THE HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AIRPORT COMMUNITIES COALITION, Plaintiff, v. COLONEL RALPH H. GRAVES, Commander and District Engineer of the Seattle District, United States Army Corps of Engineers; UNITED STATES ARMY CORPS OF ENGINEERS, an agency of the united States government; and PORT OF SEATTLE, a municipal corporation. Defendants.	NO. CO2-2483 BJR BRIEF OF *AMICUS CURIAE* STATE OF WASHINGTON

I. INTEREST OF AMICUS CURIAE

The state of Washington ("Washington") submits this brief as *amicus curiae*. This case involves the issue of whether the United States Army Corps of Engineers ("Corps"), when issuing a Clean Water Act § 404 Permit ("404 Permit") is required to incorporate all state-imposed conditions in a Clean Water Act § 401 Certification ("401 Certification") where the certification is issued within the one-year statutory timeframe but the certification is subsequently modified through the state appeal process.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

It is the states, not the Corps, which are charged by Congress with carrying out the provisions of Section 401. Under Section 401 of the Clean Water Act ("CWA"), Congress requires applicants for federal licenses or permits authorizing "any activity . . . which may result in any discharge" into navigable waters to obtain a state certification that the activity will comply with state water quality laws. 33 U.S.C. § 1341. Section 401(d) provides that the state may impose conditions in a 401 Certification, conditions that shall become part of the federal license or permit being sought. 33 U.S.C. § 1341(d).

In this case, while accepting the 401 Certification issued by the Washington State Department of Ecology ("Ecology"), the Corps elected to ignore portions of the decision rendered by the Pollution Control Hearings Board ("PCHB") in the initial appeal of the Certification. The PCHB's decision has been appealed to the Washington Supreme Court and the issue of the validity of the conditions added to the 401 Certification by the PCHB under state law is appropriately before that Court. Independent of whether the conditions added by the PCHB are valid under state law, the Corps' action in selectively choosing from those conditions presents a direct affront to both Washington's authority under Section 401 and its judicial review process.

II. RELEVANT FACTS

The Port of Seattle ("Port") proposes to construct a third runway and associated facilities at the Seattle-Tacoma International Airport. The proposed construction requires the filling of wetlands, triggering the need to obtain a 404 Permit from the Corps and a 401 Certification from Washington. 33 U.S.C. §§ 1341, 1344.

In the fall of 2000, the Port filed an application for a 404 Permit and 401 Certification with the Corps and Ecology. The final public notice of the application was issued by the Corps on January 17, 2001. AR 54088. Ecology issued a 401 Certification on September 21, 2001. AR 38698-652. The Airport Communities Coalition ("ACC") appealed the 401 Certification to the PCHB, the quasi-judicial administrative body designated to hear appeals of Ecology

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

actions. RCW 43.21B.110. After holding a full evidentiary hearing on the appeal, the PCHB issued its decision on August 12, 2002. In its decision, the PCHB added sixteen conditions to the 401 Certification. AR 052386-248. All parties appealed the PCHB's decision. Those appeals are currently pending before the Washington Supreme Court.

On December 13, 2002, the Corps issued a Record of Decision ("ROD") approving the Port's request for a 404 Permit. AR 054101-053742. In the ROD, the Corps only included seven of the sixteen conditions set forth in the PCHB's decision. *Id.* The ACC appealed the 404 Permit to this Court.

III. ARGUMENT

A. Congress Placed the Sole Authority for Ensuring that Federally-Permitted Projects Meet State Water Quality Standards with the States.

In crafting the CWA, Congress made plain that states were given the primary role for protecting water quality:

> 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 . . . .

33 U.S.C. § 1251(b). In carrying out this policy, Congress carved out specific roles for the states. One such role is the exercise of Section 401 authority to determine if federally permitted or licensed activities requiring a discharge to navigable water will comply with applicable water quality standards. 33 U.S.C. § 1341. Section 401 provides in part:

> 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 . . . that any such discharge will comply with the applicable provisions of [the Clean Water Act].

33 U.S.C. § 1341(a)(1).

Further evidence of Congress' clear intent to provide the states with the primary role in applying state water quality standards can be found in Section 401(d). 33 U.S.C. § 1341(d).

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Section 401(d) authorizes a state to place conditions on a federal permit or license as necessary for the proposed activity to comply with water quality standards "and with other appropriate requirements of State law." *Id.* Such limitations become conditions on the federally issued permit or license. *Id.*; *see also Roosevelt Campobello Park Comm. v. EPA*, 684 F.2d 1041, 1056-57 (1st Cir. 1982).

