

ENVIRONMENTAL HEARINGS
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STATE OF WASHINGTON

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October 13, 2022

Sent as Email

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Re: **PCHB 22-059**
LIBERTY LAKE SEWER & WATER DISTRICT V. WASHINGTON STATE
DEPARTMENT OF ECOLOGY

Dear Parties:

Enclosed is an Order Granting Motion for Partial Stay in the above referenced matter.

If you have any questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,

A handwritten signature in cursive script that reads "Michelle Gonzalez".

Michelle Gonzalez, Presiding

PCHB Case No. 22-059

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MG/jm/P22-059

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via email only.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED October 13, 2022, at Tumwater, WA.

Jessica Monroe

1 by attorneys Norman Semanko and Lisa A. Kirschner. Ecology is represented by Thomas
2 Young, Janell M. Middleton, and Phyllis J. Barney.

3 The Board reviewed the following materials in deliberating on the stay motion:

- 4 1. Appellant's Motion for Stay (*Motion*);
- 5 2. Affidavit of Greg Sattler in Support of Appellant's Motion for Stay (*Sattler Decl.*);
 - 6 a. *Ex. A* (Plant Effluent Data temp corrected with 1.5 degrees Celsius);
 - 7 b. *Ex. B* (EPA Letter to Ecology's Vince McGowan, Water Quality Program
8 Manager regarding Revisions to Ecology's Surface Water Quality Standards
9 for the Natural Conditions Provisions (Nov. 19, 2021));
- 10 3. Washington State Department of Ecology's Response in Opposition to Appellant's
11 Motion for Stay (*Response*);
- 12 4. Declaration of Diana Washington in Support of Ecology's Response in Opposition to
13 Appellant's Motion for Stay (*Washington Decl.*);
 - 14 a. *Ex. A* (Ecology's Nov. 18, 2016 letter administratively extending the Permit);
 - 15 b. *Ex. B* (Permit Fact Sheet);
 - 16 c. *Ex. C* (Dep't of Health's Spokane River Safe Fish Eating Guide brochure);
 - 17 d. *Ex. D* (Liberty Lake's NPDES Permit No. WA0045144);
 - 18 e. *Ex. E* (Liberty Lake's May 2022 Comment Letter on the Draft Permit and Fact
19 Sheet);
- 20 5. Appellant's Reply in Support of Motion for Stay (*Reply*);
- 21 6. Affidavit of Norman Semanko (*Semanko Decl.*);

1 a. *Ex. A* (2011 NPDES Permit);

2 b. *Ex. B* (Ecology’s Fact Sheet for the 2011 NPDES Permit); and

3 7. The Board’s file in this matter.

4 Based upon the evidence submitted and the written materials filed, the Board enters the
5 following decision:

6 **II. BACKGROUND**

7 Under the Federal Clean Water Act (CWA), it is unlawful to discharge any pollutant into
8 the water unless the discharger has applied for and received a National Pollutant Discharge
9 Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). In Washington, Ecology
10 is designated the state water pollution control agency and has the authority to administer the state
11 waste discharge elimination permit program. RCW 90.48.260(1).

12 Ecology sets the state water quality standards, which must be approved by the Federal
13 Environmental Protection Agency (EPA) before they become effective. 40 C.F.R. § 131.21(a),
14 (e). Water quality standards consider the beneficial uses of a body of water, the maximum
15 concentration of pollutants that may be present in the water, and protection of the existing quality
16 of the water. *Response, p. 2 (citing American Paper Inst., Inc. v. U.S. E.P.A., 996 F.2d 346, 349*
17 *(1993))*. When water bodies do not meet applicable water quality standards, those water bodies
18 are identified as impaired, which is known as the “303(d)” list. 33 U.S.C. § 1313(d)(1). Ecology
19 creates a Total Maximum Daily Load (TMDL) for each pollutant, approved by EPA, that
20 allocates the amount of the pollutant facilities may discharge. 40 C.F.R. § 130.7. Ecology also
21 conducts a “reasonable potential” analysis of whether or not a facility’s discharge will cause or

1 contribute to a violation of water quality standards. 40 C.F.R. § 122.44(d)(1)(i); *Sierra Club v.*
2 *Dep't of Ecology*, PCHB No. 11-184 (FOF and COL) (July 19, 2013). If there is a reasonable
3 potential for a violation, permits must include limits on the amount of pollutants contained in a
4 facility's discharge. 33 U.S.C. § 1311(b)(1)(C), § 1342(a); WAC 173-220-130.

