance among the diverse interests of five other federal agencies, four state agencies, the Snoqualmie Indian Tribe (the "Tribe"), the Tulalip Tribes, the Yakama Nation, local governments, environmental groups, and the general public. AR 1294, ER 2144-46, 2164-65. The License Order also incorporated, without alteration, the conditions of the Project's water quality certification ("WQC") that was issued by the Washington State Department of Ecology ("Ecology").

However, through its subsequent rehearing orders issued March 5, 2005 and June 1, 2005 (collectively, the "Rehearing Orders"), FERC amended the Project's flow standards that were established in the WQC. FERC's "adjustment" of the flow standards denigrates other beneficial uses of the Snoqualmie River. In revising the Project's WQC flows, FERC exceeded its authority under the Federal Power Act ("FPA")¹ and violated the Clean Water Act ("CWA").² FERC's decision to "adjust" the flows was also taken without the support of substantial

¹ 16 U.S.C. § 791a *et seq.*

² 33 U.S.C. § 1251 *et seq.*

evidence regarding the effect of this change on interests protected by the FPA and CWA.

PSE has standing to challenge FERC's decision. PSE is the applicant for both the federal license that is the subject of this FERC decision and the WQC that was "adjusted" by FERC in the Rehearing Orders. PSE is directly regulated by the administrative action subject to review under this petition. PSE's interests in the proper application of the FPA and the CWA for the balancing of environmental, economic, recreational, cultural, and other beneficial uses of the river are within the zone of interests regulated by these statutes.

II. ARGUMENT

A. FERC Exceeded Its Authority Under the FPA and Violated the CWA When It Adjusted the Project's Flows in the Rehearing Orders.

FERC's authority under Section 10(a) of the FPA, 16 U.S.C. § 803(a), provides that the agency is to consider "beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes" in the course of licensing projects within federal waters. Although FERC has broad authority under this section, Congress's adoption of the CWA subsequent to the FPA strictly limits that authority with respect to water quality issues.³ FERC is required to

³ *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 292-93 (D.C. Cir. 2003) (the CWA "has diminished [the FPA's] preemptive reach by expressly requiring the Commission to incorporate into its licenses state-imposed water quality conditions"); *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 50 (D.C. Cir. 1987) ("we can conclude only that the [FPA] does not provide adequate justification for ignoring the express and unambiguous directive of subsequently-adopted" [CWA] amendments).

incorporate, without change, the terms and conditions of the state's WQC. *American Rivers, Inc. v. FERC*, 201 F.3d 1186, 1207 (9th Cir. 2000) ("*American Rivers II*") (rejecting Commission's assertion of absolute authority for balancing and relicensing conditioning under the FPA). If a state's water quality standards require the state agency to determine flows that maintain and protect existing uses while satisfying the criteria for attaining water quality, as Washington's do (WAC 173-201A-070), FERC cannot cast aside this determination and strike its own balance pursuant to Section 10(a) of FPA. The CWA is the controlling authority, and the state agency has the exclusive authority to make this decision.

Under the CWA, it is Ecology, not FERC, that Congress authorizes to determine whether increased flows would impact a project's compliance with state water quality certifications. In their briefs, FERC and Ecology cite only to FERC's own administrative decisions for the proposition that FERC has sufficient authority to determine what "augments" flows established in a state WQC. *See* Resp. Br. at 52; Ecology Br. at p. 13. This is contrary to the federal courts' interpretation of the CWA; moreover, FERC's own interpretation of any provision of the CWA is to receive no judicial deference because it is the Environmental Protection Agency, not FERC, that administers the CWA. *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("*American Rivers I*") (citing *Chevron USA, Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); 33 U.S.C. § 1251(d)).

Federal courts have applied the CWA to provide states with the final word on what license conditions will comply with state water quality standards. For example, in *S.D. Warren Co. v. Maine Board of Environmental Protection*, ___ U.S. ___, 126 S. Ct. 1843, 1853, 164 L. Ed. 2d 625 (2006), the U.S. Supreme Court found that "[c]hanges in the river like [effects of habitat for fish and wildlife and recreational access to and use of the river] fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns." In reviewing FERC's actions in relation to another state's WQC authority in *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991), the District of Columbia Circuit similarly held that, under the CWA, "questions of substantive state environmental" matters are "an area that Congress expressly intended to reserve to the state and concerning which federal agencies have little competence." Likewise, in *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 292-93 (D.C. Cir. 2003), the court held that "[a]lthough 'the FPA represents a congressional intention to establish 'a broad federal role in the development and licensing of hydroelectric power,'" the CWA 'has diminished [the FPA's] preemptive reach by expressly requiring the Commission to incorporate into its licenses state-imposed water quality conditions."

In enacting the CWA, "Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating*, 927 F.2d at 622. Ecology's issuance of

a WQC is a final agency action for purposes of the CWA that must be incorporated by FERC into its license. *American Rivers I*, 129 F.3d at 107 (the language in Section 401 that state certifications shall become a condition on any federal license or permit is "unequivocal, leaving little room for FERC to argue that it has authority to reject state conditions"). With respect to the water quality certification, "FERC's role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless." *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006) (citing *Keating*, 927 F.2d at 622). FERC does not have authority to review, revise, or alter the conditions of a WQC. "[T]he proper forum to review the appropriateness of a state's certification is the state court, and . . . federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification." *Roosevelt Campobello Int'l Park Comm'n v. U.S. Envtl. Prot. Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982) (citing *U.S. Steel Corp. v. Train*, 556 F.2d 822, 837-39 & n.22 (7th Cir. 1977); *Lake Erie Alliance v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234-35 (S.D. Ala. 1976)).

Were it to be assumed, arguendo, that FERC has the authority to "augment" the terms of the WQC, at a minimum, FERC would be required to petition Ecology for a determination regarding whether FERC's proposed "augmentation" is consistent with state water quality standards. As indicated in *Roosevelt*

Campobello International Park Commission, it is the state agency that has been delegated CWA authority and the state courts that have the authority to determine whether a flow standard will comply with state water quality standards.

Moreover, the CWA provides that the process for considering a WQC shall be public, providing for public notice. Under Section 401(a)(1) of the CWA, states must "establish procedures for public notice in the case of all applications for certification." 33 U.S.C. § 1341(a)(1). In *City of Tacoma*, the D.C. Circuit found that Washington State had adopted mailing and publication requirements for Section 401 certifications and that FERC had a role in verifying compliance with those procedures. 460 F.3d at 68. Additionally, Washington State procedures authorize parties to appeal Ecology's WQC decisions—including modification of such decisions—to the Washington State Pollution Control Hearings Board ("PCHB").⁴ In the WQC proceeding for relicensing of this Project, the Snoqualmie Indian Tribe brought an appeal of Ecology's WQC issuance before the PCHB for review of flows for protection of the Tribe's spiritual, cultural, aesthetic, and other interests in Snoqualmie Falls.⁵ The PCHB "heard opening statements, received the sworn testimony of witnesses, admitted exhibits, and heard closing arguments on

⁴ RCW 43.21B.110(1)(c) provides that the PCHB has authority to hear and decide appeals of "the issuance, *modification*, or termination of any . . . certificate . . . by the department." (Emphasis added.) See also WAC 371-08-315(2)(c).

⁵ AR 1279, Attachment 1 to Ecology's Brief.

behalf of the parties."⁶ At the conclusion, the PCHB issued a 47-page order detailing its findings of fact and conclusions of law.⁷

If Ecology were to have decided whether FERC's "adjustment" was consistent with state water quality standards, Washington law would have provided for implementation of the same procedural safeguards that were utilized in the prior review and approval of the WQC. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 121, 11 P.3d 726, 755 (2000).⁸ That process would allow all interested parties to address the potential impacts of the proposed revision on all beneficial uses of the Snoqualmie River, including fish, wildlife, recreation, aesthetics, navigation, and water supply for PSE's hydroelectric use.

Instead, FERC's specific flow proposal adopted in the Rehearing Orders was never submitted to Ecology for a determination of consistency with state water quality standards. Nor were any of the parties to the WQC proceeding given notice of FERC's desire to "adjust" the WQC or any opportunity to address the

⁶ *Id.* at p. 3.

⁷ *Id.*

⁸ Applying general principles of final agency determinations and res judicata, the Washington State Supreme Court has held that "once an agency has made a decision, that decision normally may be changed only through the appellate process[.] . . . When the appellate process results in remand to an agency, the agency must begin again and must provide the same procedural safeguards required in the original action." *Postema*, 142 Wn.2d at 121, 11 P.3d at 755 (citing *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 744, 887 P.2d 891 (1995)).

consistency of this "adjustment" with the State's water quality laws. Rather, FERC acted independently, without input from Ecology.

B. FERC's Adjustment of Flows in the Rehearing Orders Is Not Supported by Substantial Evidence Demonstrating Its Effects on Water Quality.

FERC and Ecology suggest that prior informal communications from Ecology provide FERC with sufficient evidence to reach the determination in the Rehearing Orders that the revised flows would not conflict with the WQC and would have a beneficial effect on water quality. However, this communication preceded the "adjustment" and contains no reference to the flows ultimately determined by FERC to be appropriate. The agencies point to a September 11, 1995 letter from Ecology to FERC as evidence of Ecology's "implicit" approval of the Project flow levels established in the Rehearing Orders. In fact, that letter merely indicates that Ecology disagreed with PSE that "*any* further diminution of water available for hydroelectric power production [*beyond that proposed in Ecology's letter of May 13, 1995*] would be in violation of the state's antidegradation policy WAC 173-201A-070." AR 1002, Attachment 1 to Resp. Br. (emphasis added). The flows proposed in Ecology's referenced May 13, 1995 letter were set at 700 cubic feet per second ("cfs") in May and 450 cfs in June during the daytime hours with nighttime flows of not less than 25 cfs. AR 984, Attachment A hereto.⁹ In AR 1002, Ecology indicated that FERC "*may* require

⁹ In the final WQC, Ecology required 200 cfs between May 16 through May 31 and 450 cfs in June during daytime and nighttime hours. AR 1294, ER 2160; AR 1245, ER 2121-32.

supplementary conditions" in excess of the May 13, 1995 proposed flows, but it did not preapprove a requirement of 1,000 cfs of flows in the months of May and June by finding that such a standard would not affect compliance with state water quality standards. (Emphasis added.) Ecology's September 11 letter indicates only that there *could* be circumstances under which FERC's adoption of flows higher than those proposed in Ecology's May 13, 1995 letter would not conflict with the state WQC. There is no evidence demonstrating that 1,000 cfs—more than double what Ecology proposed in the month of June—is consistent with the state's water quality standards.

Ecology also asserts, without citation to the record, that Ecology determined FERC's revision of the WQC flows did not conflict with the conditions of Ecology's WQC or the state's water quality protections. Ecology points to no evidence in support of this claim because none exists. FERC did not consult with Ecology to review its proposed "adjustment" of the Project flows before issuing the Rehearing Orders. The record does not include any communications from Ecology subsequent to issuance of the License Order save for its brief before this Court.

In lieu of any evidence or analysis, Ecology argues that it is "implicit" in the September 11, 1995 letter that FERC's Rehearing Orders do not change flows in a manner or to a degree inconsistent with Ecology's WQC. In essence, Ecology infers that its September 11, 1995 letter implicitly gave FERC a blank check to do whatever FERC saw fit. There is a difference between Ecology's 1995 statement

that allowed for the possibility of supplemental flows and a determination that the flows adopted in the Rehearing Orders do not conflict with Washington's water quality standards. Under Ecology's implied consent argument, any supplementation of flows would be acceptable regardless of whether those flows affected water quality standards. This argument assumes too much. If FERC's adjustment to flows had a negative impact on spawning fish, for example, under its theory Ecology would have also relinquished its responsibility under the CWA to protect that beneficial use. A simple statement in the 1995 letter that FERC *may* be able to adopt supplemental flows is no substitute for analysis, and in this case, no such analysis occurred. If Ecology makes such an implicit approval, it is shirking its CWA responsibility to ensure that the adopted flows comply with state water quality standards.

Unlike the careful analysis that was undertaken in preparation of the WQC, FERC's environmental impact statement, and the License Order, FERC's Rehearing Orders provide no evidence supporting FERC's "adjustment" of the flows. There is no evidence that the revised flows will materially enhance the value of the flows from a religious or broader aesthetic perspective. There is also no evidence indicating that FERC considered the potential adverse impacts of its flow modification on state water quality standards, including degradation of beneficial uses, potential for increasing total dissolved gas ("TDG"), and increasing river level fluctuations. As such, even if FERC were able to revise a WQC

condition under Section 10(a) of the FPA, such action would require substantial evidence to support such a decision. No such evidence is presented in this case.

C. Under Washington's Antidegradation Policy, Water Quality Standards Cannot Degrade the Preexisting Beneficial Hydroelectric Power Production Use of the Waterway.

Ecology then argues that the state's antidegradation policy, WAC 173-201A-070, does not require the maintenance and protection of hydroelectric power uses. Ecology also purports that the antidegradation policy applies where water must be of a particular quality for usage, suggesting a separation between water quality and water quantity. These arguments are contrary to the plain language of Washington law and to the federal courts' interpretation of that law. Hydropower uses are protected under Washington's antidegradation policy. WAC 173-201A-070 expressly provides that it is to be interpreted in reliance on Washington's Water Resources Act, Chapter 90.54 RCW, which expressly designates hydroelectric power production as a "beneficial use." RCW 90.54.020(1). PSE's Project, constructed in 1898, qualifies as a beneficial use that was existing at the time that Washington State adopted its antidegradation policy. Additionally, the Project utilizes the river flow—or supply of water—for industrial purposes, placing its use within the "characteristic uses" of the Snoqualmie River that are designated in the water quality standards of WAC 173-201A-030. Furthermore, as Ecology argued and the U.S. Supreme Court affirmed in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d

716 (1994), water quantity is an aspect of water quality, and the adoption of flow standards is a proper application of state and federal antidegradation regulations to maintain and protect existing instream uses.

1. Hydroelectric Power Is a Beneficial Use to Be Protected and Maintained Under Washington's Antidegradation Policy.

Federal CWA regulations require state agencies to adopt antidegradation policies that "at a minimum, [are] consistent with . . . [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12. Washington State has adopted an antidegradation policy that requires that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed." WAC 173-201A-070(1). RCW 90.54.020(1) declares that "[u]tilization and management of the waters of the state shall be guided by the following general declaration of fundamentals: (1) Uses of water for . . . hydroelectric power production . . . and all other uses compatible with the enjoyment of the public waters of the state[,] are declared to be beneficial."

Ecology attempts to fashion a distinction between the use of the term "beneficial uses" in WAC 173-201A-070(1) and in RCW 90.54.020(1). Ecology argues that, while hydroelectric power production is a beneficial use for purposes of obtaining state water rights, it is not a beneficial use for water quality purposes. Ecology Br. at pp. 20-21. Effectively, Ecology argues that the definition of

"beneficial uses" under Chapter 90.54 RCW is irrelevant to interpretation of the antidegradation policy adopted in Ecology's administrative regulations.

Ecology's attempt to rewrite the regulation cannot withstand casual—much less close—scrutiny. WAC 173-201A-070 expressly provides that the antidegradation policy is to be "generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971." See copy of regulation provided in Reply Brief Addendum.¹⁰ RCW 90.54.020 defines "beneficial uses" of water to include hydropower. The interpretation of WAC 173-201A-070 is to be guided by Chapter 90.54 RCW. Ecology argues that the term "beneficial uses" as used in WAC 173-201A-070 should be defined to include only "characteristic uses" identified under WAC 173-201A-030. Thus, contrary to the antidegradation policy, Ecology suggests that the term "beneficial use" in WAC 173-201A-070 should be defined as something other than a "beneficial use" defined by RCW 90.54.020(1). This argument violates basic principles of statutory construction. See *Redmond-Issaquah R.R. Pres. Ass'n v. Surface Transp. Bd.*, 223 F.3d 1057, 1061 (9th Cir. 2000) ("we derive meaning from context, and this requires reading the relevant statutory provisions as a whole"; "statutory interpretation is a referential endeavor").

¹⁰ The 2006 Washington water quality standards, adopted after Ecology issued the WQC, also include this interpretive guidance. In addition, the "statutory authority" notation in the regulation lists Chapter 90.54 RCW. See WAC 173-201A-300 (2006) (provided in the Reply Brief Addendum).

Hydropower generation also falls within the "characteristic use" of water supply for industrial purposes identified in WAC 173-201A-030. For Class A water bodies, the classification applied to the Snoqualmie River, "characteristic uses" include "Water supply (domestic, industrial, agricultural)." WAC 173-201A-030(2)(b)(i). The term "industrial" is not defined in Chapter 173-201A WAC or in its authorizing state statutes and federal regulations. See WAC 173-201A-020; RCW 90.48.020; 40 C.F.R. § 131.3. *Webster's Third New International Dictionary* (2002) defines "industrial" as "engaged in industry" or "being in part of industry."¹¹ This dictionary defines "industry" to include "a group of productive or profit-making enterprises that have a similar technological structure of production and that produce or supply technically substitutable goods, services, or sources of income."¹² *Webster's Third New International Dictionary* (2002) defines "hydroelectric" as "of, relating to, or employed in the production of electricity by waterpower."¹³ Given its plain meaning, hydroelectric power generation is an industrial use of water.

¹¹ *Webster's Third New International Dictionary* 1155 (2002).

¹² *Id.* at 1155-56. *Black's Law Dictionary* similarly defines "industrial" with reference to "industry," which includes "systematic labor for some useful purpose; especially, work in manufacturing or production." *Black's Law Dictionary* 779 (7th ed. 1999).

¹³ *Webster's Third New International Dictionary* 1108.

