

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

3 NISQUALLY DELTA ASSOCIATION, A  
4 NON-PROFIT ORGANIZATION, AND ED  
5 KENNEY,

6 Appellants,

7 v.

8 WASHINGTON STATE DEPARTMENT  
9 OF ECOLOGY,

10 Respondent.

PCHB No. 22-057

ORDER ON MOTIONS FOR SUMMARY  
JUDGMENT

11 **I. INTRODUCTION**

12 Nisqually Delta Association and Ed Kenney (Appellants) filed an appeal with the Pollution  
13 Control Hearings Board (Board) on July 15, 2022, challenging the Statewide General Permit for  
14 Biosolid Management (General Permit) issued by the Washington State Department of Ecology  
15 (Ecology) on June 15, 2022, and the accompanying State Environmental Policy Act (SEPA)  
16 Determination of Non-significance (DNS).

17 On April 13, 2023, the Board issued an Amended Prehearing Order establishing the  
18 following legal issues for the Board's resolution, as agreed by the parties:

- 19 1. Whether Ecology's General Permit is invalid because it does not comply  
20 with the requirements of RCW 70A.226.005(2).
- 21 2. Whether Ecology's General Permit is invalid because it violates or  
authorizes violations of chapters 90.48, 70A.225, 70A.226 RCW;  
WAC 173-308-010, 160, 190, -90005; WAC 173-200-030; WAC 173-  
201A; or 33 U.S.C. § 1345.

ORDER ON MOTIONS FOR  
SUMMARY JUDGMENT

PCHB No. 22-057

- 1           3. Whether Ecology’s General Permit is arbitrary or capricious because it is  
2           insufficient to protect and restore waters of the State pursuant to the policy  
3           set forth in RCW 90.48.010 and implementing laws and regulations.
- 4           4. Whether the General Permit is arbitrary and capricious or otherwise invalid  
5           because it does not adequately require testing, monitoring, and regulation  
6           of pollutants including PFAS, PBDEs and microplastics in biosolids and  
7           lands where biosolids are applied.
- 8           5. Whether the General Permit meets the requirements of WAC 173-308-205.
- 9           6. Whether the General Permit is invalid because it violates WAC 173-308-191  
10          by permitting the application of biosolids in a manner “likely to adversely  
11          affect a threatened or endangered species or its critical habitat as listed under  
12          Title 232 WAC or section 4 of the Endangered Species Act.”
- 13          7. Whether the General Permit meets the requirements of 40 CFR Part 503.
- 14          8. Whether Ecology’s determination of non-significance for issuance of the  
15          General Permit is clearly erroneous or otherwise fails to comply with the  
16          State Environmental Policy Act.
- 17          9. Whether Ecology was required to make a determination of significance and  
18          prepare an environmental impact statement prior to issuance of the General  
19          Permit.

20           Ecology filed a motion for summary judgment on all nine issues. Appellants filed a motion  
21           for partial summary judgment on Legal Issues Nos. 1, 4-5, and 8-9. Both parties filed response  
          briefs. The Board then granted Nisqually Delta Association’s unopposed request for a short  
          extension to the deadline for reply briefs. Subsequently, the Board granted a joint request from the  
          parties to suspend the September 5-7, 2023, hearing dates and associated deadlines, both agreeing  
          that it would be the most efficient use of time and resources to first receive the Board’s ruling on  
          the pending motions.

1 In ruling on the motions, the Board considered the following materials:

- 2 1. [Nisqually Delta Association and Ed Kenney's] Motion for Partial  
3 Summary Judgment (*Appellants' Mot.*);
- 4 2. Declaration of Wyatt F. Golding Support of Appellants' Motion, with  
5 Exs. A-L (*Golding Decl. Mot.*);
- 6 3. Expert Report on per- and polyfluoroalkyl substances (PFAS) in Biosolids,  
7 authored by Denise Trabbic-Pointer, filed by Appellants in support of  
8 Appellants' Motion;
- 9 4. Expert Report on Microplastics and other Contaminants in Biosolids,  
10 authored by Robert C. Hale, Ph.D., filed by Appellants in support of  
11 Appellants' Motion (*Hale Expert Report*);
- 12 5. State of Washington, Department of Ecology's Motion for Summary  
13 Judgment (*Ecology's Mot.*);
- 14 6. Declaration of Dylan Stonecipher in Support of Ecology's Motion, with  
15 Ex. A;
- 16 7. Declaration of Emily Kijowski in Support of Ecology's Motion, with  
17 Exs. A-F (*Kijowski Decl.*);
- 18 8. Appellants' Response to State of Washington, Department of Ecology's  
19 Motion for Summary Judgment, with Ex. M (*Appellants' Resp.*);
- 20 9. Declaration of Wyatt F. Golding in Support of Appellants' Response, with  
21 Ex. M (*Golding Decl. Resp.*);
10. State of Washington, Department of Ecology's Response to Appellants'  
Motion filed with the Board on June 2, 2023 (*Ecology's Resp.*);
11. Declaration of Dylan Stonecipher in Support of Ecology's Response, with  
Ex. A;
12. Appellants' Reply in Support of Motion for Partial Summary Judgment,  
with Exs. N-O;
13. State of Washington, Department of Ecology's Reply to Appellants'  
Response to Ecology's Motion for Summary Judgment; and



1 PFAS, PBDEs, and microplastics “are present in a wide variety of common household  
2 products used in everyday life and thus regularly end up in municipal wastewater systems.” They  
3 are also present in biosolids. *Ecology’s Mot.*, p. 4; *Kijowski Decl.*, §§ 15, 16, 19; *Appellants’ Mot.*,  
4 p. 5; *Golding Decl. Mot., Ex. E (PFAS Chemical Action Plan)*, p. 422, *Ex. L*, p. 21.

5 Biosolids are defined as “municipal sewage sludge that is a primarily organic, semisolid  
6 product resulting from the wastewater treatment process, that can be beneficially recycled and  
7 meets all requirements under [Chapter 70A.226 RCW].” RCW 70A.226.010(1). Municipal  
8 sewage sludge means “a semisolid substance consisting of settled sewage solids combined with  
9 varying amounts of water and dissolved materials generated from a publicly owned wastewater  
10 treatment plant.” RCW 70A.226.010(4).

