POLLUTION CONTROL HEARINGS BOARD

FOR THE STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR, GRAYS HARBOR AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, TWIN HARBORS WATERKEEPER, and WILD ORCA, Appellants, v. OLYMPIC REGION CLEAN AIR AGENCY, CITY OF HOQUIAM, and PACIFIC NORTHWEST RENEWABLE ENERGY, LLC., Respondents.	PCHB NO. 24-037 APPELLANTS' MOTION FOR STAY OF PERMIT ORAL ARGUMENT REQUESTED

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Seattle, WA 98104
(206) 343-7340

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INTRODUCTION

Pursuant to RCW 43.21B.110, RCW 43.21C.075, and WAC 371-08-415, appellants Friends of Grays Harbor, Grays Harbor Audubon Society, Natural Resources Defense Council, Twin Harbors Waterkeeper, and Wild Orca (collectively "Friends") move this Board to stay the effectiveness of the Order of Approval for Notice of Construction Application 23NOC1606 ("Permit"), issued by Respondent Olympic Region Clean Air Agency ("ORCAA") on May 14, 2024. This motion is supported by exhibits attached to the Declaration of Ashley Bennett, filed concurrently.[1]

The Permit authorizes construction of the Pacific Northwest Renewable Energy ("PNWRE") industrial wood pellet plant, a facility proposed in Hoquiam, Washington to produce, store, and export up to 440,800 tons of dried wood pellets per year. Harmful air pollutants linked to serious health issues will be emitted at every stage of PNWRE's wood pellet production process: logging trees, transporting the wood by trucks to the facility, converting the wood into fuel pellets, shipping the pellets to Asia and Europe.

This litany of harmful steps does not include an overarching flaw in this process—the end goal of burning the pellets in former coal-fired power plants to create electricity. Through an admitted carbon emission accounting loophole and a marketing campaign for wood burning as a renewable energy, industrial wood pellet plants feed a global delusion of addressing the climate change crisis. To the contrary, burning wood to create heat or electricity releases more greenhouse gases into the atmosphere than burning coal. And while trees can be replanted and

[1] All exhibits attached to the Bennett Declaration are referenced by exhibit number, with a shortened name and page numbers referring to their internal pagination.

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regrown, older trees store the most carbon, and the time scale for regrowing forests is simply too long to make up for the carbon released by burning.

PNWRE is the first industrial-scale pellet plant to receive an air permit in Washington, but it will not be the last to try. The decisions reached over PNWRE's process and permit will set precedents for other industrial wood pellet plants along the west coast. The track record of the industry in the southeastern United States—where the wood pellet industry has a decade-long history of violating permits and harming people's health, communities, and environment—is directly relevant to the proposals here, and one Washington should avoid.

A stay is warranted because Friends is likely to prevail on the merits of its claim that the pre-construction air permit was issued in violation of state and federal clean air laws. A stay is necessary because construction of the project could commence at any time and potentially be completed before this case is resolved. The challenged permit is a *pre-construction* permit, construction cannot begin until one is issued, and if its analysis is invalid, as Friends will show, those errors should be remedied before the proposed project is already built. After-the-fact Clean Air Act review of a completed project limits the choice of alternatives and risks exposing the community to harmful emissions during this appeal. Accordingly, a stay of the permit while this appeal proceeds is warranted.

BACKGROUND

I. INDUSTRIAL WOOD PELLET MANUFACTURING RELEASES HARMFUL AIR POLLUTION.

While fireplaces and wood-burning stoves may evoke cozy feelings in many people, the industrial-scale production of wood pellets endangers public health, wildlife, and the environment. At every stage of the wood pellet production process, harmful air pollutants are released into the environment. Trucks transport wood from unknown sources to the facility

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where it will be chopped up into chips and blasted with heat from an industrial furnace in a large rotary drum dryer to remove moisture.[2] The furnace and drying processes release heavy amounts of nitrogen oxides (NOx), particulate matter ("PM"), carbon dioxide ("CO_2"), volatile organic compounds ("VOCs"), and hazardous air pollutants ("HAPs").[3] After the wood dries, hammermills crush the chips into finer pieces.[4] The finer pieces are then fed into the pellet mill, where they will be extruded under high pressure and temperature to soften the lignin in the wood, which binds the material together to form the pellets.[5] These milling and pelletizing processes emit significant amounts of VOCs, HAPs, and PM.[6] Harmful air pollutants are also released from unprocessed wood stockpiled outside.[7] and the wood pellets stored in silos before shipping.[8]

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[2] *See e.g*. Exh. 1, Port of Grays Harbor Wood Pellet Plant, Notice of Construction Permit Application ("PNWRE Permit Application") at 11–14.; Exh. 2, New Source Final Determination to Approve, Wood Pellet Manufacturing Facility, Pacific Northwest Renewable Energy, LLC, No. 23NOC1606 ("ORCAA Final Determination") at 8–16.

[3] Exh. 3, Environmental Integrity Project, *Dirty Deception: How the Wood Biomass Industry Skirts the Clean Air Act* (2017).

[4] *Id.*; Exh. 1, PNWRE Permit Application at 3–6.

[5] *Id*.

[6] Exh. 3, EIP Report at 5–7.

[7] British Columbia, Ministry of the Environment, Air Emissions Fact Sheet: Wood Pellet Manufacturing Facilities (July 2011), www2.gov.bc.ca/assets/gov/environment/waste-management/industrial-waste/industrial-waste/pulp-paper-wood/woodpelletmanfacfs.pdf. The inhalation of dust particles can irritate the eyes, nose, and throat; cause respiratory distress, including coughing, difficulty breathing, and chest tightness; increase the severity of bronchitis, asthma, and emphysema; cause heart attacks and aggravate heart disease; and lead to premature death in individuals with serious lung or heart disease. New Hampshire Department of Environmental Services, Environmental Fact Sheet, Fugitive Dust, www.des.nh.gov/land/roads/fugitive-dust.

[8] Urban R.A. Svedberg, *et al.*, *Emissions of Hexanal and Carbon Monoxide from Storage of Wood Pellets, a Potential Occupational and Domestic Health Hazard*, 48 Ann. Occup. Hyg., No. 4, 339 (2004), https://doi.org/10.1093/annhyg/meh015; Lydia Soto-Garcia, *et al.*, *Exposures to Carbon Monoxide from Off-Gassing of Bulk Stored Wood Pellets*, Center for Air Resources Engineering and Science, Clarkson University (2014),

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For years, industrial-scale wood pellet manufacturing facilities have operated in the Southeastern part of the United States and have wreaked havoc on neighboring communities with their pollution. People living near these facilities are subjected to a near-constant stream of wood dust, VOCs, and other air pollutants including HAPs.[9] All of these pollutants can lead to asthma and other significant respiratory issues. Preliminary studies indicate that areas hosting industrial-scale wood pellet manufacturers experience more air and noise than areas without them.[10] The harm that these facilities have caused to neighboring communities has been so great that it has prompted the United States Environmental Protection Agency ("EPA") to launch an investigation into the adverse impacts of wood pellet production on air, water, and community

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https://pubs.acs.org/doi/10.1021/ef5021186; Lydia Soto-Garcia, et. al., *Measurement and Modeling of Carbon Monoxide Emission Rates from Multiple Wood Pellet Types*, Energy & Fuels, (May 19, 2015), https://pubs.acs.org/doi/full/10.1021/acs.energyfuels.5b00347; Jaya Shankar Tumuluru, *et al., Analysis on Storage Off-Gas Emissions From Woody, Herbaceous, and Torrefied Biomass*, 8 Energies 1745, 1751 (Mar. 2, 2015), www.researchgate.net/publication/273319969_Analysis_on_Storage_Off-Gas_Emissions_from_Woody_Herbaceous_and_Torrefied_Biomass; New York State Department of Health, Carbon Monoxide (CO) Hazards from Wood Pellet Storage, www.health.ny.gov/environmental/emergency/weather/carbon_monoxide/docs/pellets.pdf.

[9] James Pollard, Julie Watson, and Stephen Smith, *Wood pellets production boomed to feed EU demand. It's come at a cost for Black people in the South* (Jul. 26, 2024), https://apnews.com/article/wood-pellets-biomass-climate-environmental-justice-biden-cd9a3de5f55d5acf495986fed8ddc778; Majlie de Puy Kamp, *How Marginalized Communities in the South are Paying the Price for "Green Energy" in Europe* (Jul. 9, 2021), https://www.cnn.com/interactive/2021/07/ us/american-south-biomass-energy-invs/; Alexander C. Kaufman, *A 'Green' Energy Project Leaves A Mississippi Town Gasping For Air* (Dec. 18, 2021), www.huffpost.com/entry/biomass-energy-power-plants_n_61bcb6cae4b0a3722477d16a.

