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KEVIN STOCK
COUNTY CLERK
NO: 18-2-06632-3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

THE PUYALLUP TRIBE OF INDIANS, a
federally recognized Indian tribe,

Petitioner,

v.

WASHINGTON STATE POLLUTION
CONTROL HEARINGS BOARD; PUGET
SOUND ENERGY, a Washington
Corporation; PORT OF TACOMA, a
Washington Special Purpose District; and
WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Respondents.

NO.

PUYALLUP TRIBE OF INDIANS'
PETITION FOR REVIEW OF
POLLUTION CONTROL
HEARINGS BOARD DECISION
PCHB NO. 16-120c

PETITION AND AUTHORITY

The Puyallup Tribe of Indians (Tribe or Petitioner) petitions the Court for review of decisions rendered, and actions taken, by the Pollution Control Hearings Board of the State of Washington (PCHB or Board) in the case of *The Puyallup Tribe of Indians v. Washington State Department of Ecology, Puget Sound Energy, and the Port of Tacoma*, PCHB No. 16-120c.

PUYALLUP TRIBE OF INDIANS'
PETITION FOR REVIEW OF
PCHB NO. 16-120c - 1

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1 This Petition is made pursuant to the Pollution Control Hearings Board statutes,
2 RCW ch. 43.21B, and the Washington Administrative Procedure Act, RCW ch. 34.05
3 (APA). Decisions of the Board are subject to judicial review pursuant to RCW
4 43.21B.180, which in turn provides that review is governed by the APA under RCW
5 34.05.514 *et seq.* The filing of this Petition in the Pierce County Superior Court is
6 authorized by RCW 34.05.514(1)(b), (c).

7 I. PETITIONER

8 The Petitioner is the Puyallup Tribe of Indians, a federally recognized Indian
9 Tribe with offices located at 3009 E. Portland Avenue, Tacoma, Washington 98404.

10 II. PETITIONER'S ATTORNEYS

11 The Tribe's attorneys in this case are:

- 12 1. Lisa Anderson
13 Law Office, Puyallup Indian Tribe
14 3009 East Portland Ave.
Tacoma, Washington 98404
Phone: (253) 573-7852
- 15 2. Scott M. Missall
16 Nicholas G. Thomas
Brian S. Epley
17 Short Cressman & Burgess PLLC
999 Third Avenue, Suite 3000
18 Seattle, Washington 98104
Phone: (206) 682-3333

19 III. AGENCY WHOSE ACTION IS AT ISSUE

20 The agency whose action is at issue in this Petition is the Washington Pollution
21 Control Hearings Board, State of Washington Environmental and Land Use Hearings
22 Office, PO Box 40903, Olympia, Washington 98504-0903. The Board's physical address
23 is 1111 Israel Road, S.W., Tumwater, Washington, 98501.
24

PUYALLUP TRIBE OF INDIANS'
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IV. AGENCY ACTION AT ISSUE

The agency actions giving rise to this Petition are the following decisions rendered by the Board in PCHB No. 16-120c (collectively, Final Decisions):

(1) The Board's Order on Motions (Order on Motions), dated January 16, 2018, attached as **Exhibit A**; and

(2) The Board's Order Denying Petition for Reconsideration (Reconsideration Order), dated February 23, 2018, attached as **Exhibit B**.

This Petition challenges, *inter alia*, the Board's determinations on the following issues: Issue 1 (including Sub-Issues 1.1, 1.2, 1.3, 1.4 and 1.5); Issue 2; Issue 3; Issue 4; Issue 5; Issue 6 (including Sub-Issue 6.5); and Issue 7. The hearing on these issues was scheduled to occur from October 23 to October 27, 2017. However, because the Board decided all issues through rulings on the parties' dispositive motions, no hearing was held and the Final Decisions were issued without the Board hearing live testimony.

V. PARTIES TO THE ADJUDICATIVE PROCEEDINGS LEADING TO THE AGENCY ACTION

The parties to the Board's adjudicative proceeding in PCHB No. 16-120c were:

Puyallup Tribe of Indians. The Tribe initiated its challenge by separately appealing¹ the following two Department of Ecology orders in October 2016 (collectively, Ecology Orders):

(1) Water Quality Certification Order No. 13764, dated September 16, 2016 (401 Certification); and

(2) Coastal Zone Management Program Consistency Determination for Corps Ref. # NWS-2014-128-WRD, dated September 20, 2016 (Consistency Determination).