This is reaffirmed by the definition of the term "industrial" in other Washington statutes; "industrial development facilities" are defined in RCW 39.84.020 as including "manufacturing, processing, research, production, assembly, warehousing, transportation, public broadcasting, pollution control, solid waste disposal, *energy facilities*, sports facilities, parking facilities associated with industrial development facilities[.]" (Emphasis added.) A characteristic use of the Snoqualmie River is to provide water supply needed for industrial purposes. Ecology provides no rationale in its brief for excluding hydroelectric power from this use category. If a thermal power plant located on the Snoqualmie River withdrew water for use in its cooling process in the production of electricity, under Ecology's construction of WAC 173-201A-030, it would be treated as a "characteristic use." There is no basis for treating a hydropower plant, which is also in the business of producing electricity, differently than other industrial uses of water. Use of the Snoqualmie River for water supply needed for the industrial purpose of PSE's Snoqualmie Falls Project is a characteristic use under WAC 173-201A-030(2)(b)(i).

2. Water Quantity Is an Element of the Water Quality Determination.

Ecology's attempt to distinguish water quality and water quantity in application of the state's water quality standards is also inconsistent with past precedent and Ecology's own arguments in *PUD No. 1 of Jefferson County*. In that case, the U.S. Supreme Court examined whether Ecology had authority under the

CWA to regulate minimum instream flows with respect to a city and local utility district's proposed construction of a hydroelectric power plant. The Court held that Ecology had authority to regulate both water quality and water quantity:

Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." *This is an artificial distinction.* In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses[.]"

PUD No. 1 of Jefferson County, 511 U.S. at 719 (emphasis added.).

Washington State's adoption of minimum instream flows is also consistent with Section 101(g) and 510(2) of the CWA, 33 U.S.C. §§ 1251(g), 1370(2), respectively. Section 101(g) provides "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Section 510(2) provides that the CWA shall not be "construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370(2). This authority was affirmed by the Court in *PUD No. 1 of Jefferson County*, 511 U.S. at 720. Implementation of the CWA, therefore, involves coordination between state water pollution and water supply regulations.

In *PUD No. 1 of Jefferson County*, Ecology argued that its minimum instream flow requirements were necessary to implement the state's antidegradation policy. The Court upheld that authority, finding

[EPA regulations] require States to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." 40 CFR § 131.12 (1993). These "implementation methods shall, at a minimum, be consistent with the . . . [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Ibid.* EPA has explained that under its antidegradation regulation, "no activity is allowable . . . which could partially or completely eliminate any existing use." EPA, Questions and Answers on Antidegradation 3 (Aug. 1985). Thus, States must implement their antidegradation policy in a manner "consistent" with existing uses of the stream. . . . [T]he State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an "[e]xisting instream water us[e]" will be "maintained and protected." 40 CFR § 131.12(a)(1) (1993).

511 U.S. at 718-19.

Hydroelectric power generation is a beneficial use to be protected under the antidegradation policy. Accordingly, under this framework, Ecology must establish water quantity levels that will maintain and protect that existing use of the Snoqualmie River as a part of Ecology's obligations in implementing Washington's water quality standards. Ecology did this in its WQC, balancing the hydropower interest with other beneficial uses, such as fish, wildlife, recreation, and aesthetics, when it established instream flows. AR 18, ER 443; AR 25, ER 449; AR 272, ER

947-79; AR 855, ER 1403-412; AR 1245, ER 2121-133. Ecology's attempt to justify this by distinguishing water quality from water quantity aspects of its CWA regulation is without merit and contrary to established precedent.

D. PSE Has Standing to Challenge FERC's Decision Adjusting the Flow Standards That Apply to PSE's Project.

1. As the Applicant for the License and WQC and Owner of the Project That Is Regulated, PSE Has Prudential Standing.

This Court's jurisdiction to consider PSE's petition is derived from 16 U.S.C. § 825l, which provides that "any person [or] electric utility . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person [or] electric utility . . . is a party may apply for a rehearing." A party is "aggrieved" under this provision if it establishes both Article III and prudential standing to bring the petition. *Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001). This Court has described the two-part standing inquiry as follows: "First, an Article III federal court must ask whether a plaintiff has suffered sufficient injury to satisfy the 'case or controversy' requirement of Article III. . . . Second, if a plaintiff has suffered sufficient injury to satisfy Article III, a federal court must ask whether a statute has conferred 'standing' on that plaintiff." *Cetacean Community v. Bush*, 386 F.3d 1169, 1174-75 (9th Cir. 2004). PSE's Article III standing to bring this action is uncontested; FERC challenges only the prudential standing of PSE, and Ecology and the Tribe take no position. *See Resp. Br. at 45-51; Ecology Br. at 1; Tribe's Reply Br. at note 32.*

Prudential standing turns on a party's personal stake in the dispute, *see Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), and where a party is directly subject to the agency action in question, the party's personal stake is undeniable. "Past cases have considered self-evident the standing of parties whose interests are arguably regulated by the statute in question." *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1396 (9th Cir. 1993). "When a party is subject to the regulatory action, . . . only an *explicit* declaration of Congress barring judicial review could overcome 'Congress' evident intent to make agency action presumptively reviewable." *Id.* at 1397 (citation omitted). In *Stock West Corporation*, the Ninth Circuit found that this prudential standing rule was revealed by negative inference in the holding of *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). *Id.* At page 50 of its brief, FERC provides only a partial quotation from the *Clarke* holding regarding applicability of the zone of interests test, leaving out the critical phrase that begins the statement, emphasized below:

But when, as here, the plaintiff is not "the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."

Ashley Creek Phosphate Co., 420 F.3d 934, 940 (9th Cir. 2005) (emphasis added), *cert. denied*, 126 S. Ct. 2967 (2006), (quoting *Clarke*, 479 U.S. at 399) .

The prudential, or "'zone of interests' test for standing is a generous one. One seeking standing need only assert an interest that is 'arguably' within the zone protected by the statute." *California Cartage Co., Inc. v. United States*, 721 F.2d 1199 (9th Cir. 1983) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). An applicant is generally within the zone of interests protected by statutes applied by the agency in ruling on the subject application. If the petitioner is the subject of the challenged action, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Here, as the applicant for the FERC license and owner of the Project that is the subject of the order under review, PSE's easily recognizable personal stake in FERC's application of the FPA and the CWA to that relicensing decision clearly satisfies prudential standing requirements.

2. The Adjustment of Project Flows Implicates Intertwined Environmental and Economic Issues That Are Within the Zone of Interests Protected by the FPA and CWA.

Consistent with the requirements of Washington State's antidegradation policy, the goal of the relicensing WQC process is to establish Project flows and other operational conditions that will achieve water quality and maintain, protect and balance all existing beneficial uses. *See* WAC 173-201A-070 ("[e]xisting

beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed"). The amount of water discharged by the Project back into the Snoqualmie River has relevance to protection of the renewable power resource, fish and wildlife, recreation, and aesthetic/cultural values. The flows adopted by Ecology in its WQC resulted from years of collaborative studies and analysis that sought to balance those existing beneficial uses in relation to the state's water quality standards. *See* AR 18, ER 443; AR 25, ER 449; AR 272, ER 947-79; AR 855, ER 1403-412. This effort involved the Snoqualmie Indian Tribe, FERC, Washington Department of Fish and Wildlife, the City of Snoqualmie, King County Parks, the National Park Service, Washington State Parks and Recreation Commission, and The Tulalip Tribes, among others. *See* AR 1, ER 90-91; AR 1294, ER 2144-46.

To comply with the antidegradation policy, Ecology was required to balance PSE's water right claim for nonconsumptive diversion of 2,500 cfs of water for the generation of power with other existing beneficial uses of the Snoqualmie River, including aesthetics and aquatic resources. AR 984, ER 1473. PSE indisputably has an economic interest in the Project's power production. In addition, as a license applicant, PSE has an interest in seeing that the relicensing process is conducted in accordance with applicable procedural and substantive regulations, as those regulations set the framework for Project planning and stakeholder

participation in the relicensing process. Here, such procedures and substantive regulations required, among other things, implementation of the Washington State antidegradation policy and public participation procedures. PSE's interest in seeking review of FERC's Rehearing Orders is to ensure that the agency charged with certification responsibilities under Section 401 of the CWA—Ecology—is the entity responsible for striking the water quality balance.¹⁴

This balance includes consideration of all existing beneficial uses, including fish and wildlife enhancement, aesthetics, recreation, and hydroelectric power generation purposes. RCW 90.54.020(1). FERC's "adjustment" to the WQC flows diminishes utilization of a renewable energy resource, is likely to increase TDG levels in the pool at the base of Snoqualmie Falls, and results in a greater range of flows and greater river level fluctuations than those established in the WQC flows.

¹⁴ FERC suggests that PSE is not interested in FERC's usurpation of Ecology's balance-striking responsibilities because PSE did not seek rehearing of the License Order, which included a minor adjustment to the flows. That minor adjustment—requiring 200 cfs day and night solely on Labor Day weekend (the same level as required in the months of July and August)—affects flows over a mere three-day period. The License Order did not appreciably tip the water quality scales. The Rehearing Order adjustments increased the flow requirement for two months of the year from 200-450 cfs to 1,000 cfs. The revision in the Rehearing Orders is even more dramatic when one considers that the highest flows under the WQC for any month of the year were set at 450 cfs. Although PSE believed there was no basis for the Labor Day revisions, adjusting flows for three days of the year had a minimal impact and, therefore, minimal potential for dramatically affecting the balance struck by Ecology in the WQC. FERC's extreme adjustment of flows for May and June, however, significantly alters the balance, affecting power generation uses, TDG levels, and river fluctuations. Given these facts, FERC's unchallenged minor deviation in the License Order does not establish that PSE was not aggrieved by the License Order alteration.

See AR 1094, ER 1897-1901 (environmental cost of lost renewable power); AR 1337, ER 2238 (monetary cost of lost renewable power); AR 1345, ER 2259; AR 1245, ER 2129 (TDG effects); AR 1279, ER 2137-39 (limiting river level fluctuation to minimize potential effects on aquatic species downstream).

In setting the balance of flows under the WQC, effects on environmental, economic, recreational, and cultural interests are linked. Given the interrelationship of these values in the actions undertaken by FERC and Ecology, FERC's reliance on *Ashley Creek Phosphate Company* is misplaced. In that case, the plaintiff, a potential competitor of a mining project under review by the Bureau of Land Management, was denied standing for raising purely economic issues in a procedural challenge under the National Environmental Policy Act. The plaintiff in *Ashley Creek Phosphate Company* "never claimed to be protecting an interest...even remotely intertwined with the environment" and failed to link "its pecuniary interest to the physical environment or to the environmental impacts of the project evaluated in the [environmental impact statement]." 420 F.3d at 940.

Here, PSE's interests include directly intertwined environmental, economic, aesthetic, recreational, and cultural interests. The CWA and the FPA require the implementing agencies to consider all of these interests in their respective certification and licensing decisions. Section 10(a) of the FPA, 16 U.S.C. § 803(a), requires FERC to determine the plan best adapted to

improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and

utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes[.]

Under the antidegradation policy requirement of the CWA, state agencies implementing water quality standards must also consider how to maintain and protect existing beneficial uses of the federal waterway. 40 C.F.R. § 131.12.

Under Washington's antidegradation policy (WAC 173-201A-070), interpreted in connection with RCW 90.54.020, PSE's existing power generation use was one of the beneficial uses to be considered along with the aquatic, aesthetic, and recreational uses of the river.

Furthermore, FERC's suggestion that PSE's interests do not fall within the zone of interests of the CWA is contradicted by Section 401 of the CWA, which provides that "*any applicant for a Federal license...shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate.*" 33 U.S.C. § 1341(a)(1) (emphasis added). There is no doubt that an applicant's interests in the proper implementation of the CWA for the protection of balanced environmental, economic, and other values and in the incorporation of the certification into FERC's federal license fall within the zone of interests regulated by the CWA.

III. CONCLUSION

For the reasons set forth above and in PSE's Opening & Intervenor Brief, PSE respectfully requests that this Court (a) affirm the License Order with respect

to its decision regarding cultural and historic resource issues, which is consistent with applicable law and supported by substantial evidence, and (b) reverse FERC's Rehearing Orders with respect to the inappropriate adjustment of the Project's flows in conflict with the requirements of Washington State's WQC.

DATED: November 9, 2006

PERKINS COIE LLP

By: Mark W. Schneider
Mark W. Schneider (per M.W.)
Markham A. Quehrn
Kristine R. Wilson

Attorneys for Petitioner
Puget Sound Energy, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Puget Sound Energy, Inc.'s Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,115 words.

November 9, 2006
Date

Kenneth B. Wilson
Kenneth B. Wilson
Attorney at Law

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I certify under penalty of perjury that on November 9, 2006, I caused to be served by United States mail, postage prepaid, two (2) true and correct copies of Puget Sound Energy, Inc.'s Reply Brief to the following counsel of record:

Andrea Rodgers
Snoqualmie Indian Tribe
8130 Railroad Avenue
P.O. Box 969
Snoqualmie, WA 98065

Charles M. Tebbutt
Western Environmental Law
Center
1216 Lincoln Street
Eugene, OR 97401


Joan M. Marchioro
Washington Attorney General
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117

Michael Kaufmann
Federal Energy Regulatory
Commission
M/S: GC-12, Location : 9A-07
888 First Street, NE
Washington, D.C. 20426

Michael Gendler
Gendler & Mann, LLP
1424 Fourth Avenue, Suite 1015
Seattle, WA 98101

Harold S. Shepherd
Center for Tribal Water Advocacy
P.O. Box 583
Clifton, CO 81520

DATED this 9th day of November, 2006, at San Francisco, CA.

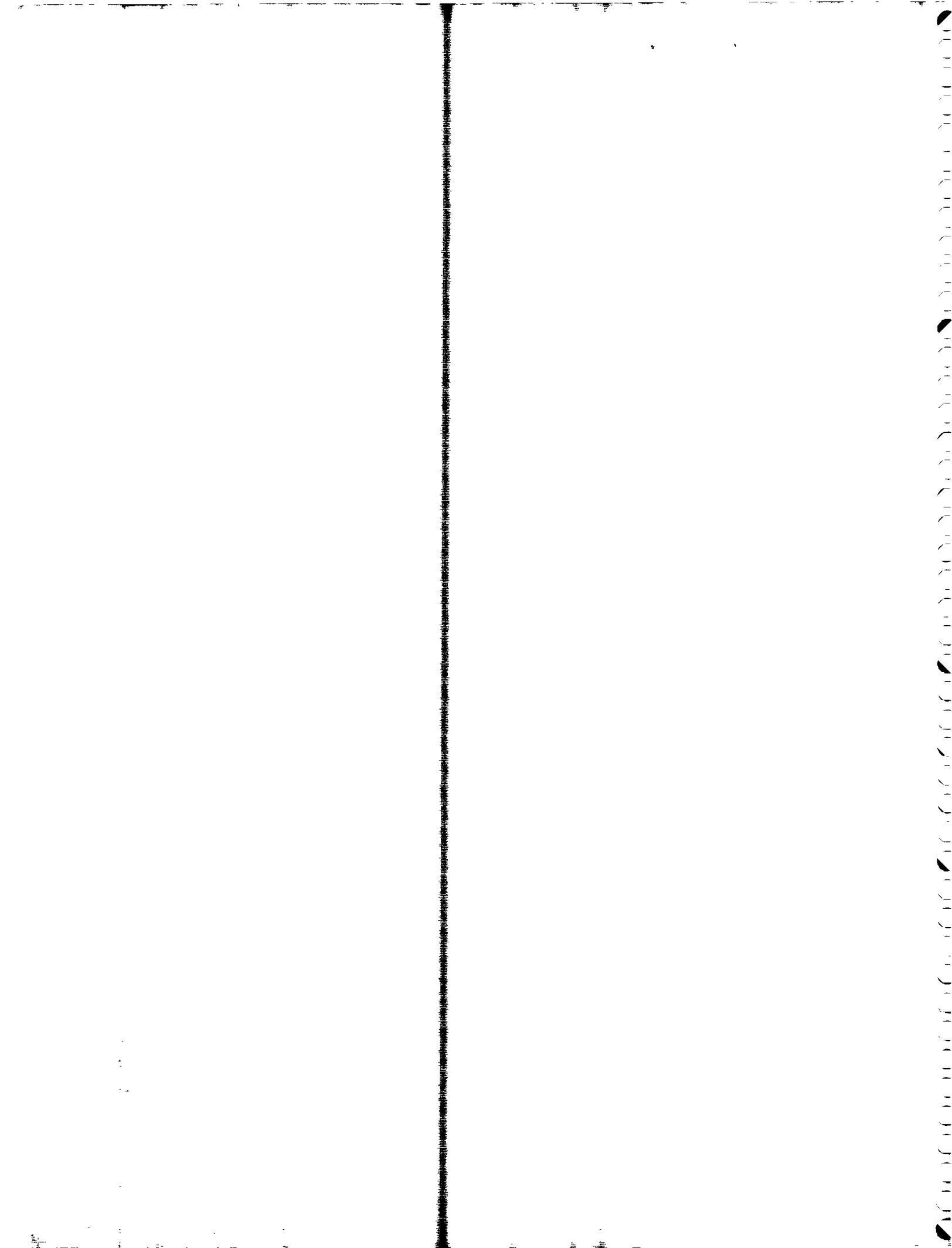


Kenneth B. Wilson
Attorney at Law

REPLY BRIEF ADDENDUM

Relevant Portions of Statutes, Regulations and Rules Cited

**Mark W. Schneider
Markham A. Quehrn
Kristine R. Wilson
PERKINS COIE LLP
10885 NE 4th Street, Suite 700
Bellevue, WA 98004-5579
(425) 635-1400
Attorneys for Petitioner Puget Sound Energy, Inc.**



**UNITED
STATES
CODE
ANNOTATED**

TITLE 16

Conservation

§§ 761 to 980

Comprising All Laws of a General
and Permanent Nature
Under Arrangement of the Official Code of
the Laws of the United States
with
Annotations from Federal and State Courts



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SUBCHAPTER I—REGULATION OF THE DEVELOPMENT
OF WATER POWER AND RESOURCES

HISTORICAL AND STATUTORY NOTES

Designation of Subchapter; Savings Provision

Act Aug. 26, 1935, c. 687, Title II, § 212, 49 Stat. 847, provided that sections 1 to 29 of the Federal Water Power Act, as amended (sections 792, 793, former section 794, sections 795 to 797, 798 to 818, former section 819 and sections 820 to 823 of this title) shall constitute Subchapter I of the Act, as set out above. Section 212 also repealed sections 25 and

30 of the Act (former sections 819 and 791 of this title). It also contained a proviso as follows: "That nothing in that Act, as amended, shall be construed to repeal or amend the provisions of the amendment to the Federal Water Power Act approved March 3, 1921 (41 Stat. 1353 [section 797a of this title]), or the provisions of any other Act relating to national parks and national monuments."

