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REPORT
ON LEGAL ISSUES

IN CONNECTION WITH THE PROPOSED EXPANSION OF SEATTLE-TACOMA INTERNATIONAL AIRPORT

Prepared for
AIRPORT COMMUNITIES COALITION

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April 1993

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I. INTRODUCTION

This report has been prepared for the Airport Communities Coalition and its member cities ("ACC Cities") as an overview of the legal issues that may arise in connection with the proposed construction of a third runway at Seattle-Tacoma International Airport. The report addresses, too, the planning process under which runway construction at the airport is being evaluated as a potential means to provide additional air transportation capacity for the central Puget Sound region.

The factual information contained in the report is drawn from a variety of sources, and may not reflect fully the plans which are being developed by the Port of Seattle or the Federal Aviation Administration that have not yet been made available to the public. Nevertheless, the report reviews known factual conditions concerning the Port of Seattle's plans for a third runway, and discusses the potential applicability of numerous state and federal environmental protection and planning statutes to the airport's proposed expansion. This report thus should serve as a resource document for the ACC Cities as they consider alternative legal strategies that address their collective and individual concerns about the possible expansion of Seattle-Tacoma International Airport.[1/]

[1/] The report has not considered, however, the extent to which powers possessed by entities that have not joined the ACC, such as the Highline School District, could affect the proposed expansion of the airport.

II. BACKGROUND

A. Ownership and Control of Seattle-Tacoma International Airport

Seattle-Tacoma International Airport ("SEA") is owned and operated by the Port of Seattle (the "Port"). The Port is a municipal corporation under state law,[2] and is governed by a five-person Commission. Gary Grant, one of the five Port Commissioners and a former King County Council chairman, recently was elected president of the Commission.[3]

Port Commissioners are elected by the citizens of King County as at-large representatives of all of King County. Recently, however, legislation has been introduced in the Washington State Legislature to divide King County into five election districts with one Port Commissioner to be elected from each district.[4] Proponents of the legislation argue that as at-large representatives, the current commissioners fail to represent adequately the interests of particular regions of King County.[5]

The Port's Aviation Division has principal responsibility for SEA operations. The Aviation Division's Managing Director -- Gary LeTellier -- recently left his position and has been replaced on an interim basis by William Brougher.

B. Airport Facilities and Setting

1. Existing Facilities

The Port commenced operations at SEA in the early 1940's,[6] intending that the airport would supplement air transportation services already being provided by the Seattle

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[2] RCW 53.04.060.

[3] Grant Selected Year's Port President, Highline Times, Jan. 23, 1993. The other Port Commissioners are Paige Miller (immediate past president of the Commission), Pat Davis, Jack Block and Paul Schell.

[4] Gorlick, Bills By Foes of 3rd Runway Target Port, Seattle Post-Intelligencer, Feb. 12, 1993.

[5] Id.

[6] Coffman Associates, Noise Exposure Map Update for Sea-Tac International Airport (1989) at 1-2 (the "1989 NEM Update").

area's primary airport at the time -- Boeing Field/King County International Airport.[7] Over the course of the next several decades, however, operations at SEA grew until the airport supplanted Boeing Field as the region's principal airport.[8] In 1989, SEA served approximately 15.2 million passengers.[9] Nearly 339,000 aircraft operations took place in 1991 at SEA, including both arrivals and departures.[10]

The current boundaries of SEA lie almost entirely within the corporate boundaries of the City of SeaTac; a portion of airport property is located in the City of Des Moines.[11] The property within Des Moines was acquired as part of SEA's noise abatement and acquisition program, and is not used for airport operations.[12] SEA is bounded generally by two limited access highways and two surface roads: State Route 509 to the west and State Route 518 to the north, State Route 99 to the east and South 192nd Street to the south.[13]

SEA property comprises approximately 2,500 acres of land,[14] about 1,900 acres of which are used for airport operations and the remainder for airport-related activities.[15]

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[7] Washington State Air Transp. Comm'n, Governance Authority and Key Policy Issues, Discussion Draft Working Paper (June 17, 1992) at 9.

[8] 1989 NEM Update at 1-2.

[9] U.S. Dep't of Transp., Fed. Aviation Admin., Port of Seattle, and Airlines Serving Seattle-Tacoma, Seattle-Tacoma International Airport, Airport Capacity Enhancement Plan (June 1991) at 1 (the "1991 SEA Capacity Enhancement Plan").

[10] Peter D. Beaulieu, Manager, Flight Plan Project, Flight Plan Briefing Paper No. 3: Demand and Capacity (Apr. 30, 1992) at 1.