¹ The Tribe's separate appeals were subsequently consolidated by the Board into one case, PCHB No. 16-120c, for hearing and decision.

1 The Tribe and many of its members are directly interested in and substantially
2 affected by the Ecology Orders and the Board's Final Decisions, including their direct
3 impact on the Tribe, the Tribe's members, the status and availability of the Tribe's
4 historic, usual and accustomed fishing grounds, the Tribe's Treaty rights, the Tribe's
5 statutory and constitutional rights, and the fundamental right to due process of law.

6 Washington State Department of Ecology. The Washington State Department of
7 Ecology (Ecology) was named a respondent in the Tribe's appeal to the Board because it
8 issued the Ecology Orders listed above.

9 Puget Sound Energy. Puget Sound Energy (PSE) was named a respondent in the
10 Tribe's appeal to the Board because PSE, the shareholder-owned utility that is the project
11 proponent for a liquefied natural gas plant and vessel fueling facilities proposed in
12 Commencement Bay (LNG Project), and because PSE is the principal applicant for, and
13 is the recipient and beneficiary of, the Ecology Orders.

14 Port of Tacoma. The Port of Tacoma (Port) was named a respondent in the
15 Tribe's appeal to the Board because the Port is the owner of the properties on which the
16 LNG Project is to be constructed and thereafter operated, and construction of the pier on
17 the properties is necessary to serve ships with LNG, and because the Port is the co-
18 applicant with PSE for the Ecology Orders and is directly benefited by those Orders.

19 VI. BASIS FOR JUDICIAL REVIEW AND REASONS 20 WHY RELIEF SHOULD BE GRANTED

21 The following is a concise statement of facts demonstrating the Petitioner is
22 entitled to judicial review. This concise statement does not include all facts upon which
23 the Tribe will rely in support of its appeal. Bases for judicial review and reasons why
24 the relief requested by the Petition should be granted include the following:

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1 **A. The Tribe has Substantial Rights and Interests that will be Negatively**
2 **Affected by Development of the Project.**

3 The Tribe is a federally recognized Indian Tribe. The Tribe's Reservation is
4 located in and around Tacoma and encompasses portions of Commencement Bay and
5 the Blair and Hylebos Waterways. The Tribe owns Trust land directly across the Hylebos
6 Waterway from the LNG Project, and owns various other parcels in the vicinity of the
7 LNG Project. Tribal members live near the LNG Project and in the surrounding area,
8 both on and off the Reservation.

9 The Blair and Hylebos Waterways contain habitat for fish and other aquatic life
10 of importance to the Tribe and its members, and are part of the Tribe's usual and
11 accustomed fishing grounds. Because federally listed endangered species and State
12 Priority Habitat and Species are present in the waterways, both are regulated as Fish and
13 Wildlife Habitat Conservation Areas. In addition, Wapato Creek, a tributary to the Blair,
14 contains fish including Chum and Coho Salmon and Cutthroat Trout, and is used as
15 spawning habitat by endangered species. The Blair Waterway is also a migration area
16 for juvenile salmon.

17 Commencement Bay is part of the Tribe's historic hunting and fishing grounds,
18 and has been used for cultural reasons and the Tribe's subsistence fishery from time
19 immemorial and confirmed by Treaty. Salmon and shellfish are the key traditional food
20 sources and cultural staples of the fishery. The Tribe is a sovereign nation and signed
21 the Treaty of Medicine Creek with the United States, 10 Stat. 1132 (1855), reserving its
22 historic rights to harvest fish and other natural resources both within and without its
23 reservation boundaries (Treaty Rights). The Tribe's Treaty Rights encompass a
24 Commencement Bay fishery that is healthy in both abundance and quality, together with
 sufficient habitat to support that fishery. *See United States v. Washington*, 853 F.3d 946,

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1 964-65 (9th Cir. 2017); *U.S. v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash., 1974).