11 The United States Environmental Protection Agency (EPA) regulates the use and disposal  
12 of biosolids. 40 C.F.R. Part 503. Its biosolids regulations do not, however, impose limits on PFAS,  
13 PBDEs, or microplastics. *Id.* The EPA is currently conducting biosolids risk assessments  
14 concerning PFAS. In 2019, it began developing a biosolids risk-screening tool. *Kijowski Decl.*, ¶  
15 24. In October 2021, the EPA issued its PFAS Strategic Roadmap, which indicated that EPA would  
16 complete its ongoing biosolids risk assessment concerning PFAS by Winter 2024. *Golding Decl.*  
17 *Mot., Ex. H (EPA PFAS Roadmap)*, p. 16; *see also Ecology’s Mot.*, p. 7; *Kijowski Decl.*, ¶¶ 24,  
18 25. The EPA also stated in the PFAS Strategic Roadmap that “harmful [PFAS] are an urgent public  
19 health and environmental issue facing communities across the United States.” *Golding Decl. Mot.*,  
20 *Ex. H (EPA PFAS Roadmap)*, p. 5.

1 Washington State agencies have also taken actions pertaining to PFAS. The Washington  
2 State Department of Health (DOH) issued a final rule regarding State Action Levels for certain  
3 PFAS compounds on January 1, 2022. *Golding Decl. Mot., Ex. F (MTCA PFAS Focus Sheet)*. In  
4 July 2022, Ecology’s Toxic Cleanup Program published a focus sheet on PFAS Cleanup Levels in  
5 soil and groundwater, which referenced the DOH final rule regarding State Action Levels for  
6 certain PFAS compounds and the “interim” Health Advisories for certain PFAS, which had been  
7 issued by the EPA the month before. *Id.* Later that same year, in September 2022, Ecology issued  
8 its PFAS Chemical Action Plan, which was a revised version of the plan issued in November 2021.  
9 The PFAS Chemical Action Plan states that “PFAs persist in the environment for long periods of  
10 time, where they can bioaccumulate to levels that pose threats to human health and the environment  
11 in Washington.” *Golding Decl. Mot., Ex. E, pp. 35, 107.*

## 12 **B. THE GENERAL PERMIT**

13 Washington created its biosolids program in 1992. *See* Ch. 70A.226 RCW. Ecology’s rules  
14 implementing the biosolids program require all facilities treating domestic sewage and applying  
15 biosolids to land to “apply for a permit for the final use or disposal of biosolids or sewage sludge”.  
16 WAC 173-308-310(1). No facility can apply biosolids to land “except in accordance with  
17 applicable requirements of [Chapter 173-308 WAC] and any applicable permit issued under this  
18 chapter.” WAC 173-308-110.

19 In 2002, Ecology created the General Permit to regulate biosolids produced, treated, stored,  
20 transferred, sold or given away, land applied for beneficial use, and disposed through incineration  
21 or landfill. *Kijowski Decl., Ex. D (SEPA Environmental Checklist), p. 4; Fire Mountain Farms,*

1 *Inc. v. Dep't of Ecology*, PCHB No. 16-050, p. 3 (Sep. 15, 2017); *Guenther v. Dep't of Ecology*,  
2 PCHB No. 21-034, p. 4 (Jun. 9, 2022). The General Permit implements the biosolids management  
3 requirements in Chapter 70A.226 RCW and other applicable state or federal biosolids management  
4 requirements. WAC 173-308-90005(1)(a).

5 Since 2002, the General Permit has been reissued several times, most recently on June 15,  
6 2022, replacing the prior version that expired on September 4, 2020. *Appellants' Mot.*, p. 9;  
7 *Ecology's Mot.*, p. 10; *Kijowski Decl.*, ¶ 3; *Kijowski Decl., Ex. A (General Permit)*. The primary  
8 difference between the General Permit and previous versions is that the General Permit separates  
9 facilities into three sections, which require different coverages: Baseline, Active Septage  
10 Management, and Active Biosolids Management sections. *Kijowski Decl.*, ¶ 7. All facilities  
11 require coverage under the Baseline section, but facilities with active management programs must  
12 also have coverage under the Active Septage Management or Active Biosolids Management  
13 sections. *Id.* The General Permit automatically grants Baseline coverage to existing facilities  
14 without active management programs that had coverage under the prior permit. New facilities  
15 without active management programs are not automatically covered and must apply for Baseline  
16 coverage. *Id.* Any facility that directly applies biosolids to land must have an active management  
17 program and the corresponding coverage under the Active Septage Management or Active  
18 Biosolids Management sections. *See id.*

19 The General Permit includes the pollutant limits in WAC 173-308-160 for facilities that  
20 require coverage under the Active Septage Management or Active Biosolids Management.  
21 *Kijowski Decl., Ex. A (General Permit)* at §§ 3.6.3, 3.6.5, 4.5.3, 4.5.5). The limits are set for

1 pollutants such as cadmium, lead, zinc, and mercury. WAC 173-308-160. PFAS, PBDEs, and  
2 microplastics are not included in the pollutant limits in WAC 173-308-160. Ecology indicates that  
3 it could amend WAC 173-308-160 through a rulemaking “if future studies and risk analyses  
4 indicate that regulatory limits and monitoring for PFAS in biosolids are warranted, or if EPA  
5 adopts regulatory limits and monitoring requirements. . . .” *Kijowski Decl.*, ¶ 28.

### 6 C. THE GENERAL PERMIT’S SEPA PROCESS

7 On May 5, 2021, Ecology released a draft General Permit, SEPA Checklist, and a DNS.<sup>1</sup>  
8 *Appellants’ Mot.* at 8; *Kijowski Decl., Ex. A (General Permit); Golding Decl. Mot., Ex. B (SEPA*  
9 *Checklist), Ex. C (DNS); Kijowski Decl., Ex. D (SEPA Checklist); Ex. E (DNS).* From May 19  
10 through July 12, 2021, Ecology conducted a comment period for the General Permit prior to its  
11 issuance. *Kijowski Decl.* ¶ 8. Ecology received 146 comments, including comments from  
12 Appellants that addressed PFAS, PBDEs, and microplastics in biosolids. *Id.*; *see also, Kijowski*  
13 *Decl., Ex. B (July 12, 2021, Comment Letter of Appellants).*

14 When it issued the final General Permit in June 2022, Ecology also published its Response  
15 to Comments received on the General Permit, its SEPA Checklist, and its DNS. *Kijowski Decl.,*  
16 *Ex. C (Resp. to Comments, Excerpts, June 2022), Ex. A (General Permit); Golding Decl. Mot.,*  
17 *Ex. D (Resp. to Comments).* In its Response to Comments, Ecology responds to comments  
18 regarding PFAS, PBDEs, and microplastics in biosolids. *Kijowski Decl., Ex. C (Resp. to*  
19

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20 <sup>1</sup> The SEPA Checklist indicates it was prepared on May 4, 2021, but signed on May 5, 2021. *Kijowski Decl.,*  
21 *Ex. A (General Permit).*