Denial of the certification by a state precludes issuance of the federal permit or license as a matter of law. 33 U.S.C. § 1341(a)(1). The federal permitting or licensing agency lacks authority to review or revise state water quality certification conditions. *Roosevelt Campobello* at 1056; *American Rivers v. FERC*, 129 F.3d 99, 110-11 (2nd Cir. 1997).

Congress thus reserved to the states the responsibility for certifying compliance with the state water quality standards. Nothing in the Clean Water Act provides that the Corps has any role to play in the implementation of Section 401 and, for this reason, this Court is not obligated to accept the Corps' interpretation of this section. Applying this same rationale, the Ninth Circuit has held that the Federal Energy Regulatory Commission's interpretation of the CWA is not entitled to deference. *California Trout v. FERC*, 313 F.3d 1131, 1133-34 (9th Cir. 2002). The Corps is, therefore, beyond its authority in promulgating rules or regulatory guidance that purports to interpret or limit the states' procedures for issuance and review of Section 401 certifications. *See also City of Fredricksburg v. FERC*, 876 F.2d 1109, 1111-12 (4th Cir. 1989) (state to establish its own procedures for processing Section 401 applications).

In light of the unambiguous language of the CWA and the case law interpreting Section 401, it is clear that the Corps has no discretion to choose which conditions of the 401 Certification will be incorporated into the 404 Permit. Instead, the Corps is required to defer to the state's determination of what is required for compliance with water quality standards. In this case, the Corps did not incorporate all of the conditions in the state 401 Certification as approved by the PCHB and so failed to satisfy its obligations under the CWA.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

B. The Corps is Obligated to Accept the Conditions in the 401 Certification Because the State Issued its 401 Certification Within a Year.

The filing of an application for a federal permit or license triggers the Section 401 certification requirement. The applicant must submit a request for certification to the state. 33 U.S.C. § 1341(a)(1). There is no question that Washington is a state under the CWA. 33 U.S.C. § 1362(3). Under RCW 90.48.260, the Washington Legislature vested Ecology with the authority to implement the CWA within the state.

Upon receiving the application, the state has one year "to act on [the] request for certification." 33 U.S.C. § 1341(a)(1). A failure to act on the request within a year constitutes a waiver of the certification requirement. *Id.* In this case, the Corps published a final public notice of the Port's application on January 17, 2001, starting the one-year clock. AR 54088. Ecology issued the Port a 401 Certification on September 21, 2001. AR 38698-652. It is undisputed that Ecology, the agency designated by the Washington State Legislature to implement the CWA, acted on the Port's request within the year timeframe required by Section 401. Consequently, Washington did not waive its Section 401 authority. The Corps is, for this reason, not free to ignore the state 401 Certification.

C. The Corps Acted Contrary to the CWA by Failing to Include All of the Conditions Added by the PCHB to the State's 401 Certification.

If a state "acts" on a request for a 401 Certification within a year, the Corps is obligated to accept the state's 401 Certification, even if it is modified during a review process that takes place after the one year period has passed. The CWA allows states to establish their own process for reviewing 401 Certification requests. *Fredricksburg*, 876 F.2d at 1111-12. The United States, however, argues that the Corps is not obligated to include the conditions in the 401 Certification as approved by the PCHB in its August 12, 2002 decision because they were added after the one year time period had elapsed. The CWA does not support this reading.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Section 401(d) states that all state water quality certification requirements "**shall** become a condition on any federal license." 33 U.S.C. § 1341(d) (emphasis added). The United States ignores this language and argues an interpretation of the CWA that would allow the Corps to adopt only the conditions contained in the initial state action even if upon judicial review it is subsequently determined that those conditions were legally inadequate. The United States' interpretation runs directly contrary to Congressional intent to give states, not federal agencies, primary responsibility to determine what conditions are necessary to protect water quality.

D. Requiring the Corps to Accept the 401 Certification as Finally Approved After the Completion of State Administrative and Judicial Review is Consistent with Congress' Intent

The crux of the issue raised by the Corps' interpretation of Section 401 is whether, when establishing the one-year period for state action, Congress intended to include within that timeframe a full state judicial review of the state's decision. In support of its interpretation that it does not have to respect the decision of a tribunal which acts after one year, the United States cites to congressional history suggesting that the one-year deadline was intended to prevent unreasonable delay.[1] While accepting that Congress included the one year limitation in order to ensure that the states did not unreasonably delay action on a request for certification, Washington cannot accept the United States' argument by extension that Congress also intended to force states to compress all administrative and judicial review into one year. Such an interpretation is irrational given the length of time that any reasonable review process takes, particularly in complex cases such as the case presently before this Court. Allowing for the completion of state administrative and judicial review does no violence to the goal of Congress that states act with diligence in processing requests for 401 Certifications.