2 For these reasons, the Tribe takes an active role as a co-manager of the Commencement
3 Bay fishery, is a provider of key fish habitat through restoration sites and conservation
4 areas in the Bay and elsewhere, and supplements the fishery through hatcheries it owns
5 and operates. The Tribe's rights and interests exist to maintain and improve these
6 resources for the benefit of the Tribe, its members, the larger society, and future
7 generations. The Tribe also has an interest in the application and enforcement of the
8 laws that impact and/or implicate these rights.

9 Those waters and their fishery resources will be negatively affected by the
10 development and use of the LNG Project as authorized by the Ecology Orders and the
11 Board's Final Decisions.² The impacts from the LNG Project and its operations on the
12 waters, sediments, shorelines, habitat, fishery, and surrounding environs and uses thereof
13 go to the heart of the Tribe's historic rights and cultural practices exercised from time
14 immemorial. The Board's actions in this case, and its Final Decisions, improperly
15 deprive the Tribe of its Treaty protected rights, as well as statutory and constitutionally-
16 protected rights, and did so without due process of law.

17 **B. The Board's Final Decisions Failed to Protect the Tribe's Rights and Failed**
18 **to Ensure that Ecology Correctly Implemented Environmental Laws and**
Permitting Requirements Applicable to the Project.

19 The Tribe's consolidated appeal to the Board (PCHB Appeal) challenged the
20 LNG Project for its negative impacts and because the Ecology Orders improperly
21 sanctioned, allowed, and/or overlooked permitting requirements and components of the
22

23 _____
24 ² As just one example, disturbance of sediments in connection with the LNG Project would re-suspend
toxic and other contaminants present in the sediments, harming sea life through ingestion of toxic
substances.

1 Project. The Board's Final Decisions largely ignored the former and erroneously upheld
2 the Ecology Orders.

3 In its Order on Motions, the Board stated it would "treat all motions to dismiss as
4 motions for summary judgment under CR 56." Order on Motions at 13. The Board
5 correctly acknowledged that summary judgment can only be granted where the moving
6 party establishes that there is no genuine issue of material fact, and that all facts and
7 inferences are to be construed in favor of the non-moving party. Order on Motions at
8 14. However, rather than apply these standards, the Board erred by essentially trying the
9 case on the merits. First, the Board unambiguously and openly construed facts and
10 inferences in favor of the Respondents in dismissing the issues for adjudication that the
11 Tribe presented and sought to have heard by live hearing and evidence. Second, the
12 Board applied the burden of proof standard used at trial instead of determining whether
13 the Tribe raised a genuine issue of material fact as required under summary judgment
14 standards. *See, e.g.*, Order on Motions at 20:11-13, 20: 21-21:2, 24:12-14, 24:20-21,
15 28:3-6, 29:5-8, 32:4-7, 35:17-36:2, and 36:4-6.

16 Further, in deciding the PCHB Appeal, the Board engaged in unlawful
17 procedures and decision-making actions; violated the Tribe's right to a meaningful
18 hearing; failed to follow a prescribed procedure; denied the Tribe its right and
19 opportunity to challenge the Ecology Orders in a manner that comports with due process
20 and fundamental fairness; erroneously interpreted and misapplied the law; violated the
21 Tribe's constitutionally-protected property and Treaty rights; and made decisions that are
22 in whole or in part not consistent with law, not supported by substantial evidence, and
23 are arbitrary and capricious. These failures are discussed in the following sections.

1 **C. The Board Erroneously Dismissed Issues Related to the 401 Water Quality**
2 **Certification (Issues 1 and 2).³**

3 **1. Relevant Background.**

4 PSE and the Port propose to construct the LNG Project in the Port of Tacoma and
5 within the coastal zone,⁴ on the peninsula between the Blair and Hylebos Waterways.
6 The PCHB Appeal challenged, *inter alia*, Ecology's granting PSE's and the Port's request
7 for a Clean Water Act (CWA) Section 401 Water Quality Certification pertaining to
8 construction of the TOTE⁵ fueling pier associated with the Project and located in and on
9 the Blair Waterway.

10 Among other things, the work to which the Ecology Orders pertain allowed (1)
11 removal of 24 creosote piles from the Blair Waterway, (2) removal of 24 additional piles
12 from other locations in Commencement Bay as mitigation for the LNG Project, and (3)
13 driving 48 new steel piles into the Blair Waterway site sediments. In the 401
14 Certification, Ecology acknowledged that installation and removal of piles will disturb
15 sediments in the Blair Waterway.

