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Sent via Fax and Mail

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Re: Demand for Compliance by the Port and Ecology with the Decision of the Washington Supreme Court in *Port of Seattle, et al. v. Pollution Control Hearings Board, et al.*, Supreme Court Case No. 73419-4

Dear Counsel:

This is in response to the Port's letter dated May 26, 2004. The letter suggests that the Port is "free to begin construction" because the Washington Supreme Court issued its decision "affirming Ecology's Clean Water Act ("CWA") section 401 certification with minor conditions" (emphasis added). ACC is not aware that the conditions imposed by the Washington Supreme Court (some of which the Port hotly contested) are "minor." ACC is aware that the documents made public to date indicate that the Port "Work Plan," bid documents, and other materials are premised on violations of the conditions which the Washington Supreme Court has imposed. Therefore, please be advised that, under these circumstances, the Port is not "free to begin construction" and that all "outstanding state law issues" will not be resolved until, if, and when the Port, its Work Plan, its bid documents, and all other operative materials are brought into compliance with the Washington Supreme Court decision. These matters are explained in greater detail below.

The Supreme Court decision in *Port of Seattle v. Pollution Control Hearings Board, et al.*, Supreme Court Case No. 73419-4, includes several significant environmental protections regulating importation of fill to the third runway site. It held that, "If the proposed borrow site was ever contaminated, even if it has since been rehabilitated, its dirt may not be used as fill for the third runway." Slip Op. at 53.

The Court also affirmatively "set fill criteria for TPH at 0" (Slip Op at 59) over the objections of the Port, which, the Court noted, had argued that "TPH levels might appear in

uncontaminated samples because of the natural decomposition of organic compounds." Slip Op. at 58. This renders illegal presence of any TPH compounds in any fill proposed for the third runway under both the Supreme Court's "only uncontaminated sites" ruling, and its zero TPH ruling.

Finally, the Supreme Court added a protective condition (presumably one of the "minor" conditions to which the May 26 letter refers) regarding use of the SPLP procedure:

> [T]he SPLP leachate **must** be compared against both surface **and groundwater** quality criteria.

Slip Op. at 67 (emphasis added). Thus, the Supreme Court required the rejection of any source site where an SPLP test for any contaminant exceeded the applicable groundwater standard in Ch. 173-200 WAC.

The May 26 letter now suggests that the Port plans to proceed to commence construction based on bid documents[1] issued prior to the Washington Supreme Court ruling. Those documents, based on work plans prepared earlier by the Port (including the October 3, 2003, Work Plan to Qualify Fill Materials), are in direct conflict with the Supreme Court's rulings.

For example, specific state groundwater standards referred to by the Supreme Court are listed in WAC 173-200-040, Table 1. They include the following limits:

[1] We are unaware of any action the Port has taken formally to modify its bid notices and require submission of modified bids in compliance with the conditions imposed by the Supreme Court (which the Port had opposed as presenting significant burdens).

TABLE 1
GROUND WATER QUALITY CRITERIA

CONTAMINANT		CRITERION
I. PRIMARY AND SECONDARY CONTAMINANTS AND RADIONUCLIDES		
A. PRIMARY CONTAMINANTS		
Barium*	1.0	milligrams/liter (mg/1)
Cadmium*	0.01	mg/1
Chromium*	0.05	mg/1
Lead*	0.05	mg/1
Mercury*	0.002	mg/1
Selenium*	0.01	mg/1
Silver*	0.05	mg/1
***		
B. SECONDARY CONTAMINANTS		
Copper*	1.0	mg/1
Zinc*	5.0	mg/1
***		
II. CARCINOGENS		
***		
Arsenic*	0.05	(ug/1)
******		

However, the regulatory standards the Port prescribes for itself in its October 2003 Work Plan (and on which the bid documents were apparently based) exceed (in some cases greatly) the values listed in WAC 173-200-040. For example, Table 7 of the Work Plan (at p. 23) purports to list the "Most Stringent [numeric value] of Groundwater or Surface Water Quality Criterion in ug/L" (micrograms per liter) for arsenic as 14.75 ug/L -- several hundred times greater than the 0.05 ug/L limit for arsenic in WAC 173-200-040, Table 1. This deviation was never presented to

the PCHB or the Supreme Court for approval and is clearly inconsistent with the Court's May 14 ruling.

