No. 73419-4

THE SUPREME COURT OF WASHINGTON

PORT OF SEATTLE, a port district of the State of Washington,

Petitioner,

v.

THE POLLUTION CONTROL HEARINGS BOARD, an agency of the State of Washington,

Respondent,

AIRPORT COMMUNITIES COALITION; and CITIZENS AGAINST SEA-TAC EXPANSION,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, an agency of the State of Washington,

Petitioner.

OPENING BRIEF OF PETITIONER CITIZENS AGAINST SEA-TAC EXPANSION

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I. Introduction

Citizens Against Sea-Tac Expansion ("CASE") submits this Opening Brief in support of its petition for review of the Findings of Fact, Conclusions of Law, and Order ("Order") of the Pollution Control Hearings Board ("PCHB") regarding the Clean Water Act § 401 Certification granted to the Port of Seattle by the Department of Ecology for the Port's proposed Third Runway Project at Sea-Tac Airport.

II. Assignments of Error

1. The Board erred in attempting to repair Ecology's § 401 Certification based on future prospects of reasonable assurance rather than ordering denial of the Port's application based on the record before it. AR 000885 (PCHB Decision at p. 112).

2. The PCHB Erred by improperly applying its *de novo* review standard to permit consideration of post-certification studies, plans and reports. AR 000866-871 (PCHB Decision at pp. 93-98).

3. The Board erred in selectively redacting Depositions of Ecology officials. AR 001494-880 (Order dated April 22, 2002, Publishing Certain Portions of Depositions).

4. The Board Erred in Permitting the Port and Ecology to Introduce and Rely on Reports and Data Which Not only Post-Dated Ecology's purported Certification of reasonable assurance of compliance with water quality standards, but which were also offered after deadlines set by the Board in the appeal proceeding. AR 001885, 002106, 002058.

5. The PCHB erred in relying upon future "adaptive management" in determining that reasonable assurance of compliance with water quality laws existed as of the time of certification. AR 000858-862 (PCHB Order at pp. 85-89, Findings IV(B)(7)); AR 000904-906 (PCHB Order at pp. 131-133, Conclusion of Law 7).

6. The PCHB erred in concluding that Ecology may rely on the Port's current and future NPDES permits to provide reasonable assurance that

stormwater discharges will comply with water quality standards. AR 000790-807, 000812-813 (PCHB Findings IV(B)(1)(a)-(c), (g)); AR 000881-883 (PCHB Conclusion of Law 12).

7. The PCHB erred both in concluding that Ecology's authorization of mixing zones for in-stream work does not violate the procedural requirements of WAC 173-201A-100 and 110(3), and in concluding that the § 401 Certification's conditions for mixing zones provide reasonable assurance that substantive water quality standards will not be violated. AR 000813-814 (PCHB Finding IV(B)(1)(h)); AR 000887 (PCHB Conclusion of Law 13).

8. The PCHB erred in approving the Certification based on mitigation which did not offset wetlands destruction and therefore did not provide reasonable assurance of compliance with water quality standards. AR 000854-857 (PCHB Findings 6(b)) (PCHB Order at pp. 81, line 12 to 82, line 18; PCHB Order at 83, line 18, to 84, line 2); AR 000901-093 (PCHB Conclusion 6) (PCHB Order at 128, line 18, to 130, line 17).

9. The PCHB erred in determining that stream flow mitigation was adequate for the project based on documents that were not before Ecology at the time of Certification and which were themselves inadequate to form a basis for a finding of reasonable assurance of compliance with water quality laws. AR 000816-000824 (PCHB Findings 2) (PCHB Order at 43-51); AR 000891-893 (PCHB Conclusion 2) (PCHB Order at 118 -120).

10. The PCHB erred in excluding from its record a document disclosed by Ecology pursuant to the Public Disclosure Act. AR 005877-879 (Order on Motion to Reconsider Motion to Strike (11/26/01))

III. Issues Pertaining to Assignments of Error

1. Did the Board err as a matter of law in attempting to repair Ecology's § 401 Certification where its record did not meet the reasonable assurance standard, rather than ordering denial and reversing and remanding Ecology's Certification ? (Assignment of Error 1)

2. Whether the PCHB's De Novo review of Ecology's decision on a § 401 Certification may consider studies, reports and plans not in existence at the time of Ecology's certification? (Assignment of Error 2)

3. Did the Board Err in selectively redacting portions of depositions taken by ACC of Ecology officials which were offered into evidence in response to Ecology reasonable assurance claims ? (Assignment of Error 3)

4. Did the Board Err in Permitting the Port and Ecology to Continue Creating and Offering Post-Hoc justifications for the September, 2001 Certification, Including Shortly before Trial and In Violation of Prehearing orders which the Board had entered for the orderly conduct of the Proceeding? (Assignment of Error 4)

5. Whether a Clean Water Act § 401 Certification may be premised upon a theory of post-certification monitoring and "adaptive management"? (Assignment of Error 5)

6. Does a 401 Certification comply with the Clean Water Act requirement for reasonable assurance that water quality standards will not be violated when the Certification itself allows its provisions necessary for reasonable assurance to be superseded by future NPDES permits, which do not require such compliance? (Assignment of Error 6)

7. May a Clean Water Act Section 401 certification violate the procedural requirements of state water quality standards (WAC 173-201A-110(3) and WAC 173-201A-100(4)) by authorizing a temporary turbidity mixing zone: *before* "the activity has received all other necessary local and state permits and approvals"; *before* "the implementation of appropriate best management practices to avoid or minimize disturbance of in-place sediments and exceedances of the turbidity criteria"; and *without* requiring any review and approval of the mixing zones? (Assignment of Error 7)

8. Is a Clean Water Act section 401 Certification based on the required reasonable assurance that substantive water quality standards for turbidity will not be violated if it fails to comply with the procedural requirements for temporary turbidity mixing zones ? (Assignment of Error 7)

9. Whether the Board erred in approving wetland “restoration” credit for an area which Ecology had previously acknowledged did not warrant such credit and which the Port had successfully contended in King County Superior Court was already a functional wetland? (Assignment of Error 8)

10. Whether a Clean Water Act § 401 Certification may be premised on out-of-basin wetland mitigation that has not been determined to offset the impacts related to destruction of wetlands? (Assignment of Error 8)

11. Whether a Clean Water Act § 401 Certification may be premised upon on an assumption that an incomplete analysis and plan for key aspects of and issues raised by the proposal will someday be sufficient to satisfy the requirements of the Clean Water Act? (Assignment of Error 9)

12. Whether a Clean Water Act § 401 Certification may be premised on a mitigation plan that is necessary for a finding of reasonable assurance of compliance with water quality standards, but which is found to contain significant errors and has not been validated? (Assignment of Error 9)

13. Whether a Clean Water Act § 401 Certification requires mitigation of impacts at the time those impacts commence? (Assignment of Error 9)

14. Whether the Board erred in excluding from the record as attorney-client privileged a document disclosed by the agency itself pursuant to the Public Records Act, RCW Ch. 42.17? (Assignment of Error 10)

IV. Statement of the Case

A. Factual Background

1. Description of the Project

The Third Runway Project would cost over one billion dollars. The new 8,500-foot[1] parallel air-carrier runway would be constructed west of the existing runways, approximately where 12th Avenue South now runs. As the PCHB described it:

> The site of the proposed Third Runway is currently a wooded canyon encompassing Miller Creek, the bottom of which lies approximately 150 feet below the level of the Airport's existing runways. To provide the site for the Third Runway, the Port proposes to fill the canyon with over twenty (20) million cubic

[1] AR 000784 (PCHB Order at 11).

> yards of fill. Under the fill, the Port would construct a drainfield to capture and transport groundwater.[2] [3]

The enormous rock drainfield under the fill[4] would supposedly "capture" groundwater and transport it downslope in the hope of supporting the streams and wetlands below which would otherwise be starved of water as a result of the massive fill and construction.

The Port proposes several retaining walls to support portions of the fill embankments. The largest of these is a monolithic, mechanically stabilized earth (MSE) wall over 150 feet high and approaching one-third of a mile in length.[5] Dubbed the "Great Wall of SeaTac," the Port proposes to construct the MSE wall on soils subject to liquefaction during earthquakes.[6]

> The Port proposes an elaborate system of embankments and retaining structures to keep the 20 million cubic yards of fill in place. One element of this would be a 135-foot-high mechanically stabilized earth (MSE) wall with a 20-foot high sloped embankment above the wall. This section of the wall would run for approximately 1,500 feet. The proposed construction footprint for the MSE wall comes within approximately 50 feet of Miller Creek.[7]

The Project would be constructed in the Miller Creek, Walker Creek, and Des Moines Creek watersheds and in wetlands at Sea-Tac Airport

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[2] AR 000785 (PCHB Order at 12).

[3] According to Ecology, the (over) 20 million cubic yards of fill would be the equivalent of 40 football fields each piled 300 feet deep. AR 027998-999 (Ecology Press Release, dated August 10, 2001).

[4] AR 000785 (PCHB Order at 12).

[5] AR 000786 (PCHB Order at 13).

[6] AR 014145 (Kavazanjian Pre-filed Testimony at p. 7).

[7] AR 000786 (PCHB Order at 13); *see also* AR 030273 (December 2001 Wetlands Functional Assessment, App. A, Figure 3.2.2-2.)

("STIA," "Airport").[8] Miller, Walker and Des Moines Creek are all fish-bearing streams classified as Class AA waters of the state,[9] the highest and most protective category established for state waters. WAC 173-201A-030(1).

As Ecology has stated: "The potential effects on water quality and the natural environment are enormous . . ."[10] If approved, the Project would impact over 700 acres,[11] create over 300 acres of new impervious surfaces with associated stormwater runoff,[12] with massive amounts of polluted stormwater runoff, starve dry-season stream flows,[13] and fill all or portions of 50 wetlands totaling more than 20 acres.[14] It would obliterate 980 linear feet of a fish-bearing stream, Miller Creek,[15] relocating it in a flat, fabric-lined ditch,[16] and fill hundreds of feet of drainage channels in the Miller Creek and Des Moines Creek basins.[17] In sum, the Third Runway Project, if built, would literally re-plumb the Miller, Des Moines and associated Walker Creek watersheds and wetlands. These streams

[8] AR 034248 (Second Revised Public Notice issued by Army Corps of Engineers, dated December 27, 2000, at 1).
[9] AR 016891 (September 21, 2001, § 401 Certification, at p. 2).
[10] AR 027998 (Ecology Press Release, dated August 10, 2001, at p. 1).
[11] AR 034249 (Second Revised Public Notice at p. 2).
[12] AR 000790 (Order at 17); AR 046403 (Comprehensive Stormwater Management Plan (CSMP) Vol. 1 at 4-4, Table 4-1).
[13] AR 000794 (PCHB Order at p. 21)
[14] AR 000785 (PCHB Order at p. 12).
[15] AR 034249 (Second Revised Public Notice at p. 2).
[16] AR 007204-206 (10/5/01 Sheldon Declaration in Support of Stay, at pp. 16-18, ¶ 19); AR 014770-771, 773 (Sheldon Pre-filed Testimony at pp. 18-19, ¶ 35, and p. 21, ¶ 41); AR 015037 (Sheldon Pre-filed Testimony at Ex. M, 4/6/98 Memo from Tappel to Kelley, p. 2).
[17] AR 034249 (Second Revised Public Notice at 2).

and wetlands are characteristic of the still viable -- but fragile -- aquatic systems which have been much in the news as the Puget Sound region awakens to the consequences of their elimination.