1 *Comments, Excerpts, June 2022*), pp. 6-20, 28-37. Ecology’s responses contain some evaluation,  
2 explanation, and reasoning regarding PFAS, PBDEs, and microplastics in biosolids. *See id.*  
3 Ecology’s SEPA Checklist contains minimal discussion on “pollutants in biosolids that are not  
4 regulated,” which could pertain to PFAS, PBDEs, and microplastics, but it is unclear since those  
5 three pollutants are not named in the SEPA Checklist. *Kijowski Decl., Ex. D, p. 12.*

6 Ecology’s DNS, however, contains no discussion that might clearly pertain to PFAS,  
7 PBDEs, or microplastics in biosolids. *Kijowski Decl., Ex. E (DNS)*. Ultimately, the SEPA  
8 Checklist includes only an implied reference to PFAS, PBDEs, and microplastics in its minimal  
9 discussion of pollutants that are not regulated, and the DNS includes no mention or evaluation of  
10 those three pollutants in biosolids. *Kijowski Decl., Ex. D (SEPA Checklist), Ex. E (DNS)*.

### 11 **III. ANALYSIS**

12 After review of the entire record and applicable law, the Board grants summary judgment  
13 in favor of Appellants regarding Legal Issue No. 8, and denies the same to Ecology, concluding  
14 that Ecology’s SEPA Checklist and DNS fail to comply with the requirements of SEPA. Further,  
15 the Board determines that, having granted summary judgment in favor of Appellants on Legal  
16 Issue No. 8, it need not resolve the remaining issues.

#### 17 **A. SUMMARY JUDGMENT STANDARD**

18 Summary judgment is a procedure available to avoid unnecessary trials where there is no  
19 genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675-  
20 76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if only  
21

1 questions of law remain for resolution, and neither party contests the facts relevant to a legal  
2 determination. *Rainier Nat'l Bank v. Sec. State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990).

3 Summary judgment is appropriate “if the pleadings, depositions, answers to  
4 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
5 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter  
6 of law.” Civil Rule 56(c); see *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930  
7 P.2d 307 (1997). A material fact in a summary judgment proceeding is one affecting the outcome  
8 under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

9 Summary judgment is subject to a burden-shifting scheme. If the moving party satisfies its  
10 burden, then the nonmoving party must present evidence demonstrating that material facts are in  
11 dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).  
12 When determining whether an issue of material fact exists, all facts and inferences are construed  
13 in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068  
14 (2002). However, bare assertions concerning alleged genuine material issues do not constitute facts  
15 sufficient to defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140,  
16 331 P.3d 40 (2014). A nonmoving party cannot rely on speculative statements or conclusory  
17 allegations to defeat summary judgment. *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731,  
18 736, 150 P.3d 633 (2007).

19 If there are no genuine issues of material fact, the Board then determines whether the  
20 undisputed material facts entitle the moving party to judgment as a matter of law. *Skagit Hill  
21 Recycling v. Skagit Cnty.*, 162 Wn. App. 308, 318, 253 P.3d 1135 (2011).

1                   **B. BOARD JURISDICTION**

2                   The Board has subject matter jurisdiction in this appeal under RCW 43.21B.110(1)(c). The  
3 scope and standard of review for this appeal are de novo. WAC 371-08-485(1). Appellants have  
4 the burden of proving, by a preponderance of evidence, that the General Permit is invalid or  
5 unlawful. WAC 371-08-485(3). The Board gives deference to Ecology’s expertise on technical  
6 judgments, especially where they involve complex scientific issues. *Port of Seattle v. Pollution*  
7 *Control Hr’gs. Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004).

8                   **C. SEPA (ISSUES 8-9)**

9                   Legal Issue No. 8 asks whether Ecology’s DNS for issuance of the General Permit is clearly  
10 erroneous or otherwise fails to comply with SEPA. Both parties move for summary judgment on  
11 this issue.

12                   SEPA is a procedural law that ensures government agencies and other decision makers  
13 consider environmental impacts and alternatives before taking certain actions. *Cornelius v. Dep’t*  
14 *of Ecology*, 182 Wn.2d 574, 598, 344 P.3d 199 (2015). An applicant proposing an action must  
15 meet certain environmental review and documentation requirements. *Cornelius*, 182 Wn.2d at  
16 598; WAC 197-11-310. First, applicants must prepare an environmental checklist to describe basic  
17 information about a proposal’s environmental impacts. *Cornelius*, 182 Wn.2d at 598; WAC 197-  
18 11-960. A lead agency responsible for the environmental analysis and procedural steps under  
19 SEPA then reviews the checklist to evaluate the proposal’s likely environmental impacts.  
20 *Cornelius*, 182 Wn.2d at 598; *Wild Fish Conservancy v. Dep’t of Fish & Wildlife*, 198 Wn.2d 846,  
21 856, 502 P.3d 359 (2022).

1           The evaluation includes the “threshold determination” of whether the action will result in  
2 “probable significant adverse environmental” impacts. *Id.*; RCW 43.21C.031; WAC 197-11-  
3 330(1)(b). This threshold determination must be made “based upon information reasonably  
4 sufficient to evaluate the environmental impact of a proposal . . . .” WAC 197-11-335.  
5 “Significant” means “a reasonable likelihood of more than a moderate adverse impact on  
6 environmental quality.” WAC 197-11-794(1).

7           Significance involves context and intensity (WAC 197-11-330) and does  
8 not lend itself to a formula or quantifiable test. The context may vary with the  
9 physical setting. Intensity depends on the magnitude and duration of an impact.

10           The severity of an impact should be weighed along with the likelihood of  
11 its occurrence. An impact may be significant if its chance of occurrence is not great,  
12 but the resulting environmental impact would be severe if it occurred.

13 WAC 197-11-794(2); *see also* WAC 197-11-330.

14           If the agency determines the proposal is not likely to have significant adverse impacts on  
15 the environment, it will issue a DNS, and no further environmental review is required. *Wild Fish*  
16 *Conservancy*, 198 Wn.2d at 856; WAC 197-11-340. If the agency finds the proposal will likely  
17 have significant adverse impacts on the environment, it will issue a determination of significance  
18 and the process of preparing an environmental impact study begins. *Wild Fish Conservancy*, 198  
19 Wn.2d at 856; RCW 43.21C.031. In addition, the SEPA process must “be integrated with agency  
20 activities at the earliest possible time to ensure that planning and decisions reflect environmental  
21 values, to avoid delays later in the process, and to seek to resolve potential problems.” WAC 197-  
11-055(1).