5 Liberty Lake operates a wastewater facility and is a relatively small provider of sewer
6 services with fewer than 5,000 customers. *Sattler Decl.*, ¶ 3; *Washington Decl., Ex. B (Fact*
7 *Sheet)*. It discharges treated effluent to the Spokane River approximately three and a half miles
8 downstream from the Washington/Idaho border. *Washington Decl., Ex. B, p. 9.*¹ Ecology has
9 found that multiple sources discharge polychlorinated biphenyls (PCBs) into the Spokane River,
10 including industrial and municipal facilities. *Response, p. 3*. Spokane River is on the 303(d) list
11 as an impaired water body for PCBs in fish tissue and water temperature. *Washington Decl.*, ¶ 4.

12 Diana Washington is a licensed environmental engineer employed by the Department of
13 Ecology's Water Quality Program, Eastern Regional Office. *Washington Decl.*, ¶ 2. Washington
14 is the permit writer for the Liberty Lake NPDES Permit No. WA0045144.² *Id.*, ¶ 3. Washington
15 included a numeric effluent limit for PCBs in the Permit in order to address the narrative criteria
16 of protecting the designated use of fish harvesting. *Id.*, ¶ 5. The Permit limit implements the
17 numeric water quality criteria for PCBs in the Spokane River without dilution and is effective at
18 the point of discharge. *Id.*

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¹ Exhibit page numbers refer to the pdf page number of the declaration.

² Liberty Lake's previous permit was issued June 23, 2011. On November 18, 2016, Ecology administratively extended the Permit past the expiration date of June 30, 2016. *Washington Decl., Ex. A.*

1 Liberty Lake and other dischargers on the Spokane River submitted a variance
2 application for PCBs. Ecology is required to complete rulemaking for the variance. *Washington*
3 *Decl.*, ¶ 6. Ecology has issued notice it is considering rulemaking for the variance, referred to as
4 a CR 101, but has not yet completed the rulemaking or issued the variance. *Id.*

5 Ecology has found Liberty Lake discharges into a segment of the Spokane River that is
6 impaired for temperature. *Washington Decl.*, ¶ 7. The Permit contains a water temperature limit
7 of 20 degrees Celsius because of this temperature impairment. *Id.* The Permit has a compliance
8 schedule, and the final temperature limit does not apply until expiration of the compliance
9 schedule on August 1, 2032. *Id. Ex. D, p. 30* (Permit, S1.A, Table 4). The Permit includes an
10 interim effluent temperature limit of 21.6 degrees Celsius – Average Monthly and 24.8 degrees
11 Celsius – Maximum Daily. *Id.* In setting the interim temperature limit, Washington relied on
12 Liberty Lake’s 2018-21 discharge monitoring reports (DMRs) for the critical season, July 15 –
13 September 14. *Id.*, ¶ 7. Washington used this data to calculate the monthly average and daily
14 maximum interim limit. *Washington Decl.*, ¶ 9.

15 Washington included the interim temperature limits in the draft Permit and solicited
16 public comment. *Washington Decl.*, ¶ 10. Liberty Lake submitted comments in a Comment
17 Letter on the Draft Permit and Fact Sheet. *Washington Decl.*, ¶ 15, *Ex. E.* In Comment 5, Liberty
18 Lake addressed concerns about the final and interim water temperature limits. *Ex., E pp. 37-39.*
19 First, Liberty Lake asserted Ecology has recognized that the Spokane River temperature
20 impairment listing is based on summer month data and “likely reflects natural conditions.” *Id.*, *p.*
21 *37.* Liberty Lake suggested Ecology delay establishing final temperature limits until it had the

1 results of pending water studies used to establish a TMDL. *Id.*, p. 38. Liberty Lake commented:
2 “Even if Ecology delays further assessment of the natural conditions of the receiving waters, the
3 proposed performance-based interim limits should not apply end-of-pipe, year-round.”

4 *Washington Decl., Ex. E p. 39.*

5 Greg Sattler is the Chief Operator of the Water Reclamation Facility (WRF) for Liberty
6 Lake and is familiar with the NPDES Permit and compliance. *Sattler Decl.*, ¶ 2. Sattler states
7 during the summer season it is reasonably likely that Liberty Lake would potentially exceed the
8 maximum daily interim limit of 24.8 degrees Celsius. *Id.* ¶ 6. Historically, Liberty Lake
9 measured effluent temperatures in the very early morning and recorded these temperatures in the
10 DMRs. *Sattler Decl.*, ¶ 7, *Ex. A.* According to Sattler, the daily recorded temperature is more
11 reflective of the daily minimum temperature, not its maximum. *Id.* The water temperature data in
12 2019 shows the average monthly temperature was 21.8 degrees Celsius in July and 22.4 degrees
13 Celsius in August, which exceeded the maximum average monthly temperature interim limit of
14 21.6 degrees Celsius. *Id.*, p. 8. The maximum daily temperature was 23.8 degrees Celsius in July
15 and 24.1 degrees Celsius in August, which did not exceed the interim maximum daily
16 temperature limit of 24.8 degrees Celsius. *Id.*