ACC and CASE have a critical stake in the outcome of this appeal. The affected waters -- Des Moines, Miller and Walker Creeks -- all flow through ACC member cities.[18] The over 150,000 citizens of ACC cities, including the students of the Highline School District, use these streams for recreational and aesthetic purposes. *Id.* For example, Miller and Walker Creeks flow around and through the City of Normandy Park Community Center property. *Id.* Des Moines Creek is an important feature of Des Moines' main waterfront park, and, after flowing through the park, discharges into Puget Sound. *Id.* Over the years, school children and community groups have undertaken significant efforts to restore these salmon-bearing streams to levels of purity in which aquatic biota may thrive. *Id.* at pp. 2-3. Many residents fish in the streams. *Id.* at p. 3. An aquifer used for drinking water underlies the project site.[19]

The Project requires a permit from the United States Army Corps of Engineers ("Corps") under § 404 of the Clean Water Act ("CWA") (33 U.S.C. § 1344), because it would fill protected wetlands and eliminate protected aquatic resources. The CWA, in turn, requires under § 401 a certification by the State that water quality laws and standards will not be violated in the construction and operation of the Project. 33 U.S.C. §

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[18] AR 014583 (Nelson, Pre-filed Testimony, p. 2).
[19] AR 041914.

1341(d); 33 CFR § 320.4(d). A § 401 certification is:

> a one-time opportunity to ensure compliance with state water quality standards and to inform the federal permitting agency whether the proposed activities will meet the applicable requirements. Therefore, the 401 review and decision is critical because it is the state's sole opportunity to determine whether the proposed permanent loss of all or part of a waterbody is adequately avoided, minimized, and mitigated, and whether the activities associated with construction and operation of the facility requiring the certification meet water quality standards.[20]

The State may only issue the certification if there is "reasonable assurance" that the project will comply with water quality laws and, in particular, state water quality standards. 33 U.S.C. § 1341 (d); 33 CFR § 320.4 (d).

In the case of the Port's Third Runway Project, those standards are high because, as noted, area streams are classified as Class AA waters, and the applicable water quality standards include an explicit injunction against degradation.[21] Washington's overarching water quality anti-degradation mandate also applies:

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[20] AR 014402 (Declaration of Thomas Luster, p. 8, ¶ 18) (emphasis added).

[21] For example, in Class AA waters, such as Des Moines, Miller and Walker Creeks, state water quality standards require that, "Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses." WAC 173-201A-030(1)(a). They further provide that, "Toxic substances *shall not be introduced above natural background levels* in waters of the state which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependant upon those waters, or adversely affect public health, as determined by the department." WAC 173-201A-040(1) (emphasis added); *see also* WAC 173-201A-030(1)(c)(vii).

> Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed.[22]

2. History of Port Applications and PCHB Proceedings

In 1997, the Port submitted the first application in a series of attempts to obtain a State § 401 certification for the Third Runway Project. Ecology in fact issued a § 401 certification to the Port in July 1998, but the Port itself appealed it to the Pollution Control Hearings Board (PCHB No. 98-150), delaying its own project. The Port's 1998 appeal and the underlying § 401 Certification were both withdrawn later that year when it came out that the Port had substantially underestimated the number of wetlands that would be impacted by the Project.[23]

The Port next re-applied in September 1999. After a year-long investigation, and facing denial of certification by Ecology, the Port withdrew the second application in late September 2000. *Id.*

The Port applied yet a third time in October 2000. *Id.* The same issues which had prevented approval of the earlier application remained largely unresolved[24] when, under "substantial" pressure, Ecology issued the Port a § 401 Certification on August 10, 2001.[25] This August 2001 Certification was based on long lists of Port "IOUs" for reports and

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[22] WAC 173-201A-070(1). The regulatory effect of this anti-degradation mandate in Washington's water quality standards was reaffirmed several years ago by the United States Supreme Court. *PUD No. 1, et al. v. Washington Department of Ecology, et al*., 511 U.S. 700, 719 (1994); *see Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 192 (1993).
[23] AR 000781 (PCHB Order at 8).
[24] AR 014401 (Luster Pre-filed Testimony at Exhibit A (Declaration of Thomas R. Luster dated 9/10/01, at p. 7)).
[25] *See, e.g.,* AR 001640 (Hellwig Dep. at 78).

analyses[26] needed to justify the approval it had received in advance of their submission. Nevertheless, despite the unprecedented leeway Ecology had given the Port, the Port once again appealed Ecology's Certification to the PCHB (PCHB No. 01-150), challenging requirements which Ecology had just touted as "scientifically sound, technically feasible, and legally defensible."[27] Ecology responded, after intervention by the Governor's Office,[28] by entering into closed-door negotiations and then a settlement with the Port, withdrawing the August § 401 Certification it had just issued, and then granting a new, weakened one more to the Port's liking on September 21, 2001. AR 016888-934. It was that September 2001 § 401 Certification which was reviewed by the PCHB on appeal by ACC.[29]

As part of its appeal, ACC sought an order from the Board staying the Ecology Certification pending its final decision on the merits. After briefing and oral argument, the Board issued on December 17, 2001, its Order Granting Motion to Stay the Effectiveness of Section 401 Certification. AR 005809-829. It identified three issues raised by ACC which met the standard for a stay: importation of polluted fill to the site, wetlands protection, and the requirement for water rights for stream flow

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[26] AR 000793 (PCHB Order at p. 20).
[27] AR 027998-999 (Ecology News Release dated August 10, 2001). Significantly, the respondents have very much insisted on <u>not</u> leaving defense of either the August or September 401 to what was before Ecology when it made its decision.
[28] AR 001615-616 (Fitzsimmons Dep.); AR 001595 (*id.*).
[29] CASE sought and was granted intervenor-appellant status in December 2001.

augmentation.[30]

Prior to trial, the parties engaged in extensive pretrial discovery, including some 40 depositions of experts. The matter was then tried before the Board from March 18 through March 29, 2002. The trial was conducted using pre-filed direct testimony, with examination of witnesses by all counsel and the Board at the trial. After closing arguments on March 29, 2002, the Board left the record open for several purposes, which were separately addressed in subsequent orders. The Board also set a schedule for submission by the parties of proposed findings and conclusions, based on an outline previously published by the Board. The Board then reviewed the 60,000-page record and deliberated for four and a half months before issuing a unanimous 139-page Findings of Fact, Conclusions of Law, and Order on August 12, 2002. AR 000774-912.

The Order identified significant flaws in Ecology's § 401 Certification, but did not vacate and remand to Ecology. Instead, it imposed sixteen new conditions, and concluded that, "with the further conditions imposed by the Board, there is reasonable assurance the construction of the Port's proposed improvements at the Airport will comply with state water quality standards."[31] The new conditions remedy some -- but not all -- of Ecology's errors and omissions. Several

[30] There were several other substantive pretrial decisions by the Board, including pretrial orders denying ACC's motion for summary judgment on Legal Issue 9 (whether a water right is required) and reserving that issue for the hearing (AR 004617-619), and an Order Granting Judgment on Issue 14, dismissing Issue No. 14, a SEPA claim. AR 002384-395.

[31] AR 000911 (PCHB Order at p. 138).

fundamental flaws in the Ecology Certification were left untouched, and some new errors were inserted in the course of PCHB review.

The Port filed a petition with the Board on August 22, 2002, seeking reconsideration of the Board's rejection of the Port's "SPLP" workplan, which the Board rejected because it would not prevent use of contaminated fill for the project.[32] However, a few days later, before the Board could respond, the Port proposed an agreed order dismissing its own petition for reconsideration pursuant to RCW 34.05.470(4) and WAC 371-08-550. That order was entered by the PCHB on September 6, 2002, triggering the 30-day APA review period.

B. <u>Procedural History of Appeals of PCHB Order</u>

Within hours of the Board's entry of the Port's requested agreed dismissal of its reconsideration request on September 6, 2001, the Port filed an APA petition for review in King County Superior Court. The Port's petition challenged at least eight of the sixteen conditions imposed by the Board, including conditions related to protections against polluted fill, wetland protections, water rights and protections against polluted stormwater runoff.

Subsequently, on September 12, ACC and CASE filed an APA petition in Thurston County Superior Court seeking review of some of the

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[32] AR 000760-773 (Port's 8/22/02 Petition for Reconsideration Regarding Condition 8). SPLP stands for "Synthetic Precipitation Leaching Procedure," the merits of which will be discussed elsewhere in the parties' briefing. The Board ruled that, "The SPLP process may not be used to authorize the importation of fill that exceeds the modified fill criteria." AR 000910 (PCHB Order at p. 137).

Board's interlocutory rulings as well as limited aspects of its final Order. A few days later, on September 18, 2002, Ecology filed its own petition in Thurston County attacking three of the substantive conditions contained in the Board's final Order, one relating to water quality and two relating to contaminated fill.

All of the petitions, by a circuitous path, have now been consolidated for direct review before this Court.

V. ARGUMENT

In addition to the arguments below, CASE adopts the arguments in ACC's Opening Brief for the following Assignments of Error (as enumerated in the above-listed Assignments of Error and Issues Pertaining to Assignments of Error): 1, 2, 8, 9, and 10.

A. Standard of Review

CASE adopts the Standard of Review in ACC's Opening Brief.

B. The PCHB Erred in Concluding that Ecology May Rely on the Port's Current and Future NPDES Permits to Provide Reasonable Assurance that Stormwater Discharges Will Comply with Water Quality Standards.

1. Overview

Construction of the proposed third runway and other Master Plan Update (MPU) projects will add approximately 300 acres of new impervious surfaces to the facilities at Sea-Tac International Airport

(STIA).[33] In combination with existing impervious surfaces, the third runway will contribute enormous quantities of polluted stormwater to the streams surrounding the Airport.[34] Absent control and treatment, this stormwater scours streambeds and adds pollutants from airport operations to the water column. (AR 046419.)

Although the Port's stormwater discharges have been the subject of a Clean Water Act § 402 National Pollutant Discharge Elimination System ("NPDES") water quality permit since 1994 (AR 000796), the Board correctly found that existing discharges exceed numeric water quality criteria for toxic pollutants -- particularly copper -- established in WAC 173-201A-040. (AR 000800-803, 806.) Based on this finding, the Board concluded that Ecology's § 401 stormwater conditions, which perpetuated the status quo, were inadequate for a finding of reasonable assurance without the additional conditions imposed by the Board. (AR 000908.) As the Board explained, "Without these conditions, there would not be reasonable assurance." (AR 000867.)

The Board therefore imposed several new conditions on the § 401 Certification, which ACC and CASE do not challenge here. These include

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[33] AR 000790 (Order at 17); AR 046403 (Comprehensive Stormwater Management Plan (CSMP) Vol. 1 at 4-4, Table 4-1).