CROSS REFERENCES

- Exemption from licensing requirements of this subchapter to 5,000 kilowatts hydroelectric power project, see 16 USCA § 2705.
 Inapplicability of this subchapter to Colorado River between Hoover Dam and Glen Canyon Dam, see 43 USCA § 1555.
 Reentry rights on Alaskan lands if not subject to license or license application under this subchapter—
 Native allotments under certain statutes, see 43 USCA § 1634.
 Public lands patents under certain statutes, see 16 USCA § 3215.
 Snake River Birds of Prey National Conservation Area, hydroelectric facilities, see 16 USCA § 460iii-3.

§ 791. Repealed. Aug. 26, 1935, c. 687, Title II, § 212, 49 Stat. 847

HISTORICAL AND STATUTORY NOTES

Section, Act June 10, 1920, c. 285, § 30, 41 Stat. 1077, designated this chapter as The Federal Water Power Act.

§ 791a. Short title

This chapter may be cited as the "Federal Power Act."

(June 10, 1920, c. 285, § 321, formerly § 320, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 863, and renumbered Nov. 9, 1978, Pub.L. 95-617, Title II, § 212, 92 Stat. 3148.)

HISTORICAL AND STATUTORY NOTES

Short Title

1990 Amendments. Pub.L. 101-575, § 1, Nov. 5, 1990, 104 Stat. 2834, provided that: "This Act [enacting section 2243 of Title 42, Public Health and Welfare, amending sections 796 and 824a-3 of this title and sections 2014, 2061, 2201 and 2284 of Title 42, and enacting provisions set out as a note under section 796 of this

title] may be cited as the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990".

1988 Amendments. Pub.L. 100-473, § 1, Oct. 6, 1988, 102 Stat. 2299, provided that: "This Act [amending section 824e(a), enacting section 824e(b) and (c), and redesignating as section 824e(d) former section 824e(b) of this title and en-

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capa-

bilities for encouraging electricity cost-effective policies, restrictive regulatory authority

(3) Upon receipt of a license shall solicit recommendations from Indian tribes identified in such plan for proposed terms and conditions for inclusion in the license.

(b) Alterations in project

That except when necessary for navigation, life, health or safety, no alteration or addition not in conformity with the original plan made to any dam or structure or the capacity of an installed capacity without the prior approval of the Commission or agency alteration or addition to such modification a

(c) Maintenance and operation—see for damages

That the licensee shall maintain in good condition of repair adequate for the efficient operation of the project for the transmission of power, shall establish rules and regulations, shall establish standards for such purposes as not to impair the project or the property of other persons, shall prescribe for the protection of the licensee hereunder shall be the property of other persons, shall operation of the project and accessory thereto, consistent with the United States

(d) Amortization reserve

That after the first year of operation, if a reasonable rate of return is earned thereafter, if a reasonable rate of return is earned on any project or projects, the licensee shall maintain amortization reserve in the discretion of the Commission, the license or be applied to the net investment. Such

bilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus so earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion

§ 800: Issuance of preliminary permits or licenses

HISTORICAL AND STATUTORY NOTES

Termination of Reporting Requirements
For termination of reporting provisions of subsec. (b) of this section, effective May 15, 2000, see Pub.L. 104-66, § 3003, as amended, set out as a note under 31 U.S.C.A. § 1113, and page 91 of House Document No. 103-7.

§ 803. Conditions of license generally.

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title, if necessary, in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

[See main volume for text of (2) and (3), (b) to (j)]

Also in original. Probably should be followed by "and"

HISTORICAL AND STATUTORY NOTES

Termination of Reporting Requirements
For termination of reporting provisions of this section, effective May 15, 2000, see Pub.L. 104-66, § 3003, as amended, set out as a note under 31 U.S.C.A. § 1113, and page 91 of House Document No. 103-7.

Termination of Reporting Requirements
For termination, effective May 15, 2000, of provisions in subsec. (e)(4) of this section relat-

ing to reporting recommendations to Congress every 5 years, see Pub.L. 104-66, § 3003, as amended, set out as a note under 31 U.S.C.A. § 1113, and page 91 of House Document No. 103-7.

CODE OF FEDERAL REGULATIONS

Annual charges, see 18 CFR § 11.20 et seq.
Application form pertaining to transactions involving securities of public utility, see 18 CFR § 33.1 et seq.

Recreational opportunities and development at licensed projects, see 18 CFR § 8.1 et seq.
Surrender or termination of license, see 18 CFR § 6.1 et seq.

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17 Am. Jur. Proof of Facts 2d 133, Failure to Manage Dam or Reservoir to Prevent Flooding.
19 Am. Jur. Proof of Facts 2d 75, Dam Failure as Result of Negligent Design or Maintenance.

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olies § 4:1.

Notes of Decisions

1. Construction
Electric utility licensed by Federal Energy Regulatory Commission (FERC) could not, under *Ex Parte Young* doctrine, maintain action seeking to prevent state from recovering damages to its property allegedly resulting from utility's negligence in the operation of the licensed power project; Federal Power Act unmistakably evidenced intent to exclude licensees from maintaining such an action. Union Elec. Co. v. Missouri Dept. of Conservation, C.A.8 (Mo.) 2004, 366 F.3d 655. Electricity ⇨ 19(5).
6. Duties and responsibilities of Commission
Federal Power Act (FPA) commanded Federal Energy Regulatory Commission (FERC) to assess annual charges against hydroelectric utilities licensed under FPA, which included review of cost reports of other federal agencies on which charges were based, and therefore FERC acted contrary to unambiguously expressed intent of Congress and contrary to law by failing to conduct that review. City of Tacoma, Washington v. F.E.R.C., C.A.D.C.2003, 331 F.3d 106, 356 U.S.App.D.C. 289, on remand 2004 WL 1377391. Electricity ⇨ 10.

ty, ambien well as b Brady v. C.A.D.C.20 Electricity Federal (FERC). Federal P operation conditions and wildlif rizing it t cense for I that projec plan to m therefore Chevron d contention targeted s by project, ties: could which in t wildlife. I C.A.D.C.20 Electricity.

8. Adaptability of project to comprehensive plan.
City of New Martinsville, W.Va. v. F.E.R.C., C.A.D.C.1996, 102 F.3d 567, 322 U.S.App.D.C. 169, (main volume) on remand 1997 WL 660517.
17. Costs
An 1872 deed whereby canal company conveyed works of improvement to United States, while reserving right to "water power" and "surplus water," reserved what would later be known under Federal Power Act as "headwater benefits" attributable to storage-and-release capability of upstream dam owned by United States. City of Kaukauna, Wis. v. F.E.R.C., C.A.7 (Wis.) 2000, 214 F.3d 888, on remand 2000 WL 1211268. Electricity ⇨ 8.4
22. Fish and wildlife protection—Generally
Federal Energy Regulatory Commission (FERC) did not fail to consider non-development public uses in allowing Oklahoma agency to expand commercial marina located on property of hydroelectric project, so as to violate Federal Power Act (FPA), in that FERC's order discussed "visual character and scenic quality," impacts on fish and wildlife, air and water quali-

29. Alter Federal (FERC) permitted by support rec removing f land, and t land mana FERC's c boundary, i fied parcels property o records rec supplement uses of lan mates of a identified " throughout gaps, so as determinati project bot F.E.R.C., U.S.App.D. 30. Privat Electric Regulatory der Ex Pa

with the provisions of sections 1535 and 1536 of Title 31, providing for interdepartmental work.

(June 10, 1920, c. 285, § 312, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 859, and amended Sept. 13, 1982, Pub.L. 97-258, § 4(b), 96 Stat. 1067.)

HISTORICAL AND STATUTORY NOTES

Codifications

"Sections 1535 and 1536 of Title 31" was substituted in text for "sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])" on authority of Pub.L. 97-258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

Transfer of Functions

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to

CROSS REFERENCES

Information on matters subject to investigation by Commission concerning regulatory provisions of natural gas companies published in manner authorized under this section, see 15 USCA § 717m.

Penalty mail, use to announce publication of maps, atlases, statistical and other reports, see 39 USCA § 3204.

LIBRARY REFERENCES

Administrative Law

Issuance of securities, see 18 CFR § 20.1 et seq.

American Digest System

Electricity ⇨1.
Key Number System Topic No. 145.
United States ⇨40.
Key Number System Topic No. 393.

Encyclopedias

Electricity, see C.J.S. § 1.
United States, see C.J.S. §§ 38 to 40.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 8251. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commis-

sion is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such

terms and conditions as to such proceeding may modify its findings and conclusions on the evidence so taken, and may make such new findings which, if such findings are conclusive, and its conclusions, setting aside of the original order of the court, affirming, modifying or setting aside such order of the Commission. The Supreme Court of the United States as provided in section 125.

(c) Stay of Commission's order

The filing of an application for review of this section shall not, unless otherwise ordered, operate as a stay of the Commission's order in proceedings under subsection (b) specifically ordered by the Commission's order.

(June 10, 1920, c. 285, § 313; 49 Stat. 860, and amended July 24, 1949, c. 139, § 127, 63 Stat. 947.)

HISTORIC

Revision Notes and Legislative History. 1949 Acts. Senate Report No. 352, House Report No. 352, see 1949 Code Cong. Service, p. 1248.

1958 Acts. Senate Report No. 1000, see 1958 U.S. Code Cong. and Admin. News, p. 3996.

Codifications

In subsec. (b), "section 125-28" was substituted for "section 240 of the Judicial Code, as (U.S.C., Title 28, secs. 346 and authority of Act June 25, 1948, 61 Stat. 869, the first section of which amended Title 28, Judiciary and Judicial Administration."

Amendments

1958 Amendments. Subsec. (b). Pub.L. 85-791, § 16(a), added providing that Commission may set aside findings or orders if such order has been filed in court of appeals.

Subsec. (b). Pub.L. 85-791, § 16(b), second sentence, substituted "to be taken before the court" for "to be taken before the Commission" and "to be taken before the court" for "to be taken before the Commission" and "to be taken before the court" for "to be taken before the Commission".

terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 16, 72 Stat. 947.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1949 Acts. Senate Report No. 303 and House Report No. 352, see 1949 U.S. Code Cong. Service, p. 1248.

1958 Acts. Senate Report No. 2129, see 1958 U.S. Code Cong. and Adm. News, p. 3996.

Codifications

In subsec. (b), "section 1254 of Title 28" was substituted for "sections 239 and 240 of the Judicial Code, as amended (U.S.C., Title 28, secs. 346 and 347)" on authority of Act June 25, 1948, c. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

Amendments

1958 Amendments. Subsec. (a). Pub.L. 85-791, § 16(a), added sentence providing that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub.L. 85-791, § 16(b), in second sentence, substituted "transmitted by the clerk of the court to" for "served upon" and "file with the court" for "certify and file with the court a transcript

of", and inserted "as provided in section 2112 of Title 28", and in third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

Change of Name

Act June 25, 1948, cff. Sept. 1, 1948, as amended by Act May 24, 1949, substituted "Court of Appeals" for "Circuit Court of Appeals".

Transfer of Functions

The Federal Power Commission was terminated and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under

16 § 825h

Note 14

sion (FERC) had shifted its regulatory focus from electricity transmission to sales so as to undermine the factual basis of its prior order governing the assessment methodology for annual charges to public utilities and warrant a new rule that was based on sales as well as transmissions; focus of FERC's prior order was never exclusively on transmission, to the extent the agency's intervention in California energy

crisis focused on sales, its actions reflected imperatives of a singular event, not a sustained shift in regulatory priorities, and transmission reform remained a top agency priority. Midwest Independent Transmission System Operator, Inc. v. F.E.R.C., C.A.D.C.2004, 388 F.3d 903, 363 U.S.App.D.C. 382. Electricity 11.3(1)

§ 825j. Investigations relating to electric energy; reports to Congress.

HISTORICAL AND STATUTORY NOTES

Termination of Reporting Requirements

For termination of reporting provisions of subsec. (d) of this section, effective May 15,

2000, see Pub.L. 104-66, § 3003, as amended set out as a note under 31 U.S.C.A. § 1113, at page 91 of House Document No. 103-7.

§ 825k. Publication and sale of reports

CODE OF FEDERAL REGULATIONS

Issuance of securities, see 18 CFR § 20.1 et seq.

§ 825l. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

[See main volume for text of (b) and (c)]

(June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 16, 72 Stat. 947; Aug. 8, 2005, Pub.L. 109-58, Title XII, § 1284(c), 119 Stat. 980.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2005 Acts. House Conference Report No. 109-190, see 2005 U.S. Code Cong. and Adm. News, p. 448.

Statement by President, see 2005 U.S. Code Cong. and Adm. News, p. 517.

Amendments

2005 Amendments. Subsec. (a). Pub.L. 109-58, § 1284(c), inserted "electric utility," after "person," in the first 2 places it appeared and struck out "any person unless such person" and inserted "any entity unless such entity"

LIBRARY REFERENCES

American Digest System

Electricity ⇨ 19(5, 13).
Key Number System Topic No. 145.

Corpus Juris Secundum

CJS Electricity § 9, Powers of Federal Energy Regulatory Commission—Proceedings and Judicial Review.

CONSERVATION CONSERVATION

Research References

ALR Library

40 ALR, Fed. 891, Construction and Application of § 23(B) of Federal Power Act (16 U.S.C.A. § 817), Requiring Any Person Intending to Construct Dam or Project on Nonnavigable Stream to File Declaration of Such Intention.

93 ALR, Fed. 186, Requirement that Objection be Urged on Rehearing Before Federal Energy Regulatory Commission as Prerequisite for Judicial Review Under § 19 of Natural Gas Act (15 U.S.C.A. § 717r), § 506a of Natural Gas Policy.

Encyclopedias

Am. Jur. 2d Public Utilities § 230, Standing.

Forms

Federal Procedural Forms § 50:181, Jurisdiction.

Notes of Decisions

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Weight and sufficiency of evidence 29-31

Prescription, weight and sufficiency of evidence 29a

6. Prerequisites to review—Generally

Where neither transmission providers' rule-making petition to the Federal Energy Regulatory Commission (FERC) nor their petition for rehearing pointed to a "changed circumstances" policy argument as the reason that a new rule governing the assessment methodology for annual charges to public utilities was required, and where, on appeal, transmission providers presented no "reasonable ground" for this default, the Court of Appeals lacked jurisdiction to consider that argument. Midwest Independent Transmission System Operator, Inc. v. F.E.R.C., C.A.D.C.2004, 388 F.3d 903, 363 U.S.App.D.C. 382. Electricity ⇨ 11.3(7)

Even if hydroelectric project licensee had recovered its capital investments in the projects and had engaged in conspiracy to hide that fact from project developer that was purported joint venturer, developer did not have standing to bring petition for review of Federal Energy Regulatory Commission (FERC) decision that rejected its challenges to licensee's sale of project debt; joint venture agreements required licensee to recover its capital investment and projects to meet energy output projections in order for developer to receive profit distributions, and there was no evidence that the projects would meet those projections. Hydro In-

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UNITED STATES CODE ANNOTATED

TITLE 33

Navigation and Navigable Waters

§§ 1251 to 2000

Comprising All Laws of a General
and Permanent Nature
Under Arrangement of the Official Code of
the Laws of the United States
with
Annotations from Federal and State Courts



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CODE

ANNOTATED

Labor.
Mineral Lands and Mining.
Money and Finance.
National Guard.
Navigation and Navigable
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Navy (*See Title 10, Armed
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Patents.
Patriotic and National
Observances,
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Postal Service.
Public Buildings, Property,
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Public Contracts.
The Public Health and
Welfare.
Public Lands.
Public Printing and
Documents.
Railroads.
Shipping.
Telegraphs, Telephones,
and Radiotelegraphs.
Territories and Insular
Possessions.
Transportation.
War and National Defense.

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- expand your library with additional resources
- retrieve current, comprehensive history citing references to a case with KeyCite

For more information on using WESTLAW to supplement your research, see the WESTLAW Electronic Research Guide, which follows the Explanation.

SUBCHAPTER I—RESEARCH AND RELATED PROGRAMS
CROSS REFERENCES

- "Airport development" defined as in this section for purposes of airport development and noise, see 49 USCA § 47102.
- Environmental conservation acreage reserve program assistance, see 16 USCA § 3830.
- Source water—
- Assessment and delineations of surface or ground water, see 42 USCA § 300j-13.
 - Petition program approval, see 42 USCA § 300j-14.