1 An agency’s DNS threshold determination under SEPA is entitled to “substantial weight”  
2 and reviewing entities apply a “clearly erroneous” standard of review. *Cornelius*, 182 Wn.2d at  
3 599; RCW 43.21C.090. Under that standard of review, we look beyond whether substantial  
4 evidence exists to support the agency’s decision. Rather, we review the entire record and  
5 determine whether, based on the entirety of the evidence, we are left with the definite and firm  
6 conviction that a mistake has been committed. *Wild Fish Conservancy*, 198 Wn. 2d at 866  
7 (quotations omitted). Consideration of the public policy and environmental values of SEPA is  
8 required as well when reviewing a SEPA action. *Id.* at 866-67. A review of the record must show  
9 that environmental factors were considered in a manner sufficient to amount to prima facie  
10 compliance with the procedural requirements of SEPA. *Id.* (quotations omitted). Appellants  
11 generally contend that Ecology clearly erred in its SEPA DNS by not conducting “even basic  
12 effects analysis of the environmental impacts of biosolids application.” *Appellants’ Mot.*, pg. 1.  
13 Specifically, Appellants contend that Ecology’s DNS and SEPA Checklist violate SEPA  
14 implementing regulations requiring threshold determinations to: (1) be based on adequate  
15 information; (2) take into account several marginal impacts when considered together that may  
16 result in a significant adverse impact; and (3) not balance the benefits of a proposal against the  
17 impacts. *See* WAC 197-11-335; WAC 197-11-330(3), (5); WAC 197-11-340(3)(a)(ii). Ecology  
18 argues that its DNS was valid because: 1) the General Permit does not on its own entirely authorize  
19 land application of biosolids; 2) Ecology lacks the authority to prohibit beneficial reuse of  
20 biosolids; and 3) the General Permit requires SEPA review each time Ecology grants coverage  
21 under the General Permit to a new facility. *Ecology Mot.*, pp. 23-24.

1 SEPA requires that an agency’s threshold determination be supported by sufficient reason  
2 and explanation for its determination. *See* WAC 197-11-335; WAC 197-11-340; *Anderson v.*  
3 *Pierce Cnty.*, 86 Wn. App. 290, 301, 936 P.2d 432 (1997); *Moss v. City of Bellingham*,  
4 109 Wn. App. 6, 14, 31 P.3d 703 (2001). Here, despite some inclusion in its June 2022 Response  
5 to Comments of the General Permit, Ecology’s SEPA Checklist and DNS issued on May 4, 2021,  
6 fail to identify, address, or even mention more than by implication PFAS, PBDEs, and  
7 microplastics in biosolids and how these were considered in its threshold determination. *Kijowski*  
8 *Decl., Ex. D (SEPA Checklist); Ex. E (DNS).*

9 After Ecology first issued its SEPA Checklist and DNS along with a draft General Permit  
10 in May 2021, the presence and concerns of PFAS, PBDEs, and microplastics in biosolids and their  
11 effects on soil and groundwater were raised in the following documents, many of which are  
12 Ecology’s own studies and plans:

- 13 1. In Ecology’s original Chemical Action Plan issued in November 2021, *Kijowski*  
14 *Decl.*, ¶ 26;
- 15 2. In Appellants’ July 12, 2021, Comment Letter during the comment period for the  
16 General Permit *Kijowski Decl., Ex. B (July 12, 2021, Comment Letter of*  
17 *Appellants)*;
- 18 3. In the EPA’s PFAS Strategic Roadmap issued in October 2021, *Golding Decl. Mot.,*  
19 *Ex. H (EPA PFAS Roadmap), pp. 5, 7, 16*;
- 20 4. In the final rule regarding State Action Levels for certain PFAS compounds issued  
21 by DOH on January 1, 2022, *Golding Decl. Mot., Ex. F (MTCA PFAS Focus*  
*Sheet)*;
5. In the “interim” Health Advisories for certain PFAS issued by the EPA on June 15,  
2022, *id.*;
6. In Ecology’s Toxic Cleanup Program focus sheet on PFAS Cleanup Levels issued  
in July 2022, *id.*;

- 1           7. In Ecology’s revised Chemical Action Plan issued in September 2022, *Golding*  
2           *Decl. Mot., Ex. E (PFAS Chemical Action Plan)*, pp. 422-31;
- 3           8. In Ecology’s February 2021 study to evaluate concentrations of PFAS from three  
4           municipal wastewater treatment plants that receive influent likely to contain PFAS  
5           by collecting samples of influent, effluent, sludge, and biosolids for analysis of  
6           PFAS. The study culminated in the November 2022 publication of “PFAS  
7           Concentrations in Influent, Effluent, Solids, and Biosolids of Three Wastewater  
8           Treatment Plants”, *Golding Decl. Mot., Ex. L*.

9           Despite Ecology’s knowledge of PFAS, PBDEs, and microplastics in biosolids and  
10          discussion of them in its Response to Comments, Ecology’s SEPA Checklist and DNS issued in  
11          May 2021 contains no evaluation and explanation related to PFAS, PBDEs, and microplastics in  
12          biosolids. *See Kijowski Decl., Ex. A (General Permit); Ex. D (SEPA Checklist); Ex. E (DNS)*. The  
13          DNS consists of only the following paragraph:

14                 This [DNS] is based on the following findings and conclusions:

15                 The state biosolids program is based on, and meets or exceeds the requirements of  
16                 the federal biosolids management program implemented by U.S. EPA under 40  
17                 CFR Part 503. Beneficial use is the primary means of management in Washington,  
18                 and nationwide. Biosolids that meet appropriate standards for beneficial use do not  
19                 pose a significant risk to human health or the environment when used in accordance  
20                 with applicable rules, guidelines and permit requirements. The permit authorizes  
21                 landfilling and incineration when biosolids do not meet applicable standards. The  
                    permit program implemented by Ecology allows the agency to impose additional  
                    or more stringent requirements for individual facilities and sites, as required,  
                    following review of a permit application, additional environmental review, and  
                    public hearings if required.

*Kijowski Decl., Ex. E, p. 1.*

1           Moreover, PFAS, PBDEs, and microplastics are not mentioned in the SEPA Checklist. The  
2 SEPA Checklist included only the following excerpts, which could be read to pertain to PFAS,  
3 PBDEs, and microplastics:

4           There are also pollutants in biosolids that are not regulated. In that sense, the permit  
5 will authorize the release of pollutants, but within the limits of established  
6 regulations.