[10] Brown University School of Public Health and Tougaloo College, *Pellet Pollution: Story of Gloster, MS* (May 2024); Corrie Pikul, *Brown University and Tougaloo College Students Investigate Public Health Challenges In Rural Areas*, THE JACKSON ADVOCATE (May 6, 2024), https://jacksonadvocateonline.com/brown-university-and-tougaloo-college-students-investigate-public-health-challenges-in-rural-areas/; Carl Dimitri St., *Looming Health Crisis Shadowing South's Wood Pellet Boom*, THE JACKSON ADVOCATE (Apr. 29, 2024), https://jacksonadvocateonline.com/looming-health-crisis-shadowing-souths-wood-pellet-boom/.

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health in the Southeast.[11] Wood pellet manufacturers in the South also have a documented history of repeated emissions' violations that have exposed neighboring communities to alarming levels of air pollution, further exacerbating health risks.[12]

Pictured below is a wood pellet plant operating in Ahoskie, North Carolina that produces 410,000 tons of pellets for export to Europe.[13]

Closer to home, industrial wood pellet plants in British Columbia, Canada have repeated this pattern of violations, with facilities to Washington's north violating environmental laws 189

[11] U.S. EPA, *U.S. EPA Wood Pellet Research Project* (Apr. 30, 2024), https://www.epa.gov/risk/us-epa-wood-pellet-research-project.

[12] Southern Environmental Law Center, *Pellet Mill Violations in the South* (Oct. 2023), https://www.southernenvironment.org/wp-content/uploads/2023/10/Pellet-Mill-Violations-in-the-South.pdf ("*Pellet Mill Violations in the South*"); *see also* Jack Brook, *British energy giant reports violating toxic pollutant limits at Louisiana wood pellet facilities*, THE ASSOCIATED PRESS (Aug. 12, 2024), https://apnews.com/article/louisiana-drax-air-pollution-524bba156b9a4e5ffa55d8f5e9e1f9a0; Majlie de Puy Kamp, *supra* note 9; Alexander C. Kaufman, *supra* note 9; James Pollard et al, *supra* note 9.

[13] *See* Elizabeth Ouzts, *In North Carolina, Wood Pellet Foes See Opportunity In Cooper's Climate Order*, ENERGY NEWS NETWORK (Jan. 2, 2019), https://energynews.us/2019/01/02/in-north-carolina-wood-pellet-foes-see-opportunity-in-coopers-climate-order/; Enviva, *Production Plant Enviva Ahoskie*, https://www.envivabiomass.com/facility/ahoskie-nc/.

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times since 2012 —181 of those violations being air pollution violations.[14] In several cases, wood pellet plants were found to be emitting more than double the legal limits for particulate matter pollution.[15]

II. PNWRE'S PROPOSAL AND AIR PERMIT APPLICATION

PNWRE proposes to build and operate an industrial-scale, export-focused wood pellet manufacturing plant in Hoquiam, Washington at 411 Moon Island Road.[16] This industrial wood pellet plant will be the first of its kind in Washington, but PNWRE is not new to wood pellet projects. Both PNWRE and its leadership stem from Mohegan Renewable Energy,[17] an established company that operated plants across the country including a wood pellet plant in Crossville, Alabama, that has been cited for numerous air permit and worker safety violations.[18]

In Hoquiam, PNWRE plans to produce, store, and export to Asia and Europe up to 440,800 tons of dried wood pellets per year, operating seven days a week, 24 hours a day for at least a total of 8,000 hours per year.[19] The proposed plant will stretch across a 60-acre parcel of land that is just over a mile from Emerson Elementary School, Hoquiam Middle School, and Hoquiam High School. It will neighbor residential areas and is adjacent to Grays Harbor

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[14] Jaysim Hanspal and Bertie Harrison-Broninski, *Drax's Pellet Mills Violated Environmental Law 189 Times In Canada*, LAND & CLIMATE REVIEW (May 14, 2024), https://www.landclimate.org/drax-mills/.

[15] *Id*.

[16] Exh. 2, ORCAA Final Determination at 1.

[17] *See* Exh. 4, PNWRE, Washington Dep't of Commerce, Evergreen Manufacturing Growth Grant Application at 2.

[18] Mohegan Renewable Energy, Facilities https://web.archive.org/web/20211024114447/https://www.moheganrenewables.com/facilities/; Exh. 5, Alabama Dep't of Environmental Management, Consent Order No. 20-027-CAP; *see also Pellet Mill Violations in the South*, *supra* note 12.

[19] Exh. 1, PNWRE Permit Application at 3.

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National Wildlife Refuge and local parks. PNWRE's proposed plant will be on the banks of Grays Harbor, a thriving estuary and harbor that is vital stop in North American shorebird migration and important habitat for whales, salmon, and other aquatic life.

PNWRE's proposal to operate its industrial-scale project includes using three truck tippers for delivery of harvested wood and wood byproduct for hog fuel,[20] a chips cleaning line to remove impurities and sort chipped wood by size, two wet hammermills to pound the wood into smaller pieces, one hog fuel furnace and rotary drum dryer to dry the chipped wood pieces, four dry hammer mills to further crush the wood pieces into fine dust, 12 pellet mills and associated pellet coolers to press the wood dust into pellets, five wood pellet storage silos, and a covered conveyor system to deliver wood pellets to a ship loading facility.[21] PNWRE will store all unprocessed wood and logs in large, uncovered piles outside on the property.[22]

Because the Project would add new emissions of air pollutants to the area, state and federal law, as well as the regional air agency's regulations, required PNWRE to get a permit from the Olympic Region Clean Air Agency before beginning construction of the facility.[23]

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[20] Hog fuel means any type of wood byproduct or waste that can be burned for fuel. Exh. 2, ORCAA Final Determination at 7.

[21] Exh. 1, PNWRE Permit Application at 8; *see also* Exh. 2, ORCAA Final Determination at 5–13.

[22] Exh. 1, PNWRE Permit Application at 1, 3–6; Exh. 2, ORCAA Final Determination at 6–7.

[23] *See* 42 U.S.C. § 7410(a)(2)(C) and 40 C.F.R. §§ 51.160–51.164; Washington Administrative Code ("WAC") 173-400-110 (1), (2); ORCAA Rule 6.1. PNWRE also submitted to the City of Hoquiam its State Environmental Policy Act ("SEPA") Checklist on July 20, 2023. *See* ORCAA, Appendix A NOC Application Forms and SEPA Documentation (Jul. 20, 2023), https://www.orcaa.org/wp-content/uploads/23NOC1606-Appx_A_NOC-Forms-and-SEPA.pdf. Less than a week later, the City of Hoquiam issued a Determination of Nonsignificance for the project, opening a 14-day comment period. City of Hoquiam – Notice of Application Zoning Conditional Use Permit and SEPA Threshold Determination of Non-Significance ("DNS"); Case #SEPA 2023-02 (Jul. 24, 2023). Neither the SEPA Checklist nor the DNS mention or evaluate emissions from operation of the pellet plant.

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PNWRE submitted an application for a Notice of Construction permit to ORCAA on July 24, 2023.[24] The company submitted two addendums to its application, on August 11, 2023, and September 6, 2023, before ORCAA deemed its application complete on September 11, 2023.[25] PNWRE submitted an additional addendum on October 25, 2023.[26] The application, even with all addendums, omitted entire emission sources and used an emission factor for an entirely different industry that EPA expressly warned against using.

PNWRE projected that its wood pellet plant would emit no more than 1.32 tons of HAPs per year.[27] To reach this conclusion, PNWRE submitted information to ORCAA that the pelletizers and pellet coolers would emit *zero* HAP emissions (Emission Source ID EP-08).[28] The company estimated that the Project's storage piles (Emission Source ID SP-01-03), dry product intermediate storage (Emission Source ID EP-03 & 04), and pellet storage silos (Emission Source ID EP-10-15) would also emit *zero* HAPs.[29] PNWRE failed to indicate whether the wood-fired furnace would emit hydrochloric acid, which is a listed HAP.[30]

PNWRE calculated emissions for the furnace, dryer, and dry hammermill using the U.S. Environmental Protection Agency's AP-42 emission factors for particleboard manufacturing, which is a different industry altogether.[31] (AP-42 Chapter 10.6.2, Table 10.6.2-3). For the

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[24] Exh. 1, PNWRE Permit Application at 2.

[25] Exh. 2, ORCAA Final Determination at 3.

[26] *Id*.

[27] Exh. 1, PNWRE Permit Application at 7.

[28] Exh, 6, App. C to PNWRE Permit Application, Emissions Calculations, at 19, Table C-9c ("PNWRE Emissions Calculations").

[29] *Id.* at 4, Table C-2, p. 15 Table C-8b, p. 16 Table C-8c.

[30] *Id.* at 15, Table C-8b.