LIBRARY REFERENCES
Law Review and Journal Commentaries

- As natural landscaping takes root we must weed out the bad laws—How natural landscaping and Leopold's Land Ethic collide with unenlightened weed laws and what must be done about it. Bret Rappaport, 26 J.Marshall L.Rev. 865 (1993).
- Oil spill litigation: Private party lawsuits and limitations: Bruce B. Weyhrauch, 27 Land & Water L.Rev. 363 (1992).

§ 1251. Congressional declaration of goals and policy

- (a) **Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective**

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and

propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimina-

tion of discharge of pollutants to at least the same extent

(d) Administrator of Environment chapter

Except as otherwise expressed by the Administrator of the Environment chapter called "Administrat

(e) Public participation in of any regulation, etc.

Public participation in the of any regulation, standards established by the Administrator be provided for, encouraged the States. The Administrator develop and publish regulations public participation in such

(f) Procedures utilized for i

It is the national policy that procedures utilized for implementing the drastic minimization of procedures, and the best use to prevent needless duplication of government.

(g) Authority of States over

It is the policy of Congress to allocate quantities of water reserved, abrogated or otherwise further policy of Congress construed to supersede or which have been established operate with State and local solutions to prevent, reduce programs for managing water (June 30, 1948, c. 758, Title I, § 2, 86 Stat. 816, and amended 91 Stat. 1567, 1575; Feb. 4, 1960.)

HISTORICAL

Revision Notes and Legislative Report 1972 Acts. Senate Report No. 9 and Senate Conference Report

and wildlife and provides for to be achieved by July 1, 1983; of the discharge of toxic pollu- ed;

Federal financial assistance be yned waste treatment works; hat areawide waste treatment be developed and implemented es of pollutants in each State; a major research and demon- technology necessary to elimi- to the navigable waters, waters ans; and

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ognize, preserve, and protect of States to prevent, reduce, evelopment and use (including ment) of land and water re- nistrator in the exercise of his e policy of Congress that the program under this chapter der sections 1342 and 1344 of e Congress to support and aid duction, and elimination of ical services and financial aid municipalities in connection anation of pollution.

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tion of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

(June 30, 1948, c. 758, Title I, § 101, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 816, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 5(a), 26(b), 91 Stat. 1567, 1575; Feb. 4, 1987, Pub.L. 100-4, Title III, § 316(b), 101 Stat. 60.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 92-1236, see 1972 U.S. Code Cong. and 1972 Acts. Senate Report No. 92-414 Adm. News, p. 3668. and Senate Conference Report No.

SUBCHAPTER IV—PERMITS AND LICENSES

CROSS REFERENCES

Continuing planning process, approval of State permit program, see 33 USCA § 1313.

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of

33 § 1369

Note 96

decision notwithstanding fact that there had been a prior citizen's suit in the district court which was dismissed because Agency commenced administrative proceedings on same subject matter. *Montgomery Environmental Coalition v. Costle*, C.A.D.C.1981, 646 F.2d 595, 207 U.S.App.D.C. 260.

97. — Prevailing party, attorney fees, practice and procedure

For purposes of a statutory award of attorney fees, environmental organization "prevailed" in its challenge to Environmental Protection Agency's categorization of plans into two groups for the development of effluent limitations based on best available technology, when issue was remanded for notice-and-comment proceeding; organization had raised substantive and procedural challenges to subcategorization and argued that subcategorization might lead to unnecessary pollution. *Chemical Mfrs. Ass'n v. U.S.E.P.A.*, C.A.5 1989, 885 F.2d 1276.

98. Remand, practice and procedure

Although district court improperly found that it did not have jurisdiction to review Administrator's veto of state waste discharge permit, remand was not required in view of presence of a dispositive legal issue which court of appeals would itself resolve in interests of judicial econ-

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omy. *State of Wash. v. U.S. Environmental Protection Agency*, C.A.9 (Wash.) 1978, 573 F.2d 583.

Response by Environmental Protection Agency to problem of temperature impact as bearing on standards for control of water pollution was unsatisfactory, and on remand, Agency was to reconsider its decision not to make allowance for temperature; in light of strong evidence that reduced removal efficiency occurred in the industry during cold weather. *Tanners' Council of America, Inc. v. Train*, C.A.4 1976, 540 F.2d 1188.

Concession by the Environmental Protection Agency that its concentrations used in effluent limitations for the petroleum refinery industry were based on gross limitations did not require remand where regulations allowed a permit applicant to demonstrate that pollutants in intake water would not be removed by treatment systems designed to reduce process waste-water pollutants to the levels required by the applicable limitations, so that in an appropriate situation gross would be reduced to net and plant not penalized for something it could not prevent. *American Petroleum Institute v. E.P.A.*, C.A.10 1976, 540 F.2d 1023; certiorari denied 97 S.Ct. 1340, 430 U.S. 922, 51 L.Ed.2d 601.

§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

(June 30, 1948, c. 758, Title V, § 510, as added Oct. 18, 1972, Pub.L. 92-500; § 2, 86 Stat. 893.)

Ch. 26 POLLUTION

HISTO

Revision Notes and Legislation
1972 Acts. Senate Report
and Senate Conference

Timetable for achievement

American Digest System
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Key Number System T

Encyclopedias
Health and Environmental
Pollution Control, 61A

Law Review and Journal
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Act: Raging Hill
New Jersey clean up
Control Act. F
Water rights, Clean W
G. Laitos, 60 U

Texts and Treatises
Business and Commerce
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Effluent standards and li
Hazardous substance ba
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Remedies preceding efflu
Sewer sludge 8
Water quantity regulatio

1. Purpose

Purpose of this chapter is to preempt but to supplement any preexisting remedies to protect interstate waters of Ill. ex rel. Scott v. C. Wis., N.D.Ill.1973, 366.

2. Remedies preceding

This chapter was not to destroy any remedies available prior to its passage.

West's
REVISED CODE OF
WASHINGTON ANNOTATED

Title 39
PUBLIC CONTRACTS AND INDEBTEDNESS

Title 40
PUBLIC DOCUMENTS, RECORDS AND
PUBLICATIONS

*Under Arrangement of the Official
Revised Code of Washington*



TRACTS—INDEBTEDNESS

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Notes

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under of the act or the applica-
in circumstances is not affect-

Notes

CHAPTER 39.84

INDUSTRIAL DEVELOPMENT REVENUE BONDS

Section

- 39.84.010. Finding and declaration of necessity.
- 39.84.020. Definitions.
- 39.84.030. Public corporations—Creation, dissolution.
- 39.84.040. Board of directors of public corporation.
- 39.84.050. Public corporations—Directors—Conflicts of interest.
- 39.84.060. Public corporations—Limitations.
- 39.84.070. Public corporations—Audit by state.
- 39.84.080. Public corporations—Powers.
- 39.84.090. Reporting to the department of community, trade, and economic development.
- 39.84.100. Revenue bonds—Provisions.
- 39.84.110. Revenue bonds—Refunding.
- 39.84.120. Trust agreements.
- 39.84.130. Commingling of bond proceeds or revenues with municipal funds prohibited—Exception.
- 39.84.140. Subleases and assignments.
- 39.84.150. Determination of rent.
- 39.84.160. Proceedings in the event of default.
- 39.84.200. Authority of community economic revitalization board under this chapter.
- 39.84.900. Construction—Supplemental nature of chapter.
- 39.84.910. Captions not part of law.
- 39.84.920. Severability—1981 c 300.

Cross References

Special revenue financing, see Const. Art. 32, § 1.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

39.84.010. Finding and declaration of necessity

The legislature hereby finds and declares that this state urgently needs to do the following: Promote higher employment; encourage the development of new jobs; maintain and supplement the capital investments in industry that currently exist in this state; encourage future employment by ensuring future capital investment; attract environmentally sound industry to the state; protect and enhance the quality of natural resources and the environment; and promote the production and conservation of energy.

[1981 c 300 § 1.]

39.84.020. Definitions

As used in this chapter, the following terms have the meanings indicated unless the context clearly requires otherwise.

construction of an industrial development facility, including costs of studies assessing the feasibility of an industrial development facility; (c) finance costs, including discounts, if any, the costs of issuing revenue bonds, and costs incurred in carrying out any trust agreement; (d) interest during construction and during the six months after estimated completion of construction, and capitalized debt service or repair and replacement or other appropriate reserves; (e) the refunding of any outstanding obligations incurred for any of the costs outlined in this subsection; and (f) other costs incidental to any of the costs listed in this section.

(11) "Revenue bond" means a nonrecourse revenue bond, nonrecourse revenue note, or other nonrecourse revenue obligation issued for the purpose of financing an industrial development facility on an interim or permanent basis.

(12) "User" means one or more persons acting as lessee, purchaser, mortgagor, or borrower under a financing document and may include a party who transfers the right of use and occupancy to another party by lease, sublease, or otherwise.
 [1986 c 309 § 1; 1986 c 308 § 2; 1985 c 439 § 1; 1983 1st ex.s. c 51 § 1; 1981 c 300 § 2.]

Historical and Statutory Notes

Reviser's note: This section was amended by 1986 c 308 § 2 and by 1986 c 309 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Severability—1986 c 308: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1986 c 308 § 3.]

Notes of Decisions

Revenue bond 1

1. Revenue bond

Nonrecourse revenue bonds issued by Economic Development Finance Authority to improve small businesses' access to capital by creating a secondary market for Small Business Administration (SBA) loans were not "industrial development bonds," within meaning of state constitutional limitation on issuance of such bonds, though some of the SBA loans purchased with proceeds of bonds were originally made for industrial development projects. Washington Economic

Development Finance Authority v. Grimm (1992) 119 Wash.2d 738; 837 P.2d 606.

State constitutional requirement for issuance of nonrecourse industrial development bonds, that interest paid on bonds be tax exempt, applied only to nonrecourse bonds issued pursuant to statute adopted at same time as constitutional amendment, and was not intended to limit any other types of bonds that could be legally issued. Washington Economic Development Finance Authority v. Grimm (1992) 119 Wash.2d 738; 837 P.2d 606.

39.84.030. Public corporations—Creation, dissolution

(1) For the purpose of facilitating economic development and employment opportunities in the state of Washington through the

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Title 43
STATE GOVERNMENT—EXECUTIVE
Chapters 43.01 to 43.21J

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43.21B.090

STATE GOVERNMENT—EXECUTIVE

hearings board shall perform all the powers and duties specified in this chapter or as otherwise provided by law.

Added by Laws 1970, Ex.Sess., ch. 62, § 39, eff. July 1, 1970. Amended by Laws 1974, Ex.Sess., ch. 69, § 1; Laws 1990, ch. 65, § 2.

Historical and Statutory Notes

Laws 1974, Ex.Sess., ch. 69, § 1, inserted the fourth sentence. appointment of hearing examiners to assist the board.

Laws 1990, ch. 65, § 2, deleted a former fourth sentence, which permitted the

Library References

States ¶67. Pollution Control Hearings Board, see WESTLAW Topic No. 360. Wash.Prac. vol. 1C, Kunsch, § 91.71. C.J.S. States §§ 120, 121, 136 to 138, 140.

43.21B.100. Board to make findings of fact and written decisions on each case considered—Effective upon signing and filing—Public information

The hearings board shall make findings of fact and prepare a written decision in each case decided by it, and such findings and decisions shall be effective upon being signed by two or more members of the hearings board and upon being filed at the hearings board's principal office, and shall be open for public inspection at all reasonable times.

Added by Laws 1970, Ex.Sess., ch. 62, § 40, eff. July 1, 1970.

Library References

Health and Environment ¶25.5(9). WESTLAW Topic No. 199. C.J.S. Health and Environment §§ 65, 66, 103, 107, 140 et seq.

Notes of Decisions

Written decision 1

1. Written decision

If Pollution Control Hearings Board (PCHB) found that Department of Ecology violated the State Environmental

Policy Act (SEPA) in issuing National Pollutant Discharge Elimination System permits, PCHB would be obligated to issue written decision to that effect. Dioxin/Organochlorine Center v. Department of Ecology (1992) 119 Wash.2d 761, 837 P.2d 1007.

43.21B.110. Pollution control hearings board jurisdiction

(1) The hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department, the director, the administrator of the office of marine safety,¹ and the air pollution control boards or authorities as established pursuant to chapter 70.94 RCW, or local health departments:

ENVIRONME

(a) Civil p 70.94.431, 70 90.56.310, and

(b) Orders 43.27A.190, 7 90.14.130, and

(c) The issu cate, or lice exercise of its waste dispos: disposal perm a waste dispo

(d) Decisio denial of solic

(e) Decisio and enforcem: 70.95J.080.

(f) Any oth office of mar must be deci RCW.

(2) The fol board:

(a) Hearin hearings boa

(b) Hearin 70.94.332, 7 and 90.44.18

(c) Procee tions of wa

(d) Hearin repeal rules.

(3) Review shall be sub Administrati Added by Lav Laws 1987, cl 1992, ch. 73, and amended

¹ Reviser's N ecology and res 2nd sp.s. c 14 §

ENVIRONMENTAL HEARINGS OFFICE

43.21B.110

(a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431, 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and 90.56.330.

(b) Orders issued pursuant to RCW 18.104.043, 18.104.060, 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070, 90.14.130, and 90.48.120.

(c) The issuance, modification, or termination of any permit, certificate, or license by the department or any air authority in the exercise of its jurisdiction, including the issuance or termination of a waste disposal permit, the denial of an application for a waste disposal permit, or the modification of the conditions or the terms of a waste disposal permit.

(d) Decisions of local health departments regarding the grant or denial of solid waste permits pursuant to chapter 70.95 RCW.

(e) Decisions of local health departments regarding the issuance and enforcement of permits to use or dispose of biosolids under RCW 70.95J.080.

(f) Any other decision by the department, the administrator of the office of marine safety, or an air authority which pursuant to law must be decided as an adjudicative proceeding under chapter 34.05 RCW.

(2) The following hearings shall not be conducted by the hearings board:

(a) Hearings required by law to be conducted by the shorelines hearings board pursuant to chapter 90.58 RCW.

(b) Hearings conducted by the department pursuant to RCW 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

(c) Proceedings by the department relating to general adjudications of water rights pursuant to chapter 90.03 or 90.44 RCW.

(d) Hearings conducted by the department to adopt, modify, or repeal rules.

(3) Review of rules and regulations adopted by the hearings board shall be subject to review in accordance with the provisions of the Administrative Procedure Act, chapter 34.05 RCW.

Added by Laws 1970, Ex.Sess., ch. 62, § 41, eff. July 1, 1970. Amended by Laws 1987, ch. 109, § 10; Laws 1989, ch. 175, § 102, eff. July 1, 1989; Laws 1992, ch. 73, § 1, eff. March 26, 1992; Laws 1992, ch. 174, § 13. Reenacted and amended by Laws 1993, ch. 387, § 22, eff. July 1, 1993.

¹ Reviser's Note: The office of marine safety was transferred to the department of ecology and renamed the integrated oil spill prevention and response program by 1995 2nd sp.s. c 14 § 515, effective January 1, 1996, until June 30, 1997.

43.21B.110. Pollution control hearings board jurisdiction

(1) The hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department, the director, local conservation districts, and the air pollution control boards or authorities as established pursuant to chapter 70.94 RCW, or local health departments:

(a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431, 70.105.080, 70.107.050, 88.46.090, 90.03.600, 90.48.144, 90.56.310, and 90.56.330.

(b) Orders issued pursuant to RCW 18.104.043, 18.104.060, 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070, 90.14.130, 90.48.120, and 90.56.330.

(c) Except as provided in RCW 90.03.210(2), the issuance, modification, or termination of any permit, certificate, or license by the department or any air authority in the exercise of its jurisdiction, including the issuance or termination of a waste disposal permit, the denial of an application for a waste disposal permit, the modification of the conditions or the terms of a waste disposal permit, or a decision to approve or deny an application for a solid waste permit exemption under RCW 70.95.300.

(d) Decisions of local health departments regarding the grant or denial of solid waste permits pursuant to chapter 70.95 RCW.

(e) Decisions of local health departments regarding the issuance and enforcement of permits to use or dispose of biosolids under RCW 70.95J.080.

(f) Decisions of the department regarding waste-derived fertilizer or micro-nutrient fertilizer under RCW 15.54.820, and decisions of the department regarding waste-derived soil amendments under RCW 70.95.205.

(g) Decisions of local conservation districts related to the denial of approval or denial of certification of a dairy nutrient management plan; conditions contained in a plan; application of any dairy nutrient management practices, standards, methods, and technologies to a particular dairy farm; and failure to adhere to the plan review and approval timelines in RCW 90.64.026.

(h) Any other decision by the department or an air authority which pursuant to law must be decided as an adjudicative proceeding under chapter 34.05 RCW.

(2) The following hearings shall not be conducted by the hearings board:

(a) Hearings required by law to be conducted by the shorelines hearings board pursuant to chapter 90.53 RCW.

(b) Hearings conducted by the department pursuant to RCW 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

(c) Proceedings conducted by the department, or the department's designee, under RCW 90.03.160 through 90.03.210 or 90.44.220.

(d) Hearings conducted by the department to adopt, modify, or repeal rules.

(e) Appeals of decisions by the department as provided in chapter 43.21L RCW.

(3) Review of rules and regulations adopted by the hearings board shall be subject to review in accordance with the provisions of the Administrative Procedure Act, chapter 34.05 RCW.

[2003 c 393 § 19, eff. May 20, 2003; 2001 c 220 § 2. Prior: 1998 c 262 § 18; 1998 c 156 § 8; 1998 c 36 § 22; 1993 c 387 § 22; prior: 1992 c 174 § 13; 1992 c 73 § 1; 1989 c 175 § 102; 1987 c 109 § 10; 1970 ex.s. c 62 § 41.]

ac. Series § 25.42, The Environmental Hearings Office.
ac. Series § 25.43, The Pollution Hearings Board.