[34] For example, record evidence confirms that airfield Outfall SDS-3 -- the key outfall that presently drains 224 acres (76%) of the impervious airfield surface at STIA (AR 017175)-- discharged 8.2 million gallons of stormwater during a single storm event in June 2001. (AR 017178, 2001 Annual Storm Water Monitoring Report for Sea-Tac International Airport, Appendix A, "Estimated Runoff Volumes (gal) for Storm Events Monitored 7/1/00-6/30/01," Column 6.) In a single storm event in January 2000, SDS-3 discharged 12.7 million gallons of stormwater. (AR 045731, 2000 Annual Storm Water Monitoring Report, Appendix A, "Estimated Runoff Volumes (gal) for Storm Events Monitored 7/1/99-6/30/00," Column 6).

requirements that the Port's new stormwater facilities incorporate "treatment BMPs"[35] better able to remove dissolved metals from the airport's stormwater discharges (AR 000804-805); that the Port retrofit its existing stormwater facilities to prevent continued degradation of local streams (AR 000808); that the Port use appropriate scientific methods to monitor stormwater quality (AR 000807), including expanded use of the Whole Effluent Testing ("WET") method to assess sub-lethal harm to aquatic biota (AR 000808); and that Ecology not utilize the Water Effects Ratio ("WER") study process to relax water quality standards for receiving waters to which the Third Runway Project will discharge (AR 000812). As the Board correctly found on the basis of substantial record evidence, these conditions are necessary to ensure compliance with state water quality standards.

The Board erred, however, with respect to other water quality findings and conclusions. Most importantly, the Board erred in concluding that Ecology could base reasonable assurance of water quality compliance at the time of issuance of the § 401 Certification on a reservation of authority to alter those terms of compliance in the Port's future § 402 (NPDES) permits. (AR 000881-883.) This conclusion overlooks the distinct legal standards and purposes of the two separate Clean Water Act approval processes and disregards important evidence presented at the hearing. It

[35] "BMP" is an acronym for "best management practices," a term meaning "physical, structural, and/or managerial practices approved by the department that, when used singularly or in combination, prevent or reduce pollutant discharges." WAC 173-201A-020.

also relies on the terms of future Port NPDES permits which were not in evidence before the Board (because they did not exist) , assuming that those permits will, contrary to past practice, actually enable enforcement of Washington's state water quality standards.

2. <u>Water Quality Standards and the Federal Clean Water Act</u>

The Clean Water Act, 33 U.S.C. § 1251 et seq., is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters[,]" 33 U.S.C. § 1251(a), and to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2). To achieve these ambitious goals, the Act utilizes technology-based limitations on individual discharges into the country's navigable waters from point sources, *see* 33 U.S.C. §§ 1311, 1314; and comprehensive water quality standards establishing water quality goals for all intrastate waters. 33 U.S.C. §§ 1311(b) (1)(C), 1313.

As the United States Supreme Court has explained, state water quality standards consist of (1) the designated uses of the navigable waters involved, 33 U.S.C. § 1313(c)(2)(A); (2) the water quality criteria for such waters based upon such uses, *id.;* and (3) an antidegradation policy -- that is, "a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation." *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,

511 U.S. 700, 704-05, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994). The Court further explained:

> The State of Washington has adopted comprehensive water quality standards intended to regulate all of the State's navigable waters. See Washington Administrative Code (WAC) 173-201-010 to 173-201-120 (1986). The State created an inventory of all the State's waters, and divided the waters into five classes. 173-201-045. Each individual fresh surface water of the State is placed into one of these classes. 173-201-080. . . . The water quality standard for Class AA waters is set forth at 173-201-045(1). The standard identifies the designated uses of Class AA waters as well as the criteria applicable to such waters.

PUD No. 1, 511 U.S. at 705-06.[36]

Washington's water standards are generally set forth in WAC 173-201A. The "characteristic uses" applicable to the various classes of water are set forth in WAC 173-201A-030. Section 030 also sets forth the applicable water quality criteria, including both "numeric" and "narrative" criteria. *See, e.g.,* WAC 173-201A-030(1). An example of a numeric criterion is that established for dissolved oxygen: in Class AA freshwater, "dissolved oxygen shall exceed 9.5 mg/l." WAC 173-201A-030(1)(c)(ii). An example of a narrative criterion is that established for aesthetics: in Class AA waters, "Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste." WAC 173-201A-

[36] Like the Dosewallips River discussed in *PUD No. 1* (*id.* at 705), the creeks to which STIA discharges stormwater -- Miller, Des Moines, and Walker Creek -- are designated as Class AA waters. (AR 000785; WAC 173-201A-130.)

030(1)(c)(viii). The third component of Washington's water quality standards, the antidegradation policy, is set forth in WAC 173-201A-070.

A certification under § 401 of the Clean Water Act, 33 U.S.C. § 1341, focuses on prevention of violations of such water quality standards. As Tom Luster, Ecology's former senior policy and technical expert for issues related to Section 401 reviews explained:

> Unlike other permits, such as the 402 NPDES permit [33 U.S.C. § 1342], which generally include a regular schedule allowing initial permit requirements to be updated as necessary, a 401 decision is a one-time opportunity to ensure compliance with state water quality standards and to inform the federal permitting agency whether the proposed activities will meet the applicable requirements.

(AR 014402.) More specifically:

> Approvals issued under either section 401 or 402 require compliance with similar aquatic protection requirements (e.g., Section 401 requires compliance with CWA sections 301, 302, 303, 306, and 307 for 401 permits, and Section 402 requires compliance with CWA sections 301, 302, 306, 307, 308, and 403).
>
> However, to address the immediate and permanent losses of waterbodies that occur under 401 certifications, Ecology's practice has been to recognize that the CWA imposes a stricter standard of review in 401 than it does in 402. Section 401(d) of the Act states that a 401 certification must include all necessary effluent limitations to ensure standards are met, while Section 402(a) states that a 402 permit may include either those limitations or other measures that would eventually lead to standards being met. In practice, this often results in an iterative process occurring over one or more five-year section 402 permit cycles . . . .
>
> In contrast, . . . 401 certifications are only required when an applicant proposes to place fill in a waterbody, thereby resulting for the most part in a permanent loss of all or part of a waterbody. A 401 decision is [a] one-time opportunity . . . . Unlike the 402 process, it is not meant to initiate an iterative multi-year process

> for bringing a noncompliant activity and project into compliance, and its interaction with the federal permitting process generally does not allow the initial decision to be revisited.

(AR 014403-014405 (paragraph numbers omitted.) (emphasis added).)

3. Regulation of Stormwater Discharges at STIA

As noted above, discharges of stormwater at STIA have been covered under the Port's NPDES permit since 1994 (AR 000796). The Port's current[37] NPDES permit authorizes the discharge of "stormwater associated with industrial activity" to the STIA Stormwater Drainage System (SDS) "in accordance with the terms and conditions of this permit." (AR 016990, Permit Cond. S1.E.)

The permit does not impose effluent limitations on the Port's discharges of stormwater associated with industrial activity. (AR 016987-016991, Permit Cond. S.1; AR 000881). Instead, as the Board found, the Port's NPDES permit regulates stormwater discharges from the Airport through the use of BMPs. (AR 000881.) The permit-related BMPs are identified in the Port's Storm Water Pollution Prevention Plan (SWPPP). (AR 000791; *and see,* AR 052594.)

Stormwater discharges from the third runway and other airport projects may be regulated under the Port's Comprehensive Stormwater Management Plan (CSMP) identified in § 401 Certification Cond. J.1. (AR 016914; *and see,* AR 046366.) However, as discussed further below,

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[37] The Port's current permit expired on June 30, 2002. (AR 016979.) The permit remains in effect by virtue of WAC 173-220-180(5).

under § 401 Certification Cond. B.1.(f) (AR 016893), the provisions of the CSMP approved and incorporated as a basis for the 401 Certification may be superseded -- that is, set aside and replaced -- by "any future Ecology-approved NPDES permit" for STIA. (AR 016893.)

4. **The Board Erred in Tying the § 401 Certification to Future NPDES Permits.**

It was error for the Board to grant Ecology broad leeway by relying on future unknown NPDES permits to provide reasonable assurance that operational stormwater discharges from the Port's projects will meet state water quality standards. In particular, the Board erred by concluding that the required assurance is not defeated by a new provision in the § 401 Certification allowing Ecology to replace its conditions -- which explicitly require compliance with water quality standards -- with conditions in future NPDES permits, which may not.

As discussed further below, the Board also misconstrued the provisions of the Port's current NPDES permit in reaching its conclusions.

a. **Operational Stormwater**

"Operational" stormwater refers to the stormwater discharges that result from the operation -- rather than the initial construction -- of the third runway related airport facilities. The Port's plan for managing operational stormwater is the four volume Comprehensive Stormwater Management Plan (CSMP). *See,* §401 Cond. J.1; and AR 046366.

The §401 Certification's provisions pertaining to operational stormwater have a special legal significance. As the U.S. Supreme Court

has explained, EPA's "regulations expressly interpret § 401 as requiring the State to find that 'there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards.' 40 CFR § 121.2(a)(3) (1993)." *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 712, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) (emphasis added by U.S. Supreme Court).[38]

Under these authorities, the § 401 Certification must assure that the discharges of stormwater resulting from the *future operation* of the third runway and related airport facilities will comply with state water quality standards.

b. <u>Future Control of Operational Stormwater at STIA</u>

Consistent with 33 U.S.C. § 1341(d), the § 401 Certification's present requirements pertaining to operational stormwater explicitly require compliance with state water quality standards: "All stormwater discharges from the project shall be in compliance with state of Washington surface water quality standards (Chapter 173-201A WAC) . . . ." 401 Cert. Cond. J.2.(b) (AR 016916).

However, the amended § 401 Certification here leaves the *future* control of operational stormwater to substantial and legally impermissible doubt. Ecology's original August, 2001 § 401 Certification assured that

[38] As the U.S. Supreme Court further emphasized, "EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference." *PUD No. 1*, 511 U.S. at 712 (emphasis in original), *citing Arkansas v. Oklahoma*, 503 U.S. 91, 110, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992), *and Chevron U.S. A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

operational stormwater discharges would remain subject to Certification Condition J.2.b's explicit requirement for compliance with water quality standards in perpetuity, by providing that "This Order shall be valid during construction and long-term operation and maintenance of the project." (August § 401, Cond. B.1 (AR 016939) (emphasis added.))