[31] *Id.* at 16, Table C-8c; EPA, AP-42: Compilation of Air Emissions Factors from Stationary Sources ("AP-42"), Chapter 10: Wood Products Industry, 10.6.2, Table 10.6.2-3,

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furnace and dryer, PNWRE specifically relied on AP-42 particleboard emission factors for the source type labeled "rotary dryer, direct wood-fired, softwood" under the source category for dryers processing previously dried (as opposed to wet) wood.[32] The AP-42 factors that PNWRE referred to for the Project's dry hammermill emissions were derived from one test that was conducted in 1997.[33]

III. ORCAA'S REVIEW AND APPROVAL OF PNWRE'S PROPOSED WOOD PELLET PLANT

Relying on emissions estimates from PNWRE, ORCAA drafted a preliminary determination to approve PNWRE's application on November 30, 2023 and released it to the public for comment on December 8, 2023.[34] ORCAA received a chorus of public comments objecting to approval of the Project.[35] Along with concerns about the potential adverse effects from the Project on public health and the environment, commenters flagged several critical flaws in PNWRE's emissions numbers and ORCAA's reliance on those numbers.[36] These flaws include, among other things, PNWRE and ORCAA's:

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https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-fifth-edition-volume-i-chapter-10-wood-products-0.

[32] Exh. 6, PNWRE Emissions Calculations at 15, Table C-8b.

[33] *Id.* at 19, Table C-9c; AP-42 Chapter 10, 10.6.2.

[34] ORCAA, New Source Preliminary Determination to Approve: Wood Pellet Manufacturing Facility, Pacific Northwest Renewable Energy LLC, 23NOC1606 (Nov. 30, 2023), https://www.orcaa.org/wp-content/uploads/PNWRE_PrelimDeter_23NOC1606-Final.pdf; ORCAA, Notice of Construction: Pacific Northwest Renewable Energy (Dec. 8, 2023), https://www.orcaa.org/notices/notice-of-construction-pacific-northwest-renewable-energy-2/.

[35] Public Comments to ORCAA on New Source Preliminary Determination to Approve: Wood Pellet Manufacturing Facility, Pacific Northwest Renewable Energy LLC, 23NOC1606, https://www.orcaa.org/final-determination-issued-pnwre-application.

[36] *See e.g.*, *generally*, Exh. 7, Comment Letter from National Parks Conservation Association, to Lauren Whybrew, ORCAA (" NPCA Comments"); Exh. 8, Letter from Patrick J. Anderson, Southern Environmental Center, to Lauren Whybrew, ORCAA ("SELC Comments"); Exh. 9, Letter from Friends of Gray Harbor et. al., to Lauren Whybrew, ORCAA ("Friends Comments").

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- reliance on AP-42 emissions factors despite EPA's explicit warnings not to use them when there are more representative emissions values available;[37]
- use of AP-42 emission factors for a different and non-analogous industry to calculate the Project's HAPs emissions; and [38]
- failure to account for HAPs emissions from various parts of the proposed plant, including the hammermills, pelletizers, and pellet coolers.[39]

The deficiencies in PNWRE's emissions estimates were the root cause of three major legal violations highlighted in many of the comments. First, ORCAA based its air emissions calculations on flawed emissions data.[40] Second, the air toxic modeling PNWRE completed and ORCAA relied on was invalid because it was based on faulty emissions calculations.[41] Third, the agency failed to conduct a required Maximum Achievable Control Technology ("MACT") analysis for the project, incorrectly classifying it as a minor rather than a major source of HAPs.[42]

Despite widespread concerns over the accuracy of PNWRE's emissions estimates and ORCAA's assumptions, the agency issued a Final Determination and Order of Approval for the Project on May 14, 2024, along with responses to comments.[43] ORCAA opted to accept

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[37] Exh. 7, NPCA Comments at 17-18; Exh. 8, SELC Comments at 1-2; *see also* Exh. 10, U.S. EPA, Office of Compliance and Assurance, EPA Reminder About Inappropriate Use of AP-42 Emission Factors ("EPA AP-42 Enforcement Alert") at 1.

[38] Exh. 7, NPCA Comments at 17; Exh. 8, SELC Comments at 1.

[39] Exh. 7, NPCA Comments at 16; Exh, 8, SELC Comments at 2.

[40] Exh. 7, NPCA Comments at 15-23; Exh. 8, SELC Comments at 1-2; Exh. 9, Friends Comments at 1.

[41] Exh. 7, NPCA Comments at 29-30.

[42] Exh. 7, NPCA Comments at 17; Exh. 8, SELC Comments at 2; Exh. 9, Friends Comments at 1.

[43] *See* Exh. 2, ORCAA Final Determination; Exh. 11, ORCAA, Order of Approval, Notice of Construction 23NOC1606, *also available at* www.orcaa.org/wp-content/uploads/23NOC1606-ApprovalOrder.pdf; Exh. 12, ORCAA, ORCAA Responses, Pacific Northwest Renewable

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PNWRE's use of AP-42 emission factors for particleboard manufacturers, a completely different industry, rather than use emissions data from other similar-sized wood pellet facilities with similar controls as the ones PNWRE is proposing.[44] The agency waived off concerns about the use of AP-42 emissions factors, noting that EPA did not say that they could never be used, despite EPA's explicit warnings that AP-42 emissions factors should not be used for permitting decisions—especially when more representative emissions values are available.[45] ORCAA ignored several emissions tests and permit applications from other similar-sized wood pellet facilities that were provided to the agency during the comment period.[46]

ORCAA also declined to use emissions data from existing wood pellet plants because of the difference in the amount of pollutants emitted by tree species in the Pacific Northwest and the Southeast.[47] Yet even if regional tree species made a significant difference in pollution emissions, ORCAA had received information from commenters that a similar-sized plant with similar proposed controls using similar tree species, to be located in Longview, Washington,

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Energy, 23NOC1606 ("ORCAA Comment Responses") *also available at*, https://www.orcaa.org/wp-content/uploads/Official-Responses-to-Comments-FINAL.pdf.

[44] Exh. 12, ORCAA Comment Responses at 1, 38.

[45] Exh. 12, ORCAA Comment Responses at 1, 38; Exh. 10, EPA Ap-42 Enforcement Alert at 1; AP-42, Introduction at 2, https://www3.epa.gov/ttnchie1/ap42/c00s00.pdf.

[46] *See* Exh. 13, Enviva Wiggins Stack Test Attached to NPCA Comments ("Wiggins Stack Test"); Exh. 14, Enviva Amory Stack Test Attached to NPCA Comments ("Amory Stack Test"); Exh. 15, Drax Amite Application Attached to SELC Comments ("Amite Application"); Exh. 16, Enviva Waycross Application Attached to SELC Comments ("Waycross Application").

[47] Exh. 12, ORCAA Response to Comments at 1, 38. Relatedly, PNWRE also incorrectly claimed that the emissions data from other fuel pellet manufacturers was not comparable because those facilities did not use the same pollution controls that PNWRE proposed to employ at its facility. *See* Exh. 17, E-mail from Brandon Henderson, Director of Engineering, PNWRE to Lauren Whybrew, ORCAA Re: ESA Responses.

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revised its air permit application to reflect approximately 49 tons of HAPs annually, starkly contrasting with PNWRE's estimate of just 1.32 tons per year.[48]

In response to concerns about emissions estimates, ORCAA stated that the agency would rely on post-construction/operation testing and monitoring to remedy any issues related to potential excess emissions from the industrial wood pellet plant.[49] ORCAA took this approach even though the agency had received emissions testing, applications, and citations of air quality violations from other plants of similar size with similar controls that showed those plants were emitting significantly more HAPs than what PNWRE had estimated.[50]

STANDARD FOR STAY

Under Washington law, a stay is warranted where a movant makes out a "prima facie case" for a stay by demonstrating either "a likelihood of success on the merits of the appeal" or irreparable harm.[51] Once either showing is made, the Board "shall" grant the stay "unless the issuing agency demonstrates "a substantial probability of success on the merits" or "likelihood of success on the merits and an overriding public interest which justifies denial of the stay."[52] In other words, once a prima facie showing has been made, the burden shifts to the respondent to

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[48] Exh. 7, NPCA Comments at 18; Exh. 8, SELC Comments at 1–2; *see also* Exh. 18, Letter from Jennifer Pohlman, Senior Consultant, Trinity to Danny Phipps, Air Quality Engineer 1, Southwest Clean Air Agency, RE: Completeness Determination for ADP Application CO-1057 ("Drax Revised Application") at 3.

[49] Exh. 12, ORCAA Comment Responses at 37, 39.

[50] Exh. 7, NPCA Comments at 16; Exh. 8, SELC Comments at 1–2; *see* Exh. 13, Wiggins Stack Test; Exh. 14, Amory Stack Test.

[51] RCW 43.21B.320(3) (emphasis added).

[52] *Id*.