Created—Purpose

ac. Series § 1.11, Environmental Hearings Office Overview.
ac. Series § 5.86, Pollution Hearings Board.

Attainment

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Disqualification

Series § 25.52, Member-

Board powers

Series § 25.52, Member-

West's
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ANNOTATED

Title 90
WATER RIGHTS—ENVIRONMENT
Chapters 90.48 to End

Title 91
WATERWAYS

*Under Arrangement of the Official
Revised Code of Washington*

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90.48.010

WATER RIGHTS—ENVIRONMENT

Note 1

Olympia Oyster Co. v. Rayonier Inc., W.D.Wash.1964, 229 F.Supp. 855.

Extent and character of tideland water pollution and industrial development of state are factors to be considered in determining whether primary administrative jurisdiction rule is applicable to Washington Water Pollution Act, and if so to what extent and effect. Ellison v. Rayonier Inc., W.D.Wash. 1957, 156 F.Supp. 214. Administrative Law And Procedure ⇨ 228.1; Environmental Law ⇨ 664

2. Construction with other laws

Declarations of policy in federal Clean Water Act (CWA) and Washington's Water Pollution Control Act (WPCA) do not control over the more specific statutory provisions adopted to implement those general declarations. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 33 U.S.C.A. §§ 1251 et seq.; Puget Sound-keeper Alliance v. State, Dept. of Ecology (2000) 9 P.3d 892. Environmental Law ⇨ 170; Environmental Law ⇨ 167

3. Common law

Right of action to recover damages for wrongful water pollution is established in common law recognized in Washington, and Water Pollution Control Act contains no expressed declaration against continued recognition of such right of action. Ellison v. Rayonier Inc., W.D.Wash.1957, 156 F.Supp. 214. Nuisance ⇨ 41

90.48.020. Definitions

Whenever the word "person" is used in this chapter, it shall be construed to include any political subdivision, government agency, municipality, industry, public or private corporation, copartnership, association, firm, individual or any other entity whatsoever.

Wherever the words "waters of the state" shall be used in this chapter, they shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.

Whenever the word "pollution" is used in this chapter, it shall be construed to mean such contamination, or other alteration of

Washington recognizes common law right of action to recover damages for wrongful water pollution, and such right of action has not been abolished by Water Pollution Control Act. Tieggs v. Watts (1998) 135 Wash.2d 1, 954 P.2d 877. Waters And Water Courses ⇨ 74; Waters And Water Courses ⇨ 107(1); Waters And Water Courses ⇨ 123

4. Mines and minerals

Evidence established that it was reasonably foreseeable that quarry operation activities would result in pollution of neighboring landowners' pond, which thus supported liability of quarry operator for trespass under Washington law, where quarry originally lay about fifteen 15 feet away from edge of pond, where original quarry area was on top of springs supplying pond with water, and where quarry operator did not move his activity further away from landowners' property until they sued him and his consultant recommended such action. Gill v. LDI, W.D.Wash. 1998, 19 F.Supp.2d 1188. Trespass ⇨ 14

Uncontested evidence of tangible invasions of landowners' property from quarry operation, including silt plumes in their pond and rocks deposited on their lawn, established trespass as matter of law under Washington law, even absent any evidence of substantial damage to their property. Gill v. LDI, W.D.Wash.1998, 19 F.Supp.2d 1188. Trespass ⇨ 46(1)

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[2002 c 161 § 4; 199
216 § 2; Rem. Supp.

Severability—Effectiv
255: See RCW 17.26.90

Purpose—Short
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1987 c 109: See notes
43.21B.001.

Laws 1967, ch. 13, §
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WATER POLLUTION CONTROL

90.48.020

the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

Wherever the word "department" is used in this chapter it shall mean the department of ecology.

Whenever the word "director" is used in this chapter it shall mean the director of ecology.

Whenever the words "aquatic noxious weed" are used in this chapter, they have the meaning prescribed under RCW 17.26.020.

Whenever the words "general sewer plan" are used in this chapter they shall be construed to include all sewerage general plans, sewer general comprehensive plans, plans for a system of sewerage, and other plans for sewer systems adopted by a local government entity including but not limited to cities, towns, public utility districts, and water-sewer districts.

[2002 c 161 § 4; 1995 c 255 § 7; 1987 c 109 § 122; 1967 c 13 § 1; 1945 c 216 § 2; Rem. Supp. 1945 § 10964b.]

Historical and Statutory Notes

Severability—Effective date—1995 c 255: See RCW 17.26.900 and 17.26.901.

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW 43.21B.001.

Laws 1967, ch. 13, § 1, at the end of the section, added the following:

"Whenever the word 'pollution' is used in this chapter, it shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the

public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life. Wherever the word 'commission' is used in this chapter it shall mean the Water Pollution Control Commission as created in section 2 of this 1967 amendatory act. Whenever the word 'director' is used in this chapter it shall mean the director as provided for in RCW 90.48.023."

Laws 1987, ch. 109, § 122, divided a former last paragraph into three paragraphs; then, in the resulting next-to-last paragraph, substituted "department" for "commission" and "department of ecology" for "water pollution control commission as created in RCW 90.48.021"; and, in the last paragraph,

90.48.020

WATER RIGHTS—ENVIRONMENT

substituted "of ecology" for "as provided for in RCW 90.48.023".

Laws 1995, ch. 255, § 7, added the sixth paragraph.

Laws 2002, ch. 161, § 4 added the last paragraph.

Source:
RRS § 10964b.

Library References

Environmental Law ☞ 174.
Westlaw Topic No. 149E.

Research References

Treatises and Practice Aids

1C Wash. Prac. Series § 91.70A, Water Pollution Control.
23 Wash. Prac. Series § 7.11, Introduction.
23 Wash. Prac. Series § 7.12, Terms and Definitions.
23 Wash. Prac. Series § 7.21, Overview.

23 Wash. Prac. Series § 7.39, Technology-Based Standards for Publicly Owned Treatment Works.
23 Wash. Prac. Series § 7.102, Requirement for National Pollutant Discharge Elimination System Permit.

Notes of Decisions

Pollution 1

1. Pollution

Man-induced diminishment of water quantity can be "pollution" under both

the Federal Clean Water Act and the State Water Pollution Act. Public Utility Dist. No. 1 of Pend Oreille County v. State, Dept. of Ecology (2002) 146 Wash.2d 778, 51 P.3d 744. Environmental Law ☞ 175

90.48.021 to 90.48.027. Repealed by Laws 1970, Ex.Sess., ch. 62, § 30, eff. July 1, 1970

Historical and Statutory Notes

The repealed §§ 90.48.021 to 90.48.027, which related to a water pollution control commission, were derived from:

Laws 1945, ch. 216, §§ 3 to 9.
RRS §§ 10964c to 10964i.
Former §§ 43.54.010 to 43.54.070.
Laws 1967, ch. 13, §§ 2 to 5.

90.48.030. Jurisdiction of department

The department shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington.

[1987 c 109 § 123; 1945 c 216 § 10; Rem. Supp. 1945 § 10964j. FORMER PART OF SECTION: 1945 c 216 § 11; Rem. Supp. 1945 § 10964k, now codified as RCW 90.48.035.]

WATER POLLUTION CONTROL

Historic

Purpose—Short title—Caption—Rules—Severability—Captions
1987 c 109: See notes following 43.21B.001.

Laws 1987, ch. 109, § 123, in the sentence, substituted "department" for "commission".

Lit

Environmental Law ☞ 161, 215
Westlaw Topic No. 149E.

Res

Treatises and Practice Aids

1C Wash. Prac. Series § 91.70A, Water Pollution Control.

Notes

In general 1

1. In general

Water Pollution Control Commission has been vested with primary jurisdiction to control and prevent undue pollution of all waters of State and for purpose to adopt rules, regulations standards consistent with known feasible and reasonable methods of preventing pollution consistent with many overlapping and conflicting state interests and ultimate public welfare. *Ellison v. Rayonier* W.D.Wash.1957, 156 F.Supp. 214.

Authority of water pollution control commission to adopt and enforce water quality standards for "interstate

90.48.035. Rule-making

The department shall have the power to create, amend, or rescind such rules and regulations as may be necessary to carry out the provisions of this chapter, not limited to rules and regulations for waters of the state and for inland waters of the state in order to maintain the highest water quality in the state in accordance with 90.48.010.

[1987 c 109 § 124; 1970 ex.s. c 109 § 124; Rem. Supp. 1945 § 10964k. Form



Code of Federal Regulations

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Parts 100 to 135

Revised as of July 1, 2006

Protection of Environment

Containing a codification of documents
of general applicability and future effect

As of July 1, 2006

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Published by
Office of the Federal Register
National Archives and Records
Administration

A Special Edition of the Federal Register

§ 131.12

Quality Planning and Management Regulations (40 CFR part 35).

(b) Form of criteria: In establishing criteria, States should:

(1) Establish numerical values based on:

- (i) 304(a) Guidance; or
- (ii) 304(a) Guidance modified to reflect site-specific conditions; or
- (iii) Other scientifically defensible methods;

(2) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.

§ 131.12 Antidegradation policy.

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or

40 CFR Ch. I (7-1-06 Edition)

ecological significance, that water quality shall be maintained and protected.

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.

§ 131.13 General policies.

States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA review and approval.

Subpart C—Procedures for Review and Revision of Water Quality Standards

§ 131.20 State review and revision of water quality standards.

(a) *State review.* The State shall from time to time, but at least once every three years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Any water body segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act shall be re-examined every three years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process.

(b) *Public participation.* The State shall hold a public hearing for the purpose of reviewing water quality standards, in accordance with provisions of State law, EPA's water quality management regulation (40 CFR 130.3(b)(6)) and public participation regulation (40 CFR part 25). The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing.

(c) *Submittal to EPA.* The State shall submit the results of the review, any

Environmental Protection A

supporting analysis for the ability analysis, the method used for site-specific criteria, any general policies to water quality standards revisions of the standards regional Administrator for approval, within 30 days of State action to adopt and revised standard, or if no action made as a result of the review 30 days of the completion of

§ 131.21 EPA review and water quality standards.

(a) After the State specially adopted revisions, the Administrator shall either:

- (1) Notify the State within 30 days that the revisions are approved;
- (2) Notify the State within 30 days that the revisions are disapproved. Such notification of disapproval shall include a written explanation of the reasons for disapproval.

If—	Then—
(1) A State or authorized Tribe has adopted a water quality standard that is effective under State or Tribal law and has been submitted to EPA before May 30, 2000...	...the State quality standard for the Act.
(2) A State or authorized Tribe adopts a water quality standard that goes into effect under State or Tribal law on or after May 30, 2000...	...once the water quality standard becomes effective for the purpose.

(d) *When do I use the applicable quality standards identified in (c) above?* Applicable water quality standards for purposes of the minimum standards which used when the CWA and implementing the CWA water quality standards, for example identifying impaired waters relating TMDLs under section 303(d) and NPDES permit under section 301(b)(1)(C), proposed discharges of dredged material under section 309 and issuing certifications under section 305 of the Act.

(e) *For how long does a water quality standard for purposes of the Act remain the applicable standard for purposes of the Act?*

PART 131—WATER QUALITY STANDARDS

Subpart A—General Provisions

Sec.

- 131.1 Scope.
- 131.2 Purpose.
- 131.3 Definitions.
- 131.4 State authority.
- 131.5 EPA authority.
- 131.6 Minimum requirements for water quality standards submission.
- 131.7 Dispute resolution mechanism.
- 131.8 Requirements for Indian Tribes to administer a water quality standards program.

Subpart B—Establishment of Water Quality Standards

- 131.10 Designation of uses.
- 131.11 Criteria.
- 131.12 Antidegradation policy.
- 131.13 General policies.

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- 131.21 EPA review and approval of water quality standards.
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Subpart D—Federally Promulgated Water Quality Standards

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- 131.40 Puerto Rico.
- 131.41 Bacteriological criteria for those states not complying with Clean Water Act section 303(i)(1)(A).

AUTHORITY: 33 U.S.C. 1251 *et seq.*

SOURCE: 48 FR 51405, Nov. 8, 1983, unless otherwise noted.

Subpart A—General Provisions

§ 131.1 Scope.

This part describes the requirements and procedures for developing, review-

ing, revising, and approving water quality standards by the States as authorized by section 303(c) of the Clean Water Act. Additional specific procedures for developing, reviewing, revising, and approving water quality standards for Great Lakes States or Great Lakes Tribes (as defined in 40 CFR 132.2) to conform to section 118 of the Clean Water Act and 40 CFR part 132, are provided in 40 CFR part 132.

[60 FR 15386, Mar. 23, 1995]

§ 131.2 Purpose.

A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

Such standards serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act.

§ 131.3 Definitions.

(a) *The Act* means the Clean Water Act (Pub. L. 92-500, as amended (33 U.S.C. 1251 *et seq.*)).

(b) *Criteria* are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met,

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water quality will generally meet the designated use.

(c) *Section 304(a) criteria* by EPA under authority of section 304(a) of the Act based on scientific information or data that the effect of a discharge of a pollutant on a particular species and/or human health is such that the effect of the discharge on the species or human health is such that the discharge is likely to result in the death of the species or human health. The information is issued by the States as guidance for developing criteria.

(d) *Toxic pollutants* are those listed by the Administrator in section 307(a) of the Act.

(e) *Existing uses* are those uses actually attained in the water body after November 28, 1975, which are included in the standards.

(f) *Designated uses* are those specified in water quality standards for each water body or segment of a water body that are not being attained.

(g) *Use attainability* is the ability of a water body to attain a designated use which may include physical, biological, and economic factors affecting the attainment of the use as described in § 131.10(g).

(h) *Water quality line* means any segment of a water body where the water quality does not meet the applicable water quality standards, even if the water quality standards are not expected to meet applicable water quality standards, even if the water quality standards are not expected to meet applicable water quality standards, even if the water quality standards are not expected to meet applicable water quality standards.

(i) *Water quality standards* are those established by the Administrator in section 303(c) of the Act. They consist of a designated use and the water quality criteria for that use. The water quality criteria are based upon such uses. The standards are to protect public health or welfare, enhance the quality of water and serve the purposes of the Act.

(j) *States* include: The 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the American Samoa, the Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that are eligible for Federal funding for water quality standards pro-

ing, and approving water standards by the States as authorized by section 303(c) of the Clean Water Act. Additional specific procedures for developing, reviewing, revising, and approving water quality standards for Great Lakes States or Great Lakes States (as defined in 40 CFR part 132) conform to section 118 of the Clean Water Act and 40 CFR part 132; see also 40 CFR part 132.

Mar. 23, 1995]

purpose. . . .
 quality standard defines the quality goals of a water body, or use, by designating the use to be made of the water and by the criteria necessary to protect the States adopt water quality standards to protect public health or enhance the quality of water for the purposes of the Clean Water Act. "Serve the purposes of the Act" (as defined in section 302 and 303(c) of the Act) water quality standards that are never attainable, provide a basis for the protection and management of fish, shellfish and wildlife, recreation in and on the water, take into consideration their use of public water supplies, protection of fish, shellfish, and wildlife in and on the water, municipal, industrial, and other uses, and navigation.

Standards serve the dual purposes of attaining the water quality goals for each water body and serve as a basis for the establishment of water quality-based treatment strategies beyond the established levels of treatment provided in sections 301(b) and 306 of the Act.

Definitions.

Act means the Clean Water Act, 33 U.S.C. 1362-1369, as amended (33 U.S.C. 1362 *et seq.*).

Attainable means the elements of State water quality standards, expressed as maximum concentrations, levels, or limits, representing a water body that supports a particular use. When criteria are met,

water quality will generally protect the designated use.

(c) *Section 304(a) criteria* are developed by EPA under authority of section 304(a) of the Act based on the latest scientific information on the relationship that the effect of a constituent concentration has on particular aquatic species and/or human health. This information is issued periodically to the States as guidance for use in developing criteria.

(d) *Toxic pollutants* are those pollutants listed by the Administrator under section 307(a) of the Act.

(e) *Existing uses* are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.

(f) *Designated uses* are those uses specified in water quality standards for each water body or segment whether or not they are being attained.

(g) *Use attainability analysis* is a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g).

(h) *Water quality limited segment* means any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations, required by sections 301(b) and 306 of the Act.

(i) *Water quality standards* are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

(j) *States* include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of water quality standards program.

(k) *Federal Indian Reservation, Indian Reservation, or Reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(l) *Indian Tribe or Tribe* means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

[48 FR 51405, Nov. 8, 1983, as amended at 56 FR 64893, Dec. 12, 1991; 59 FR 64344, Dec. 14, 1994]

§ 131.4 State authority.

(a) States (as defined in § 131.3) are responsible for reviewing, establishing, and revising water quality standards. As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required by this regulation. Consistent with section 101(g) and 518(a) of the Clean Water Act, water quality standards shall not be construed to supersede or abrogate rights to quantities of water.

(b) States (as defined in § 131.3) may issue certifications pursuant to the requirements of Clean Water Act section 401. Revisions adopted by States shall be applicable for use in issuing State certifications consistent with the provisions of § 131.21(c).

(c) Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401.

[56 FR 64893, Dec. 12, 1991, as amended at 59 FR 64344, Dec. 14, 1994]

§ 131.5 EPA authority.

(a) Under section 303(c) of the Act, EPA is to review and to approve or disapprove State-adopted water quality standards. The review involves a determination of:

(1) Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act;

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tribal authorities to coordinate ground water management activities.