But this "Permit Duration" provision changed dramatically when Ecology withdrew its August certification and issued a modified one a month later. *See,* § 401 Cond. B (AR 016893). In the September 401 Certification ,the provisions governing operational stormwater no longer apply in perpetuity. Now, as the Board's Order explains, "The provisions of the operational stormwater requirements (condition J), to the extent they are incorporated into and superseded by any future NPDES permit for the Airport, shall be superseded as determined in the NPDES permit." Order at 16 (AR 000789); *and see,* Cond. B.1 (AR 016893) (emphasis added)[39] The § 401 Certification further provides, "Ecology may require changes to the approved CSMP as a part of future NPDES permits." (AR 016916).

c. Supersede Means Set Aside, Annul, Replace

"Supersede" means "[o]bliterate, set aside, annul, replace, make void, inefficacious or useless, repeal." Black's Law Dictionary 1437 (6th ed. 1990). Thus, with respect to operational stormwater, all of the protections carefully spelled out in § 401 Condition J -- *including* the explicit

[39] The Board further noted, "The future NPDES permit can supersede the §401 certification provisions." Order at 18 (AR 000791).

requirement of compliance with water quality standards presently incorporated in Cond. J.2.b. -- can be set aside, annulled, and replaced by the unknown provisions of any future NPDES permit for STIA. (AR 016893.) Ecology's § 401 coordinator and primary author acknowledged, in both deposition and hearing testimony, that the § 401 standards could be modified to a lesser standard by a future NPDES permit. (AR 001727; AR 054977.)

d. Future Uncertain

There are no conditions in the § 401 Certification or in the Board's Order that establish any minimum requirements for the Port's future NPDES permits with respect to water quality standards. The issue is crucial because the terms and provisions of the Port's future NPDES permits are speculative and unknown. Ecology did not provide, and the Board was thus unable to review, the terms and conditions of any future NPDES permit. The § 401 Certification's primary author conceded that Ecology could have incorporated language providing that the Certification's provisions could only be superseded by a future NPDES permit if the superseding terms were stronger than those included in the original Certification. (AR 055122-055123.) Obviously, Ecology did not incorporate any such limitation. (AR 016893, Cond. B.1.f.)

How, then, did the Board conclude that the future discharges of operational stormwater would comply with water quality standards?

e. <u>The Board's Examination and Misconstruction of the Port's Current NPDES Permit</u>

In several important respects, the Board erroneously interpreted and applied the law in construing the Port's current NPDES permit. *See*, Order at 18-20 (AR 000791-793).

i. One Fundamental Error

The Board fundamentally misconstrued basic aspects of the Port's NPDES permit, and the relationship between the NPDES permit and the § 401 Certification.

In its findings, the Board states, "Ecology required ongoing compliance with all of the terms of the NPDES permit as one of the conditions of the §401 certification (Condition J)." (AR 000858.) This statement is clearly erroneous -- Condition J says no such thing. *See,* 401 Cond. J (AR 016914-917).[40] With respect to operational stormwater, the § 401 Certification does *not* require compliance with the Port's NPDES permit. And, as discussed below, the Port's NPDES permit does not require compliance with water quality standards.

ii. The Port's NPDES Permit Does Not Require Compliance with Water Quality Standards

Most significantly, the Board erroneously concluded that provisions governing operational stormwater in the § 401 Certification and the § 402

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[40] The erroneous statement is taken verbatim from Respondents' Proposed Findings & Conclusions (AR 001086, lines 13-14). A different and lesser requirement, applying only to discharges of construction-related stormwater "[d]uring construction," is included in § 401 Certification Condition H(1). (AR 016909.)

permit equally require compliance with water quality standards. As noted above, the § 401 Certification explicitly requires compliance with water quality standards in Cond. J.2.b.

However, the Port's NPDES permit does not require compliance with water quality standards. *See generally,* Exh. 1094 (AR 041460). There is no explicit requirement of compliance with water quality standards anywhere in the permit. Rather, the permit merely requires that "[a]ll discharges and activities authorized by this permit shall be consistent with the terms and conditions of this permit." (Permit Cond. S1., AR 041467 (emphasis added).)

This key omission is significant in light of 33 USC 1342(k), a section of the Clean Water Act known as the permit "shield provision." *See, e.g., Tiegs v. Watts*, 135 Wn.2d 1, 27 n.1, 954 P.2d 877 (1998) (J. Talmadge, concurring).[41] Under this provision, compliance with the terms of the NPDES permit is "deemed" to satisfy the requirements of the CWA and state water quality standards.[42] The shield provision "allows the permit holder an absolute defense [against enforcement actions] if he can demonstrate compliance with his permit, unless the standard sought to be enforced is a toxic pollutant standard relating to human health." *Inland*

[41] *See also, Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993) ("Section 402(k) contains the so-called 'shield provision,' *33 U.S.C. § 1342*(k), which defines compliance with a NPDES or SPDES permit as compliance with Section 301 for the purposes of the CWA's enforcement provisions.").

[42] The Board took note of the parallel provision in the Port's current NPDES permit, observing: "The Port's compliance with the NPDES permit is deemed to constitute compliance with the Clean Water Act for those discharges governed by that Permit." Order at 92 (AR 000865).

Steel Co. v. Environmental Protection Agency, 574 F.2d 367, 370 (7th Cir. 1978).

As a matter of law, because the Port's NPDES permit does not incorporate the water quality standards, compliance with water quality standards is not an enforceable requirement of the Port's permit. *See Northwest Env'tl Advocates v. City of Portland*, 56 F.3d 979, 989 n. 11, (9th Cir. 1995), *reh'g denied*, 74 F.3d 945 (1996), *cert. denied*, 518 U.S. 1018, 116 S. Ct. 2550, 135 L. Ed. 2d 1069 (1996) (state water quality standard can constitute an effluent standard or limitation enforceable under the CWA only if it has been incorporated in to an NPDES permit). This means that, with respect to its NPDES permit, the Port does not have to comply with water quality standards. Moreover, no one -- not Ecology, not EPA, not CASE -- can take enforcement action under the Port's NPDES permit for violations of water quality standards. Thus, the Board erred as a matter of law in relying on a (future unwritten) CWA § 402 NPDES permit to meet the § 401 requirement for compliance with water quality standards.

iii. "Requirements" v. "Objectives"

The Board's analysis of the Port's current NPDES permit focused on the condition governing operational stormwater -- the Stormwater Pollution Prevention Plan ("SWPPP") for Airport Operations, Permit

Cond. S.12. (AR 000791; 017016.)[43] The NPDES permit uses Best Management Practices, rather than numeric effluent limitations, to manage operational stormwater.[44] The BMPs are set forth in the facility SWPPP, as required by Cond. S.12.

Significantly, as is the case with the NPDES permit generally, Permit Cond. S.12 does not require the Port to comply with water quality standards. Instead of incorporating the water quality standards as an enforceable term of the permit, Permit Cond. S12 merely identifies preventing violations of water quality standards as one of several "Objectives" -- not as a binding "General Requirement[]." (AR 017016.)[45]

Nevertheless, despite the plain language of both permit Cond. S.12 (AR 017017) and the facility SWPPP (AR 022238), the Board erroneously concluded that the NPDES permit requires the selection of BMPs adequate "to meet water quality standards." (AR 000791-792.)[46] But neither the

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[43] The SWPPP for Airport Operations is sometimes called the "facility SWPPP" to distinguish it from the SWPPP for Construction Activities governed by permit Condition S.13. (AR 017018-017025.)

[44] Fitzpatrick, Tr. at 5-0041 (AR 055802); Fitzpatrick Prefiled Testimony at 3-4 (AR 015592-593). "Best management practices (BMP)" means physical, structural, and/or managerial practices approved by the department that, when used singularly or in combination, prevent or reduce pollutant discharges." WAC 173-201A-020. The Clean Water Act defines "effluent limitation" to mean "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . ." 33 U.S.C. § 1362(11).

[45] *See also* the facility SWPPP itself, listing "objectives." (AR 022237.)

[46] Specifically, the Board found, "Whenever a self-inspection reveals the pollution prevention measures and controls are inadequate to meet water quality standards, due to the discharge of or the potential to discharge, the SWPPP shall be modified, as appropriate." Order at 18 ln. 20 - 19 ln. 2 (AR 000791-792) (emphasis added).

Permit[47] nor the SWPPP[48] cites or incorporates state water quality standards in its operative provision.

The Board's interpretation ignores the plain language of the permit as well as the intent of the parties. As the Board found, on the basis of testimony by Ecology and Port staff (AR 055803, 056370), the general purpose of the NPDES permit's monitoring requirements is to assess the effectiveness of the Port's BMPs (AR 000797) -- not to determine compliance with state water quality standards. And indeed, Ecology testified it does not know whether the Port's nonconstruction stormwater discharges are exceeding state water quality standards. (AR 055826, lns. 3-6.) The Board itself found the current NPDES permit monitoring regime to result in "at best, confusing and, at worst, inaccurate data." (AR 000807.)

The Board's finding was based in part on its observation that, although analysis of compliance with the water quality criterion for metals requires (1) hardness data measured in the receiving water, (2) sampling over a set period of time, (3) sampling in the receiving waters, and (4)

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[47] Permit Condition S.12.B.2.b. provides:

> "Whenever a self-inspection reveals that the description of potential pollutant sources or the pollution prevention measures and controls identified in the SWPPP are inadequate, due to the discharge of, or the potential to discharge, a significant amount of pollutant, the SWPPP shall be modified, as appropriate . . . ."

(AR 017017.)

[48] The facility SWPPP states, "The current NPDES Permit requires the Port to:

> * * *

- Conduct self-inspections to verify that the description of potential pollutant sources or the pollution prevention measures and controls identified in the SWPPP are adequate."

(AR 022238).

measurement of the dissolved fraction of metals (AR 000800), the monitoring conducted under the Port's NPDES permit does not provide *any* of this information. First, the NPDES permit "does not currently require the Port to monitor the hardness of the receiving water." (AR 000807.) Second, "The Port's sampling shows instantaneous exceedances of the numeric water quality criteria, but they do not show that the criteria were exceeded for the necessary length of time." (AR 000806). Third, the Port's samples are taken "at points prior to entering the receiving waters." (AR 000801.) And fourth, the Port samples total recoverable metal, rather than the dissolved fraction. (AR 000800, 000807.) Thus, the Board deadpanned, "The Board is not . . . convinced the Port has done an adequate job in sampling to ascertain the status of the receiving waters." (AR 000801.)

iv. Discretionary Compliance

Yet another provision of the Port's current NPDES permit indicates that compliance with water quality standards is not mandatory. In NPDES Condition S.13, Ecology reserves discretion to do nothing in the event that construction stormwater discharges violate water quality standards. Specifically, Cond. S.13.B.7.b states, "The Department *may* require SWPPP and BMP modification if compliance with State of Washington Surface Water Quality Standards . . . is not being achieved." (AR 017020 (emphasis added.))

Thus, the Port's current NPDES permit allows Ecology to take no action in the face of water quality standards violations. This provision

was directly comparable to Ecology's § 401 Condition E(3) -- a monitoring provision which the Board felt compelled to modify , precisely because it was too lax.. (AR 000911.) The Board added Condition 13 to explicitly require Ecology to take action to eliminate exceedances of water quality criteria in the event that monitoring detects such exceedances. (AR 000860-861) As the Board explained:

> Condition E (3) of the §401 certification uses the word "may" rather than a mandatory requirement to take action based on post-construction monitoring. The Board finds this condition must have more certainty in the outcome. Therefore, the Board further conditions this requirement to require Ecology to take action to eliminate the exceedances in the event monitoring detects exceedances of the water quality criteria in either surface or groundwater.