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make this heightened showing.[53] This Board elaborated on the "likelihood of success" standard in *Airport Communities Coalition v. Ecology*:

> Likelihood of success on the merits is not a pure probability standard …. This standard does not require the moving party to demonstrate it will conclusively win on the merits, but only that there are questions "so serious as to make them fair ground for litigation and thus more deliberative investigation."[54]

The Board employs a "sliding scale" under which the strength of a party's "likelihood of success" is balanced with the harm to the parties from the presence or absence of a stay.[55] With respect to irreparable harm, the Board considers the possibility that implementation of the permit would cause any kind of environmental damage while the case proceeds.[56]

ARGUMENT

Although appellants have raised several challenges to the air permit ORCAA issued to PNWRE, as well as violations of the State Environmental Policy Act ("SEPA") and the Ocean Resources Management Act by ORCAA and the City of Hoquiam, this motion to stay the Notice of Construction permit focuses on two claims. First, whether on its own or in reliance on the data supplied by PNWRE, ORCAA failed to fulfill its Clean Air Act obligations by issuing a pre-construction air permit based on invalid emissions data and assumptions. Second, because of these fundamental errors in calculating emissions from the project, ORCAA incorrectly classified PNWRE's proposed plant as a minor source of HAPs instead of a major source of HAPs—a classification that requires more stringent Clean Air Act controls for this project.

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[53] *Cedar Grove Composting v. Puget Sound Clean Air Agency*, 2011 WL 2279107, at *5 (PCHB June 3, 2011).

[54] *Airport Cmtys. Coal. v. State of Wash.,* 2001 WL 1638639, at *2 (PCHB Dec. 17, 2001).

[55] *Id*.

[56] *See, e.g., Clough v. State of Wash*., 2012 WL 5285004, at *5-6 (PCHB Aug. 31, 2012) (issuing stay because of proximity of construction to undelineated wetland).

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A stay is warranted here because Friends are likely to prevail on these claims that ORCAA's issuance of a pre-construction Notice of Construction permit to PNWRE was arbitrary, capricious, and violates Clean Air Act requirements.

I. THE CLEAN AIR ACT REQUIRES CAREFUL ANALYSIS OF A PROPOSED PROJECT'S AIR POLLUTION BEFORE CONSTRUCTION.

One of the fundamental purposes of the Clean Air Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C § 7401(b)(1). Crucial to fulfilling this purpose is the Clean Air Act's preconstruction permitting program known as New Source Review, which requires a proponent of a new, air polluting industrial facility to obtain a permit before starting construction.[57] The preconstruction permit sets emissions limits and operating conditions to ensure that the new polluting, industrial facility complies with all applicable air quality requirements.[58] These permits are issued by the states, regional, or local authorities through state implementation plans ("SIPs").[59]

[57] Preconstruction permits are mandatory for both minor and major sources of pollution, though the permitting processes differ for each type of source. 42 U.S.C. § 7410(a)(2)(C) and 40 C.F.R. §§ 51.160–51.164 (minor sources); *contra* 42 U.S.C. §§ 7470–7503 and 40 C.F.R. §§ 51.165–51.166, pt. 51 appendix S (major sources); s*ee also* WAC 173-400-710 to 173-400-740. Major sources are defined as sources with the potential to emit a regulated pollutant over a certain annual threshold and have more stringent permitting process.

[58] *See e.g.*, 42 U.S.C. § 7410(a)(2)(C) and 40 C.F.R. §§ 51.160–51.164; WAC 173-400-111(3); ORCAA Rule 6.1.4.

[59] A State Implementation Plan ("SIP") is a comprehensive set of regulations and documents developed by a state, territory, or local air district. Its purpose is to implement, maintain, and enforce the National Ambient Air Quality Standards ("NAAQS") and to meet other requirements of the federal Clean Air Act. EPA is responsible for reviewing and approving all SIPs. ORCAA's SIP was last approved in 1995. *See* 40 C.F.R. § 52.2470(c) Table 6 - Additional Regulations Approved for the Olympic Region Clean Air Agency (ORCAA) Jurisdiction, https://www.epa.gov/air-quality-implementation-plans/washington-sip-epa-approved-regulations-table-6-olympic-region#documents.

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In the State of Washington, the New Source Review process is triggered when a proponent of a new polluting facility submits a Notice of Construction application to the permitting authority for approval. [60] The permitting authority for Grays Harbor County is the Olympic Region Clean Air Agency ("ORCAA").[61] ORCAA can only approve a Notice of Construction application after the agency analyzes air quality impacts from the proposed industrial facility and ensures that it complies with all applicable federal Clean Air Act, state, and ORCAA air quality requirements.[62] ORCAA uses a source's potential-to-emit as a mechanism to determine applicable air quality requirements and evaluate the potential impacts of the source's emissions on ambient air quality.[63] Potential-to-emit refers to the maximum amount of pollutants that a source can emit based on its physical design and operational limits.[64]

The Clean Air Act gives pollutants classified as being hazardous to human health (even in very small concentrations) special consideration.[65] "The listed air toxics include known carcinogens as well as substances causing serious non-cancer health effects to various bodily organs and systems—including nerves, heart, lungs, liver, skin, and reproductive systems—and to fetal development. Many of these toxics affect people's health through multiple pathways

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[60] *See* WAC 173-400-110 (1), (2); ORCAA Rule 6.1.

[61] *See* 40 C.F.R. § 52.2470(c) Table 6 - Additional Regulations Approved for the Olympic Region Clean Air Agency (ORCAA) Jurisdiction, https://www.epa.gov/air-quality-implementation-plans/washington-sip-epa-approved-regulations-table-6-olympic-region#documents.

[62] ORCAA Rule 6.1.4; WAC 173-400-111(3).

[63] ORCAA, Air Pollutant Emissions Assessment – Form 4 Facility Emissions Summary at 2, https://www.orcaa.org/wp-content/uploads/Form-4-Facility-Emissions-Summary.pdf; ORCAA, Potential to Emit Fact Sheet, https://www.orcaa.org/wp-content/uploads/PTE-Fact-Sheet_2023.pdf.

[64] 40 C.F.R. § 52.21(b)(4).

[65] *See generally* 42 U.S.C. § 7412.

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(water, soil, food, air), are persistent (meaning that, once emitted, they linger in the environment), and bio-accumulative (such that small amounts inhaled or otherwise absorbed by bodily tissues build up over time, thereby intensifying associated health risks)."[66] Although originally regulated under a risk-based approach, Congress reacted to the lack of pollution control progress by amending the Act in 1990 to establish a technology-based approach, with Congress initially identifying HAPs and directing EPA to set emissions limits.[67]

When a new source is projected to emit at least 10 tons per year of a single HAP or 25 tons per year of total HAPs, it is classified as a major source.[68] Federal requirements restrict major sources of HAPs emissions to levels consistent with the lowest emitting (also called best-performing) plants.[69] EPA develops these air toxics control standards, known as maximum achievable control technology ("MACT") standards.[70] In instances where EPA has not established standards for a specific source category, it is the permitting authority's responsibility to conduct an individualized MACT analysis for the source (known as a "case-by-case" analysis).[71] The objective of the case-by-case analysis is to set emission limits that "*shall not be less stringent than the emission control which is achieved in practice by the best controlled similar source*."[72] This means that the minimum degree of control efficiency under MACT requirements is determined by the best-controlled similar source's real-world emission control,

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[66] *Louisiana Env't Action Network v. EPA*, 955 F.3d 1088, 1092 (D.C. Cir. 2020).

[67] 42 U.S.C. § 7412(b)(1), (2); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 593 (D.C. Cir. 2016).

[68] 42 U.S.C. § 7412(a)(1).

[69] *Id*. § 7412(d)(1)-(3).

[70] *See id*. § 7412(d)(1).

[71] *See id*. § 7412(g)(2); 40 C.F.R. § 63.42(c).

[72] 40 C.F.R. § 63.43(d)(1) (emphasis added).

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also known as the MACT "floor."[73] The MACT floor ensures that all HAPs sources "at least clean up their emissions to the level that their best performing peers have shown can be achieved," without considering costs.[74]

This MACT analysis for new sources, and case-by-case MACT in particular, is meant to be a pre-construction determination because the design of the facility may be impacted by the control technology that is selected as MACT—and vice-versa. For instance, if MACT is selected after construction, it may not be feasible to install the control technology that is selected as MACT. In the case of PNWRE in particular, case-by-case MACT might require larger or additional air pollution controls and associated ductwork that may not fit with the current plan for the facility. ORCAA may also be less likely to require these enhanced MACT controls if it knows that doing so would be expensive or infeasible after construction. It is critical that MACT for new sources, and case-by-case MACT in particular, be determined before construction rather than after its completion.

II. FRIENDS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLEAN AIR ACT CLAIMS.

A. ORCAA Issued the Permit Based on Flawed Data and Calculations That Grossly Underestimate HAP Emissions.

ORCAA can only approve a Notice of Construction permit after the agency analyzes air quality impacts from the proposed industrial facility and ensures that it complies with all applicable federal Clean Air Act, state, and ORCAA's air quality requirements.[75] It is impossible for ORCAA to meet these approval requirements if the emissions estimates that

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[73] *Id*.

[74] *Sierra Club v. EPA*, 353 F.3d 976, 980 (D.C. Cir. 2004).