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[1] Federal Defendants' Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 9.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

In Washington, an applicant for a federal license or permit triggering a need for a 401 Certification is required to submit a Joint Aquatics Resource Permit Application ("JARPA") to Ecology. The JARPA requires the applicant to provide detailed information about the proposed project, including plans for mitigating the impacts of the proposal. Public notice is made, written comments solicited, and, where appropriate, a public hearing held. Wash. Admin. Code 173-225-030. Depending on the complexity of the proposed project, several Ecology staff may be assigned to review the proposal for compliance with water quality standards. Also, depending upon the complexity of the project and the completeness of the information submitted by the applicant, Ecology may need to take up to the one year deadline to issue a decision. When Ecology acts, it has acted for Washington as required by Section 401.[2] The federal agency is then free to grant the requested permit or license. 33 U.S.C. § 1341 (a)(1).

Under Washington law, Ecology's decision on a 401 Certification application constitutes agency action that is appealable to the PCHB. The PCHB is a state quasi-judicial board that conducts adjudicative proceedings at the request of persons aggrieved by Ecology orders. RCW 43.21B.110(1). The PCHB is the exclusive means of an appeal of such Ecology decisions. RCW 43.21B.310(1).[3] The PCHB was created to provide expert and independent review of Ecology decisions, *State ex rel. Martin Marietta Aluminum, Inc. v. Woodward*, 84 Wn.2d 329, 332-33, 525 P.2d 247 (1974), and to serve the function of a trial court. *Id.*[4]

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[2] Although not required, it is Ecology's practice to issue 401 Certifications as an order under both the authority granted by the Clean Water Act and the state's Water Pollution Control Act, ch. 90.48 RCW. The fact that the 401 Certification is also a ch. 90.48 order does not minimize or eliminate the authority Congress specifically granted the states in Section 401.

[3] RCW 43.21B.310(1) states in relevant part "[e]xcept as provided under Chapter 70.105D RCW and RCW 90.03.210(2), this is the exclusive means of appeal of such an order." Neither ch. 70. 105D RCW nor RCW 90.03.210(2) applies to this case.

[4] Further support for this proposition can be found in *Portage Bay v. Shorelines Hearing Bd.*, 92 Wn. 2d 1, 593 P.2d 151 (1979). The Shorelines Hearings Board is a quasi-judicial body also part of the Environmental Hearings Office which serves the same function as the PCHB in this case. RCW 90.58.170. In *Portage Bay*, the Washington Supreme Court found that the Shorelines Hearings Board is analogous to a trial court. *Id.* at 8-9.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

The PCHB is not an arm of Ecology but is part of the Environmental Hearings Office which is made up of members appointed by the Governor. RCW 43.21B.020. Its purpose is to "provide for a more expeditious and efficient disposition of appeals with respect to the decisions and orders of" Ecology. RCW 43.21B.010. The Director of Ecology is the executive and administrative head of Ecology with authority to exercise all the powers given to Ecology by the Washington Legislature. RCW 43.21A.050. Unlike some state and federal agencies, Ecology does not have authority to hold adjudicative hearings prior to making final decisions. RCW 43.21B.240.[5] Thus, there is a clear separation between the executive function of Ecology and the adjudicative function of the PCHB. The assertion that the PCHB's review of the 401 Certification is simply an extension of Ecology's decision-making process is unfounded.

The PCHB, governed by the civil rules and rules of evidence, conducts a fact-finding hearing and then issues findings, conclusions and a final order. RCW 43.21B.170; Wash. Admin. Code, ch. 371-08. Judicial review of the PCHB's final decision is conducted pursuant to the State Administrative Appeals Act (APA), ch. 34.05 RCW; RCW 43.21B.180. Under RCW 43.31B.190, an appeal of the PCHB's decision is directed to the state superior court. If the PCHB, however, issues a certificate of appealability, the appeal may be taken directly to the state Court of Appeals or the state Supreme Court. RCW 34.05.518(3); Rules of Appellate Procedure 6.2.