(8) For persons whose activity violates this chapter but is in compliance with best management practices adopted by rule in chapter 248-96 WAC, WAC 173-304-300(4), RCW 15.58.150 (2)(c), WAC 16-228-180(1), or 16-228-185, the department is electing, from among the enforcement mechanisms available to it for the enforcement of WAC 173-200-040 and 173-200-050, to precede any civil or criminal penalty with a compliance order.

(9) When a distinction cannot be made among ground water, surface water, or sediments the applicable standard shall depend on which beneficial use is or could be adversely affected. If beneficial uses of more than one resource are affected, the most restrictive standard shall apply.

(10) The department shall give due consideration to the precision and accuracy of sampling and analytical methods used when determining compliance with this chapter.

(11) The analytical testing methods for determining compliance with this chapter shall be approved in writing by the department prior to the performance of analyses.

[Statutory Authority: RCW 90.48.035, 90-22-023, § 173-200-100, filed 10/31/90, effective 12/1/90.]

Chapter 173-201A WAC

WATER QUALITY STANDARDS FOR SURFACE WATERS OF THE STATE OF WASHINGTON

WAC

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173-201A-040	Toxic substances.
173-201A-050	Radioactive substances.
173-201A-060	General considerations.
173-201A-070	Antidegradation.
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WAC 173-201A-010 Introduction. (1) The purpose of this chapter is to establish water quality standards for surface waters of the state of Washington consistent with public health and public enjoyment thereof, and the propagation and protection of fish, shellfish, and wildlife, pursuant to the provisions of chapter 90.48 RCW and the policies and purposes thereof.

(2) This chapter shall be reviewed periodically by the department and appropriate revisions shall be undertaken.

(3) The water use and quality criteria set forth in WAC 173-201A-030 through 173-201A-140 are established in conformance with present and potential water uses of the surface waters of the state of Washington and in consideration of the natural water quality potential and limitations of the same. Compliance with the surface water quality standards of the state of Washington require compliance with chapter 173-201A WAC, Water quality standards for surface waters of the

state of Washington, and chapter 173-204 WAC, Sediment management standards.

[Statutory Authority: Chapter 90.48 RCW, 92-24-037 (Order 92-29), § 173-201A-010, filed 11/25/92, effective 12/26/92.]

WAC 173-201A-020 Definitions. The following definitions are intended to facilitate the use of chapter 173-201A WAC:

"Action value" means a total phosphorus (TP) value established at the upper limit of the trophic states in each ecoregion. Exceedance of an action value indicates that a problem is suspected. A lake-specific study may be needed to confirm if a nutrient problem exists.

"Acute conditions" are changes in the physical, chemical, or biologic environment which are expected or demonstrated to result in injury or death to an organism as a result of short-term exposure to the substance or detrimental environmental condition.

"AKART" is an acronym for "all known, available, and reasonable methods of prevention, control, and treatment." AKART shall represent the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge. The concept of AKART applies to both point and nonpoint sources of pollution. The term "best management practices," typically applied to nonpoint source pollution controls is considered a subset of the AKART requirement. "The Stormwater Management Manual for the Puget Sound Basin" (1992), may be used as a guideline, to the extent appropriate, for developing best management practices to apply AKART for storm water discharges.

"Background conditions" means the biological, chemical, and physical conditions of a water body, outside the area of influence of the discharge under consideration. Background sampling locations in an enforcement action would be up-gradient or outside the area of influence of the discharge. If several discharges to any water body exist, and enforcement action is being taken for possible violations to the standards, background sampling would be undertaken immediately up-gradient from each discharge. When assessing background conditions in the headwaters of a disturbed watershed it may be necessary to use the background conditions of a neighboring or similar watershed as the reference conditions.

"Best management practices (BMP)" means physical, structural, and/or managerial practices approved by the department that, when used singularly or in combination, prevent or reduce pollutant discharges.

"Biological assessment" is an evaluation of the biological condition of a water body using surveys of aquatic community structure and function and other direct measurements of resident biota in surface waters.

"Bog" means those wetlands that are acidic, peat forming, and whose primary water source is precipitation, with little, if any, outflow.

"Carcinogen" means any substance or agent that produces or tends to produce cancer in humans. For implementation of this chapter, the term carcinogen will apply to substances on the United States Environmental Protection Agency lists of A (known human) and B (probable human) carcinogens, and any substance which causes a significant

increased incidence of benign or malignant tumors in a single, well conducted animal bioassay, consistent with the weight of evidence approach specified in the United States Environmental Protection Agency's Guidelines for Carcinogenic Risk Assessment as set forth in 51 FR 33992 et seq. as presently published or as subsequently amended or republished.

"Chronic conditions" are changes in the physical, chemical, or biologic environment which are expected or demonstrated to result in injury or death to an organism as a result of repeated or constant exposure over an extended period of time to a substance or detrimental environmental condition.

"Created wetlands" means those wetlands intentionally created from nonwetland sites to produce or replace natural wetland habitat.

"Critical condition" is when the physical, chemical, and biological characteristics of the receiving water environment interact with the effluent to produce the greatest potential adverse impact on aquatic biota and existing or characteristic water uses. For steady-state discharges to riverine systems the critical condition may be assumed to be equal to the 7Q10 flow event unless determined otherwise by the department.

"Damage to the ecosystem" means any demonstrated or predicted stress to aquatic or terrestrial organisms or communities of organisms which the department reasonably concludes may interfere in the health or survival success or natural structure of such populations. This stress may be due to, but is not limited to, alteration in habitat or changes in water temperature, chemistry, or turbidity, and shall consider the potential build up of discharge constituents or temporal increases in habitat alteration which may create such stress in the long term.

"Department" means the state of Washington department of ecology.

"Director" means the director of the state of Washington department of ecology.

"Drainage ditch" means that portion of a designed and constructed conveyance system that serves the purpose of transporting surplus water; this may include natural water courses or channels incorporated in the system design, but does not include the area adjacent to the water course or channel.

"Ecoregions" are defined using EPAs *Ecoregions of the Pacific Northwest* Document No. 600/3-86/033 July 1986 by Omernik and Gallant.

"Fecal coliform" means that portion of the coliform group which is present in the intestinal tracts and feces of warm-blooded animals as detected by the product of acid or gas from lactose in a suitable culture medium within twenty-four hours at 44.5 plus or minus 0.2 degrees Celsius.

"Geometric mean" means either the nth root of a product of n factors, or the antilogarithm of the arithmetic mean of the logarithms of the individual sample values.

"Ground water exchange" means the discharge and recharge of ground water to a surface water. Discharge is inflow from an aquifer, seeps or springs that increases the available supply of surface water. Recharge is outflow down-gradient to an aquifer or downstream to surface water for base flow maintenance. Exchange may include ground water

discharge in one season followed by recharge later in the year.

"Hardness" means a measure of the calcium and magnesium salts present in water. For purposes of this chapter, hardness is measured in milligrams per liter and expressed as calcium carbonate (CaCO₃).

"Irrigation ditch" means that portion of a designed and constructed conveyance system that serves the purpose of transporting irrigation water from its supply source to its place of use; this may include natural water courses or channels incorporated in the system design, but does not include the area adjacent to the water course or channel.

"Lakes" shall be distinguished from riverine systems as being water bodies, including reservoirs, with a mean detention time of greater than fifteen days.

"Lake-specific study" means a study intended to quantify existing nutrient concentrations, determine existing characteristic uses for lake class waters, and potential lake uses. The study determines how to protect these uses and if any uses are lost or impaired because of nutrients, algae, or aquatic plants. An appropriate study must recommend a criterion for total phosphorus (TP), total nitrogen (TN) in µg/l, or other nutrient that impairs characteristic uses by causing excessive algae blooms or aquatic plant growth.

"Mean detention time" means the time obtained by dividing a reservoir's mean annual minimum total storage by the thirty-day ten-year low-flow from the reservoir.

"Migration or translocation" means any natural movement of an organism or community of organisms from one locality to another locality.

"Mixing zone" means that portion of a water body adjacent to an effluent outfall where mixing results in the dilution of the effluent with the receiving water. Water quality criteria may be exceeded in a mixing zone as conditioned and provided for in WAC 173-201A-100.

"Natural conditions" or "natural background levels" means surface water quality that was present before any human-caused pollution. When estimating natural conditions in the headwaters of a disturbed watershed it may be necessary to use the less disturbed conditions of a neighboring or similar watershed as a reference condition.

"Nonpoint source" means pollution that enters any waters of the state from any dispersed land-based or water-based activities, including but not limited to atmospheric deposition, surface water runoff from agricultural lands, urban areas, or forest lands, subsurface or underground sources, or discharges from boats or marine vessels not otherwise regulated under the National Pollutant Discharge Elimination System program.

"Permit" means a document issued pursuant to RCW 90.48.160 et seq. or RCW 90.48.260 or both, specifying the waste treatment and control requirements and waste discharge conditions.

"pH" means the negative logarithm of the hydrogen ion concentration.

"Pollution" means such contamination, or other alteration of the physical, chemical, or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance

into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental, or injurious to the public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish, or other aquatic life.

"Primary contact recreation" means activities where a person would have direct contact with water to the point of complete submergence including, but not limited to, skin diving, swimming, and water skiing.

"Secondary contact recreation" means activities where a person's water contact would be limited (wading or fishing) to the extent that bacterial infections of eyes, ears, respiratory or digestive systems, or urogenital areas would normally be avoided.

"Shoreline stabilization" means the anchoring of soil at the water's edge, or in shallow water, by fibrous plant root complexes; this may include long-term accretion of sediment or peat, along with shoreline progradation in such areas.

"Storm water" means that portion of precipitation that does not naturally percolate into the ground or evaporate, but flows via overland flow, interflow, pipes, and other features of a storm water drainage system into a defined surface water body, or a constructed infiltration facility.

"Storm water attenuation" means the process by which peak flows from precipitation are reduced and runoff velocities are slowed as a result of passing through a surface water-body.

"Surface waters of the state" includes lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands and all other surface waters and water courses within the jurisdiction of the state of Washington.

"Temperature" means water temperature expressed in degrees Celsius (°C).

"Treatment wetlands" means those wetlands intentionally constructed on nonwetland sites and managed for the primary purpose of wastewater or storm water treatment. Treatment wetlands are considered part of a collection and treatment system, and generally are not subject to the criteria of this chapter.

"Trophic state" means a classification of the productivity of a lake ecosystem. Lake productivity depends on the amount of biologically available nutrients in water and sediments and may be based on total phosphorus (TP). Secchi depth and chlorophyll-a measurements may be used to improve the trophic state classification of a lake. Trophic states used in this rule include, from least to most nutrient-rich, ultra-oligotrophic, oligotrophic, lower mesotrophic, upper mesotrophic, and eutrophic.

"Turbidity" means the clarity of water expressed as nephelometric turbidity units (NTU) and measured with a calibrated turbidimeter.

"Upwelling" means the natural process along Washington's Pacific Coast where the summer prevailing northerly winds produce a seaward transport of surface water. Cold, deeper more saline waters rich in nutrients and low in dissolved oxygen, rise to replace the surface water. The cold oxygen deficient water enters Puget Sound and other coastal estuaries at depth where it displaces the existing deep water and eventually rises to replace the surface water. Such sur-

face water replacement results in an overall increase in salinity and nutrients accompanied by a depression in dissolved oxygen. Localized upwelling of the deeper water of Puget Sound can occur year-round under influence of tidal currents, winds, and geomorphic features.

"USEPA" means the United States Environmental Protection Agency.

"Wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands. (Waterbodies not included in the definition of wetlands as well as those mentioned in the definition are still waters of the state.)

"Wildlife habitat" means waters of the state used by, or that directly or indirectly provide food support to, fish, other aquatic life, and wildlife for any life history stage or activity.

[Statutory Authority: Chapter 90.48 RCW and 40 CFR 131.97-23-064 (Order 94-19), § 173-201A-020, filed 11/18/97, effective 12/19/97. Statutory Authority: Chapter 90.48 RCW, 92-24-037 (Order 92-29), § 173-201A-020, filed 11/25/92, effective 12/26/92.]

WAC 173-201A-030 General water use and criteria classes. The following criteria shall apply to the various classes of surface waters in the state of Washington:

(1) **Class AA (extraordinary).**

(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam, oyster, and mussel rearing, spawning, and harvesting.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria:

(i) Fecal coliform organisms:

(A) Freshwater - fecal coliform organism levels shall both not exceed a geometric mean value of 50 colonies/100 mL and not have more than 10 percent of all samples

into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental, or injurious to the public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish, or other aquatic life.

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"Secondary contact recreation" means activities where a person's water contact would be limited (wading or fishing) to the extent that bacterial infections of eyes, ears, respiratory or digestive systems, or urogenital areas would normally be avoided.

"Shoreline stabilization" means the anchoring of soil at the water's edge, or in shallow water, by fibrous plant root complexes; this may include long-term accretion of sediment or peat, along with shoreline progradation in such areas.

"Storm water" means that portion of precipitation that does not naturally percolate into the ground or evaporate, but flows via overland flow, interflow, pipes, and other features of a storm water drainage system into a defined surface water body, or a constructed infiltration facility.

"Storm water attenuation" means the process by which peak flows from precipitation are reduced and runoff velocities are slowed as a result of passing through a surface water body.

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"USEPA" means the United States Environmental Protection Agency.

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"Wildlife habitat" means waters of the state used by, or that directly or indirectly provide food support to, fish, other aquatic life, and wildlife for any life history stage or activity.

[Statutory Authority: Chapter 90.48 RCW and 40 CFR 131.97-23-064 (Order 94-19), § 173-201A-020, filed 11/18/97, effective 12/19/97. Statutory Authority: Chapter 90.48 RCW, 92-24-037 (Order 92-29), § 173-201A-020, filed 11/25/92, effective 12/26/92.]

WAC 173-201A-030 General water use and criteria classes. The following criteria shall apply to the various classes of surface waters in the state of Washington:

(1) **Class AA (extraordinary).**

(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam, oyster, and mussel rearing, spawning, and harvesting.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria:

(i) Fecal coliform organisms:

(A) Freshwater - fecal coliform organism levels shall both not exceed a geometric mean value of 50 colonies/100 mL and not have more than 10 percent of all samples

obtained for calculating the geometric mean value exceeding 100 colonies/100 mL.

(B) Marine water - fecal coliform organism levels shall both not exceed a geometric mean value of 14 colonies/100 mL, and not have more than 10 percent of all samples obtained for calculating the geometric mean value exceeding 43 colonies/100 mL.

(ii) Dissolved oxygen:

(A) Freshwater - dissolved oxygen shall exceed 9.5 mg/L.

(B) Marine water - dissolved oxygen shall exceed 7.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 7.0 mg/L, natural dissolved oxygen levels may be degraded by up to 0.2 mg/L by human-caused activities.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature shall not exceed 16.0°C (freshwater) or 13.0°C (marine water) due to human activities. When natural conditions exceed 16.0°C (freshwater) and 13.0°C (marine water), no temperature increases will be allowed which will raise the receiving water temperature by greater than 0.3°C.

Incremental temperature increases resulting from point source activities shall not, at any time, exceed $t=23/(T+5)$ (freshwater) or $t=8/(T-4)$ (marine water). Incremental temperature increases resulting from nonpoint source activities shall not exceed 2.8°C.

For purposes hereof, "t" represents the maximum permissible temperature increase measured at a mixing zone boundary; and "T" represents the background temperature as measured at a point or points unaffected by the discharge and representative of the highest ambient water temperature in the vicinity of the discharge.

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a human-caused variation within the above range of less than 0.2 units.

(vi) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by the department (see WAC 173-201A-040 and 173-201A-050).

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.

(2) Class A (excellent).

(a) General characteristic. Water quality of this class shall meet or exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.
Other fish migration, rearing, spawning, and harvesting.
Clam, oyster, and mussel rearing, spawning, and harvesting.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria:

(i) Fecal coliform organisms:

(A) Freshwater - fecal coliform organism levels shall both not exceed a geometric mean value of 100 colonies/100 mL, and not have more than 10 percent of all samples obtained for calculating the geometric mean value exceeding 200 colonies/100 mL.

(B) Marine water - fecal coliform organism levels shall both not exceed a geometric mean value of 14 colonies/100 mL, and not have more than 10 percent of all samples obtained for calculating the geometric mean value exceeding 43 colonies/100 mL.

(ii) Dissolved oxygen:

(A) Freshwater - dissolved oxygen shall exceed 8.0 mg/L.

(B) Marine water - dissolved oxygen shall exceed 6.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 6.0 mg/L, natural dissolved oxygen levels may be degraded by up to 0.2 mg/L by human-caused activities.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature shall not exceed 18.0°C (freshwater) or 16.0°C (marine water) due to human activities. When natural conditions exceed 18.0°C (freshwater) and 16.0°C (marine water), no temperature increases will be allowed which will raise the receiving water temperature by greater than 0.3°C.

Incremental temperature increases resulting from point source activities shall not, at any time, exceed $t=28/(T+7)$ (freshwater) or $t=12/(T-2)$ (marine water). Incremental temperature increases resulting from nonpoint source activities shall not exceed 2.8°C.

For purposes hereof, "t" represents the maximum permissible temperature increase measured at a mixing zone boundary; and "T" represents the background temperature as measured at a point or points unaffected by the discharge and representative of the highest ambient water temperature in the vicinity of the discharge.

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a human-caused variation within the above range of less than 0.5 units.

(vi) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which have the potential either singularly or cumulatively to adversely affect characteristic water uses; cause acute or chronic conditions to the most sen-

sitive biota dependent upon those waters, or adversely affect public health, as determined by the department (see WAC 173-201A-040 and 173-201A-050).

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.

(3) Class B (good).

(a) General characteristic. Water quality of this class shall meet or exceed the requirements for most uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (industrial and agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam, oyster, and mussel rearing and spawning.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting:

(iv) Wildlife habitat.