[11] See Sea-Tac International Airport, Existing Noise Exposure Map (Draft) (1991) (the "1991 NEM Map"). See also Appendix B hereto.

[12] Sea-Tac International Airport, Noise Exposure Map Update (Draft) (1991) at 2 ("1991 NEM Update").

[13] Id. at 1, 2.

[14] Puget Sound Regional Council and Port of Seattle, The Flight Plan Project, Final Environmental Impact Statement (1992) at 4-60 (the "Flight Plan EIS").

[15] Susan Evans, Airport Would Lie at Sammamish Without Tacoma, Highline Times, July 15, 1992 at A1-A2. The Port has acquired about 500 acres of noise-affected property in the vicinity of the airport. Id. This additional acreage generally lies at the northern and southern extremes of airport property (i.e., north of State Route 518 and south of S. 192nd Street). See 1991 NEM Map.

The airport itself consists of two parallel runways, designated 16R/34L and 16L/34R, with associated taxiways.[16] Runway 16R/34L, the west runway, is 9,425 feet long and 150 feet wide, while Runway 16L/34R, the east runway, is 11,900 feet long and 150 feet wide.[17] The two runways are separated by 800 feet, which means that in instrument flight rule ("IFR") weather conditions, they cannot be operated independently.[18] Consequently, aircraft at SEA are limited in poor weather conditions to the use of a single runway.

The airport's commercial passenger facilities include a main terminal, four concourses (A, B, C and D) and two satellite terminals (north and south). Also located on airport property are a large fuel tank farm, several commercial airline hangars, general aviation facilities, a Weyerhauser corporate hangar, and cargo facilities for Airborne Freight, Federal Express, United Airlines, Alaska Airlines, Delta Airlines and a few other cargo carriers.[19] Additionally, an industrial wastewater treatment plant (designed to treat wastewater from aircraft maintenance and other industrial activities at SEA)[20] is located in the southwest portion of airport property along South 188th Street.[21]

The main passenger terminal is sited along the eastern portion of SEA property, with cargo facilities generally located north of the terminal.[22] Access to the passenger

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[16] Sea-Tac International Airport, Airport Layout Plan (rev. Feb. 1992).

[17] 1989 NEM Update at 1-4.

[18] Current FAA rules authorize simultaneous "independent" operations to occur on parallel runways in IFR weather conditions only if the centerlines of such runways are separated by at least 4,300 feet. See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin., DOT/FAA/ASC-91-1, 1991-92 Aviation System Capacity Plan at 3-3 (the "1991-92 FAA Aviation System Capacity Plan"). By "independent" operations, the FAA means that two aircraft may arrive on, or two aircraft may depart from, parallel runways at the same instant.

[19] See 1989 NEM Update at 1-4, Exhibit 1B.

[20] Flight Plan EIS at 4-106.

[21] 1989 NEM Update at 1-4, Exhibit 1B.

[22] Id.

terminal is available via either a north access road connected to State Route 518 or a surface connection to State Route 99.[23]

2. Planned Improvements to Land-Side Facilities

The Port has prepared plans for several improvements to land-side facilities at SEA, including airport terminal improvements, construction of a south access road, and development of a large new aircraft maintenance facility in the southeastern portion of the airport property.[24] Airport terminal improvements identified in the proposed terminal development program include the following projects slated to be completed before the year 2000:

- Expansion of the main terminal for ticketing and baggage claim;
- Expansion and refurbishment of Concourse A for additional aircraft parking;
- Construction of a Concourse D office building and possible hotel;
- Expansion of the south satellite terminal for additional holdroom, in-transit facilities and public circulation;
- Preparation for the relocation of international arrival facilities on Concourse A; and
- Related utilities, site preparation and facility relocations.[25]

Long-term improvements under consideration by the Port for SEA include a range of terminal and other facility expansions, the scope of which would depend on whether SEA is allowed to expand beyond its current aviation capacity. Facility developments are identified for three different annual operation figures -- 380,000, 410,000 and 480,000.[26]

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[23] Id.

[24] See Port of Seattle, South Aviation Support Area - Draft Environmental Impact Statement (Mar. 1992) ("SASA draft EIS"); Port of Seattle, Terminal Development Program - Seattle-Tacoma International Airport (Draft) (Apr. 1, 1992) ("Terminal Development Program"); Port Commission of the Port of Seattle, Proposed Minutes of the Special Meeting (Feb. 20, 1993) at 4-5; Port Commission of the Port of Seattle, Proposed Minutes of the Regular Meeting (Feb. 23, 1993) at 8-9. Neither the Terminal Development Program nor the SASA draft EIS have been prepared as final documents. Telephone communication between J. Barton Seitz, Cutler & Stanfield and Betsy Lloyd, Office of J. Richard Aramburu (Apr. 1, 1993).