Similarly, Table 7 in the Work Plan lists 1,450 ug/L as the most stringent criterion for barium, yet the limit in Table 1 of WAC 173-200-040 is 1,000 ug/L. And, as another example, the standard listed in the Work Plan's Table 7 for chromium is 100 ug/L, twice the limit in WAC 173-200-040 Table 1. The testing procedures the Port has told contractors to rely on in submitting their bids are therefore in clear conflict with the Supreme Court's ruling regarding compliance with groundwater standards.

The Supreme Court's unambiguous "zero TPH" ruling, imposed despite the Port's arguments concerning low level "natural" occurrences, is also violated by the Port's preexisting plans. The test methods and reporting limits cited by the Port as acceptable would effectively nullify the Court's ruling and allow the Port to accomplish precisely what the Court forbade. For example, the Port's Work Plan states that limits of 5 mg/kg for gas-range TPH, 25 mg/kg for diesel-range TPH, and 100 mg/kg for oil-range TPH are acceptable *Id.* These are limits used at already-contaminated sites to determine if contaminants are present at levels above limits set for regulatory cleanup. Thus, for purposes of those tests it is unimportant if TPH is present at levels lower than MTCA cleanup levels. This approach was rejected for TPH by the Supreme Court in its adoption of the "zero TPH" standard. And, there are tests readily available (including in Seattle) to detect down to limits far closer to the Supreme Court standard. For example, while the Port's Work Plan lists 5 mg/kg for gas, the correct value for reporting limits is no greater than 1 mg/kg and, for method detection limits, 0.177 mg/kg. Similarly, while the Port would allow bidding contractors the leeway of 25 mg/kg for diesel, the correct value for reporting limits is 10 mg/kg and, for method detection limits, 0.41 mg/kg. And the Port's value for heavy oil, 100 mg/kg, reflects a similar discrepancy with far lower levels at which contamination can be routinely detected: 50 mg/kg.[2] The use of limits not attuned to the Supreme Court's "zero TPH" mandate is an impermissible effort to avoid it.

The Washington Supreme Court left no doubt that it expected compliance with the conditions it imposed regardless of their status under the federal section 404 permit:

> However, the §401 certification was issued as an independently enforceable state order under Chapter 90.48 RCW, and the PCHB decision merely added conditions to that order. Thus, all unchallenged PCHB conditions and those affirmed by this Court must be

[2] Specific TPH components which are regulated as contaminants can also be detected at even lower levels. For example, Ecology's Implementation Memorandum No. 3 (admitted into the PCHB record) lists the limit for toluene (a gasoline-range TPH) as 0.005 mg/kg

> incorporated into the §401 certification by Ecology and are independently enforceable under state law.

Slip Op. at 8. Whether the Port views the conditions imposed (and those upheld) by the Washington Supreme Court as "minor" is beside the point: compliance under state law is still required. The Port has no authority to proceed with construction in violation of them. Ecology has no authority to allow such violations.

The May 26, 2004, Port letter's suggestion, then, that ACC must now seek injunctive relief in the Ninth Circuit is misplaced. Until, if and when there are, *inter alia,* bids, construction contracts and work plans in compliance with the Washington Supreme Court decision, the Port should not be engaged in any construction activities as a matter of state law. If, contrary to the analysis above, the Port has modified its work plans, bid documents, and construction contracts to render them compliant since issuance of the Washington Supreme Court decision, then please advise immediately (you may consider this a Public Disclosure Act request for such information), and ACC will then consider what action on the federal level or otherwise might be appropriate.[3] For now, ACC reserves all rights in this regard, including rights relating to enforcement of the state order as modified by the Supreme Court.

By directing this letter to Department of Ecology counsel, ACC is also alerting the Department to its demands that the Department not permit any activity at the site which would be in contempt of and/or inconsistent with the letter and intention of the Washington Supreme Court decision. ACC further demands that the Department take immediate action to halt such incipient Port activities.

Sincerely,

HELSELL FETTERMAN LLP

Peter J. Eglick

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[3] In any event, the law in the Ninth Circuit (as elsewhere) is that a party prevailing below acts at its own peril if it proceeds before the appeal is concluded. *See NLRB v. Sav-On Drugs, Inc.,* 728 F.2d 1254, 1256 (9th Cir. 1984). ACC in particular reserves all rights in this regard concerning abatement, removal and restoration.