[75] WAC 173-400-111(3); ORCAA Rule 6.1.4.

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undergird its analysis for a proposed industrial facility are based on flawed data. And yet that is what ORCAA did here when it approved PNWRE's Notice of Construction permit.

In particular, ORCAA accepted PNWRE's inappropriate use of AP-42 emission factors to estimate emissions from the Project when EPA expressly warned against their use in permitting decisions.[76] The agency accepted PNWRE's inappropriate use of emission factors for particleboard manufacturers even though ORCAA received information for source-specific emission factors for wood pellet plants, which should have been employed.[77] ORCAA accepted PNWRE's HAP emissions estimates despite PNWRE's failure to account for HAP emissions from pelletizers and pellet coolers.[78] All these errors affected ORCAA's impact analysis, ambient air modeling, and determination that case-by-case MACT was inapplicable.

ORCAA cannot excuse its refusal to use source-specific data to estimate emissions from the industrial wood pellet plant based on the alleged differences in trees between the Pacific Northwest and Southeastern regions of the country. While it may be true that there is a slight difference in total VOC emissions between these tree species, no evidence supports ORCAA and PNWRE's position that there is more than a *30 times* difference in emissions, especially as to HAPs. In fact, a company that runs seven industrial-scale wood pellet plants in British Columbia,[79] processing the same type of trees as PNWRE, estimates that nearly 50 tons of HAPs

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[76] Exh. 12, ORCAA Comment Responses at 1, 38; Exh. 10, EPA Ap-42 Enforcement Alert at 1; AP-42, Introduction, *supra* note 45, at 2.

[77] Exh. 2, ORCAA Final Determination at 15-16, 31-33; Exh. 12, ORCAA Comment Responses at 1, 38. *See* Exh. 7, NPCA Comments at 17-18; Exh. 8, SELC Comments at 1-2 n. 3-4.

[78] Exh. 2, ORCAA Final Determination at 15-16, 31-33; Exh. 12, ORCAA Comment Responses at 1, 38; PNWRE Emissions Calculations at p. 19 Table C-9c. *See* Exh. 7, NPCA comments at 17-18; Exh. 8, SELC Comments at 1-2.

[79] Nelson Bennett, B.C.'s Wood Pellet Power Play, Business Intelligence for B.C. (Sept. 13, 2022), https://www.biv.com/news/resources-agriculture/bcs-wood-pellet-power-play-8268953.

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will be released into the air from a similarly-sized wood pellet plant it is proposing to build in Longview, Washington—a mere 75 miles from where PNWRE's has proposed its plant.[80]

As shown below, it is indisputable that ORCAA has erred in accepting deficient emissions calculations from PNWRE, and that appellants are likely to succeed on the merits of proving that ORCAA's decision to accept these emissions calculations and issue an air permit to PNWRE was arbitrary, capricious, and contrary to law.

1. ORCAA accepted the use of AP-42 emissions factors, despite EPA's explicit warning against their use for permitting decisions.

Potential-to-emit estimates are used in the permitting process to determine the applicability of air quality requirements, evaluate air quality impacts from the proposed industrial facility, identify effective emission control strategies, and ensure compliance with applicable air quality requirements.[81] One method for estimating emissions that PNWRE and ORCAA relied on is the use of emission factors, which are a representative measure of emissions in pounds per ton of wood processed by given unit at the proposed plant.[82] ORCAA erred in allowing PNWRE to use AP-42 emission factors to estimate the potential emissions from the industrial wood pellet facility and relying on those estimated emissions to make permitting decisions.

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[80] Exh. 18, Drax Revised Application at 3.

[81] ORCAA, Air Pollutant Emissions Assessment – Form 4 Facility Emissions Summary at 2, https://www.orcaa.org/wp-content/uploads/Form-4-Facility-Emissions-Summary.pdf; ORCAA, intrPotential to Emit Fact Sheet, https://www.orcaa.org/wp-content/uploads/PTE-Fact-Sheet_2023.pdf.

[82] ORCAA, Potential to Emit Fact Sheet at 2, https://www.orcaa.org/wp-content/uploads/PTE-Fact-Sheet_2023.pdf.

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AP-42 is a compilation of emission factors that EPA has developed based on emissions testing at facilities across the country.[83] In many instances, these emission factors are averages of all available data for a source category and may be based on just one or two tests.[84] Although emissions tests at several wood pellet manufacturing facilities have resulted in a wealth of representative source-specific emission values for HAPs, PNWRE and ORCAA opted to rely on emission factors from EPA's AP-42 emission factors for *particleboard* manufacturing to calculate HAP emissions, save for one type of unit.[85]

Contrary to ORCAA's assertion that PNWRE's use AP-42 factors was appropriate, the EPA has been emphatic (actually placing a red flag warning on its website) that AP-42 emissions factors should not be used in place of more representative source-specific emission values for Clean Air Act permitting, explaining that such reliance "can be costly to [regulated entities], inefficient, and in some circumstance, can subject regulated entities to enforcement and penalties."[86]

Within the AP-42 scheme, the trustworthiness of particular emission factors are rated A to E, with A being the most reliable and E being the least reliable.[87] "This rating is assigned based on the estimated reliability of the tests used to develop the factor and on both the amount

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[83] AP-42, Introduction, *supra* note 45, at 1.

[84] *Id.* at 8-10.

[85] The only exception is for the facility's wet (often called "green") hammermills. PNWRE and ORCAA initially assumed that these units would not emit any HAPs or VOCs more broadly. After public comments identified that these wet hammermills would indeed emit at least six HAPs in substantial quantities based on wood pellet stack tests (as well as a substantial amount of VOCs), ORCAA accepted that these units emit HAPs and VOCs, adopting the rate from the wood pellet stack tests. It's unclear why ORCAA rejected these same comments that pointed out similar deficiencies in PNWRE's HAP calculations across most of the other units at PNWRE.

[86] Exh. 10, EPA AP-42 Enforcement Alert at 1.

[87] Introduction to AP-42, *supra* note 45, at 8-10.

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and the representative characteristics of those data."[88] While emission factors with higher AP-42 grades of "A" or "B" are considered more reliable, they are still only based on averages derived from data collected from multiple, albeit similar, sources.[89] Consequently, EPA has found that AP-42 emission factors are likely to inaccurately predict emissions from any specific source, except in very limited scenarios inapplicable here.[90]

AP-42 even provides the following warning:

> Use of these factors as source-specific permit limits and/or as emission regulation compliance determinations is **NOT** recommended by EPA. Because emission factors essentially represent an average of a range of emission rates, approximately half of the subject sources will have emission rates greater than the emission factor and the other half will have emission rates less than the factor.[91]

Moreover, permit limits must be capable of ensuring compliance with 1-hour and short-term National Ambient Air Quality Standards ("NAAQS"), and, as EPA explained, AP-42 emission factors do not account for short-term variations because they are primarily intended for use in developing area-wide annual or triannual emission inventories.[92] EPA further noted that:

> [S]hort-term fluctuations in emissions can stem from variations in process conditions, control device conditions, raw materials, ambient conditions, or other similar factors. This means that if facilities use AP-42 emission factors as permit limits, facilities increase their chances of violating their short-term permit limits.[93]

ORCAA dismissed EPA's warning and failed to require PNWRE to use appropriate emissions factors, justifying the decision because the Permit includes "recommended conditions

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[88] *Id*. at 8.

[89] *Id*. at 1-2.

[90] *Id*.

[91] Introduction to AP-42, *supra* note 45, at 2; Exh. 10, EPA AP-42 Enforcement Alert at 1-2.

[92] *Id*. at 2.

[93] *Id*.

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[that will] require source testing to establish site-specific emission factors *once the facility is built* to demonstrate compliance with the short-term emission limits."[94] This reliance on *post*-construction/operation testing and monitoring to remedy any issues related to excess emissions from PRWRE's proposed industrial wood pellet plant is antithetical to the very purpose of the Clean Air Act's New Source Review permitting program. This program is designed to prevent air quality from being degraded by requiring a proponent of a new, air polluting source to get a permit that appropriately sets emissions limits and operating conditions to ensure the protection of public health and the environment *before* a project is built.[95] Moreover, ORCAA's position that it is appropriate for PNWRE to use AP-42 emission factors is untenable given that the agency received through public comments several air permit applications and stack tests from other similarly sized and similarly controlled wood pellet plants (including one proposed in Longview, Washington) that provide representative source-specific emissions factors. [96] ORCAA's post-construction conditions to demonstrate compliance with short term emissions limits does nothing to address the flaws with the annual emissions estimates and limits ORCAA established based on PNWRE's inappropriate use of AP-42 emissions factors.

2. ORCAA accepted the use of emission factors for particleboard manufacturing when source-specific emission factors for wood pellet plants exist and should be employed.

Compounding the erroneous decision to use AP-42 at all, ORCAA erred in relying on the particleboard emission factors chosen by PNWRE to estimate potential emissions for several units from the proposed industrial-scale wood pellet plant. Because ORCAA refused to use

[94] Exh. 12, ORCAA Response to Comments at 38 (emphasis added).