(AR 000860-861). Significantly, even though the Board expressly found Condition 13 necessary to protect water quality standards, there is no such provision in the NPDES permit, and may be none in any future NPDES permit which, per the Board's Order, may modify the § 401 Certification, eliminating the reasonable assurance on which it must be based.

f. Back to the Future

On the record established before the Board, there is absolutely no evidence -- much less reasonable assurance -- that "any future Ecology-approved NPDES permit" at STIA will incorporate compliance with water quality standards as an enforceable permit condition. On the contrary, if the current NPDES permit for the airport serves as an example, and the Board evidently thought it did (*see, e.g.,* AR 000791-793, AR 000795-

811, AR 000858)), the Port will be issued a permit that specifically omits compliance with water quality standards as a condition of the permit. As a result, the PCHB erred in concluding there is reasonable assurance that discharges of stormwater from the operation of the third runway and other airport projects will comply with water quality standards.

The modified § 401 Certification approved by the Board appears at first glance to require actual compliance with state water quality standards, enforceable by Ecology as well as the public. However, even that appearance is deceiving. Because of its provisions allowing the Port's new NPDES to supersede 401 requirements, because of the NPDES permit shield provision described above, and because there is no assurance that the new NPDES , in contrast to the Port's current one, will incorporate water quality standards as mandatory requirements, there is no assurance of compliance with water quality standards.

Under the APA's standards, this Court reviews the Board's interpretation of an NPDES permit as it would the interpretation of a contract or other legal document -- *de novo*. RCW 34.05.570(3)(d); *see also, Northwest Env'tl. Advocates v. City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995).[49] Here such a review demonstrates that the Board Order and Ecology's Certification erred in relying on future 402 permits to

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[49] As the Ninth Circuit explained,

> When reviewing a district court's interpretation of such a writing, the court reviews de novo the determination of whether it is ambiguous. Interpretation of an unambiguous writing is also a question of law subject to *de novo* review. If the court must look to extrinsic evidence in order to interpret a writing, its findings of fact are reviewed for clear error.

Northwest Env'tl Advocates, 56 F.3d at 982 (citations omitted).

satisfy § 401's requirements. The Board's Decision on this point, granting the Port leeway insupportable under the law, should be reversed and the 401 certification vacated and remanded.

C. **The PCHB Erred in Allowing Pre-Authorization of Mixing Zones.**

Mixing zones in Clean Water Act terms are areas within surface waters where Ecology may -- upon satisfying specific legal requirements -- authorize the violation of water quality standards established to protect ecosystems, habitat, public health, and the ability to use and enjoy surface waters for water supply, fishing and swimming.

While the Board's findings of fact with respect to mixing zones for in-stream construction work -- authorized by Condition A.2 in Ecology's § 401 Certification (AR 016891-92) -- are supported by substantial evidence, its mixing zone legal conclusions are flawed. In reaching them, the Board disregarded the plain language of Ecology's § 401 Certification, the uncontested testimony of the Certification's primary author -- as well as the facial requirements of Washington's water quality standards. As a result, the Board erroneously interpreted and applied the law in concluding that Ecology's pre-authorization of mixing zones does not violate procedural and substantive requirements of state water quality standards.

1. The Protections Against Excessive Use of Mixing Zones in Washington's Water Quality Standards

Though nowhere expressly authorized by the Clean Water Act,[50] mixing zones are defined[51] and closely circumscribed in Washington's water quality standards. As the PCHB recently explained in the Industrial Stormwater General Permit appeal, WAC 173-201A-100 imposes "a fairly rigorous array of procedures and substantive provisions to ensure these zones are not used excessively to thwart the goals and policies of the Clean Water Act and the State Water Pollution Control Act." *See, Puget Soundkeeper Alliance v. Department of Ecology,* PCHB Nos. 02-162, 163 and 164 (Order Granting Partial Summary Judgment at 19 (June 6, 2003)).[52]

WAC 173-201A-110(3) sets forth the requirements for "temporary turbidity mixing zones." In pertinent part, section 110(3) provides:

> A temporary turbidity mixing zone is subject to the constraints of WAC 173-201A-100(4) and (6) and is authorized only after the activity has received all other necessary local and state permits and approvals, and after the implementation of appropriate best management practices to avoid or minimize disturbance of in-place sediments and exceedances of the turbidity criteria.

[50] *See, Puget Soundkeeper Alliance v. Department of Ecology,* PCHB Nos. 02-162, 163 and 164 (Order Granting Partial Summary Judgment at 17, and 17-19 (June 6, 2003)) ("Nowhere in the CWA is the concept of incorporating mixing zones into state water quality standards mentioned.") The Order may be viewed at: http://www.eho.wa.gov/boarddecisions.asp

[51] Under WAC 173-201A-020, "'Mixing zone' means that portion of a water body adjacent to an effluent outfall where mixing results in the dilution of the effluent with the receiving water. Water quality criteria may be exceeded in a mixing zone as conditioned and provided for in WAC 173-201A-100."

[52] The Board's ruling in the Industrial Stormwater General Permit (ISGP) appeal is available at http://www.eho.wa.gov/boarddecisions.asp

WAC 173-201A-110(3) (emphasis added). As described by the PCHB, the referenced subsections[53] of WAC 173-201A-100 are "protections against the excessive use of these zones." *Puget Soundkeeper Alliance*, PCHB No. 02-162, at 19.

2. **The Board's Findings**

Ecology's § 401 Certification authorized mixing zones for turbidity resulting from in-stream and shoreline construction activities, such as relocating the channel of Miller Creek and demolishing existing bridge abutments. (AR 000813) In discussing these mixing zones, the Board correctly found that the § 401 Certification:

- places no specific limitations on the size or scope of the "preauthorized" mixing zones (AR 000813);
- contemplates exceedances of the water quality standard for turbidity beyond the boundaries of the mixing zones (*id.*);
- does *not* require the Port to stop work in the event that water quality standards are exceeded outside the mixing zone (AR 000814);
- does *not* require the Port to stop the exceedance of the turbidity standard in any such event (*id.*); and
- does *not* require the Port to notify Ecology when such an exceedance occurs. (*Id.*)

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[53] Subsection 100(4) provides that "No mixing zone shall be granted unless the supporting information clearly indicates the mixing zone would not have a reasonable potential to cause a loss of sensitive or important habitat, substantially interfere with the existing or characteristic uses of the water body, result in damage to the ecosystem, or adversely affect public health as determined by the Department." WAC 173-201A-100(4). Subsection 100(6) requires that, "The size of a mixing zone and the concentrations of pollutants present shall be minimized." WAC 173-201A-100(6).

The Board also found that the § 401 Certification "does not require the Port to identify or implement Best Management Practices before authorizing the mixing zone for turbidity." (*Id.*) In addition, the § 401 defers, until the Port submits a monitoring plan, any demonstration that the proposed construction in streams can and will occur in compliance with applicable standards, including the requirement of minimization in accordance with WAC 173-201A-100(6). (*Id.*)

3. <u>Uncontested Record Evidence the Board Overlooked</u>

While the Board's mixing zone findings, such as those cataloged above, were fine as far as they went, the Board disregarded key testimony that demonstrated conclusively that the regulatory standards for mixing zones simply were not met. For example, it was undisputed that Ecology did not require any review and approval of the mixing zones for construction of Third Runway projects. (AR 028734, Kenny Dep., p. 140, lines 13-24.) Ms. Kenny, Ecology 's primary author for the § 401 Certification, testified, "It's not required for temporary construction activities. That's not required." (*id.,* lines 17-18.) The Board also disregarded testimony that Ecology did not require the Port to provide any supporting information regarding the impacts of the temporary turbidity mixing zones. (AR 054969, Kenny, Tr. at 1-0124) In fact, Ms. Kenny testified that Ecology asked the Port "whether they thought they would be able to construct their projects, do the in-water work and meet the criteria of WAC 173-201A-110(3)," and "they said that they thought that they would be able to meet those requirements." (*Id.*)

In addition, the Board disregarded Ms. Kenny's testimony that she did not know whether the Port had received all of the necessary local and state permits and approvals for its in-stream construction activities.[54] (AR 055047.) Ms. Kenny testified, "There may also be other local permits that they're waiting for and they may still be waiting for their hydraulic project approval."[55] (AR 055054.) Ms. Kenny explained, "The way this section works is that . . . every developer that wants to use this provision of the WAC for temporary turbidity, suspension of those temporary turbidity limits, they do it, and then we go out and if we get a complaint, we check at that point to see if those provisions have been complied with." (AR 055048.)

4. <u>The Board's Erroneous Interpretation and Application of Law</u>

The PCHB simply failed to make the connection between (or even to address) what Ecology testified about its mixing zone approval and its application of the regulatory standards. As a result, the Board erred both in concluding that Ecology's authorization of mixing zones for in-stream work does not violate the procedural requirements of WAC 173-201A-100(4) and 110(3), and in concluding that the § 401 Certification's

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[54] At her deposition, Ms. Kenny testified, "I know that the Port is still in the process of obtaining their Hydraulic Project Approval from the Department of Fish and Wildlife, and often for in-stream work, Ecology relies on the Department of Fish and Wildlife to set suitable standards for in-stream work." (AR 028730, Kenny Dep, p. 122, lines 14-19.)

[55] The September 21, 2001, cover letter to the § 401 Certification states that the certification is "subject to" specified permits and approvals, including "The Hydraulic Project Approval (HPA) [to] be issued by the Washington State Department of Fish & Wildlife (WDFW). (AR 016889)

conditions for mixing zones provide reasonable assurance that substantive water quality standards will not be violated.

a. <u>WAC 173-201A-100(4)</u>

First, Ecology's actions plainly violate the procedural requirements of WAC 173-201A-100(4). Under this water quality standard, *no mixing zone shall be granted* unless the supporting information clearly indicates there is no reasonable potential for loss of sensitive or important habitat, no substantial interference with characteristic uses of the water body, no resulting damage to the ecosystem, and no adverse effect on public health. But here, Ecology admittedly did not require any review or approval of the mixing zones. (AR 028734, Kenny Dep., p. 140, lines 13-24.) The § 401 Certification's primary author believed no such review was required.[56] (*id.,* lines 17-18.) So, Ecology simply asked the Port if it thought it could construct its projects without violating the water quality standards, and accepted the Port's affirmative response as satisfactory. (AR 054969, Kenny, Tr. at 1-0124.)

The PCHB recently rejected the very same *modus operandi* as an "impermissible self-regulatory system," inconsistent with the recent federal decision in *Environmental Defense Center v. EPA*, 319 F.3d 398, 423-25 (9th Cir. 2003). *Puget Soundkeeper Alliance*, PCHB No. 02-162 at

[56] Apparently, notwithstanding WAC 173-201A-110(3), Ms. Kenny erroneously believed that WAC 173-201A-100 only applies to mixing zones associated with discharges of effluents from outfalls. *See, e.g.,* AR 028734, Kenny Dep., p. 140, lines 7-12.