17 In 2020, the average monthly temperature was 21.3 degrees Celsius in July, which did
18 not exceed the interim limit; however, the August monthly temperature of 22.2 degrees Celsius
19 did exceed the interim limit. The maximum daily temperature was 22.8 degrees Celsius in July
20 and 23.0 degrees Celsius in August. *Id.* In 2021, the average monthly temperature was 23.0

1 degrees Celsius in July and 22.8 degrees Celsius in August, both of which exceeded the interim
2 maximum average monthly limit.

3 Liberty Lake claims the daily maximum could be one to two degrees higher. In order to
4 demonstrate the effect of averaging the daily maximum temperature, Sattler recalculated the
5 historical monthly average temperatures adding 1.5 degrees Celsius to show temperature from
6 2019 to 2022. *Sattler Decl.*, ¶ 8, *Ex. A*, p. 9. This temperature difference indicates there are days
7 when the effluent temperature would exceed the monthly average interim temperature limits
8 during summer months. *Id.*

9 According to Sattler, Liberty Lake would need to seek additional funds from its customer
10 base in order to comply with the NPDES Permit requirements. *Sattler Decl.*, ¶ 4, 10. He asserts
11 the District has not had sufficient time to investigate available technologies to reduce
12 temperature. Last, noncompliance would cause enforcement issues, third party lawsuits, and
13 negatively affect Liberty Lake's reputation. *Id.*, ¶ 11.

14 Liberty Lake filed a notice of appeal on July 29, 2022, *See, Notice of Appeal in Board*
15 *file*. The hearing for this matter is set on October 10-12, 2023. *See, Scheduling Letter*
16 (September 20, 2022). On August 5, 2022, Liberty Lake moved to stay the effectiveness of the
17 Permit.³

18 III. ANALYSIS

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21 ³ In its *Reply*, Liberty Lake narrowed its motion to a partial stay of the interim water temperature limits, Condition S1.A.

1 **A. MOTION TO STAY STANDARD**

2 The Board is authorized to stay the effectiveness of an order until a decision is rendered
3 on the merits. RCW 43.21B.320(3); WAC 371-08-415. In order to obtain a stay under these
4 provisions, the party appealing an order must make a prima facie case for issuance of the stay by
5 showing either: (1) a likelihood of success on the merits of the appeal, or (2) irreparable harm.
6 WAC 371-08-415(4). If the appellant is able to make a prima facie case, the Board is required to
7 grant the stay unless the respondent shows either: (1) a substantial probability of success on the
8 merits, or (2) a likelihood of success on the merits accompanied with an overriding public
9 interest which justifies denial of the stay. *Id.*

10 A stay is akin to a preliminary injunction and is not an adjudication on the merits, but
11 rather a device for preserving the status quo and preventing irreparable loss of rights before the
12 judgment. *Coal. to Protect Puget Sound Habitat v. Dep't of Ecology*, PCHB No. 14-047, p. 6
13 (June 23, 2014). “An injunction is an extraordinary equitable remedy designed to prevent serious
14 harm.” *Kucera v. Dep't. of Transportation*, 140 Wn.2d 200, 995 P.2d 63 (2000) (quoting *Tyler*
15 *Pipe Indus. v. Dep't. of Revenue*, 96 Wn.2d 785, 638 P.2d 1213 (1982)).

16 Likelihood of success on the merits means one or both sides have presented the Board
17 with justiciable arguments for and against a particular proposition. Likelihood of success on the
18 merits is not a pure probability standard under RCW 43.21B.320 and WAC 371-08-415(4) where
19 the moving party is required to demonstrate it will conclusively win on the merits. Rather, the
20 party must demonstrate only that there are questions “so serious . . . as to make them fair ground
21 for litigation and thus more deliberative investigation.” *Airport Communities Coalition v. Dep't*

1 *Ecology*, PCHB No. 01-160, Order Granting Motion to Stay Effectiveness of Section 401
2 Certification, p. 3 (Dec. 17, 2001). Furthermore, evaluation of the likely outcome on the merits is
3 based on a sliding scale that balances the comparative injuries that the parties and non-parties
4 may suffer if a stay is granted or denied. For example, where the non-moving party will incur
5 little or no harm or injury if a stay is granted, then the moving party’s demonstration of
6 likelihood of success need not be as strong where the moving party would suffer great injury. *Id.*