[95] U.S. EPA, New Source Review Workshop Manual at 3-4 (Draft Oct. 1990), https://www.epa.gov/sites/default/files/2015-07/documents/1990wman.pdf.

[96] *See* SELC Comments, n. 2-4; NPCA Comments at 16-18.

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available industry-specific emission factors for these units, the agency significantly underestimated emissions from PNWRE's proposed plant. ORCAA's decision to issue a pre-construction permit to PNWRE based on fatally flawed emissions estimates is arbitrary, capricious, and contrary to agency's Clean Air Act obligation to properly analyze air quality impacts from PNWRE's proposed plant and ensure that PNWRE complies with all applicable air quality requirements meant to protect public health and the environment.[97]

a) ORCAA erred in using AP-42 Particle Board emission factors for Emission Source ID EP-02: Drying Line (Furnace, Drum Dryer).

PNWRE relied on AP-42's emissions factors for particleboard manufacturing to calculate potential emissions from the proposed facility's furnace and drum dryer (AP-42 Chapter 10.6.2, Table 10.6.2-3), specifically factors under the source category labeled "Rotary dryer, direct wood-fired, softwood."[98] Using this emission factor, PNWRE and ORCAA estimated that the dryer would emit just 0.742 tons of HAPs per year.[99] However, when wood pellet manufacturers have used emission factors derived from testing at other wood pellet plants, dryers of similar size and with comparable pollution controls to PNWRE have been estimated to emit between 15 and 35 tons of HAPs per year.[100] For example, Drax Biomass, which operates seven wood pellet plants in British Colombia and eight more across Alberta and the U.S. Southeast,[101] is proposing to build a wood pellet facility in Longview, Washington of similar size and with similar pollution

[97] ORCAA Rule 6.1.4; WAC 173-400-111(3).

[98] Exh. 6, PNWRE Emissions Calculations at 15 Table C-8b.

[99] *Id*.; *see also Id*. at 4 Table C-2.

[100] Exh. 18, Drax Revised Application at Table C-3d; Exh. 16, Enviva Waycross Application at Appendix C.

[101] Drax, North American Operations, https://www.drax.com/us/operations-north-america/; Nelson Bennett, B.C.'s Wood Pellet Power Play, Business Intelligence for B.C. (Sept. 13, 2022), https://www.biv.com/news/resources-agriculture/bcs-wood-pellet-power-play-8268953.

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controls as PNWRE. To calculate emissions from the drum dryer, Drax used emission factors derived from testing at one of its similarly sized and controlled plants.[102] Based on those industry-specific emissions factors, Drax estimated that the drum dryer—that is like the one in PNWRE's proposal—would emit 22 tons of HAPs. This is over 29 times more than what PNWRE estimated would be emitted at its proposed facility, which is just 75 miles from where Drax is proposing to build a plant in Washington.[103]

Moreover, the specific AP-42 particleboard emission factors that ORCAA and PNWRE relied on to calculate dryer emissions are all rated as some of the least reliable on EPA's reliability scale. With the exception of formaldehyde, which is rated "C," all the emission factors PNWRE and ORCAA applied to calculate dryer emissions are all rated "D,"[104] those where "there may be reason to suspect these facilities [that were tested] do not represent a random sample of the industry."[105] In other words, the emission factors that PNWRE and ORCAA relied on aren't even adequate to calculate emissions within the particleboard industry itself, let alone a distinct industry like wood pellet manufacturing.

Even accepting that particleboard emission factors could be applied here (and they cannot because industry-specific emissions factors exist), PNWRE selected a source category within the particleboard industry that is particularly inapt. PNWRE and ORCAA relied on an AP-42 category that applies to dryers processing wood that has already been dried (e.g., sawmill

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[102] Exh. 18, Drax Revised Application at Table C-3d.

[103] *Id.* at 1.

[104] EPA, AP-42 Chapter 10.6.2, Particleboard Manufacturing, Table 10.6.2-3, Source: Rotary dryer, direct wood-fired, softwood (SCC 3-07-006-07).

[105] AP-42, Introduction, *supra* note 45, at 8-10.

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residuals);[106] PNWRE's dryers will dry green, or wet, wood that has not been dried. The difference is key because drying wood releases organic HAP emissions, resulting in substantially more overall HAP emissions than pre-dried wood; in other words, pre-dried wood has already released some of its HAPs and will emit lower amounts of HAPs when it is re-dried.[107]

In sum, despite ORCAA being presented with Drax's air permit emission calculations, along with numerous other wood pellet plant permit applications and stack tests specific to the wood pellet industry, the agency insisted on using AP-42's much lower emission factors for particleboard dryers. This misplaced reliance, coupled with the agency's refusal to apply industry-specific dryer emissions factors, directly conflicted with EPA's explicit guidance that AP-42 emissions factors should not be used in place of more representative source-specific emission values for Clean Air Act permitting. ORCAA's decision to issue a permit to PNWRE based on emissions estimates that are derived from inapplicable and defective AP-42 emission factors sourced from a completely different industry was arbitrary, capricious, and contrary to the Clean Air Act requirements.

b) ORCAA erred in using AP-42 Particle Board emission factors for Emission Source ID EP-07: Dry Hammermills.

ORCAA and PNWRE's emission rates for the dry hammermills were again calculated using AP-42's particleboard emission factors rather than wood pellet specific emission factors.[108]

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[106] EPA, AP-42 Chapter 10.6.2, Particleboard Manufacturing, Table 10.6.2-3, Source: "Rotary dryer, direct wood-fired, softwood (SCC 3-07-006-07)" *contra id*., source "Rotary dryer, green, direct wood-fired, softwood (inlet moisture content >50%, dry basis) (SCC 3-07-006-25)."

[107] Although none of the AP-42 emission factors should be used, the particleboard emission factor that better matches PNWRE's operation is "Rotary dryer, green, direct wood-fired, softwood (inlet moisture content >50%, dry basis)." The emission factors in this category are still about six times higher than the category which PNWRE and ORCAA used. *Id.*

[108] PNWRE Emissions Calculations at 18 Table C-9b.

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Based on these inappropriate emission factors, ORCAA and PNWRE claimed that the facility's dry hammermills will only emit two HAPs, methanol and phenol, and that the total emissions of these two pollutants will be just 0.129 tons per year.[109] There are two obvious errors here. First, every other wood pellet plant using dry hammermills acknowledged that they emit *six* HAPs, methanol and phenol, plus acetaldehyde, acrolein, formaldehyde, and propionaldehyde.[110] Second, the alleged emission rates for methanol and phenol (the two pollutants PNWRE did include) were vastly lower than other wood pellet plant emission factors predict.

The contrast is stark. Drax and every other wood pellet plant acknowledged that dry hammermills emit all six wood-product HAPs at significant rates. Drax's Washington pellet plant is again a useful example: Drax estimated its dry hammermills will emit 11.1 tons of HAPs, including six tons of methanol.[111] These rates are about *75 times higher* than the rates estimated by PNWRE and ORCAA based on AP-42 emission factors from an entirely different industry. Emission factors from other pellet plants submitted to ORCAA during the comment period were similar.[112] Drax also estimated that it will emit significant amounts of the HAPs that ORCAA and PNWRE omitted, with Drax's estimates for acetaldehyde, acrolein, formaldehyde, and propionaldehyde from the dry hammermills totaling 1.76 tons per year.[113] Drax and the other sources of emission factors provided to ORCAA during the comment period based their emission factors on actual wood-pellet stack tests.

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[109] *Id*. at 4 Table C-2.

[110] *See, e.g.* Drax and Enviva applications, *supra* n. 104.

[111] Drax Revised Application at Table C-6c.

[112] SELC Comments n. 2–4.

[113] Drax Revised Application at Table C-6c.

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At no point in the record did PNWRE nor ORCAA attempt to explain why particleboard emission factors for dry hammermills (which are likely operating substantially differently from wood pellet dry hammermills) were representative of emissions at PNWRE. And once again, the particular AP-42 emission factors selected by PNWRE and ORCAA are not only inapplicable, but they were also deeply flawed in their own right. The methanol and phenol emission factors are D and E rated emission factors (in fact, they are based on just one test from a "refiner/hammermill" from 1997[114]), meaning they are again unreliable even for estimating emissions within the particleboard industry, let alone a wood pellet plant.

Given the above, ORCAA's decision to ignore the wood pellet specific emission factors presented to it during the public comment—factors that are directly relevant (and far higher)—and instead approve the permit based on AP-42's particleboard emission factors, was plainly arbitrary and capricious and materially impacted the assessment of applicable requirements and the air toxics modeling.