24. In explaining the obligations WAC 173-201A-100(4) imposes *on Ecology*, the Board emphasized:

> A certification by an applicant, absent review by Ecology, does not satisfy the requirements of the regulation. The regulations presume Ecology is reviewing and approving of these mixing zones.
>
> * * *
>
> An applicant's statement he is complying with the regulations does not satisfy this regulation. The statement fails to detail what best management practices the applicant proposes to use, identify the water body characteristics, including seasonal flows, depth, width, or sensitive organisms and fish species occupying the water body, so Ecology could reasonably rely on the statement as a basis for granting the zone.

Puget Soundkeeper Alliance, PCHB No. 02-162, at 21-22. It is uncontested that Ecology has not reviewed and approved of these mixing zones prior to granting its authorization. It is also uncontested that no such information has been provided to Ecology for review: by the plain terms of Ecology's§ 401 Certification, the Port is required only to provide a *monitoring* plan -- not a description of the proposed BMPs, the water body, its sensitive or important habitat, its existing or characteristic uses -- at some point in the future.

b. WAC 173-201A-110(3)

Second, Ecology's actions plainly violate the procedural requirements of WAC 173-201A-110(3). Under this water quality standard, a temporary turbidity mixing zone can be authorized "*only after* the activity has received all other necessary local and state permits and approvals, and

after the implementation of appropriate best management practices . . ." WAC 173-201A-110(3) (emphasis added). Here again, it is uncontested that the in-stream construction activities have not received all other necessary local and state permits and approvals, including the HPA permit. (AR 028730, Kenny Dep, p. 122, lines 14-19.) While it may be entirely appropriate for Ecology to rely on WDFW to "set suitable standards for instream work" (AR 028730, Kenny Dep, p. 122, lines 14-19), Ecology violates WAC 173-201A-110(3) by authorizing the mixing zones *before it even knows* what conditions WDFW will impose. In this regard, it bears emphasis that by law, the sole concern of WDFW in deciding whether to grant or deny hydraulic project approval is to protect fish life. *See, Northwest Steelhead v. State Dep't of Fisheries*, 78 Wn. App. 778, 787, 896 P.2d 1292 (1995). Ecology, however, has numerous concerns under the water quality standards, including protecting the full array of existing or characteristic uses of the waterbody. WAC 173-201A-030(1)(b). In addition, it is uncontested that the Port has not yet identified -- much less implemented, as expressly required by WAC 173-201A-110(3) -- any best management practices to avoid or minimize disturbance of in-place sediments and exceedances of turbidity criteria. (AR 000814.)

Ecology's failure to satisfy the explicit legal requirements for mixing zones constitutes a *per se* violation of the water quality standards. The Board's contrary conclusion is the result of an erroneous interpretation or application of the law, under RCW 34.05.570(3)(d).

c. Ecology's *Per Se* Violation of Water Quality Standards Eliminates Reasonable Assurance

The Board further erred in concluding that the § 401 Certification's conditions for mixing zones provide reasonable assurance that substantive water quality standards will not be violated. In reaching its conclusion, the Board should have evaluated the pre-authorized mixing zones for compliance with the water quality standards. In doing so, as discussed above, the Board should have concluded that the § 401 Certification violates the water quality standards' requirements of Ecology review and approval of environmental impacts; fails to require the implementation of best management practices to avoid environmental impacts; and fails to condition the mixing zone authorization on the Port's receipt of all other necessary local and state permits and approvals. WAC 173-201A-100(4), 110(3).

Then, the Board should have determined -- in light of these significant, *per se* violations of the water quality standards -- whether Ecology could have any basis for assurance that the narrative[57] and numeric[58] criteria of WAC 173-201A-030(1) would not be violated during the proposed in-

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[57] The narrative criteria in Class AA waters such as Miller, Des Moines, and Walker Creek include the criterion for "Toxic, radioactive, or deleterious material" (WAC 173-201A-030(1)(c)(vii)), and the criterion for "Aesthetic values" (WAC 173-201A-030(1)(c)(viii)).

[58] The numeric criteria for turbidity in Class AA waters provides:

> Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

WAC 173-201A-030(1)(c)(vi). NTU is an acronym for nephelometric turbidity units, a measure of clarity. WAC 173-201A-020 (*see,* definition of "turbidity").

stream construction. Instead, the Board ignored the violations and opined, "Appellants have failed to prove that these conditions are unlawful, or otherwise fail to fully provide reasonable assurance that in-water and shoreline construction will be in compliance with water quality standards." (AR 000887, PCHB Order at 114). At the outset, the Board's conclusion is erroneous because the record was undisputed (as Ms. Kenney's testimony demonstrated) that the § 401 Certification's conditions for mixing zones are unlawful: they are unlawful because they authorize mixing zones without complying with the requirements of WAC 173-201A-100(4) and 110(3).

The Board's error on this issue is particularly troubling because it effectively nullifies many of the standards pertaining to mixing zones by suggesting it was appellants' burden to show harm (prospectively) from the *per se* violations. In fact, Washington's water quality standards, adopted after substantial public deliberation and approved pursuant to the federal Clean Water Act by EPA, constitute the legal definition of what is necessary to protect characteristic uses of Washington's surface waters, and the public health and public enjoyment thereof. WAC 173-201A-010. "Compliance with the surface water quality standards of the state of Washington require[s] compliance with chapter 173-201A WAC, Water quality standards for surface waters of the state of Washington . . ." WAC 173-201A-010(3). The appellants clearly met their burden, both legally and factually.

Apparently, the Board gave the Port the benefit of the doubt (as it did in many other instances), assuming that the Port's as-yet-unseen monitoring reports promised in the § 401 Certification would be in themselves sufficient to prevent violations of the narrative and numeric criteria designed to protect characteristic uses of these Class AA creeks.[59] (AR 000887). However, the monitoring plans are not required to identify the best management practices offered by the Port to comply with WAC 173-201A-110(3). (AR 016892, § 401 Cert. Cond. A.2., p. 3) Nor is the Port required to provide, in the monitoring plans or elsewhere, the "supporting information" Ecology needs to fulfill its obligations under WAC 173-201A-100(4) to protect habitat, characteristic uses, public health and the ecosystem.

Moreover, the monitoring plans do nothing to ameliorate the Board's specific findings that the § 401 Certification: contemplates exceedances of the water quality standard for turbidity *beyond the boundaries of the mixing zones* (AR 000813); does *not* require the Port to stop work in the event that water quality standards are exceeded outside the mixing zone (AR 000814); does *not* require the Port to stop the exceedance of the turbidity standard in any such event (*id.*); and does *not* require the Port to notify Ecology when such an exceedance occurs (*id.*).

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[59] The Board noted the monitoring plans must include provisions to:

> 1) ensure that qualified Port staff or contractors are on-site during construction to implement the plan, 2) the plan minimizes any mixing zone in accordance with WAC 173-201A-100(4) and (6), 3) corrective action is taken if the numeric turbidity standard is not being met at the boundary of the mixing zone, and 4) the Port submits monitoring reports to Ecology.

(AR 000887, PCHB Order at 114).

In light of these specific findings and *per se* violations of the water quality standards, the Board's apparent conclusion that future monitoring plans provide reasonable assurance that in-stream construction will not violate turbidity standards beyond the edge of a properly minimized mixing zone is arbitrary and capricious, or the result of an erroneous interpretation or application of the law.

D. The PCHB Properly Identified the *De Novo* Standard of Review It Was Required to Apply to Ecology's § 401 Certification, But Improperly Applied the Standard by Considering Studies, Plans and Reports Not in Existence at the Time of Ecology's Certification.

The PCHB properly concluded that its *de novo* review of the Ecology § 401 certification was to be based upon the record as it existed at the time of certification by Ecology:

> We conclude, because the Clean Water Act and applicable federal regulations require Ecology to have reasonable assurance in order to issue a legally defensible water quality certification, this Board's *de novo* review of §401 certifications must be based upon the record before Ecology at the time the certification is issued. To hold otherwise would blur the distinction between Ecology and the Board's statutory roles, ignore the requirements of the Clean Water Act, and foster issuance of speculative and incomplete permits.[60]

However, the PCHB then eviscerated this conclusion of law by stating that:

> Ecology and the Board may rely on the conditions, which require completion of post-certification studies, plans, and reports so long as the implementation and outcome of those post-certification

[60] AR 000867 (PCHB Decision at p. 94)(emphasis added).

> studies, plans, and reports meets the same reasonable assurance test.[61]

The PCHB's ruling in this regard is legally erroneous, inconsistent with its own regulation and practice, and must be reversed, or at minimum, remanded on these bases. RCW 34.05.570(3)(d); RCW 34.05.570(3)(h).

There is no dispute that when the PCHB reviews Ecology orders, it reviews them "*de novo* unless otherwise provided by law." WAC 371-08-485 (emphasis added). In the context of CWA § 401 and its implementing rules, there is additional law to be considered which limits the scope of the PCHB's *de novo* review to a review of the record as it existed at the time Ecology issues a § 401 certification, in this case, on September 21, 2001.

CWA § 401 provides, in pertinent part, that "any applicant for a federal license or permit . . . shall provide the licensing or permitting agency a certification from the state . . . that any such discharge will comply with the applicable provisions . . . [of the CWA]." 33 U.S.C. § 1341(a)(1). EPA regulations further clarify that the state, **before** issuing a certification, must make a finding that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3) (emphasis added).

In recognizing here that Ecology must have reasonable assurance in order to issue a legally defensible water quality certification in the first

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[61] AR 000868 (PCHB Decision at p. 95).

place, the PCHB acknowledged that, "To hold otherwise would blur the distinction between Ecology and the Board's statutory roles, ignore the requirements of the Clean Water Act, and foster issuance of speculative and incomplete permits."[62] As the PCHB stated, "The very essence of a certification is that at the time of issuance the state has reasonable assurance that there will be compliance with water quality laws."[63] As a result, the Board's *de novo* review is necessarily bounded by the CWA as "otherwise provided by law." WAC 371-08-485.

The PCHB's Decision here runs afoul of the standard it articulates because it admittedly considers submissions past the time of Ecology certification. The PCHB is not the appropriate place for applicants and Ecology to address significant uncertainties, incomplete assessments of impacts, and speculative mitigation plans for complex projects. Accordingly, the Court should reverse, or at minimum remand the PCHB decision to have the PCHB apply its standard of review to the record as it existed at the time of issuance of Ecology's certification.

E. The PCHB Erred in Relying upon Promises of "Adaptive Management" in Lieu of Actual Reasonable Assurance of Compliance with Water Quality Standards at the Time of Certification.