7           Generally, pollutants in biosolids occur in very low concentrations, below the level  
8 where an adverse effect is expected. Pollutants in biosolids originate from the  
9 activities of businesses and individuals. We are often much more highly exposed to  
10 them during the course of routine daily activities than would be possible from the  
11 use of biosolids. Some pollutants, although present in very small amounts, are  
12 known to persist or bioaccumulate. Those are of most concern, and research and  
13 investigation by U.S. EPA, Ecology, and universities on the fate and transport of  
14 pollutants in biosolids is [continuing] [sic].

15 *Kijowski Decl., Ex. D (SEPA Checklist), p. 12; see also, id., p. 13* (“EPA’s current top priority for  
16 the national biosolids program is development of a new risk-screening tool that can be used to  
17 further evaluate risks from pollutants.”). It is unclear from the excerpt above whether “pollutants”  
18 refer to the nine regulated pollutants in WAC 173-308-160 or more broadly to include unregulated  
19 PFAS, PBDEs, and microplastics. Omitting analysis for a reasonably foreseeable impact renders  
20 the DNS clearly erroneous. *Spokane Cnty. v. Eastern Wash. Growth Mgm’t Hr’gs Bd.*, 176 Wn.  
21 App. 555, 579-81, 309 P.3d 673 (2013), *review denied*, 179 Wn.2d 1015 (2014) (SEPA checklist  
failed to address the probable environmental impact of the county’s comprehensive plan  
amendment); *Conservation Nw. v. Okanogan Cnty.*, 194 Wn. App. 1034 (2016) (unreported  
decision that is not precedential under WA General Rule 14.1) (DNS was clearly erroneous where



1 environmental checklist omitted sufficient information to evaluate the probable environmental  
2 impacts of opening county roads to all terrain vehicle use); *Quinault Indian Nation v. City of*  
3 *Hoquiam*, SHB No. 13-012c, pp. 16-26 (Dec. 9, 2013, Order on Summ. J., (as Amended on  
4 Recons.)), (MDNS clearly erroneous where it only considered impacts from two crude oil by rail  
5 terminal projects and omitted consideration of impacts from reasonably foreseeable third similar  
6 project).

7 The dearth of discussion or even information on PFAS, PBDEs, and microplastics in the  
8 SEPA Checklist and DNS is at odds with the information that was available in many of the above  
9 enumerated documents, and evinces an inadequate evaluation of the impacts from biosolids  
10 storage, transfer, land application, and disposal that is authorized by the General Permit.  
11 See WAC 197-11-335 (lead agency shall make its threshold determination based upon information  
12 reasonably sufficient to evaluate the environmental impact of a proposal); WAC 197-11-  
13 340(3)(a)(ii)<sup>2</sup> (lead agency shall withdraw DNS if there is significant new information indicating,  
14 or on, a proposal's probable significant adverse environmental impacts); WAC 197-11-335(1) (if  
15 SEPA checklist does not contain sufficient information to make a threshold determination, the  
16 preparer may be required to submit additional information); *Moss*, 109 Wn. App. at 14

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18 <sup>2</sup> The Board agrees with Appellants that in the year that elapsed between issuance of the SEPA Checklist  
19 and DNS in May 2021 and issuance of the final General Permit in June 2022, significant information on  
20 the presence and potential risks of PFAS in biosolids was developed, as indicated in some of the above  
21 eight enumerated documents. Such information must be considered in the SEPA Checklist or threshold  
determination to determine whether the General Permit will result in probable, adverse environmental  
impacts. WAC 197-11-340(3)(c) (if lead agency withdraws a DNS, the agency shall make a new threshold  
determination).

1 (2001). The SEPA Checklist also does not address the likely increase of pollutants discharged  
2 from biosolids. In answering question 1 in Part D (the supplemental sheet for nonproject actions)  
3 – whether the General Permit would be likely to increase discharge to water; emissions to air;  
4 production, storage, or release of toxic or hazardous substances – the Checklist states, “[e]xcepting  
5 *the impact of population growth*, from the standpoint of current practices, the proposed general  
6 permit is not expected to increase the discharge of pollutants to water . . . production, storage or  
7 release of toxic or hazardous substances . . . .” *Kijowski Decl., Ex. D, p. 12* (emphasis added).  
8 However, in answering whether the proposed General Permit would likely increase demands on  
9 transportation or public services, the SEPA Checklist states that “[i]ncreased population will result  
10 in increased production of biosolids.” *Id., p. 16*. Increased production of biosolids will logically  
11 increase discharges of pollutants contained in them, including PFAS, PBDEs, and microplastics,  
12 yet the SEPA Checklist simply excludes the impacts of increased biosolids production from  
13 population growth.

14         Argument or explanation regarding PFAS, PBDEs, and microplastics in biosolids  
15 presented by Ecology in its Response to Comments cannot correct the near absence of such  
16 discussion in the SEPA Checklist and DNS. The Board agrees with Appellants and concludes that  
17 compliance with the SEPA regulations discussed above required Ecology to include as part of its  
18 SEPA threshold determination greater evaluation, explanation, and reasoning concerning PFAS,  
19 PBDEs, and microplastics in biosolids in its SEPA Checklist and DNS.

20         As stated, Ecology sets forth three bases for summary judgment on Legal Issue No. 8 in its  
21 favor: 1) the General Permit does not on its own entirely authorize land application of biosolids;

1 2) Ecology lacks the authority to prohibit beneficial reuse of biosolids; and 3) the General Permit  
2 requires SEPA review each time Ecology grants coverage under the General Permit to a new  
3 facility. *Ecology Mot.*, pp. 23-24. None of these reasons entitle Ecology to summary judgment that  
4 its DNS complies with SEPA and was not clearly erroneous.