16 The Blair Waterway was listed on the CERCLA⁶ National Priorities List (NPL)
17 as a Superfund cleanup site. It was removed from the NPL following remedial dredging
18 of its navigation channel to remove contaminants present in channel sediments. The
19 LNG Project area is outside the navigation channel and was not subject to the
20 remediation activities that led to the NPL delisting. Since its delisting, there have been
21 a number of cleanups in the Blair Waterway, notably including the Pier 4 emergency

22 ³ The "Issues" identified herein are those articulated in the Board's Prehearing Order, which established
23 the issues to be adjudicated in the PCHB Appeal.

24 ⁴ 16 U.S.C. § 1453(1).

⁵ TOTE is the company acronym for Totem Ocean Trailer Express.

⁶ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*
(also commonly referred to as the Superfund statute).

1 cleanup conducted in 2015 by the Port of Tacoma directly across the Blair Waterway
2 from the LNG Project site. The Pier 4 emergency cleanup occurred well before Ecology
3 issued the 401 Certification for the LNG Project on September 16, 2016, and was well
4 known to Ecology.

5 No information was available regarding the presence of contaminants within the
6 LNG Project footprint when Ecology issued the 401 Certification because no sediment
7 sampling had occurred within the area. Sediment samples from nearby areas of the Blair
8 Waterway therefore provided the best available information as to the condition of
9 sediments at the LNG Project area. Ecology analyzed some sediment contamination data
10 from nearby locations in the Blair prior to issuing the 401 Certification, and
11 acknowledged that its analysis of the data demonstrated that violations of water quality
12 standards could result from project work.

13 The environmental impact statement (EIS) for the LNG Project discussed the
14 presence of, and informational uncertainty regarding, Blair Waterway sediment
15 contamination and resulting water quality impacts. The EIS analysis—which was issued
16 in 2015, long before Ecology issued the 401 Certification in 2016—concluded in part:

17 Given the limited [PAH] concentration information available for the
18 Proposed Action site seafloor, it is difficult to predict what concentrations
19 would be in the water column during creosote-treated pile removal.
20 Nevertheless, it is reasonable to assume PAH concentrations in the water
21 column would be elevated somewhat ... throughout the entire duration of
22 these activities, as a result of resuspension of these contaminated
23 sediments.

24 Ecology was aware of these contaminant concerns as it had reviewed and
commented on the EIS. Despite being aware that PAHs were a recognized water quality
concern, and knowing that data gaps impeded reasonable analysis of likely PAH
concentrations in water, Ecology did not: (a) ask the Project applicants to furnish

1 additional information on the issue; (b) require sediment sampling to enable an informed
2 assessment of likely water quality impacts; or (c) review Ecology databases for PAH
3 sediment concentrations at nearby sites to estimate possible impacts.

4 Instead, Ecology imposed certain conditions on in-water work to facilitate
5 reaching the conclusion that there was "reasonable assurance" that water quality
6 standards would not be violated. Although monitoring for toxic contaminants is
7 something that can be (and is) routinely done, these conditions notably omitted
8 monitoring for the contaminants (including toxic contaminants like the PAHs and
9 copper) that many, including Ecology, suspected were present. As a consequence,
10 neither the LNG Project proponents nor Ecology could or would know if exceedances of
11 water quality standards for toxic contaminants were actually occurring during in-water
12 work. Ecology witnesses testified that they used sediment turbidity as a "surrogate" for
13 the presence of toxic contamination, but acknowledged that turbidity does not equate to
14 toxic contamination and that turbidity monitoring would tell nothing about releases of
15 toxic contaminants.

16 During discovery, sediments in the Project area were sampled. After analyzing
17 the results of these sediment data, the Tribe's experts offered opinions and testimony that
18 the Project work would likely cause violations of Washington's water quality standards.⁷
19 The Tribes experts also opined and testified that, at the time Ecology granted the Section
20 401 Certification, Ecology lacked sufficient information to properly certify it had
21 reasonable assurance that Washington's water quality standards would not be violated.
22
23

24 ⁷ As one example, the Tribe's expert witnesses determined that release of contaminants would exceed
applicable water quality criteria for copper.