(v) Recreation (secondary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria:

(i) Fecal coliform organisms:

(A) Freshwater - fecal coliform organism levels shall both not exceed a geometric mean value of 200 colonies/100 mL, and not have more than 10 percent of all samples obtained for calculating the geometric mean value exceeding 400 colonies/100 mL.

(B) Marine water - fecal coliform organism levels shall both not exceed a geometric mean value of 100 colonies/100 mL, and not have more than 10 percent of all samples obtained for calculating the geometric mean value exceeding 200 colonies/100 mL.

(ii) Dissolved oxygen:

(A) Freshwater - dissolved oxygen shall exceed 6.5 mg/L.

(B) Marine water - dissolved oxygen shall exceed 5.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 5.0 mg/L, natural dissolved oxygen levels may be degraded by up to 0.2 mg/L by human-caused activities.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature shall not exceed 21.0°C (freshwater) or 19.0°C (marine water) due to human activities. When natural conditions exceed 21.0°C (freshwater) and 19.0°C (marine water), no temperature increases will be allowed which will raise the receiving water temperature by greater than 0.3°C.

Incremental temperature increases resulting from point source activities shall not, at any time, exceed $t=34/(T+9)$ (freshwater) or $t=16/(T)$ (marine water). Incremental temperature increases resulting from nonpoint source activities shall not exceed 2.8°C.

For purposes hereof, "t" represents the maximum permissible temperature increase measured at a mixing zone boundary; and "T" represents the background temperature as measured at a point or points unaffected by the discharge and

representative of the highest ambient water temperature in the vicinity of the discharge.

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) and 7.0 to 8.5 (marine water) with a human-caused variation within the above range of less than 0.5 units.

(vi) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by the department (see WAC 173-201A-040 and 173-201A-050).

(viii) Aesthetic values shall not be reduced by dissolved, suspended, floating, or submerged matter not attributed to natural causes, so as to affect water use or taint the flesh of edible species.

(4) Class C (fair).

(a) General characteristic. Water quality of this class shall meet or exceed the requirements of selected and essential uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (industrial).

(ii) Fish (salmonid and other fish migration).

(iii) Recreation (secondary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(iv) Commerce and navigation.

(c) Water quality criteria - marine water:

(i) Fecal coliform organism levels shall both not exceed a geometric mean value of 200 colonies/100 mL, and not have more than 10 percent of all samples obtained for calculating the geometric mean value exceeding 400 colonies/100 mL.

(ii) Dissolved oxygen shall exceed 4.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 4.0 mg/L, natural dissolved oxygen levels may be degraded by up to 0.2 mg/L by human-caused activities.

(iii) Temperature shall not exceed 22.0°C due to human activities. When natural conditions exceed 22.0°C, no temperature increases will be allowed which will raise the receiving water temperature by greater than 0.3°C.

Incremental temperature increases shall not, at any time, exceed $t=20/(T+2)$.

For purposes hereof, "t" represents the maximum permissible temperature increase measured at a mixing zone boundary; and "T" represents the background temperature as measured at a point or points unaffected by the discharge and representative of the highest ambient water temperature in the vicinity of the discharge.

(iv) pH shall be within the range of 6.5 to 9.0 with a human-caused variation within a range of less than 0.5 units.

(v) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or

have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vi) Toxic, radioactive, or deleterious material concentrations shall be below those which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by the department (see WAC 173-201A-040 and 173-201A-050).

(vii) Aesthetic values shall not be interfered with by the presence of obnoxious wastes, slimes, aquatic growths, or materials which will taint the flesh of edible species.

(5) Lake class.

(a) General characteristic. Water quality of this class shall meet or exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam and mussel rearing, spawning, and harvesting.

Crayfish rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria:

(i) Fecal coliform organism levels shall both not exceed a geometric mean value of 50 colonies/100 mL, and not have more than 10 percent of all samples obtained for calculating the geometric mean value exceeding 100 colonies/100 mL.

(ii) Dissolved oxygen - no measurable decrease from natural conditions.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature - no measurable change from natural conditions.

(v) pH - no measurable change from natural conditions.

(vi) Turbidity shall not exceed 5 NTU over background conditions.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by the department (see WAC 173-201A-040 and 173-201A-050).

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.

(6) Establishing lake nutrient criteria.

(a) The following table shall be used to aid in establishing nutrient criteria:

(Table 1) The ecoregional and trophic-state action values for establishing nutrient criteria:

Coast Range, Puget Lowlands, and Northern Rockies Ecoregions:		
Trophic State	If Ambient TP (µg/l) Range of Lake is:	Then criteria should be set at:
Ultra-oligotrophic	0-4	4 or less
Oligotrophic	>4-10	10 or less
Lower mesotrophic	>10-20	20 or less
	<u>Action value</u> >20 lake specific study may be initiated.
Cascades Ecoregion:		
Trophic State	If Ambient TP (µg/l) Range of Lake is:	Then criteria should be set at:
Ultra-oligotrophic	0-4	4 or less
Oligotrophic	>4-10	10 or less
	<u>Action value</u> >10 lake specific study may be initiated.
Columbia Basin Ecoregion:		
Trophic State	If Ambient TP (µg/l) Range of Lake is:	Then criteria should be set at:
Ultra-oligotrophic	0-4	4 or less
Oligotrophic	>4-10	10 or less
Lower mesotrophic	>10-20	20 or less
Upper mesotrophic	>20-35	35 or less
	<u>Action value</u> >35 lake specific study may be initiated.

Lakes in the Willamette, East Cascade Foothills, or Blue Mountain ecoregions do not have recommended values and need to have lake-specific studies in order to receive criteria as described in (c)(i) of this subsection.

(b) The following actions are recommended if ambient monitoring of a lake shows the epilimnetic total phosphorus concentration, as shown in Table 1 of this section, is below the action value for an ecoregion:

(i) Determine trophic status from existing or newly gathered data. The recommended minimum sampling to determine trophic status is calculated as the mean of four or more samples collected from the epilimnion between June through September in one or more consecutive years. Sampling must be spread throughout the season.

(ii) Propose criteria at or below the upper limit of the trophic state; or

(iii) Conduct lake-specific study to determine and propose to adopt appropriate criteria as described in (c) of this subsection.

(c) The following actions are recommended if ambient monitoring of a lake shows total phosphorus to exceed the action value for an ecoregion shown in Table 1 of this section or where recommended ecoregional action values do not exist:

(i) Conduct a lake-specific study to evaluate the characteristic uses of the lake. A lake-specific study may vary depending on the source or threat of impairment. Phytoplankton blooms, toxic phytoplankton, or excessive aquatic plants, are examples of various sources of impairment. The following are examples of quantitative measures that a study may describe: Total phosphorus, total nitrogen, chlorophyll-a, dissolved oxygen in the hypolimnion if thermally stratified, pH, hardness, or other measures of existing conditions and potential changes in any one of these parameters.

(ii) Determine appropriate total phosphorus concentrations or other nutrient criteria to protect characteristic lake uses. If the existing total phosphorus concentration is protective of characteristic lake uses, then set criteria at existing total phosphorus concentration. If the existing total phosphorus concentration is not protective of the existing characteristic lake uses, then set criteria at a protective concentration. Proposals to adopt appropriate total phosphorus criteria to protect characteristic uses must be developed by considering technical information and stakeholder input as part of a public involvement process equivalent to the Administrative Procedure Act (chapter 34.05 RCW).

(iii) Determine if the proposed total phosphorus criteria necessary to protect characteristic uses is achievable. If the recommended criterion is not achievable and if the characteristic use the criterion is intended to protect is not an existing use, then a higher criterion may be proposed in conformance with 40 CFR part 131.10.

(d) The department will consider proposed lake-specific nutrient criteria during any water quality standards rule making that follows development of a proposal. Adoption by rule formally establishes the criteria for that lake.

(e) Prioritization and investigation of lakes by the department will be initiated by listing problem lakes in a watershed needs assessment, and scheduled as part of the water quality program's watershed approach to pollution control. This prioritization will apply to lakes identified as warranting a criteria based on the results of a lake-specific study, to lakes warranting a lake-specific study for establishing criteria, and to lakes requiring restoration and pollution control measures due to exceedance of an established criterion. The adoption of nutrient criteria are generally not intended to apply to lakes or ponds with a surface area smaller than five acres; or to ponds wholly contained on private property owned and sur-

rounded by a single landowner; and nutrients do not drain or leach from these lakes or private ponds to the detriment of other property owners or other water bodies; and do not impact designated uses in the lake. However, if the landowner proposes criteria the department may consider adoption.

(f) The department may not need to set a lake-specific criteria or further investigate a lake if existing water quality conditions are naturally poorer (higher TP) than the action value and uses have not been lost or degraded, per WAC 173-201A-070(2).

[Statutory Authority: Chapter 90.48 RCW and 40 CFR 131.97-23-064 (Order 94-19), § 173-201A-030, filed 11/18/97, effective 12/19/97. Statutory Authority: Chapter 90.48 RCW. 92-24-037 (Order 92-29), § 173-201A-030, filed 11/25/92, effective 12/26/92.]

WAC 173-201A-040 Toxic substances. (1) Toxic substances shall not be introduced above natural background levels in waters of the state which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by the department.

(2) The department shall employ or require chemical testing, acute and chronic toxicity testing, and biological assessments, as appropriate, to evaluate compliance with subsection (1) of this section and to ensure that aquatic communities and the existing and characteristic beneficial uses of waters are being fully protected.

(3) The following criteria shall be applied to all surface waters of the state of Washington for the protection of aquatic life. The department may revise the following criteria on a statewide or waterbody-specific basis as needed to protect aquatic life occurring in waters of the state and to increase the technical accuracy of the criteria being applied. The department shall formally adopt any appropriate revised criteria as part of this chapter in accordance with the provisions established in chapter 34.05 RCW, the Administrative Procedure Act. The department shall ensure there are early opportunities for public review and comment on proposals to develop revised criteria. Values are µg/L for all substances except Ammonia and Chloride which are mg/L:

Substance	Freshwater		Marine Water	
	Acute	Chronic	Acute	Chronic
Aldrin/Dieldrin	2.5a	0.0019b	0.71a	0.0019b
Ammonia (un-ionized NH ₃) hh	f,c	g,d	0.233h,c	0.035h,d
Arsenic dd	360.0c	190.0d	69.0c,II	36.0d, cc,II
Cadmium dd	i,c	j,d	42.0c	9.3d
Chlordane	2.4a	0.0043b	0.09a	0.004b
Chloride (Dissolved) k	860.0h,c	230.0h,d	-	-
Chlorine (Total Residual)	19.0c	11.0d	13.0c	7.5d
Chlorpyrifos	0.083e	0.041d	0.011c	0.0056d
Chromium (Hex) dd	15.0c,i,ii	10.0d,jj	1,100.0c,i,II	50.0d,II
Chromium (Tri) gg	m,c	n,d	-	-
Copper dd	o,c	p,d	4.8c,II	3.1d,II
Cyanide ee	22.0c	5.2d	1.0c,mm	-
DDT (and metabolites)	1.1a	0.001b	0.13a	0.001b
Dieldrin/Aldrin e	2.5a	0.0019b	0.71a	0.0019b
Endosulfan	0.22a	0.056b	0.034a	0.0087b
Endrin	0.18a	0.0023b	0.037a	0.0023b
Heptachlor	0.52a	0.0038b	0.053a	0.0036b

(b) Permits shall be subject to modification by the department whenever it appears to the department the discharge violates water quality standards. Modification of permits, as provided herein, shall be subject to review in the same manner as originally issued permits.

(6) No waste discharge permit shall be issued which results in a violation of established water quality criteria, except as provided for under WAC 173-201A-100 or 173-201A-110.

(7) Due consideration will be given to the precision and accuracy of the sampling and analytical methods used as well as existing conditions at the time, in the application of the criteria.

(8) The analytical testing methods for these criteria shall be in accordance with the "Guidelines Establishing Test Procedures for the Analysis of Pollutants" (40 C.F.R. Part 136) and other or superseding methods published and/or approved by the department following consultation with adjacent states and concurrence of the USEPA.

(9) Nothing in this chapter shall be interpreted to prohibit the establishment of effluent limitations for the control of the thermal component of any discharge in accordance with Section 316 of the federal Clean Water Act (33 U.S.C. 1251 et seq.).

(10) The primary means for protecting water quality in wetlands is through implementing the antidegradation procedures section (WAC 173-201A-070).

(a) In addition to designated uses, wetlands may have existing beneficial uses that are to be protected that include ground water exchange, shoreline stabilization, and storm water attenuation.

(b) Water quality in wetlands is maintained and protected by maintaining the hydrologic conditions, hydrophytic vegetation, and substrate characteristics necessary to support existing and designated uses.

(c) Wetlands shall be delineated using the Washington State Wetlands Identification and Delineation Manual, in accordance with WAC 173-22-035.

[Statutory Authority: Chapter 90.48 RCW and 40 CFR 131.97-23-064 (Order 94-19), § 173-201A-060, filed 11/18/97, effective 12/19/97. Statutory Authority: Chapter 90.48 RCW, 92-24-037 (Order 92-29), § 173-201A-060, filed 11/25/92, effective 12/26/92.]

WAC 173-201A-070 Antidegradation. The antidegradation policy of the state of Washington, as generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971, is stated as follows:

(1) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed.

(2) Whenever the natural conditions of said waters are of a lower quality than the criteria assigned, the natural conditions shall constitute the water quality criteria.

(3) Water quality shall be maintained and protected in waters designated as outstanding resource waters in WAC 173-201A-080.

(4) Whenever waters are of a higher quality than the criteria assigned for said waters, the existing water quality shall

be protected and pollution of said waters which will reduce the existing quality shall not be allowed, except in those instances where:

(a) It is clear, after satisfactory public participation and intergovernmental coordination, that overriding considerations of the public interest will be served;

(b) All wastes and other materials and substances discharged into said waters shall be provided with all known available, and reasonable methods of prevention, control, and treatment by new and existing point sources before discharge. All activities which result in the pollution of waters from nonpoint sources shall be provided with all known, available, and reasonable best management practices; and

(c) When the lowering of water quality in high quality waters is authorized, the lower water quality shall still be of high enough quality to fully support all existing beneficial uses.

(5) Short-term modification of water quality may be permitted as conditioned by WAC 173-201A-110.

[Statutory Authority: Chapter 90.48 RCW, 92-24-037 (Order 92-29), § 173-201A-070, filed 11/25/92, effective 12/26/92.]

WAC 173-201A-080 Outstanding resource waters. Waters meeting one or more of the following criteria shall be considered for outstanding resource water designation. Designations shall be adopted in accordance with the provisions of chapter 34.05 RCW, Administrative Procedure Act.

(1) Waters in national parks, national monuments, national preserves, national wildlife refuges, national wilderness areas, federal wild and scenic rivers, national seashores, national marine sanctuaries, national recreation areas, national scenic areas, and national estuarine research reserves;

(2) Waters in state parks, state natural areas, state wildlife management areas, and state scenic rivers;

(3) Documented aquatic habitat of priority species as determined by the department of wildlife;

(4) Documented critical habitat for populations of threatened or endangered species of native anadromous fish;

(5) Waters of exceptional recreational or ecological significance.

[Statutory Authority: Chapter 90.48 RCW, 92-24-037 (Order 92-29), § 173-201A-080, filed 11/25/92, effective 12/26/92.]

WAC 173-201A-100 Mixing zones. (1) The allowable size and location of a mixing zone and the associated effluent limits shall be established in discharge permits, general permits, or orders, as appropriate.

(2) A discharger shall be required to fully apply AKART prior to being authorized a mixing zone.

(3) Mixing zone determinations shall consider critical discharge conditions.

(4) No mixing zone shall be granted unless the supporting information clearly indicates the mixing zone would not have a reasonable potential to cause a loss of sensitive or important habitat, substantially interfere with the existing or characteristic uses of the water body, result in damage to the ecosystem, or adversely affect public health as determined by the department.

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(a) Toxic, radioactive, or deleterious material concentrations must be below those which have the potential, either singularly or cumulatively, to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health (see WAC 173-201A-240, toxic substances, and 173-201A-250, radioactive substances).

(b) Aesthetic values must not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste (see WAC 173-201A-230 for guidance on establishing lake nutrient standards to protect aesthetics).

(3) **Procedures for applying water quality criteria.** In applying the appropriate water quality criteria for a water, the department will use the following procedure:

(a) The department will establish water quality requirements for water bodies, in addition to those specifically listed in this chapter, on a case-specific basis where determined necessary to provide full support for designated and existing uses.

(b) Upstream actions must be conducted in manners that meet downstream water body criteria. Except where and to the extent described otherwise in this chapter, the criteria associated with the most upstream uses designated for a water body are to be applied to headwaters to protect nonfish aquatic species and the designated downstream uses.

(c) Where multiple criteria for the same water quality parameter are assigned to a water body to protect different uses, the most stringent criterion for each parameter is to be applied.

(d) At the boundary between water bodies protected for different uses, the more stringent criteria apply.

(e) In brackish waters of estuaries, where different criteria for the same use occurs for fresh and marine waters, the decision to use the fresh water or the marine water criteria must be selected and applied on the basis of vertically averaged daily maximum salinity, referred to below as "salinity."

(i) The fresh water criteria must be applied at any point where ninety-five percent of the salinity values are less than or equal to one part per thousand, except that the fresh water criteria for bacteria applies when the salinity is less than ten parts per thousand; and

(ii) The marine water criteria must apply at all other locations where the salinity values are greater than one part per thousand, except that the marine criteria for bacteria applies when the salinity is ten parts per thousand or greater.