The Ecology certification approved by the PCHB improperly relies on such future-oriented concepts as "adaptive management" for the

[62] AR 000867 (PCHB Decision at p. 94).
[63] AR 000869 (PCHB Decision at p. 96) (citations and internal quotations omitted).

reasonable assurance required at the time a § 401 certification is issued.[64] "Adaptive management," as contemplated in the Ecology § 401 Certification, for example, at Condition D, "Wetland Stream and Riparian Mitigation,"[65] is jargon for a make-it-up-as-you-go-along substitute for reasonable assurance. Under this approach, reasonable assurance is based on a § 401 certification condition requiring unspecified changes in a project after the project has been built and harm to aquatic resources has occurred. This concept is antithetical to the purpose of a federal Clean Water Act § 401 certification. Tom Luster, for years Ecology's statewide federal Clean Water Act § 401 Coordinator,[66] explained to the PCHB that a § 401 certification is:

> a one-time opportunity to ensure compliance with state water quality standards and to inform the federal permitting agency whether the proposed activities will meet the applicable requirements. Therefore, the 401 review and decision is critical because it is the state's sole opportunity to determine whether the proposed permanent loss of all or part of a waterbody is adequately avoided, minimized, and mitigated, and whether the activities associated with construction and operation of the facility requiring the certification meet water quality standards.[67]

Deferral to future submittals is antithetical to § 401 certification and

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[64] AR 000904-906 (PCHB Decision at pp. 131-133) ("the Board concludes that both Ecology and the Board may rely on adaptive management processes, including post-certification studies, plans and reports, in making a determination of whether reasonable assurance exists").
[65] AR 016896 (§ 401 Certification at p. 7). That part of the § 401 Certification provides, in pertinent part, that "The Port shall provide Ecology with written documentation of . . .adaptive management measures set forth in the [Natural Resources Mitigation Plan]."
[66] Tom Luster was also for years the Ecology manager for the Port's § 401 certification application, and is now on the staff of the California Coastal Commission. AR 014366 (Luster Pre-filed Testimony at p. 2).
[67] AR 014402 (Declaration of Thomas Luster, p. 8, ¶ 18) (emphasis added).

precludes any finding of reasonable assurance under the Clean Water Act:

> [Ecology] identified a number of significant impacts during its review and in the certification, but required only that they be handled through future submittals by the Port. This approach is highly speculative, and does not meet the need for reasonable assurance to be based on information available at the time of certification. This is even more problematic, given that the Port submittals since the certification was issued still do not provide the necessary level of information needed for reasonable assurance. ... reasonable assurance requires more than a declaration that standards must be met – it needs to be based on an orderly assessment of available facts leading to support of a conclusion.[68]

The concept of "adaptive management" is therefore fundamentally at odds with the mandate of the Water Quality Standards ("WQS") which a 401 certification must uphold. The WQS require that "no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed." WAC 173-201A-070(1); RCW 90.54.020(3)(b). Their purpose is to prevent water quality from falling below acceptable levels, not to allow the harm on the promise that it will later be corrected to the extent possible. *See PUD No. 1 v. Washington Department of Ecology,* 511 U.S. 700, 704, 114 S. Ct. 1900 (1994). The prospective reasonable assurance of non-degradation required under CWA § 401 is clearly not fulfilled by a promise of change after degradation occurs.

Further, "adaptive management" cannot work where post-construction conditions are not even known, and thus cannot be preserved. Thus the problems with "adaptive management" are compounded by the § 401

[68] AR 014369 (Luster Pre-filed Testimony at p. 5).

Certification's post-construction monitoring conditions, which offer no reasonable certainty that water quality violations will not occur in the first place. While it may be prudent to require such conditions for enforcement purposes, their function can only be to identify a problem after the fact, not to prevent one from occurring.

A good example of this is the hydrologic monitoring relied upon in the place of actual reasonable assurance that remaining project area wetlands could be maintained.[69] Ecology's original August § 401 Certification which it withdrew in the face of a Port appeal and pressure from above required "hydrologic monitoring during the wet season, November through May, *before construction* and for at least 3 years after completion."[70] By comparison, the substitute § 401 Certification which Ecology issued in September 2001 after reaching agreement with the Port states that "the Port shall immediately begin conducting twice monthly hydrologic monitoring during the wet season, November through May, and shall continue such monitoring for at least three (3) years following construction."[71] This change relieved the Port from the consequences of its placement of some embankment fill materials in the upland watershed above groundwater-fed wetlands, which had already altered wetland hydrology from preconstruction conditions, allowing the Port to "lower the bar" on monitoring and mitigation. *Id.* The original conditions would

[69] AR 016896 (§ 401 Certification at p. 7, Condition D(1)(g)).
[70] AR 016942 (August § 401 Certification at 6).
[71] AR 016896 ([September] § 401 Certification at p. 7, Condition D(1)(g)).

have required the Port to stop and take the time to properly identify actual pre-construction conditions as the benchmark for monitoring and mitigation.[72]

Without this pre-construction hydrology data, there is no reasonable assurance that water quality and beneficial uses will be maintained.[73] Without hydroperiod data to establish baseline wetland conditions, it will be impossible to determine whether or not mitigation measures proposed are effective and whether existing beneficial uses are being maintained.[74]

While adaptive management might be practicable (apart from its illegality under the federal Clean Water Act) for small projects where violations could be immediately detected and corrective actions immediately implemented, it is clearly inappropriate for the Third Runway Project given its size, scope and complexity and its far-reaching changes to the physical environment. It would be too late to protect project-area wetlands and streams from contaminated embankment seepage after the Port has filled substantial portions of the Miller, Walker and Des Moines Creek watersheds with over 20 million cubic yards of potentially contaminated fill in a more than one-mile-long embankment.

There is yet another fundamental problem with reliance on inchoate adaptive management and further monitoring. As the PCHB's

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[72] AR 014756-757 (Sheldon Prefiled Testimony at pp. 4-5, ¶ 7.)
[73] *Id.* Data regarding the pre-construction hydroperiod (the frequency, depth and duration of water's influence on a wetland) is necessary to determine wetland function. AR 014754-755 (*id.* at ¶ 5.) AR 055216 (Azous, Tr. at 2-0144, lines 18-21.)
[74] AR 055218 (Azous, Tr. at 2-0146, lines 1-3.)

justification for reliance on "adaptive management" implicitly acknowledges, it is really not consistent with the reasonable assurance required under the CWA, but is instead reasonable assurance once removed:

> In order to rely upon adaptive management, the required monitoring and subsequent changes must be set forth with specificity and must meet the reasonable assurance test, which means the future action and outcome must be reasonably certain to occur.

AR 000859 (PCHB Order at p. 86) (emphasis added). Here, however, the Board's own decision confirms that, if the Port's past practices (in performing sampling and monitoring pursuant to its CWA § 402 NPDES Permit) are any indication, future action pursuant to an adaptive management strategy is not certain to occur. The PCHB stated flatly that it was "not, however, convinced the Port has done an adequate job in sampling to ascertain the status of the receiving waters." AR 000801 (PCHB Order at p. 28). It observed that the Port had failed miserably in meeting prior requirements for water quality sampling:

> In the historic sampling data presented, one or more of the required elements were missing–either the hardness data (averaged over the correct time period) was missing, the sampling was done in-pipe rather than in receiving water, the sampling was an instantaneous reading rather than an average over the time period required in WAC 173-201A-040, or the sampling showed total recoverable metals rather than the dissolved fraction. Even the in-stream sampling from 1997 was not done over the proper time period to determine compliance with numeric criteria, and also did not show what contribution of metals in-stream were from the Port's stormwater, and what contribution came from other sources such as area highways and roadways that drain to the same creeks. This

> appears to be related more to the sampling methods than to any chemical changes.

AR 000806 (PCHB Order at p. 33) (emphasis added). Finally, the Board concluded that, "The Board finds [the Port's] lack of monitoring to result in, at best, confusing and, at worst, inaccurate data." AR 000807 (PCHB Decision at p. 34). Clearly, if past performance is any indication, then the "future action and outcome" of the Port's adaptive management strategy does not meet even the once-removed standard announced by the PCHB as the basis for acceptance of inchoate future adaptive management as a stand-in for present reasonable assurance.

As the PCHB acknowledged, adopting Tom Luster's formulation, "The §401 certification is a one-time opportunity for the State to assure water quality standards will be met …"[75] The Board's reliance on future monitoring and "adaptive management" as bases for current reasonable assurance is contrary to the CWA § 401 requirement that reasonable assurance exist at the time of certification. The Board erred in not ordering denial of the § 401 Certification on this basis. Therefore, its Decision should be reversed and remanded. RCW 34.05.570(3)(d).

F. The PCHB Erred in Attempting to Repair Ecology's § 401 Certification Based on Future Prospects of Reasonable Assurance Rather Than Ordering Denial of the Port's Application Based on the Record Before It.

Throughout its 140-page decision, the Board repeatedly criticizes the Port's environmental practices and Ecology's § 401 Certification. Among

[75] AR 000790 (PCHB Decision at p. 17).

other criticisms, the Board found: 1) the Port's past practices in sampling and monitoring stormwater discharges were inadequate to measure and monitor water quality;[76] 2) the Port's best management practices "are not effective in removing dissolved metals from the stormwater";[77] 3) the Port has not "done an adequate job in sampling to ascertain the status of receiving waters";[78] 4) "the § 401 certification contains no requirement for the Port to implement any stormwater treatment measures beyond the King County Basic Water Quality list, despite the demonstrated problems of dissolved metals in the Port's stormwater discharges";[79] 5) the Port's failure to monitor for hardness in receiving water results in, "at best, confusing and, at worst, inaccurate data";[80] 6) the Port's use of whole effluent toxicity (WET) testing to measure only for mortality but not for impairment or loss of function "does not measure injury to existing beneficial uses";[81] 7) the 401 certification allows use at the site of fill containing pollutants at "higher than natural background";[82] 8) the 401 certification improperly allows deposit of oil- (total petroleum hydrocarbons) contaminated fill;[83] 9) the 401 certification's sampling

[76] *See, e.g.,* AR 000885 (PCHB Decision at p. 112) ("The Board does find, however, that certain aspects of the BMPs and monitoring require further conditioning by the Board.
[77] AR 000798 (PCHB Order at p. 25).
[78] AR 000801 (PCHB Order at p. 28).
[79] AR 000803 (PCHB Order at p. 30).
[80] AR 000807 (PCHB Order at p. 34).
[81] AR 000808 (PCHB Order at p. 35).
[82] AR 000834 (PCHB Order at p. 61).
[83] AR 000835 (PCHB Order at p. 62); AR 000836 (*id.* at p. 63) (PCHB revised fill criteria to establish limit of zero (0) TPH); AR 000909-910 (*id.* at pp. 136-137, Condition 7) (same).

protocol for assessing the presence of contamination in the fill is "inadequate";[84] 10) the SPLP testing procedure allowed by the 401 certification to avoid the (inadequate) fill contamination limits is "ineffective at determining compliance with water quality standards" for certain metals;[85] 11) "the Port did not fully evaluate the headwater wetland in the Walker Creek basin for its potential to serve as mitigation";[86] 12) the § 401 Certification is based upon improper wetland mitigation credit for Lora Lake, buffers and enhancement activities;[87] and 13) "the Port has not fully mitigated the impacts to the filled wetlands and wetland functions."[88]

In an effort to resolve such fundamental flaws, the Board imposed sixteen new conditions on the Port. Many of the new conditions will require the Port to make -- and Ecology to review -- sweeping and as-yet-unknown changes. The Port will have to submit wholesale revisions to the plans and reports upon which the 401 Certification is based including, but not limited to, the Comprehensive Stormwater Management Plan, the Low Flow Plan, and the Natural Resources Mitigation Plan.