1 **2. Facts Concerning Board's Determination.**

2 As a threshold matter, the Board's Final Decision conflated Issues 1 and 2⁸ and,
3 in order to support the Board's findings and conclusions, misconstrued the Tribe's
4 position to purportedly be that sediment sampling and toxics monitoring was *always*
5 required in *all* circumstances. The Tribe never contended that was the case. The Tribe
6 asserted that, under the particular circumstances presented in this case (*i.e.*, Project
7 located in former Superfund site outside the remedial dredging area; no data available
8 for site sediments; numerous surrounding sediment samples showing the potential for
9 water quality exceedances; emergency cleanup actions occurring directly across the Blair
10 Waterway, etc.) Ecology lacked sufficient information to properly certify it had
11 reasonable assurance that Washington's water quality standards would not be violated.

12 The Board incorrectly concluded that the Tribe failed to "me[e]t its burden of
13 showing that the 401 Certification does not reasonably assure compliance with
14 applicable water quality standards." Order on Motions at 29:5-6. For purposes of
15 withstanding summary judgment, the Tribe more than sufficiently demonstrated that
16 there were material facts concerning the status of contamination in the Waterway
17 sediments, and further that the 401 Certification did not meet the reasonable assurance
18 compliance standard to meet applicable water quality standards.

19 The Board disregarded that showing. Instead, the Board asserted "the Tribe *failed*
20 *to meet its burden to prove* that the 401 Certification's monitoring requirements are
21 deficient" and that "[t]he Tribe does not identify which toxic substance should be
22 monitored, or demonstrate that monitoring for all such substances is necessary in order
23

24 ⁸ These issues are separate and distinct, and each has been recognized as furnishing sufficient bases for
challenging and overturning a certification under Section 401 of the Clean Water Act.

1 to have reasonable assurance...." Order at 24:12-14 (emphasis added). The Tribe's
2 burden in opposing Respondents' dispositive motions was to demonstrate a genuine issue
3 of material fact, which it did. The Tribe's experts identified a number of contaminants
4 that were likely to exceed applicable water quality standards as a result of the permitted
5 work. A showing that violations of water quality standards are likely to occur is the
6 essence of lacking reasonable assurance that standards will be met. The Tribe made an
7 evidentiary showing on this that was more than sufficient to meet summary judgment
8 standards and withstand summary dismissal. The Tribe also specifically identified
9 contaminants (the heavy metals, copper and silver) that should be monitored, and it
10 addressed (in detail) throughout dispositive briefing why monitoring was needed to attain
11 reasonable assurance under the circumstances presented in this case.⁹

12 By way of further example, the Board apparently based its dismissal of these
13 issues (at least in part) on its conclusion that "Ecology, as the agency charged with
14 issuing Section 401 Certifications, is authorized to determine the necessary monitoring
15 requirements and other applicable limitations to impose on a project." Order at 29:8-11.
16 The Tribe does not dispute Ecology's authority to determine monitoring requirements in
17 a 401 Certification. However, the Board's formulation indicates Ecology's discretionary
18 determinations regarding monitoring and permit conditions are entitled to such deference
19 that they are beyond reproach. But Ecology can fail to properly perform this function
20 (as it did here), which is the very point of the ability to appeal the issuance of a 401
21 Certification.

22
23
24 ⁹ Further, specifying chemicals to be monitored was not germane to resolving the matter on summary judgment, particularly when Respondents made no countervailing showing.

1 The Board also erroneously interpreted the law. Most notably, the Board
2 misinterpreted Section 401 of the Clean Water Act as allowing any project to be certified
3 under Section 401 regardless of circumstances due to a permitting agency's ability to
4 impose, at its discretion, prophylactic conditions on permitted work to be performed.
5 The Board also erred in its reading and applying *Port of Seattle v. Pollution Control*
6 *Hearings Bd.*, 151 Wn.2d 568, 90 P.3d 659 (2004) on this issue. That case does not stand
7 for the proposition that Ecology has unbridled discretion in granting a Section 401
8 permit. The Board also incorrectly equated Sections 401 and 402 to support its erroneous
9 conclusions in the PCHB Appeal that the 401 Certification was sound.