3. ORCAA failed to account for HAP emissions from pelletizers and pellet coolers.

PNWRE's application, as approved by ORCAA, did not include any HAP emissions from the facility's pelletizers and pellet coolers (Emission Source ID EP-08). As demonstrated by the information submitted to ORCAA during the comment period, pelletizers and pellet coolers are substantial emitters of HAPs.[115] Pelletizers press the wood dust through a die, a process involving high pressure that raises the temperature of the wood to several hundred

[114] PNWRE Emissions Calculations at 18 Table C-9b; U.S. EPA, Section 10.6.2 Detailed Data Tables, https://www.epa.gov/sites/default/files/2020-10/r10s06-2.zip.

[115] SELC Comments at 1-2 n. 2-4; NPCA Comments 16-18; Enviva Wiggins Stack Test; Drax Amory Stack Test; Drax Amite Application; Enviva Waycross Application.

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degrees (sufficient for the lignin in the wood to melt and bind the pellet together). This process releases VOCs and HAPs, emissions that continue as the pellets cool in pellet coolers.

Drax, for instance, estimated that pelletizers and coolers emit more than 10 tons of HAPs at its proposed Washington plant, and other recent applications and tests (also submitted to ORCAA during the comment period) list comparable rates.[116] PNWRE's application likely omitted HAPs from these units because PNWRE relied on AP-42's particleboard emission factors, which of course do not contain emission factors for pelletizers and pellet coolers since particleboard plants do not operate these units.

Whatever the reasons behind PNWRE's failure, they cannot explain ORCAA's decision to issue the permit based on these defective emissions assumptions. Not only did ORCAA have pellet-specific emissions factors for pelletizers and pellet coolers in front of it, ORCAA actually knew that PNWRE's pelletizer emission estimates were flawed. ORCAA's Permit Review Checklist states under the heading "loose ends" that "[e]xcept for Methanol and Phenol, HAP emissions from the pelletizers are not accounted for. Results from source testing at the Enviva Pellet Mill in Sampson, NC indicate that other HAPs such as formaldehyde are emitted." ORCAA seems to confuse the dry hammermills with the pelletizers here,[117] but despite recognizing that there were missing HAP emissions, ORCAA ultimately accepted PNWRE's flawed emissions estimates and issued the air permit.

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[116] Exh. 18, Drax Revised Application at Table C-7c; SELC Comments, n. 2-4.

[117] PNWRE's application listed zero HAPs emitted by the pelletizers, and instead listed the dry hammermills as emitting only methanol and phenol. Exh. 6, PNWRE Emissions Calculations at 18 Table C-9b; 4 Table C-2. PNWRE was mistaken on both fronts, as discussed herein. Exh. 19, ORCAA, Review Checklist, Loose Ends at 1.

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Consequently, ORCAA's decision to accept PNWRE's incorrect assumption that pelletizers and pellet coolers do not emit *any* HAPs—especially when the agency recognized this was not true—was arbitrary, capricious, and contrary to law.

4. ORCAA erred in accepting the Ambient Impact Review for PNWRE's plant because it was based on underestimated emissions.

Although PNWRE did an Ambient Impact Review for its proposed plant, PNWRE used flawed emissions data. Washington law requires a proponent of a new industrial facility emitting toxic air pollutants to include in its Notice of Construction application ambient impact analysis for each toxic air pollutant that will be emitted by facility's emission units.[118] The proponent must demonstrate through ambient air dispersion modeling that the ambient impact of each toxic air pollutant emitted does not exceed the acceptable source impact level for that pollutant.[119] This modeling requirement is only triggered if the emission rate of a toxic air pollutant exceeds thresholds known as small quantity emission rates.[120]

PNWRE did not model phenol, propionaldehyde, or hydrochloric acid because it estimated that emissions of those toxic air pollutants would be below the small quantity emission rates threshold.[121] However, emission rates from other similar size and similar controlled sources, including Drax and Enviva, show that these toxic air pollutants easily exceed the small quantity emission rate threshold.[122] Based on this emissions data, PNWRE should have modeled phenol, propionaldehyde, and hydrochloric acid.

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[118] WAC 173-460-040; 173-460-050; 173-460-070; 173-460-080.

[119] WAC 173-460-070; 173-460-080(2)(a).

[120] WAC 173-460-020(7); 173-460-080(2)(b).

[121] Exh. 6, PNWRE Emissions Calculations at 4 Table C-2, *see also* WAC 173-460-150

[122] Exh. 16, Waycross Application at 40; Exh. 18, Drax Revised Application at 18 Table C-2b.

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The table below illustrates the comparison of what PNWRE claims and what Drax and Enviva's actual emissions showed for similar facilities.

			Emission rate (lb/averaging period)		Exceed Small Quantity Emission Rates?[123]	
Pollutant	Averaging Period	Small Quantity Emission Rates (lb/averaging period)	PNWRE's estimate[124]	Drax/Enviva Average estimate[125]	PNWRE	Drax/Enviva Average
Acetaldehyde	year	60	329	9,900	Yes	Yes
Acrolein	24-hr	0.026	0.322	10	Yes	Yes
Formaldehyde	year	27	627	10,260	Yes	Yes
Methanol	24-hr	1500	1.29	117	No	No
Phenol	24-hr	15	0.68	26.5	No	Yes
Propionaldehyde	24-hr	0.59	0.196	5.5	No	Yes
HCL	24-hr	0.67	0	5.5	No	Yes

More significantly, even for the pollutants that exceed the small quantity emission rates and for which PNWRE did conduct modeling (acetaldehyde, acrolein, and formaldehyde), the emission rates used by PNWRE were substantially lower than the emission rates from Drax and Enviva.[126] For instance, PNWRE's modeled acrolein emissions were 30 times lower than the Drax/Enviva average emissions.[127]

B. ORCAA Failed To Conduct a Required Case-By-Case MACT Analysis.

Under the Clean Air Act's protective scheme, when a new source of emissions will release over 25 tons/year of total HAPs, it is classified as a major source.[128] If EPA has not established standards that apply to the new major source of HAPs, then that source must undergo

[123] *See* WAC 173-460-150.

[124] Exh. 6, PNWRE Emissions Calculations at 4 Table C-2.

[125] Exh. 16, Waycross Application at 40; Exh. 18, Drax Revised Application at 18 Table C-2b.

[126] Exh. 6, PNWRE Emissions Calculations at 4 Table C-2 *contra* Exh. 16, Waycross Application at 40; Exh. 18, Drax Revised Application at 18 Table C-2b.

[127] *Id.*

[128] 42 U.S.C. § 7412(a)(1).

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an individualized, case-by-case analysis to ensure the facility uses the maximum achievable control technology ("MACT") to reduce HAPs emissions.[129] A proper case-by-case MACT analysis should yield substantially better control efficiencies for HAPs, leading to lower emissions and lower health risks. This HAPs analysis cannot be considered after an air permit is issued, as the various air pollutant control technologies rely on complete information. Such a MACT analysis must also be released as a draft to the public with at least a 30-day notice and comment period.[130]

In reliance on PNWRE's incorrect emissions estimates, ORCAA found that PNWRE would be a minor source of hazardous emissions, and the agency did not undertake a MACT analysis. For the reasons detailed above, ORCAA's reliance on PNWRE's faulty emissions assumptions severely underestimated that amount of hazardous air pollutants the proposed wood pellet plant will emit. With corrected emissions calculations, ORCAA will need to undertake a case-by-case MACT analysis.

Support for this requirement can be found practically next door. Earlier this year, a strikingly similar industrial wood pellet plant proposed in Longview, Washington also sought a Notice of Construction air permit.[131] Due to its location, the Drax Longview plant submitted its application and materials to the Southwest Clean Air Agency ("SWCAA").[132] In its revised application, Drax Longview estimated its total HAPs emissions at 44 tons/year, almost double

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[129] 40 C.F.R. 63.42(c).

[130] 40 C.F.R. 63.43(h).

[131] Drax Group, Air Discharge Permit Application Wood Pellet Production Facility (July 27, 2022).

[132] SWCAA, Air Discharge Permit Application Notice, CO – 1057, Drax Group (Jul. 29, 2022), https://web.archive.org/web/20230804185435/https://www.swcleanair.gov/docs/Permits/AppNotice/CO-1057.PDF.

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the MACT analysis threshold.[133] Yet initially, like ORCAA, SWCAA issued a draft permit for public review and comment without a MACT analysis.[134]

Unlike ORCAA, however, SWCAA changed course, perhaps realizing its mistake. Although the agency had released Drax Longview's draft permit for public comment, SWCAA withdrew the draft permit before the public hearing, stating that the facility "includes certain equipment that has not yet been reviewed."[135] Documents received by Friends indicate that SWCAA is now undertaking its own MACT analysis during this revision.[136]

Case-by-case MACT requires the permitting authority to establish emission limits that "*shall not be less stringent than the emission control which is achieved in practice by the best controlled similar source*."[137] This means that the minimum degree of control efficiency under MACT requirements is determined by the best-controlled similar source's real-world emission control, the MACT floor. Cost and other impacts are only considered when determining whether to require emission limits beyond the MACT floor.[138] ORCAA failed to conduct the required MACT analysis, potentially allowing tons of HAPs per year to be invalidly emitted.