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[84] AR 000837 (PCHB Order at p. 64).
[85] AR 000838 (PCHB Order at p. 65).
[86] AR 000847 (PCHB Order at p. 74).
[87] AR 000910 (PCHB Order at p. 137, Condition 11); AR 000853-854 (PCHB Order at pp. 80-81) ("The 112.75 acres of on-site mitigation, minus the 3.06 acres for the surface of Lora Lake, equals 109.69 acres of mitigation or 33.38 acres of mitigation credit. Of the 109.69 acres, 54.93 acres are buffer enhancement (counted as 10.99 acres of mitigation credit). If the buffer enhancement and the 23.55 acres for preservation of the forested wetland and buffer are removed, the NRMP includes 31.21 acres of mitigation or 20.05 acres of mitigation credit. This amount is insufficient to meet the 2:1 ratio and to mitigate for the 21.34 acres of wetland impacts.").
[88] AR 000854 (PCHB Order at p. 81).

Particularly in light of this record and its own pronouncements, the Board's failure to order denial, vacate and remand the § 401 Certification with instructions violates the requirements of CWA § 401, particularly the requirement that reasonable assurance exist at the time certification is granted.

The PCHB was established by the Legislature to provide "uniform, independent review" of Ecology actions. *Martin Marietta Aluminum v. Woodward,* 84 Wn.2d 329, 332-33, 525 P.2d 247 (1974) (emphasis added). The Clean Water Act and federal regulations require reasonable assurance before Ecology can certify that a proposed project will comply with applicable water quality standards. As the Board has previously held, significant uncertainty about project impacts and speculative mitigation plans cannot form the basis of reasonable assurance. *Okanogan Highlands Alliance, et al. v. Department of Ecology,* PCHB Nos. 97-146, 97-182, 97-183, 97-186, and 99-019 (January 19, 2000) ("*OHA"),* at Conclusion 64. A bare hope or expectation that the Port may do better in the future than it has in the past, or that everything will work out in the end, is not sufficient for a § 401 certification: it must be based on a reasonable certainty born of more than a suspension of disbelief.

The Board is not the appropriate place for applicants and Ecology to address significant uncertainties, incomplete assessments of impacts, and speculative mitigation plans for complex projects. By assuming such a role, the Board promotes an environment in which Ecology, as it did in

this case, suspends disbelief, passing to the Board issues that must be resolved **prior** to issuance of a § 401 certification.

By approving the § 401 Certification, albeit with additional protective conditions, but with many issues still left for resolution by Ecology, the Board did the Port -- but not the orderly review of § 401 Certifications -- a favor. It is not the Board's role to function as a repair shop for incomplete proposals or inadequate certifications. Once the Board determined -- and it manifestly did so -- that the § 401 Certification issued by Ecology was not supported by reasonable assurance, it should have reversed it and ordered denial rather than attempting to approve it on a speculative, prospective basis.

G. The Board Erred in Permitting the Port and Ecology to Continue Creating and Offering Post-Hoc Justifications for the September, 2001 Certification, Including Shortly Before Trial and in Violation of Prehearing Orders Which the Board Had Entered for the Orderly Conduct of the Proceeding.

In its Decision, the Board both endorsed the position (advocated by ACC and CASE) that its review had to be based on what reasonable assurance Ecology had at the time it issued its Certification and simultaneously announced that it would not really limit Ecology to that record in reviewing its decision. For example, the Board stated:

> As set forth above and pursuant to the requirements of the Clean Water Act, the Board's independent *de novo* review of Ecology's §401 certification is based upon the record relied upon by Ecology to conclude it had reasonable assurance that the proposed project would comply with applicable water quality laws. Respondents argue that Ecology's reasonable assurance is based,

> in part, upon conditions in the §401 certification, which allow the Port to submit additional data, plans, and reports on the assumption they will satisfactorily resolve outstanding uncertainties. Consistent with our *de novo* review as defined by the Clean Water Act and as a matter of simple logic, we conclude post-certification data, reports, and plans that were not in being at the time of issuance of the certification and which at the time of certification had yet to be reviewed, considered, and approved by Ecology can form the basis of Ecology's determination of reasonable assurance. <u>This does not mean Ecology and other applicants are free to build a case while a §401 certification is on appeal to this Board. This would leave §401 certifications as moving targets and make Board review of such moving targets unmanageable.</u>[89]

The concern for a moving target had actually been addressed early on by the Board in its October 30, 2001, Prehearing Order, which set a bright line:

> Ecology and the Port are prohibited from relying at the hearing upon any plan or report prepared after November 15, 2001 unless such plan or report is noted on the above-required list. Even if noted on the list, Ecology and the Port are prohibited from relying at the hearing upon any plan or report prepared after February 1, 2002.[90]

However, as the appeal progressed, Ecology and the Port were permitted to create the "moving target" which the Board's Decision itself acknowledged can be a by-product of a review which is not limited to the record actually before Ecology when it issued the certification. The result was a series of objections and motions in limine by ACC and CASE. These sought to exclude reports and testimony based on their having been prepared long after the 401 certification was issued -- some even after the later cut-off dates established by the Board itself. *See, e.g.*, AR 002545, *et*

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[89] AR 000889-890 (PCHB Order at pp. 116-117) (emphasis added).
[90] AR 006214 (Pre-Hearing Order at p. 4 (10/30/01).

seq. In at least one case, a motion was brought because the late-prepared material had only been disclosed after the relevant depositions of Ecology or Port personnel had been taken, making the target not only moving but virtually invisible until just before trial. AR 001898. While the Board in some instances offered palliatives for these problems, it more often than not relented and allowed the target to keep moving by admitting the objectionable evidence in whole or in part.[91]

While such rulings may be discretionary up to a point, they may not cross a line in prejudicing appellants. Indeed, while ACC and CASE demonstrated such prejudice below -- and the Board's own subsequent comments about moving targets suggest as much -- a showing of actual prejudice is not required.[92]

Here, as the Board Decision implicitly acknowledges, its review of a § 401 reasonable assurance determination should be based on what had actually been before Ecology. It nevertheless gave the Port and Ecology

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[91] *See, e.g.,* AR 001885 (Board Order); AR 002106 (Board order); AR 002058 (Board Order excluding some evidence, but allowing Port and Ecology witnesses to testify on how they "felt about or evaluated" excludable information).

[92] For example, in *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 168-169, 864 P.2d 1 (Div. I 1993), the appellants challenged the exclusion of their experts , arguing that the respondents "had not shown actual prejudice..." *Id*. at 168. The Court of Appeals disagreed:

> The trial court does not abuse its discretion by excluding testimony as a sanction when there is a showing of intentional or tactical nondisclosure, willful violation of a court order, or other unconscionable conduct. A violation of a court order without reasonable excuse will be deemed willful. Thus, under LR 16(a)(3), prejudice is not a prerequisite to the court's exclusion of witnesses as a sanction for a party's failure to submit a witness list.

Id. at 168-169 (citations omitted). Similarly, in *Scott v. Grader*, 105 Wn. App. 136, 140-141, 18 P.3d 1150 (Div. 1 2001), Division I upheld exclusion based on untimely designation of a witness without reasonable excuse.

extraordinary leeway to support the September § 401 Certification based on "evidence" of reasonable assurance created months after the fact and in some case disclosed only days before trial. Although, ironically, the Port and Ecology still were unable to justify Ecology's § 401 Certification, the Board nevertheless erred. The Board's Order upholding the § 401 Certification (albeit with conditions) should therefore be reversed and remanded.

H. **The Board Erred in Redacting Deposition Testimony Offered into Evidence.**

As provided under its procedural rules (WAC 371-08-300 (2)) the Board conducted the appeal following Washington's Civil Rules, including those on discovery. Under those rules, ACC deposed Ecology's Director, Tom Fitzsimmons; its Shorelands and Environmental Assistance Program Director, Gordon White; its Northwest Regional Director, Ray Hellwig, its third runway § 401 project manager, Ann Kenny, and its wetlands expert, Erik Stockdale.[93] Ecology and the Port objected to their admission on various grounds, and the Board engaged in a motions practice to resolve the objections. In doing so the Board committed error with regard to its redaction of significant testimony by Ecology officials concerning the basis for the agency's two (August and September 2001) certifications for the Third Runway Project came about.

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[93] ACC submitted these depositions for publication and inclusion into the PCHB record pursuant to CR 32(a)(2) (allowing the deposition of a party or an officer, director, or managing agent, or a person designated to testify on behalf of a governmental agency which is a party to be "used by an adverse party for any purpose") and CR 30(b)(6).

Ecology and the Port were given great leeway at trial to argue that the Board should defer to Ecology's § 401 decision because it was made exclusively by a "team" of Ecology technical experts without regard to extraneous factors.[94] The deposition testimony offered into evidence by ACC suggested a different scenario than a team of technical experts dispassionately crafting a § 401 Certification based on scientific reasonable assurance. Instead, the testimony revealed a pattern of consistent pressure and interference from the Governor's office on behalf of the Port,[95] and suggested, for example, that such pressure had been responsible for such turnarounds as Ecology's abrupt withdrawal of its August 2001 certification in favor of the September 2001 version more to the Port's liking. It was this deposition testimony which the Board largely redacted.[96]

ACC sought reconsideration of these redactions, but the Board largely rejected ACC's request except for correction of minor errors in its original publication/redaction order. Its rationale: " The Pollution Control Hearings Board hears appeals in a de novo capacity and materials related to

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[94] *See, e.g.,* AR 054889-890 (Tr. at 1-0043 - 0044 (Ecology's opening statement: team of experts assembled to insure water quality standards are met)); AR 055056 (Tr. at 1-0212 (line 13) - 0014 (line 8) (Kenny: team reviews project and makes decision)); AR 056328-329 (Tr. at 7-0160 (line 25) - 0161 (line 13) (White: he relied on team of technical experts to make decision)); AR 057009-010 (Tr. at 10-0164 (line 20) - 0165 (line 5) (Ecology's closing argument: quoting from Gordon White's prefiled testimony regarding high quality of Ecology's technical team)).

[95] For example, the Board carved out portions of deposition testimony concerning meetings among the Port, Ecology, and members of the Governor's staff (e.g., Chiefs of Staff Joe Dear and Paul Isaki). AR 001023. This testimony went directly to Ecology's repeated claim during the hearing that the Board should defer to Ecology's § 401 decision by an unpressured "team" of technical experts.

[96] AR 001494, *et seq.* (Board's publication/redaction order); see AR 001020; 001021.

political pressure or intrigue are not relevant to the questions before the Board." AR 000921.

The Board missed the point. The theme of the Ecology/Port argument to the Board for not remanding the certification which Ecology had issued was deference to the Ecology experts who, it was said, had made the decision based on the reasonable assurance required under the Clean Water Act. They further claimed that, even where the record for reasonable assurance was still lacking, Ecology could be trusted to not allow the Port to proceed until it had put things right. ACC was entitled to respond by showing the factors which had actually gone into Ecology's certifications and which undercut the Ecology/Port demand for deference before the Board.

VI. CONCLUSION

For all the reasons discussed herein and in ACC's Opening Brief, adopted and incorporated by reference, the Court should order the § 401 Certification denied, and reverse and remand the Board's Decision.

RESPECTFULLY SUBMITTED this _____ day of July, 2003.

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