10 **D. The Board Erroneously Dismissed Issues Related to Public Notice Under**
11 **the CWA and CZMA (Issues 3, 4, 5, and 7).**

12 **1. Relevant Background.**

13 The Joint Public Notice provided by Ecology and the U.S. Army Corps of
14 Engineers (Corps) on September 18, 2015, provides that the work for the pipeline portion
15 of the LNG Project was not within Corps jurisdiction and would not be part of the permit
16 issued by the Corps. Drawings showing the work that was the subject of that Notice only
17 contained drawings of the Blair Waterway Pier construction—not upland pipeline
18 construction.

19 A second Public Notice issued by Ecology on December 21, 2015 characterized
20 the work to be performed as the TOTE Marina Vessel LNG fueling pier in the Blair
21 Waterway, the Tacoma LNG fueling pier in the Hylebos Waterway,¹⁰ and "upland
22 support facilities." What might be a vague reference to the pipeline work ("upland
23 support facilities") notwithstanding, the Public Notice referenced the JARPA¹¹ as a

24 ¹⁰ The LNG Project proponents subsequently withdrew plans to construct the pier in the Hylebos.

¹¹ Joint Aquatic Resources Program Application.

1 method by which "Additional Information" could be gained about the LNG Project. But
2 the JARPA document only indicated that the pipeline work did "not trigger Corps
3 jurisdiction." And notably, the JARPA specifically *excluded* utility lines as an element
4 of the LNG Project. Despite those omissions, Ecology issued its 401 Certification for
5 the LNG Project and included the pipeline construction therein.

6 **2. Facts Concerning Board's Determination.**

7 The Tribe made showings sufficient to withstand summary judgment that
8 centered on the goals of fair notice. The Board rejected that evidence, even though its
9 Order on Motions did not factually undermine (and largely failed even to acknowledge)
10 the Tribe's straightforward showings, and failed to address the Tribe's accompanying
11 legal argument and authority concerning inadequacy of notice under the facts in the
12 record.

13 The basis for the Board's conclusion appears to be that the Tribe did not show
14 that a statute or regulation had been violated. *See, e.g.,* Order on Motions at 35:17-36:2
15 and 36:4-6.¹² The Board's decision undermines the rights of those who will or might be
16 affected by projects, and undermines their right (and even ability) to provide input and/or
17 objections as part of the administrative process. Correspondingly, it effectively insulates
18 agencies from actually seeking or receiving information that could have been submitted,
19 impugning the integrity of the agency decision.

20
21
22
23
24 ¹² Such a decision takes the apparent position that notice cannot be inadequate unless a statute or regulation
is demonstrably violated.

1 **E. The Board Erroneously Dismissed Issues Related to the CZMA**
2 **Consistency Determination (Issue 6 and Sub-issue 6.5).**

3 **1. Relevant Background.**

4 PSE and the Port submitted the CZM Consistency Determination application as
5 Appendix G of their JARPA. The standard CZM form contains language allowing an
6 applicant to state that it has "applied for Air Quality permit." But in its submission, PSE
7 crossed this out and said instead stated "Will apply for Air Quality permit." In response,
8 Ecology subsequently communicated and later reaffirmed its position to PSE and the
9 Port that it could not grant a Consistency Determination concurrence until the Clean Air
10 Act permits were issued.

11 On September 20, 2016, PSE informed Ecology that it was anxious to obtain the
12 Consistency Determination. Ecology promptly reversed course from its previous (and
13 appropriate) position, and immediately issued the Consistency Determination as PSE
14 requested, despite the lack of any Clear Air permit having been issued. Specifically,
15 Ecology provided a conditional concurrence stating that the in-water construction work
16 is consistent with Washington's CZM Program, and predicated issuance of the
17 conditional concurrence on satisfaction of the following condition:

18 Pursuant to Section 307(c)(3) of the Coastal Zone Management Act of
19 1972 as amended, Ecology concurs with Puget Sound Energy and the Port
20 of Tacoma's determination that the proposed work is consistent with
21 Washington's CZMP based on the following condition:

22 1. As stated in the CZM form dated January 15, 2015 and in the e-mail
23 dated September 19, 2016: "The proposed project is subject to air quality
24 permitting, and Puget Sound Energy, Inc. and Port of Tacoma will be
applying for and obtaining a Notice of Construction Permit from the
Puget Sound Clean Air Agency." *This condition is necessary to ensure
the proposed action is implemented as reviewed for consistency with the
enforceable policies of the CZMP.* Chapter 70.94 Revised Code of
Washington and Washington Administrative Code 173-400-110 through

1 113, are the federally approved enforceable policies of the WA CZMP
2 that applies to this condition.