5 First, Ecology points out that the General Permit does not authorize land application of  
6 biosolids, or that the General Permit, “*on its own*, does not authorize the land application of  
7 biosolids and does not result in a significant adverse environmental impact, nor does Ecology have  
8 the authority to prevent the land application of biosolids *entirely* through the General Permit.” *Id.*  
9 (*emphasis added*). Based on that premise, Ecology argues that biosolids could and would still be  
10 land applied without issuance of a General Permit as long as it was consistent with state and federal  
11 regulations; thus, “the General Permit is beneficial, minimizing the otherwise authorized  
12 environmental effects of land applied biosolids [and] issuance of a determination of  
13 nonsignificance was appropriate.” *Id.*

14 The Board rejects the argument as contrary to the General Permit, biosolids regulations,  
15 and SEPA regulations. As Appellants point out, the General Permit itself requires facilities with  
16 active septage or active biosolids management programs to apply for coverage under the General  
17 Permit or an individual permit. *Kijowski Decl., Ex. A, pp. 7-8; see also* Washington State  
18 Department of Ecology, *Fact Sheet: 2021 General Permit for Biosolids Management (2021)*, pp. 1,  
19 2 (stating that the General Permit “is the primary regulatory mechanism for approval of the final  
20 use or disposal of biosolids” and that it “regulates the production, storage, use and disposal of  
21

1 biosolids” and “[r]egulated activities include biosolids applied to the land, sold or given away in a  
2 bag or other container, in storage, transferred from one facility to another . . .”).<sup>3</sup>

3 And a general permit is defined under the biosolids regulation as “a permit issued by  
4 [Ecology] . . . that authorizes the application of biosolids to the land or the disposal of sewage  
5 sludge in a municipal solid waste landfill . . .” WAC 173-308-080. The degree to which the  
6 General Permit on its own authorizes land application of biosolids is of no import because the  
7 General Permit sets up the structure or mechanism through which land application of biosolids  
8 according to regulations in Chapter 173-308 WAC is allowed. Accepting Ecology’s assertion that  
9 the General Permit is beneficial because it limits the effects of land applied biosolids, it simply  
10 does not follow that the DNS was therefore appropriate where it did not discuss PFAS, PBDEs,  
11 and microplastics in biosolids. Moreover, a threshold determination must not balance whether the  
12 beneficial aspects of a proposal outweigh its adverse impacts but, rather, must consider whether a  
13 proposal has any probable significant adverse environmental impacts. WAC 197-11-330(5); *King*  
14 *Cnty. v. Friends of Sammamish Valley*, 26 Wn. App. 2d 906, 942, 530 P.3d 1023 (2023);  
15 *Chuckanut Conservancy v. Dep’t of Nat. Res.*, 156 Wn. App. 274, 286, 232 P.3d 1154 (2010).

16 Second, that Ecology lacks authority to prohibit beneficial use of biosolids entirely through  
17 the General Permit does not entitle it to summary judgment on Legal Issue No. 8.<sup>4</sup> Nothing in  
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19 <sup>3</sup> Available at <https://apps.ecology.wa.gov/publications/documents/2107005.pdf>.

20 <sup>4</sup> See *Ecology Mot.*, p. 24 (“[w]hen issuing the General Permit, Ecology does not have the authority to  
21 prohibit the beneficial reuse of biosolids entirely . . . [i]n deciding whether a decision may have adverse  
effects requiring the preparation of an environmental impact statement, an agency is not required to factor  
in effects that it lacks authority to prevent as part of the decision being evaluated.”).

1 SEPA nor its implementing regulations relieve agencies from considering probable, significant  
2 adverse environmental impacts of an agency action where the agency lacks authority to prevent  
3 such impacts in the decision under review. The Board agrees with Appellants that SEPA does not  
4 so limit, but to the contrary, requires agencies to analyze all probable, significant adverse  
5 environmental impacts, where impacts are broadly defined “as the effects or consequences of  
6 actions.” WAC 197-11-752; RCW 43.21C.031(2); WAC 197-11-330(1)(b), (3). And analyzing a  
7 proposal’s environmental impact in turn requires examining, at least the extent to which the action  
8 will cause adverse environmental effects more than those created by existing uses in the area, the  
9 absolute quantitative adverse environmental effects of the action itself, including cumulative harm  
10 that results from its contribution to existing adverse conditions or uses in the affected area.  
11 *Chuckanut Conservancy*, 156 Wn. App. at 285. Moreover, according to its Response to Comments,  
12 Ecology seems to possess authority to prevent harmful effects of biosolids application through  
13 modification of the General Permit. *See, e.g., Golding Decl. Mot., Ex. D (Response to Comments)*,  
14 *p. 116* (“Ecology agrees that the question of PFAS in biosolids warrants investigation. If it  
15 becomes apparent that additional regulatory standards are needed to ensure the safety of public  
16 health and the environment, for PFAS or any other pollutant, Ecology is prepared to take action.  
17 The general permit allows for adjustments like this to be made whenever necessary, not just every  
18 5 years upon issuance.”).

19 Ecology relies on two cases to support its position that in reviewing a proposal under  
20 SEPA, an agency is not required to factor in environmental impacts of activities that it lacks  
21 authority to prevent as part of the decision being evaluated. The Board disagrees.

1           *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204, 159 L.  
2 Ed.2d 60 (2004), involved a challenge to the Federal Motor Carrier Safety’s Administration’s  
3 (FMCSA) issuance of a finding of no significant impact on the environmental effects likely to arise  
4 from the increase in the number of roadside inspections of Mexican trucks entering the U.S.  
5 because of its proposed rulemaking. *Public Citizen*, 541 U.S. at 761-62. Importantly, FMCSA did  
6 not consider any environmental impact that might be caused by the overall increase of Mexican  
7 trucks in the U.S. because it was not an “effect” of its proposed safety regulations, but rather the  
8 action of the President in lifting a moratorium prohibiting Mexican trucks from being able to  
9 operate in the U.S. *Id.* at 761. Organizations challenged FMCSA’s failure to take into account the  
10 various environmental effects caused by the increase in cross border operations of Mexican trucks,  
11 arguing that FMCSA’s promulgation of rules was the cause of entry of Mexican trucks and  
12 therefore cause of emissions. *Id.* at 765-66. The Supreme Court disagreed, concluding that it was  
13 the President lifting the moratorium that was the legally relevant cause of truck entries, and not  
14 FMCSA’s action as FMCSA had no ability to do that or otherwise categorically exclude entry of  
15 Mexican trucks. *Id.* at 766, 769. The Supreme Court concluded the requisite causation did not exist  
16 in order to require FMCSA to examine such environmental effects under the National  
17 Environmental Policy Act. *Id.* at 767, 769-70.

18           Unlike the situation in *Public Citizen* where FMCSA did not and could not take action that  
19 would cause effects or impacts subject to environmental review, Ecology here took action in  
20 issuing the General Permit that authorized storage, transportation, and land application of biosolids  
21 with its attendant effects. Thus, the requisite causal chain is present in this case, and as discussed,

1 the environmental impacts from the effects of PFAS, PBDEs, and microplastics in biosolids must  
2 be considered under SEPA.