7 Evaluating relative harm is consistent with the analogous inquiry undertaken when a
8 litigant seeks a preliminary injunction. *Ardagh Glass, Inc. v. Puget Sound Clean Air Agency*,
9 PCHB No. 15-120, Order Den. Mot. For Stay and Part. Summ. J., p. 7 (Apr. 27, 2016). A
10 reviewing body is not to adjudicate the ultimate rights in the case when considering a request for
11 a preliminary injunction. *Kucera*, 140 Wn.2d at 216 (2000) (quoting *Rabon v. City of Seattle*,
12 135 Wn.2d 278, 285, 957 P.2d 621 (1998)).

14 **B. LIBERTY LAKE’S PRIMA FACIE CASE**

15 Liberty Lake seeks a partial stay of the effectiveness of the interim temperature limits in
16 the Permit, which took effect on August 1, 2022. *See Notice of Appeal, Ex. B (Permit) at S.I.A.*
17 *Table 4*. Liberty Lake argues the interim temperature limits are based on a determination of
18 maximum temperatures. *Reply, p. 1*. Historically, effluent temperatures were measured in the
19 very early morning. *Sattler Decl.*, ¶ 7, *Ex. A, p. 8*. Therefore, argues Liberty Lake, the daily
20 recorded temperatures reflect the daily minimum temperature, not its maximum.

1 Due to water temperature impairment at the location of Liberty Lake's effluent discharge,
2 Ecology set a final temperature limit in the Permit at the water quality criterion of 20 degrees
3 Celsius, which does not apply until 2023. *Washington Decl.*, ¶ 7. Ecology set a compliance
4 schedule to enable Liberty Lake time to conduct studies and determine how it will meet the
5 standard. *Id.* Interim temperature limits were based on DMR data during the critical season, July
6 15-September 14 obtained from 2018-2021. *Id.*

7 Ecology used the standard statistical method for calculating water temperature limits and
8 contends Liberty Lake should be able to meet the interim limits 95 percent of the time. *Id.*, ¶ 9.
9 Ecology asserts Sattler's recalculation adding 1.5 degrees Celsius to the DMR data is not
10 acceptable because it may not be accurate. *Id.* Washington states she could recalculate the
11 interim limits; however, Liberty Lake would need two years of additional representative
12 monitoring data. *Id.*

13 Liberty Lake raises serious issues with respect to meeting the interim water temperature
14 limits. First, the DMR water temperature data from 2019 to 2022 shows that July and August
15 maximum average monthly temperatures exceeded or were close to exceeding the interim limit
16 of 21.6 degrees Celsius. The 2019 July and August average monthly temperatures exceeded the
17 limit. Also, the August 2020 average monthly temperature of 22.2 also exceeded the limit.
18 Again, in 2021, the average monthly temperatures in July and August, 23.0 and 22.8 degrees
19 respectively, exceeded the interim limit.

20 Furthermore, the water sampling undertaken by Liberty Lake pursuant to its prior permit
21 occurred in the early morning when temperatures are close to the minimum temperature. The

1 new permit requires that effluent temperatures are to be calculated as an average of the daily
2 *maximum* temperatures. *Sattler Decl.*, ¶ 7. Liberty Lake asserts is it not uncommon to see a 1 to
3 2-degree Celsius difference between the daily minimum and maximum temperatures.

4 Liberty Lake added 1.5 degrees Celsius to the 2019 – 2022 data in order to show the
5 effect of averaging the daily maximum values. *Sattler Decl.*, ¶ 8, *Ex. A* (“*Plant Effluent Data*
6 *temp corrected with 1.5 degrees Celsius added*”), p. 9. Liberty Lake argues that by adding 1.5
7 degrees, the monthly average temperatures exceed the permit’s interim limit of 21.6 degrees
8 Celsius in nearly all the summer months. *Id.* The method of adding 1.5 degrees to the DMR data
9 is persuasive given the fact that it was collected in the early morning when summer water
10 temperature is colder than the afternoon temperature.

11 In addition, Liberty Lake provided Spokane River water temperature data upstream and
12 downstream from the facility. *Sattler Decl.*, ¶ 9, *Ex. A*, pp. 10-18. The maximum average
13 monthly temperature upstream and downstream in July 2021 was 27.4 degrees Celsius, which
14 exceeds the interim limit of 21.6 degrees Celsius. *Id.*, p. 10. In August 2021, the maximum
15 average monthly temperature was 24.8 degrees Celsius upstream and 24.1 degrees Celsius
16 downstream, also exceeding the interim limit. *Id.*

17 The Board concludes Liberty Lake has shown a likelihood of success on the merits for a
18 partial stay given the unrefuted DMR data of the summer water temperatures and the 2021
19 Spokane River’s natural temperatures near the facility. Liberty Lake thus has shown there are
20 serious questions and justiciable arguments about how it could meet the Permit interim
21 maximum average monthly temperature limit of 21.6 degrees Celsius.