3 If the requirements for conditional concurrences specified in 15 CFR
4 930.4(a), (1) through (3), are not met, then all parties shall treat this
5 conditional concurrence letter as an objection pursuant to 15 CFR Part
6 930, subpart D. (Emphasis added)

7 To date, PSE and the Port have still not obtained the Notice of Construction
8 (NOC) Permit required by the Consistency Determination. PSE and the Port nonetheless
9 performed work encompassed by the Consistency Determination in August, 2017.

10 **2. Facts Concerning Board's Erroneous Determinations.**

11 The Board committed error in dismissing Issue 6 and Sub-issue 6.5, and then
12 committed further error in denying the Tribe's Petition for Reconsideration concerning
13 these issues. Issue 6.5 states:

14 Whether the [CZMP] Consistency Determination is valid where it is
15 conditioned only on a requirement that the project applicants (PSE and
16 the Port of Tacoma) obtain an air quality permit.¹³

17 In its dispositive briefing in these issues, Respondents had the burden of showing
18 the absence of a genuine issue of material fact, and had the burden of showing they were
19 entitled to summary judgment as a matter of law. The Respondents' briefing was devoid
20 of facts or evidence supporting the absence of a genuine issue of material fact. Thus, the
21 Board could not properly resolve the issue on summary judgment in favor of the
22 Respondents, and its doing so was an error of law.

23 The Board's subsequent denial of the Tribe's Petition for Reconsideration was
24 also in error because reconsideration was warranted due to evidence obtained after the

¹³ This sub-issue is also embedded within Issue 6, which asked "[w]hether Ecology's Consistency Determination is valid."

1 deadline for dispositive motions. This is because the evidence further undermined the
2 notion that Ecology's issuance of the Consistency Determination was proper.

3 On September 25, 2017, after dispositive motions had been filed, the Tribe
4 learned by way of a letter from the Puget Sound Clean Air Agency (PSCAA) that PSE
5 had been issued a Notice of Violation (NOV) for "failure to obtain a Notice of
6 Construction approval prior to construction, installation, establishment or modification
7 of a source." The letter further stated: "The Agency has not withdrawn the NOV issued
8 and it remains open for potential further enforcement." This evidence, which was not
9 available at the time of the dispositive motions, further undermined the notion that
10 Ecology's issuance of the Consistency Determination was proper.

11 The NOV issued by the PSCAA further supported the conclusion that issuance
12 of the Consistency Determination was not proper. PSE's performance of construction
13 work in the coastal zone during the summer of 2017, when it had not obtained the
14 required air permit, highlights the impropriety of issuing the Consistency Determination
15 under the circumstances presented in this case.

16 Ecology's issuance of the Consistency Determination under such circumstances
17 is all the more questionable due to the fact that Ecology repeatedly affirmed that it could
18 not issue the Consistency Determination unless and until all Clean Air Act permits were
19 issued, but then contradicted its position after PSE became "anxious" for the Consistency
20 Determination's issuance. The NOV also undermined PSE's contention that it had
21 complied with PSCAA regulations. Thus, the NOV constituted new material evidence
22 justifying reconsideration of the dismissal of Issues 6 and Sub-issue 6.5.

23 To reach a meaningful decision on whether the Consistency Determination is
24 valid under the circumstances presented by this case, the Board needed to review

1 evidence as well as hear and evaluate testimony subject to cross-examination. The Board
2 committed error in refusing to grant reconsideration for those purposes.

3 The Board committed other error in its handling of the Tribe's Petition for
4 Reconsideration. On January 29, 2018, the Board requested an answer to the Tribe's
5 Petition from each of the three Respondents (PSE, the Port, and the Department of
6 Ecology). Respondents' answers made, for the first time, a number of substantive
7 arguments regarding the propriety of the Consistency Determination's issuance without
8 PSE and the Port having first procured the needed air permit. The proper forum for such
9 arguments from the Respondents was through dispositive motions, not in opposition to
10 the Tribe's Petition for Reconsideration. Compounding this problem, the Board then
11 refused Tribe's request to file a Reconsideration Reply Brief, which at least would have
12 afforded the Tribe some opportunity to meet the new arguments. The Board's refusal to
13 allow the Tribe to file a Reply denied the Tribe substantial justice.