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[133] Exh. 18, Drax Revised Application at 18. This document relies on testing at Drax's Gloster, Mississippi facility, *see id*. at 1. The Drax Gloster facility is undergoing case-by-case MACT analysis.

[134] SWCAA, Preliminary Air Discharge Permit for Wood Pellet Processing Facility, Pinnacle Renewal Holding, Inc. (Drax) (Feb. 22, 2024).

[135] SWCAA, Special Permit Notice, https://www.swcleanair.gov/permits/publichearings.asp; Email from Tina Hallock, SWCAA to Interested Parties, Re: Drax Longview Draft Air Discharge Permit.

[136] Exh. 20, Email from Wess Safford, SWCAA to Wayne Kooy, Director of Environment – North America, Drax Re: Case by case MACT.

[137] 40 C.F.R. 63.43(d)(1) (emphasis added).

[138] Cost considerations only relevant under 40 C.F.R. 63.43(d)(2).

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Moreover, CAA section 112(g)(2)(B) states that "no person may construct" a new source of HAPs without a MACT determination.[139] Congress created § 112's technology-based requirement of a case-by-case MACT determination "to accelerate the regulation of *hazardous* air pollutants," which are "extremely harmful."[140]

III. ORCAA CANNOT OVERCOME FRIEND'S SHOWING OF LIKELY SUCCESS ON THE MERITS.

As detailed above, Friends are likely to succeed on the merits of their claim that ORCAA vastly underestimated or discounted the harmful air emissions from the wood pellet plant, violating state and federal clean air laws. ORCAA can only overcome Friends' stay argument by demonstrating "either (a) a substantial probability of success on the merits or (b) likelihood of success on the merits and an overriding public interest which justifies denial of the stay."[141] It cannot make such a showing.

First, ORCAA cannot show a substantial probability of success based on the arguments presented by Friends. Second, there is no overriding public interest to justify denial of a stay, even if ORCAA could demonstrate a likelihood of success on the merits. Any hypothetical costs of delay were contemplated in the enactment of the Clean Air Act and cannot be a basis to allow

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[139] For example, the "ongoing construction of a coal-fired power plant—for which no MACT determination has been made—is in violation of §112(g)(2)(B)." *Sierra Club v. Sandy Creek Energy Assocs.*, 627 F.3d 134, 142 (5th Cir. 2010).

[140] S. Rep. No. 101–228 at 133, 140 (1989) (emphasis added).

[141] RCW 43.21B.320.

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a likely violation.[142] To the contrary, the public interest fully supports a stay.[143] Without one, PNWRE will continue construction, and could even initiate operations, before this appeal is resolved. If Appellants are successful in this appeal, ORCAA will be tasked with undertaking a new analysis and making a new permit decision, which could include additional mitigation or even permit denial. In the absence of a stay, however, this decision would be made with respect to a largely completed, and potentially already operating, project, limiting the range of alternatives and mitigation that could be considered. This kind of after-the-fact review would violate the Clean Air Act.[144] Public interest favors enforcing the Clean Air Act and protecting the environment.[145]

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[142] *See Airport Cmtys.,* 2001 WL 1638639, at *8 (finding that additional expenses incurred as a result of a stay does not outweigh the "public's interest in attaining and maintaining an environment consistent with legislatively promulgated goals."); *see also Port of Vancouver, USA, et al. v. State of Wash.,.* 2003 WL 22849186, at *8 (PCHB Nov. 26, 2003) ("No significant harm resulting from issuance of the stay has been identified. Any delay in the overall pursuit of this . . . project will be more than offset by the important protections provided by meaningful and timely environmental review.").

[143] *Cmtys. for a Better Env't v. Cenco Refining Co.,* 179 F. Supp. 2d 1128, 1148 (C.D. Cal. 2001) ("[P]ublic interest favors enforcing the Clean Air Act and protecting the environment"); *United States v. Gear Box Z Inc.*, 526 F. Supp. 3d 552, 529 (D. Ariz. 2021) ("Congress enacted the CAA to combat air pollution, which itself is a declaration of public policy. The public interest in halting Defendant's acts that likely violate the CAA outweighs Defendant's interest in continuing to operate a private business.").

[144] WAC 173-400-110(1)(c)(i), (2)(a) (permit must be approved before "actual construction" of any new stationary source begins); WAC 173-400-030 ("begin[ning] actual construction" means "initiation of physical on-site construction activities on an emission unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipe work and construction of permanent storage structures.").

[145] Although the PNWRE plant would be among the first of its kind in the Pacific Northwest, industrial fuel pellet facilities have operated in the southeastern part of the United States for over a decade and have a troubling history of repeated emissions violations that have exposed neighboring communities to harmful and alarming levels of air pollution, particularly excess HAPs. *Pellet Mill Violations in the South, supra* note 12; *see also* Majlie de Puy Kamp, *supra* note 9; Alexander C. Kaufman, *supra* note 9; s*ee generally* Exh. 3, EIP Report.

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Moreover, construction and operation of the industrial wood pellet plant involve a range of risks and environmental harms to Friends' members and the public. If PNWRE goes forward with construction and operation of the plant during the pendency of this appeal, there will be irreparable harm to the environment, wildlife, and the surrounding communities. Harmful emissions are related to every phase of the project—from construction of the plant to operation to transporting and burning the wood pellets overseas. All the pollutants that would be emitted from the proposed plant pose significant risks to human health. For example, VOCs can cause ground-level ozone pollution, which in turn can cause shortness of breath, wheezing and coughing, asthma attacks, increased risk of respiratory infections, and increased respiratory distress.[146] Exposure to elevated levels of NOx can cause damage to the human respiratory tract and exacerbate respiratory infections and asthma.[147] Prolonged exposure to high levels of NOx can even result in chronic lung disease.[148] Exposure to particulate matter air pollution has been linked to significant health issues such as respiratory and cardiovascular illnesses and cancer.[149] Concerns about these risks are heightened due to the proposed plant's close proximity to schools, parks, and a wildlife refuge. Allowing PNWRE to complete construction and start operations

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[146] U.S. EPA, Ozone and Ozone Standards: The Basics, https://www.epa.gov/sites/default/files/2016-04/documents/20151001basicsfs.pdf (last visited Aug. 8, 2024)*; see also* U.S. EPA, Health Effects of Ozone Pollution, https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution.

[147] U.S. EPA, Basic Information about NO2, https://www.epa.gov/no2-pollution/basic-information-about- no2.

[148] *Id.*

[149] U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM),* https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm; *see also* U.S. EPA, *Supplement to the 2019 Integrated Science Assessment for Particulate Matter*, (May 2022), https://assessments.epa.gov/isa/document/&deid=354490; U.S. EPA, *Health and Environmental Effects of Hazardous Air Pollutants*, https://www.epa.gov/haps/health-and-environmental-effects-hazardous-air-pollutants.

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810 Third Ave. Suite 610
Seattle, WA 98104
(206) 343-7340

before this appeal is resolved would expose Friends and the public to environmental, health, and safety risks that were never properly evaluated during the permitting process.

CONCLUSION

For the foregoing reasons, Appellant's motion for stay of the Notice of Construction permit should be granted.

Respectfully submitted this 20th day of August 2024.

s/Ashley Bennett
ASHLEY BENNETT, WSBA No. 53748
KRISTEN L. BOYLES, WSBA No. 23806
LYDIA HEYE, Alaska Bar No. 2211101
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
(206) 343-7340 | Phone
abennett@earthjustice.org
kboyles@earthjustice.org
lheye@earthjustice.org

Attorneys for Appellants Friends of Grays Harbor, Grays Harbor Audubon Society, Natural Resources Defense Council, Twin Harbors Waterkeeper, and Wild Orca

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2024, the foregoing APPELLANTS' MOTION FOR STAY OF PERMIT was filed electronically through the CMS system and served on the following parties via email and U.S. First Class mail, postage prepaid:

Jeffrey S. Myers
Matthew T. Sonneby
Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S.
2674 R.W. Johnson Rd.
Tumwater, WA 98512
jmyers@lldkb.com
msonneby@lldkb.com
Counsel for Respondent ORCAA

Steve Johnson
City Attorney
City of Hoquiam
609 8th Street
Hoquiam, WA 98550
sjohnson@cityofhoquiam.com
lweidman@cityofhoquiam.com
Counsel for Respondent City of Hoquiam

Connie Sue Martin
Michael J. Mahoney
Schwabe, Williamson, & Wyatt, P.C.
1420 5th Avenue, Suite 3400
Seattle, WA 98101
csmartin@schwabe.com
mmahoney@schwabe.com
Counsel for Respondent PNWRE

Date: August 20, 2024

s/ Diana Brechtel
Diana Brechtel, Paralegal

Earthjustice
810 Third Ave. Suite 610
Seattle, WA 98104
(206) 343-7340