1 **C. Ecology’s Likelihood of Success and Overriding Public Interest**

2 Because Liberty Lake has made a prima facie case for a partial stay, Ecology must
3 demonstrate either: a) a substantial probability of success on the merits; or b) likelihood of
4 success and an overriding public interest, justifying a denial of the stay. WAC 371-08-415. The
5 Board finds Ecology has not presented sufficient evidence to challenge Liberty Lake’s prima
6 facie case.

7 Ecology argues: 1) Liberty Lake should be able to meet the interim limits 95 percent of
8 the time based on its DMR data; 2) Liberty Lake did not state it could not meet the interim limit
9 in its Comment Letter; 3) the Board cannot set a new limit or revive an expired limit from the
10 previous permit; 4) discharging without an effluent limit for temperature into a water body that is
11 impaired for temperature is not in the public interest; and 5) Liberty Lake will not suffer
12 irreparable harm if the interim limits are retained. *Response, pp. 10-11.*

13 First, because Liberty Lake has made a prima facie case of a likelihood of success on the
14 merits, it need not show irreparable harm.⁴

15 Ecology asserts it was reasonable and appropriate to rely on the DMR data in setting the
16 interim water temperature limits, and that Liberty Lake may have violated its prior permit if the
17 data reflected only early morning temperatures and were not representative. *Washington Decl.*, ¶
18 8. The Board is not persuaded by Ecology’s argument. Sattler stated that under the prior permit,
19 effluent temperatures were required to be taken once per week with no specified time of day
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⁴ In any event, the Board does not find Liberty Lake has demonstrated irreparable harm if a stay is not granted.

1 requirement. *Sattler Decl.*, ¶ 7. Ecology does not present any contrary evidence that this was in
2 violation of the prior permit. Furthermore, the fact that Liberty Lake failed to raise this issue in
3 its Comment Letter is not a sufficient basis to bar consideration of the issue at a later time.
4 Liberty Lake also raised other concerns in the Comment Letter about the natural conditions
5 affecting water temperatures and suggested the proposed performance-based interim limits
6 should not apply end-of-pipe, year-round. Ecology does not offer any evidence to refute Liberty
7 Lake's evidence that natural water temperatures near the facility are higher than the interim
8 limits.

9 In addition, the comparable harm to Liberty Lake versus Ecology weighs in favor of
10 granting a partial stay. Liberty Lake asserts it will need to direct substantial resources to research
11 available technologies and needs time to do so. *Motion*, p. 8. Ecology has not shown that it will
12 incur harm if a stay is granted. Ecology also asserts it is not in the public interest for Liberty
13 Lake to discharge without a permit. *Response*, p. 5, 11. Ecology has not presented evidence of an
14 overriding public interest and a substantial likelihood of success on the merits given that the
15 natural water temperature upstream and downstream of the facility is above the interim
16 temperature limits. Furthermore, the Board is not setting a new temperature limit, and is only
17 addressing the merits of the stay motion. *See South Bend Products, LLC v. Dep't of Ecology*,
18 PCHB 21-038 (partial stay granted where Board found little immediate harm to water quality
19 from staying Permit condition until a judgment on the merits).

20 The Board concludes Liberty Lake has shown a likelihood of success on the merits of its
21 appeal by presenting unrefuted evidence that the interim temperature limit of the Permit may not

1 be reasonable, and that it will suffer relatively greater injury if a stay is not granted compared
2 with Ecology's injury if a stay is granted. Ecology has not demonstrated either: a) a substantial
3 probability of success on the merits; or, b) a likelihood of success and an overriding public
4 interest, justifying a denial of the stay.

5 **IV. ORDER**

6 For the reasons stated above, Liberty Lake's Motion for (Partial) Stay is **GRANTED**.

7 SO ORDERED this 13th day of October 2022.

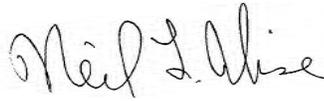
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10 **POLLUTION CONTROL HEARINGS BOARD**

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12 _____
MICHELLE GONZALEZ, Presiding

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15 _____
CAROLINA SUN-WIDROW, Board Chair

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18 _____
NEIL L. WISE, Board Member