Following Ecology's issuance of a 401 Certification to the Port in September 2001, the ACC appealed that decision to the PCHB. Within six months, the PCHB held a two-week hearing on the appeal. On August 12, 2002, the PCHB issued its decision and the parties each appealed that decision to state superior court. The Port and ACC obtained

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[5] In contrast, the administrative review provisions applicable to the Washington Department of Employment Security involve review by an administrative appeal tribunal before the final decision by the Commissioner. Ch. 50.32 RCW. Similarly, the U.S. Environmental Protection Agency has an internal review process by its own Environmental Appeals Board that takes place before the agency's final decision. *See* 40 C.F.R. § 124.19.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

certificates of appealability and sought review in different state Courts of Appeal. Finding that the case presents issues of broad public import requiring prompt and ultimate determination, Division One of the Court of Appeals accepted certification and transferred the matter to the state Supreme Court for review. The briefing before the Supreme Court will be completed on October 13, 2003, and it is anticipated that oral argument will occur before the end of this year. Congress' desire for an expeditious process is not thwarted in this case where the appeal to the state Supreme Court is progressing with such speed.

E. The Corps' Interpretation of the CWA Would Preclude Review of State 401 Certifications and Violate Principles of Due Process and State Sovereignty.

The state of Washington must be allowed to complete its administrative and judicial review of the 401 Certification issued by Ecology in order to protect principles of state court jurisdiction, due process, and state sovereignty. The Corps' interpretation of Section 401 that a 401 Certification is legally binding on the Corps' only as to conditions issued by the state within a year, regardless of subsequent judicial review, must be rejected as constitutionally infirm.

Under the Corps' interpretation of Section 401, it is completely within the Corps' discretion whether or not to give effect to the results of Washington's judicial review process, if such review takes place after the expiration of a year from the date the certification request is made. This interpretation, when viewed in light of the fact that this Court does not have jurisdiction to review the 401 Certification, *see Roosevelt Campobello,* 684 F.2d 1041, 1056 ("The courts have consistently agreed with this interpretation, ruling that the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification."), would effectively make the 401 Certification unreviewable.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

When, Congress provided the states with the authority to certify a project's compliance with water quality standards, it certainly did not intend that the states' action on the request—whether an approval, an approval with conditions, or a denial—would be independent of all judicial review. Such a result would allow projects to be licensed by the Corps which are ultimately determined by state courts to violate state water quality laws. In addition to being contrary to the plain language and purpose of the CWA, this interpretation of Section 401 does not comport with long-established federal and state constitutional principles of due process and court jurisdiction. *See, e.g., Abbott Labs v. Gardner,* 387 U.S. 136, 140 (1967) ("judicial review of a final agency action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."); *State ex. rel. Cosmopolis Consol. Sch. Dist. No. 99, Grays Harbor Co. v. Bruno,* 59 Wn.2d 366, 368-69, 367 P.2d 995, 996-97 (1962) ("the Court's constitutional power of review cannot be abridged by legislative enactment."). Further, to the extent that the United States is arguing that the CWA requires that states complete all judicial review within one year or forfeit the opportunity for any review, such an interpretation would put the CWA in significant tension with the 10th and 11th Amendments of the United States Constitution. *See, e.g., Alden v. Maine,* 527 U.S. 706, 752 (1999) (state entitled to order the processes of its own governance).

Given the obligation to ensure due process as well as state sovereignty, and the practical impossibility of issuing a 401 Certification and completing all judicial review within one year, Congress must have intended to allow for a state review process subsequent to the issuance of a 401 Certification. This obvious conclusion, combined with the unambiguous grant of primary authority to states for the implementation of Section 401, makes it clear that the Corps was obligated to accept the conditions in the 401 Certification as approved by the PCHB and to accept any further modifications that may be required by the Washington Supreme Court.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

V. CONCLUSION

As set forth above, the Corps has no role in implementing Section 401, or reviewing state 401 Certifications. The Corps' interpretation of that section of the CWA does not comport with the policies of the CWA, nor with the principle of due process and state sovereignty, because it is a practical impossibility for a state to both issue a 401 certificate and to provide an opportunity for any appellants to exhaust available state law appeals within a one year period. This Court should find that the Corps does not have discretion to disregard the conditions imposed by the PCHB or any other Washington tribunal reviewing the 401 Certification. The appropriate resolution of this issue is to require the Corps to incorporate into the 404 Permit all of the conditions imposed by the PCHB and to give full effect to the Washington Supreme Court's ultimate ruling regarding the validity of those conditions in the pending 401 Certification appeal.

DATED this 8th day of July, 2003.

CHRISTINE O. GREGOIRE
Attorney General

JOAN M. MARCHIORO
Assistant Attorney General, WSBA No. 19250
P.O. Box 40117
Olympia, Washington 98504-0117
(360) 586-4615 (tel)
(360) 586-6760 (fax)

DAVID K. MEARS
Senior Assistant Attorney General, WSBA No. 28995
P.O. Box 40117
Olympia, Washington 98504-0117
(360) 586-6743 (tel)
(360) 586-6760 (fax)

Attorneys for State of Washington