(f) Numeric criteria established in this chapter are not intended for application to human created waters managed primarily for the removal or containment of pollution. This special provision also includes private farm ponds created from upland sites that did not incorporate natural water bodies.

(i) Waters covered under this provision must be managed so that:

(A) They do not create unreasonable risks to human health or uses of the water; and

(B) Discharges from these systems meet down gradient surface and ground water quality standards.

(ii) This provision does not apply to waterways designed and managed primarily to convey or transport water from one location to another, rather than to remove pollution en route.

(g) When applying the numeric criteria established in this chapter, the department will give consideration to the precision and accuracy of the sampling and analytical methods used, as well as the existing conditions at the time.

(h) The analytical testing methods for these numeric criteria must be in accordance with the "Guidelines Establishing Test Procedures for the Analysis of Pollutants" (40 CFR Part 136) or superseding methods published. The department may also approve other methods following consultation with adjacent states and with the approval of the USEPA.

(i) The primary means for protecting water quality in wetlands is through implementing the antidegradation procedures described in Part III of this chapter.

(i) In addition to designated uses, wetlands may have existing beneficial uses that are to be protected that include ground water exchange, shoreline stabilization, and storm water attenuation.

(ii) Water quality in wetlands is maintained and protected by maintaining the hydrologic conditions, hydrophytic vegetation, and substrate characteristics necessary to support existing and designated uses.

(ii) Wetlands must be delineated using the *Washington State Wetlands Identification and Delineation Manual*, in accordance with WAC 173-22-035.

[Statutory Authority: Chapters 90.48 and 90.54 RCW. 03-14-129 (Order 02-14), § 173-201A-260, filed 7/1/03, effective 8/1/03.]

PART III - ANTIDEGRADATION

WAC 173-201A-300 Description. (1) The antidegradation policy is guided by chapter 90.48 RCW, Water Pollution Control Act, chapter 90.54 RCW, Water Resources Act of 1971, and 40 CFR 131.12.

(2) The purpose of the antidegradation policy is to:

(a) Restore and maintain the highest possible quality of the surface waters of Washington;

(b) Describe situations under which water quality may be lowered from its current condition;

(c) Apply to human activities that are likely to have an impact on the water quality of a surface water;

(d) Ensure that all human activities that are likely to contribute to a lowering of water quality, at a minimum, apply all known, available, and reasonable methods of prevention, control, and treatment (AKART); and

(e) Apply three levels of protection for surface waters of the state, as generally described below:

(i) Tier I is used to ensure existing and designated uses are maintained and protected and applies to all waters and all sources of pollution.

(ii) Tier II is used to ensure that waters of a higher quality than the criteria assigned in this chapter are not degraded unless such lowering of water quality is necessary and in the overriding public interest. Tier II applies only to a specific list of polluting activities.

(iii) Tier III is used to prevent the degradation of waters formally listed in this chapter as "outstanding resource waters," and applies to all sources of pollution.

(3) **Habitat restoration.** Both temporary harm and permanent loss of existing uses may be allowed by the department where determined necessary to secure greater ecological benefits through major habitat restoration projects

designed to return the natural physical structure and associated uses to a water body where the structure has been altered through human action.

[Statutory Authority: Chapters 90.48 and 90.54 RCW. 03-14-129 (Order 02-14), § 173-201A-300, filed 7/1/03, effective 8/1/03.]

WAC 173-201A-310 Tier I—Protection and maintenance of existing and designated uses. (1) Existing and designated uses must be maintained and protected. No degradation may be allowed that would interfere with, or become injurious to, existing or designated uses, except as provided for in this chapter.

(2) For waters that do not meet assigned criteria, or protect existing or designated uses, the department will take appropriate and definitive steps to bring the water quality back into compliance with the water quality standards.

(3) Whenever the natural conditions of a water body are of a lower quality than the assigned criteria, the natural conditions constitute the water quality criteria. Where water quality criteria are not met because of natural conditions, human actions are not allowed to further lower the water quality, except where explicitly allowed in this chapter.

[Statutory Authority: Chapters 90.48 and 90.54 RCW. 03-14-129 (Order 02-14), § 173-201A-310, filed 7/1/03, effective 8/1/03.]

WAC 173-201A-320 Tier II—Protection of waters of higher quality than the standards. (1) Whenever a water quality constituent is of a higher quality than a criterion designated for that water under this chapter, new or expanded actions within the categories identified in subsection (2) of this section that are expected to cause a measurable change in the quality of the water (see subsection (3) of this section) may not be allowed unless the department determines that the lowering of water quality is necessary and in the overriding public interest (see subsection (4) of this section).

(2) A Tier II review will only be conducted for new or expanded actions conducted under the following authorizations. Public involvement with the Tier II review will be conducted in accordance with the public involvement processes associated with these actions.

(a) National Pollutant Discharge Elimination System (NPDES) waste discharge permits;

(b) State waste discharge permits to surface waters;

(c) Federal Clean Water Act Section 401 water quality certifications; and

(d) Other water pollution control programs authorized, implemented, or administered by the department.

(3) **Definition of measurable change.** To determine that a lowering of water quality is necessary and in the overriding public interest, an analysis must be conducted for new or expanded actions when the resulting action has the potential to cause a measurable change in the physical, chemical, or biological quality of a water body. Measurable changes will be determined based on an estimated change in water quality at a point outside the source area, after allowing for mixing consistent with WAC 173-201A-400(7). In the context of this regulation, a measurable change includes a:

(a) Temperature increase of 0.3°C or greater;

(b) Dissolved oxygen decrease of 0.2 mg/L or greater;

(c) Bacteria level increase of 2 cfu/100 mL or greater;

(d) pH change of 0.1 units or greater;

(e) Turbidity increase of 0.5 NTU or greater; or

(f) Any detectable increase in the concentration of a toxic or radioactive substance.

(4) **Necessary and overriding public interest determinations.** Once an activity has been determined to cause a measurable lowering in water quality, then an analysis must be conducted to determine if the lowering of water quality is necessary and in the overriding public interest. Information to conduct the analysis must be provided by the applicant seeking the authorization, or by the department in developing a general permit or pollution control program, and must include:

(a) A statement of the benefits and costs of the social, economic, and environmental effects associated with the lowering of water quality. This information will be used by the department to determine if the lowering of water quality is in the overriding public interest. Examples of information that can assist in this determination include:

(i) Economic benefits such as creating or expanding employment, increasing median family income, or increasing the community tax base;

(ii) Providing or contributing to necessary social services;

(iii) The use and demonstration of innovative pollution control and management approaches that would allow a significant improvement in AKART for a particular industry or category of action;

(iv) The prevention or remediation of environmental or public health threats;

(v) The societal and economic benefits of better health protection;

(vi) The preservation of assimilative capacity for future industry and development; and

(vii) The benefits associated with high water quality for uses such as fishing, recreation, and tourism.

(b) Information that identifies and selects the best combination of site, structural, and managerial approaches that can be feasibly implemented to prevent or minimize the lowering of water quality. This information will be used by the department to determine if the lowering of water quality is necessary. Examples that may be considered as alternatives include:

(i) Pollution prevention measures (such as changes in plant processes, source reduction, and substitution with less toxic substances);

(ii) Recycle/reuse of waste by-products or production materials and fluids;

(iii) Application of water conservation methods;

(iv) Alternative or enhanced treatment technology;

(v) Improved operation and maintenance of existing treatment systems;

(vi) Seasonal or controlled discharge options to avoid critical conditions of water quality;

(vii) Establishing buffer areas with effective limits on activities;

(viii) Land application or infiltration to capture pollutants and reduce surface runoff, on-site treatment, or alternative discharge locations;

(ix) Water quality offsets as described in WAC 173-201A-450.

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January 1, 2005

(b) First-class, registered or certified mail. Service is complete upon deposit in the United States mail properly stamped and addressed.

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[Statutory Authority: RCW 43.21B.170, 96-15-003, § 371-08-305, filed 7/3/96, effective 8/3/96.]

WAC 371-08-306 Livestock nutrient management program (LNMP). As used in this chapter, and chapter 43.21B RCW, when referring to appeals related to civil penalties and orders issued by the department of agriculture, under the LNMP, pursuant to chapters 90.48 and 90.64 RCW, the following terms shall have the following meaning:

(1) "Department" means the department of agriculture.

(2) "Director" means the director of the department of agriculture.

[Statutory Authority: RCW 34.05.360 and 2003 c 325, 04-03-001, § 371-08-306, filed 1/7/04, effective 2/7/04.]

WAC 371-08-310 Computation of time. (1) The time within which any act shall be done, as provided by these rules, shall be computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday or a legal holiday, and then it is excluded and the next succeeding day which is neither a Saturday, Sunday nor a legal holiday is included. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.

(2) This section also pertains to the period for filing an appeal with the board.

[Statutory Authority: RCW 43.21B.170 and 1997 c 125, 97-19-064, § 371-08-310, filed 9/15/97, effective 10/16/97. Statutory Authority: RCW 43.21B.170 and *Den Beste v. Washington*, No. 13967-1-III (Div. III, April 18, 1996), 96-17-016, § 371-08-310, filed 8/12/96, effective 9/12/96.]

PART B BOARD ADMINISTRATION AND JURISDICTION

WAC 371-08-315 Membership, function and jurisdiction. (1) **Members.** The board is composed of three members appointed by the governor, with the advice and consent of the senate, for a term of six years. The members are to be qualified by experience or training in pertinent matters pertaining to the environment, and at least one member shall be a lawyer, and not more than two members shall be of the same political party.

(2) **Function and jurisdiction.** The function of this board is to provide an expeditious and efficient disposition of appeals from the decisions and orders of the department of agriculture pursuant to chapters 90.48 and 90.64 RCW, the department of ecology, from the decisions of air pollution control authorities established pursuant to chapter 70.94 RCW, and from the decisions of local health departments,

[Title 371 WAC—p. 6]

when such orders and decisions concern matters within the jurisdiction of the board as provided in RCW 43.21B.110:

(a) Civil penalties imposed pursuant to RCW 18.104.-155, 70.94.431, 70.105.080, 70.105.095, 70.107.050, 86.16.-081, 88.46.090, 90.03.600, 90.48.144, 90.56.310, 90.56.320, 90.56.330, 90.58.560 and chapter 90.64 RCW.

(b) Orders issued pursuant to RCW 18.104.043, 18.104.-060, 18.104.065, 43.27A.190, 70.94.211, 70.94.332, 70.105.-095, 70.107.060, 88.46.070, 90.14.130, 90.14.190, 90.48.120 and chapter 90.64 RCW.

(c) The issuance, modification, termination or denial of any permit certificate or license by the department of ecology or any air pollution control authority.

(d) Decisions of local health departments regarding the grant or denial of solid waste permits or of biosolid permits pursuant to chapter 70.95 RCW.

(e) Disputes between the department and the governing bodies of local governments regarding local planning requirements under RCW 70.105.220 and zone designation under RCW 70.105.225, pursuant to RCW 70.105.250.

(f) Any other decision by the department of ecology, the administrator of marine safety or an air pollution control authority which pursuant to law must be decided as an adjudicative proceeding under chapter 34.05 RCW.

(3) This section is intended to be general and informational only, and failure herein to list matters over which the board has jurisdiction at law shall not constitute any waiver or withdrawal whatsoever from such jurisdiction.

[Statutory Authority: RCW 34.05.360 and 2003 c 325, 04-03-001, § 371-08-315, filed 1/7/04, effective 2/7/04. Statutory Authority: RCW 43.21B.170, 96-15-003, § 371-08-315, filed 7/3/96, effective 8/3/96.]

WAC 371-08-320 Environmental hearings office hours, telephone number and address. (1) The administrative business of the board, except rule making, is performed by the environmental hearings office. The board holds meetings at 10:00 a.m. on the second Tuesday of each month at the address set forth below.

(2) The board is housed at the Environmental Hearings Office, 4224 6th Avenue S.E., Building 2, Rowe Six, Lacey, Washington. The principal hearing room used by the board is located at the same address, although many hearings are held near the site of the dispute at issue.

(3) The mailing address of the board is:

Pollution Control Hearings Board
4224 6th Avenue S.E., Building 2, Rowe Six
PO Box 40903
Lacey, WA 98504-0903

(4) The telephone number of the board is (360) 459-6327. The telefacsimile number is (360) 438-7699.

(5) The office hours of the environmental hearings office are 8:00 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays.

[Statutory Authority: RCW 43.21B.170, 02-06-011, § 371-08-320, filed 2/22/02, effective 3/25/02; 96-15-003, § 371-08-320, filed 7/3/96, effective 8/3/96.]

WAC 371-08-325 Public information about practice before the board and public records. (1) Questions about practicing before the board may be directed to the environ-

(2005 Ed.)

ATTACHMENT A TO REPLY BRIEF

AR 984

**Mark W. Schneider
Markham A. Quehrn
Kristine R. Wilson
PERKINS COIE LLP
10885 NE 4th Street, Suite 700
Bellevue, WA 98004-5579
(425) 635-1400
Attorneys for Petitioner Puget Sound Energy, Inc.**

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STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Northwest Regional Office, 3190 - 160th Ave S.E. • Bellevue, Washington 98008-5452 • (206) 649-7000

May 12, 1995

CERTIFIED MAIL

Ms. Lois Cashell
Secretary
Federal Energy Regulatory Commission
825 North Capitol Street Northeast
Washington, DC 20426

FILED
OFFICE OF THE SECRETARY
95 MAY 16 PM 4:03
FEDERAL ENERGY
REGULATORY
COMMISSION

RE: Snoqualmie Falls Hydroelectric Project FERC No. 2493

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Dear Ms. Cashell:

Pursuant to the State Environmental Policy Act (SEPA) regulations, the Department of Ecology may not issue a Section 401 Water Quality Certification (WQC) for the Snoqualmie Falls Hydroelectric Project until it has complied with the SEPA review process if there are other state permits requiring SEPA compliance. The Snoqualmie Falls Project requires other state permits that constitute SEPA defined actions. Furthermore, it would be beneficial to all parties to allow the Federal Energy Regulatory Commission (FERC) to complete the National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) for the proposed refurbished project.

In light of this situation Ecology would like to provide to FERC potential conditions under consideration to be included in the WQC pending completion of the EIS. Ecology asks that FERC consider these potential conditions presented for the WQC in the environmental analysis for both the "Minor Upgrade Alternative" as detailed in the DEIS and the "Refurbished Project" to be further detailed by the Applicant.

Instream Flows Over Snoqualmie Falls

Ecology has developed a flow regime, after considering information provided by the Applicant and the public, to address minimum flows over Snoqualmie Falls. The flow regime was developed in an attempt to balance public participation in the use and viewing of Snoqualmie Falls with the existing use of Snoqualmie Falls as a source of electrical power generation.

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Based upon discussions with the Applicant, it is Ecology's understanding that the Applicant would consent to imposition of these flows to address components of the state water quality standards in regard to beneficial uses such as recreation, aesthetics and hydroelectric power production as specified in RCW 90.54.020. These flows are intended to maintain and protect the beneficial uses of the Snoqualmie River. It should be noted that inclusion of these flows would be a consensual reduction in the existing diversion of water for power generation in accordance with the water right claim of the Applicant. Such reduction maintains the beneficial use of the applicant's water right claim for the generation of electric power.

Proposed minimum instream flows over Snoqualmie Falls would result in the following schedule seven days per week:

From 10 AM to sunset.

March 16 - March 31	200 cfs
April 1 - April 30	450 cfs
May 1 - May 31	700 cfs
June 1 - June 30	450 cfs
July 1 - July 15	200 cfs
July 16 to March 15	100 cfs

Nighttime flows over the falls would not be less than 25 cfs.

Dissolved Oxygen

In addition to the above flow regime, the project would be directed to operate for dissolved oxygen considerations as described below.

Ecology has determined from data produced from instream sampling for the license application, water quality sampling performed for the Snoqualmie River Total Maximum Daily Loading Study (TMDL), and modeling that there are actual and potential periods in which the dissolved oxygen in the Snoqualmie River drops below the criteria established in the state water quality standards. Based on modeling of the stream reach, Ecology is considering the following water quality condition to reduce the potential for depression of dissolved oxygen below state standards:

PAGE 3

Beginning August 1 and ending September 30 should ambient water temperatures measured at Plant 1 meet or exceed 16° C, concurrent with the mean daily flow of the Snoqualmie River measured at USGS Station 12191445 to meet or be less than 600 cfs, Puget Power shall reduce the impounded surface water condition at the dam to at least 396.5 feet msld for as long as the condition shall persist.

Ramping Rate

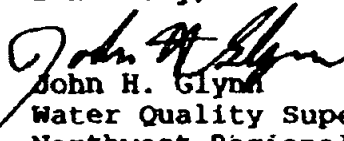
Puget Power has analyzed ramping rates necessary for accommodating any required flows over Snoqualmie Falls. On an interim basis the analysis has shown that Puget Power can minimize decreases in river stage to three (3) inches per hour or less below Powerhouse 2 at total river flows of 1700 cfs or less.

When the new and/or refurbished facilities relating to the dam and hydraulic capabilities and operations at each of the powerhouses are completed, Puget Power will be required to perform a site specific study to define a final ramping rate to be used for the provision of required flows over Snoqualmie Falls. This study shall be completed within 180 days of completion of construction.

We hope these potential WQC conditions currently under consideration facilitate completion of the NEPA document. Ecology's final decision will take into account public comments received during the public notice process, concerns of the Applicant, and the further analysis provided by the environmental review being undertaken by FERC.

If there are other questions on these subjects you may call me at (206) 649-7033, or Bob Newman at (206) 649-7046.

Sincerely,



John H. Glynn
Water Quality Supervisor
Northwest Regional Office
Department of Ecology
State of Washington

JG:RN/tc