3 *Chuckanut Conservancy v. Department of Natural Resources*, 156 Wn. App. 274, 232 P.3d  
4 1154 (2010), is also distinguishable as that case concerned the relevant baseline for consideration  
5 of alternatives under SEPA; specifically, the degree to which a proposal will cause adverse  
6 environmental impacts in excess of those created by existing uses in the area. *Chuckanut*  
7 *Conservancy*, 156 Wn. App. at 285, 289-90. The Court of Appeals upheld the Department of  
8 Natural Resources' (DNR) determination that its challenged proposal – a strategy to divide a forest  
9 into four zones that allowed different uses (conservation, recreation, logging) – was not a major  
10 action significantly affecting the environment that required an EIS under SEPA because the  
11 environmental impacts of DNR's proposal had to be evaluated or measured against forest logging  
12 as an existing use, and not against a theoretical no logging use. *Id.* at 289-90. In contrast, the SEPA  
13 dispute in Legal Issue No. 8 does not concern the degree of environmental impacts from an action,  
14 but rather whether not considering the impacts of certain pollutants in biosolids at all violates  
15 SEPA regulations discussed above.

16 Finally, Ecology relies on the fact that the General Permit requires SEPA review each time  
17 Ecology grants coverage under the General Permit to a new facility as a basis to uphold its DNS.  
18 The Board rejects this basis.

19 As stated, under the new structure of the General Permit, any existing facility without an  
20 active management program that had coverage under the prior permit is automatically granted  
21 Baseline coverage. *Kijowski Decl., Ex. A (General Permit)*, p. 1, § 1.1; p. 7, § 2.1, Fig.2; p. 8,

1 § 2.1.2. All new and existing facilities with active management programs must apply for coverage  
2 under the Active Septage Management or Active Biosolids Management. *Kijowski Decl., Ex. A*  
3 *(General Permit), p. 1, § 1.1; pp. 26-33, § 3; pp. 34-44, § 4.* At either subsequent stage of the  
4 General Permit (application for coverage under the Active Septage Management or Active  
5 Biosolids Management), another SEPA review is required for the applying facility. *Kijowski Decl.,*  
6 *Ex. A (General Permit), pp. 26-27, § 3.2.2; p. 35, § 4.2.2.; Ex. D (SEPA Checklist), p. 15.*

7 Although under the scheme described above, facilities with active biosolids management  
8 programs will be subject to additional SEPA review and may be subject to additional or more  
9 stringent requirements such as through a site specific land application plan, the only SEPA analysis  
10 for roughly 194 facilities granted automatic Baseline coverage will be Ecology’s SEPA Checklist  
11 and DNS.<sup>5</sup> Moreover, under the General Permit, application of Class A exceptional quality  
12 biosolids do not generally require a site specific land application plan, leaving the General Permit  
13 SEPA review stage seemingly the only opportunity for consideration and evaluation of their  
14 impacts.<sup>6</sup>

15 SEPA requires the evaluation process to begin at the earliest opportunity. WAC 197-11-  
16 055(1)-(2); WAC 197-11-055(2)(a)(i) (fact that proposals may require future agency approvals or

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18 <sup>5</sup> See, also Washington State Department of Ecology, *Fact Sheet: 2021 General Permit for Biosolids*  
19 *Management* (2021), p. 2 (“of the 375 existing facilities subject to the general permit: . . . . 152 sewage  
20 treatment plants have Active Biosolids Management programs . . . 29 are septage management facilities. .  
21 . .”).

<sup>6</sup> See, *Golding Decl. Mot., Ex. A (General Permit), p. 39, § 4.5.1; see also, Kijowski Decl., Ex. D, p. 15*  
20 (“Exceptional quality [EQ] biosolids are not regulated once distributed. Less than 20% of biosolids meet  
21 EQ criteria. A primary use of EQ products is on lawns and home gardens, and as components of topsoil and  
compost products.”).



1 environmental review shall not preclude current consideration, as long as proposed future activities  
2 are specific enough to allow some evaluation of their probable environmental impacts). The  
3 purpose of these SEPA requirements is to ensure consideration of environmental factors beginning  
4 at the earliest possible stage to allow decisions to be made on complete disclosure of environmental  
5 consequences. *See Klickitat Cnty. Citizens Against Imported Waste v. Klickitat Cnty.*, 122 Wn.2d  
6 619, 640, 860 P.2d 390 (1993) (citing WAC 197-11-055(2)); *Quinault Indian Nation v. Imperium*  
7 *Terminal Servs., LLC*, 190 Wn. App. 696, 709, 360 P.3d 949 (2015) (reversed on other grounds  
8 by *Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460, 387 P.3d 670  
9 (2017)); *Spokane Cnty.*, 176 Wn. App. at 579 (purpose of the SEPA checklist is to ensure agency,  
10 at earliest possible stage, fully discloses and carefully considers a proposal’s environmental impact  
11 before adopting it). Here, Ecology provided no explicit evaluation regarding PFAS, PBDEs, and  
12 microplastics in biosolids in its SEPA Checklist and DNS, which constituted the earliest and only  
13 SEPA analysis for certain facilities authorized by the General Permit. The Board is cognizant of  
14 the change in structure Ecology made in this General Permit in order to reduce the burden and  
15 speed up approvals to facilities without active management programs that are unlikely to sell, give  
16 away, or directly land apply their biosolids during the five year permit cycle. The Board’s decision  
17 on this SEPA issue does not opine on the General Permit’s structural change.

18 In addition, Ecology generally argues that it needs more information on PFAS, PBDEs,  
19 and microplastics in biosolids before it can “establish reasonable, legally defensible regulatory  
20 limits for PFAS, PBDEs, and microplastics in biosolids (through rulemaking),” and highlights that  
21 no agency (state or federal) has completed the necessary analysis to do so, such as analysis of

1 reliable testing methodologies, exposure pathways, types of and acceptable risk levels, potentially  
2 affected organisms, and background pollutant levels. *Kijowski Decl.* ¶ 14; *Ecology’s Mot.*, p. 15;  
3 *Ecology’s Resp.*, p. 5. Ecology explains that the absence of requirements for testing and pollutant  
4 limits in the General Permit for PFAS, PBDEs, and microplastics does not render it unlawful  
5 because including such requirements in the General Permit would require rule making under the  
6 Administrative Procedure Act. These arguments may persuasively rebut Appellants’ broad claims  
7 in the other legal issues that the lack of regulation for PFAS, PBDEs, and microplastics in the  
8 General Permit violates various statutes and regulations. However, Legal Issue No. 8, and  
9 Appellants’ arguments on the issue, concern only whether Ecology’s DNS complied with specified  
10 SEPA regulations, and do not concern whether regulatory limits, monitoring, or testing for PFAS,  
11 PBDEs, and microplastics in biosolids needs to be established. *Wash. State Dairy Fed’n v. Dep’t*  
12 *of Ecology*, 18 Wn.App.2d 259, 307-08, 490 P.3d 290 (2021) (SEPA is intended to act as  
13 supplement to or an overlay of other governmental authorization).