14 All of the foregoing, and the additional defects in the Board's procedure and its
15 Final Decisions to be presented by the Tribe as briefing proceeds in this matter,
16 demonstrate that the Board's Final Decisions are erroneous and substantively flawed. As
17 a consequence, the Final Decisions violate the substantive laws at issue, including the
18 Clean Water Act, the Coastal Zone Management Act, Washington's Coastal Zone
19 Management Program, and Washington's Administrative Procedure Act.

20 In summary, the Tribe's land ownership and Reservation, use of and interest in
21 the Commencement Bay fishery and surrounding environs, concern with impacts thereon
22 from the LNG Project, Treaty Rights and interests, and rights to a fair hearing, are among
23 the issues the Board was required to consider in adjudicating the Tribe's PCHB Appeal.

24
PUYALLUP TRIBE OF INDIANS'
PETITION FOR REVIEW OF
PCHB NO. 16-120c - 18

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1 A judgment by this Court in favor of the Tribe will substantially eliminate and/or redress
2 the prejudice and harm caused by the Board's Final Decisions.

3 Finally, this Petition is ripe for judicial review because the Board's actions and
4 its Final Decisions are final agency actions for which no further administrative
5 proceedings are pending or available. See Board's cover letters to **Exhibits A and B**.

6 **VII. ISSUES FOR WHICH RELIEF IS SOUGHT AND REASONS WHY**
7 **RELIEF SHOULD BE GRANTED**

8 The foregoing material is incorporated herein by this reference. The reasons the
9 Tribe believes relief should be granted are as follows:

10 1. The Board erred and engaged in unlawful procedure or decision-making
11 process in failing to properly apply the summary judgment standard throughout its Order
12 on Motions.

13 2. The Board erred, engaged in unlawful procedure, erroneously interpreted
14 and/or misapplied the law, and denied the Tribe substantial justice in dismissing Issue
15 No. 1 (including Sub-Issues 1.1, 1.2, 1.3, 1.4 and 1.5).

16 3. The Board erred, engaged in unlawful procedure, erroneously interpreted
17 and/or misapplied the law, and denied the Tribe substantial justice in dismissing Issue
18 No. 2.

19 4. The Board denied due process of law to the Tribe in violation of the
20 constitution, and engaged in unlawful procedure or decision-making process, in
21 dismissing Issues 3, 4, 5 and 7. The Board also erred, engaged in unlawful procedure,
22 erroneously interpreted and/or misapplied the law, and denied the Tribe substantial
23 justice in dismissing Issues 3, 4, 5, and 7.

5. The Board erred, engaged in unlawful procedure, erroneously interpreted and/or misapplied the law, and denied the Tribe substantial justice in granting summary dismissal of the Tribe's Consistency Determination claims, Issues 6 and 6.5. The Board further erred, and erroneously interpreted and/or misapplied the law, in denying the Tribe's Petition for Reconsideration.

6. The Board denied due process of law to the Tribe through its handling and decision process in the PCHB Appeal, and denied the Tribe's constitutionally-protected Treaty Rights and property rights.

7. To the extent applicable, the Board's decisions on the above-stated issues, in whole or in part, are not supported by substantial evidence in view of the entire record before the Court.

VIII. RELIEF REQUESTED

Based on the foregoing, the Tribe respectfully asks the Court to accept the Tribe's Petition, set a briefing and argument schedule for this appeal, and render the following relief at the conclusion thereof:

1. Reverse the Board's Final Decisions.
2. Invalidate the Board's Order on Motions and Reconsideration Order.
3. Render judgment in the Tribe's favor on the issues set forth herein.
4. Enter a stay prohibiting Respondents from further work on the LNG Project.
5. Grant the Tribe such other and further relief as is just and equitable.

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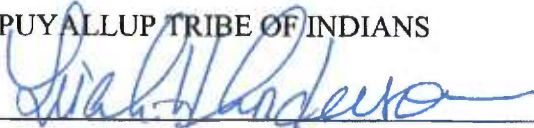
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1 DATED this 23rd day of March, 2018.

2 PUYALLUP TRIBE OF INDIANS

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