14 The Board is aware that there is incomplete information on PFAS, PBDEs, and  
15 microplastics in biosolids. *Kijowski Decl.*, ¶¶ 21-26; Washington State Department of Ecology,  
16 *Per- and Polyfluoroalkyl Substances Chemical Action Plan (2022)*, p. 423 (*Appendix 8 –*  
17 *Biosolids*).<sup>7</sup> But information gaps on the degree to which these pollutants are present in biosolids,  
18 including their exposure pathways and risk levels, should be discussed in the environmental  
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20 <sup>7</sup> Referenced as the “PFAS Chemical Action Plan” in *Kijowski Decl.*, ¶ 26 (available at  
21 <https://apps.ecology.wa.gov/publications/documents/2104048.pdf>).

1 checklist and DNS, along with forthcoming studies and screening tools. *See*, WAC 197-11-080(2)-  
2 (3) (requiring information gaps be identified, and describe how agencies may proceed in the face  
3 of lack of information); WAC 197-11-080 (2) (when there are gaps in relevant information or  
4 scientific uncertainty concerning significant impacts, agencies shall make clear that such  
5 information is lacking or that substantial uncertainty exists). Here, neither the SEPA Checklist nor  
6 the DNS disclosed the uncertainty or lack of information except for a brief reference that Ecology  
7 will be monitoring EPA’s current development of a new risk screening tool to further evaluate  
8 risks from pollutants in general, without specifying any particular pollutant. *Kijowski Decl., Ex. D,*  
9 *p. 13.*

10 In sum, none of Ecology’s claims entitle Ecology to summary judgment that its DNS  
11 complies with SEPA and was not clearly erroneous. Nor do the claims correct the clear error in  
12 failing to evaluate the impacts of PFAS, PBDEs, and microplastics in biosolids in the SEPA  
13 Checklist and DNS. Compliance with the requirements of SEPA in WAC 197-11-335, WAC 197-  
14 11-340, and WAC 197-11-055 required Ecology to evaluate them at the earliest opportunity in its  
15 SEPA Checklist and DNS. The Board therefore grants summary judgment in favor of Appellants  
16 on Legal Issue No. 8 and denies summary judgment to Ecology on the same issue.

17 Both Ecology and Appellants also move for summary judgment on Legal Issue No. 9,  
18 which asks whether Ecology was required to make a determination of significance and prepare an  
19 environmental impact statement prior to issuance of the General Permit. Appellants urge the Board  
20 to order Ecology to prepare an environmental impact statement, arguing that the General Permit  
21 has probable, significant adverse environmental effects. Given our conclusion in Legal Issue No. 8

1 that Ecology’s lack of discussion and evaluation of PFAS, PBDEs, and microplastics violates  
2 SEPA, the Board need not decide the core dispute in Legal Issue No. 9 of whether the General  
3 Permit does or does not result in probable, significant adverse environmental impacts requiring a  
4 determination of significance and preparation of an EIS. The Board also declines to require  
5 Ecology to prepare an environmental impact statement as urged by Appellants. Since SEPA is at  
6 heart an informational statute designed to provide full environmental information, the Board  
7 remands for Ecology to comply with SEPA by including in its environmental checklist and  
8 resulting determination an explicit and full disclosure and review of information on the  
9 environmental impacts of PFAs, PBDEs, and microplastics in biosolids that are stored, transported,  
10 and land applied under the General Permit. *See, e.g., Conservation NW v. Okanogan Cnty.*, 194  
11 Wn. App. 1034 (2016).<sup>8</sup>

12 **D. NON-SEPA ISSUES (ISSUES 1-7)**

13 Remaining Legal Issue Nos. 1-7 are non-SEPA issues that challenge the General Permit’s  
14 validity based on alleged violation of various statutes and regulations. A DNS is void where it fails  
15 to comply with SEPA, and the agency that issued it must revisit the determination. Decisions based  
16 on a void determination are also void. *City of Puyallup v. Pierce Cnty.*, 20 Wn. App. 2d 466, 471,  
17 500 P.3d 216 (2021) (citing *Weyerhaeuser v. Pierce Cnty.*, 124 Wn.2d 26, 42, 873 P.2d 498  
18 (1994)). Ecology’s decision to issue the final General Permit following its DNS is void because  
19 the DNS was issued in violation of SEPA. *Bhatia v. Dep’ t of Ecology*, SHB No. 95-034, COL

20 \_\_\_\_\_  
21 <sup>8</sup> GR 14.1(a) (unpublished Court of Appeals decision).

1 XVIII (Jan. 9, 1996) (consequence of failing to comply with SEPA’s procedural requirements is  
2 nullification of underlying action; thus shoreline permits issued in violation of SEPA are void);  
3 *Barrie v. Kitsap Cnty.*, 93 Wn.2d 843, 861, 613 P.2d 1158 (1980); *King Cnty. v. Wash. State*  
4 *Boundary Review Bd.*, 122 Wn.2d 648, 667, 860 P.2d 1024 (1993) (decisions based on a void  
5 determination are also void); *see also, Quinault Indian Nation*, SHB No. 13-012c, pp. 42-43 (SSDP  
6 reversed based on invalidity of underlying MDNS). The Board thus need not decide the non-  
7 SEPA issues in Legal Issue Nos. 1-7 that challenge the General Permit.

8 Based on the foregoing analysis, the Board enters the following:

9 **IV. ORDER**

10 The Board GRANTS IN PART, Nisqually Delta Association and Ed Kenney’s  
11 (Appellants) Motion for Partial Summary Judgment on Legal Issue No. 8, and DENIES the State  
12 of Washington, Department of Ecology’s Motion for Summary Judgment on Legal Issue No. 8.

13 The Department of Ecology’s decision to issue the General Permit is reversed based on  
14 noncompliance of the DNS with SEPA requirements. The matter is remanded to Ecology for action  
15 consistent with this decision.

16 SO ORDERED this 29th day of January, 2024.

17 **POLLUTION CONTROL HEARINGS BOARD**

18 

19 CAROLINA SUN-WIDROW, Presiding  
Board Chair

20 

21 MICHELLE GONZALEZ  
Acting Board Chair

1                   This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days.  
2                   *See* Administrative Procedures Act (RCW 34.05.542) and RCW 43.21B.180.

3                   You are being given the following notice as required by RCW 34.05.461(3): Any  
4 party may file a petition for reconsideration with the Board. A petition for reconsideration must  
5 be filed with the Board and served on all parties within ten days of mailing of the final decision.  
6 WAC 371-08-550.  
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