[25] Terminal Development Program at ES-8.

[26] Id. at ES-8, -9.

At 480,000 annual operations, the Port has proposed the following land-side improvements:

- Maximum expansion of ticketing and baggage claim facilities;
- Improvement of interline and outbound baggage system, including implementation of a unified automated system;
- Maximum expansion and refurbishment of Concourse A;
- Development of office building and/or hotel at Concourse D;
- Maximum expansion of both satellite terminals;
- Expansion of parking;
- Relocation of international arrival facilities to Concourse A; and
- Related utilities, site preparation and facility relocation.[27]

Port action on another land-side development -- proposed aircraft maintenance facilities[28] -- reportedly has been suspended because Alaska Airlines, which was to be one of the principal beneficiaries of the facilities, decided to locate its maintenance base in Arizona.[29] The Port is likely to proceed, nevertheless, with construction of new maintenance facilities before the year 2000, because the Port's proposed expansion of Concourse A under the terminal development program would require the demolition and relocation of existing aircraft maintenance facilities used by several air carriers.[30]

The Port has considered three alternative designs for these maintenance facilities, two of which would provide a large maintenance base for a single air carrier as well as line maintenance facilities, and one design that would provide line maintenance for daily air

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[27] Id. at ES-10. It has been reported that SEA's land-side acreage is extremely limited, particularly when compared with airports handling comparable numbers of aircraft operations. See RCAA Report, Gerald Dallas, Landside Capacity Issues (Jan. 21, 1993) at 2-5. Consequently, there is some question whether SEA is capable of handling the passenger traffic anticipated for 480,000 annual operations. Id. at 5-8.

[28] See SASA draft EIS.

[29] Telephone communication between J. Barton Seitz, Cutler & Stanfield and Betsy Lloyd, Office of J. Richard Aramburu (Apr. 1, 1993).

[30] See SASA draft EIS at 2-3.

carrier operations.[31] The property to be used for these facilities lies roughly between Runway 16L/34R (including its clear zone) and 28th Avenue South, and between South 188th Street and South 200th Street,[32] and would require the development of up to 116 acres of land.[33] All three alternatives would require the partial relocation of Des Moines Creek and the construction of a large new industrial wastewater treatment facility to control and treat stormwater runoff.[34]

A third major land-side development action being considered by the Port is the construction of a four-lane south access road, to connect the passenger terminal with either Interstate 5 or a southern extension of State Route 509. No precise route has been selected for this access road, although the draft environmental impact statement examining the south airport maintenance facilities suggested locating the road along the western perimeter of the maintenance facilities, then along 22nd Avenue South until it turned east and converged with State Route 99 at approximately South 208th Street.[35] A resolution recently adopted by the Port Commission authorized the preparation of an environmental impact statement examining the effects of constructing a South Access Road (as well as an extension southward of State Route 509), which would be coordinated and funded jointly with the Washington Department of Transportation, the City of SeaTac, the City of Des Moines, and King County.[36] It appears, therefore, that construction of a South Access Road may be initiated within the next few years.

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[31] Id. at 3-6, 3-11 to 3-13, 3-15 to 3-16. Both maintenance base options include construction of a hush house facility.

[32] Id. at 3-5, Figure 3.2-1.

[33] Id. at 3-16.

[34] Id. at 3-8 to 3-9.

[35] Id. at 4-167, Figure 4.12-4.

[36] Port Commission of the Port of Seattle, Proposed Minutes of the Regular Meeting (Feb. 23, 1993) at 8-9.

C. Operational Characteristics of SEA

Consultants to the Port and the Puget Sound Regional Council ("PSRC") have estimated that SEA's maximum efficient operational capacity equals 380,000 annual operations.[37] This capacity figure purportedly is based upon the number of aircraft operations SEA's layout and runway use patterns could handle with a limit on average aircraft delays of four to five minutes.[38]

Operational patterns and capacity limits at SEA are the result of a number of factors, including the types of aircraft using the airport, the airport layout, weather, airspace considerations, and use restrictions adopted for noise abatement purposes. These factors are discussed below.

1. Aircraft Operations

SEA currently handles a mix of commercial air carrier, commuter and general aviation operations. Historical figures for these categories of aircraft operations are shown in Table A, while past and forecast numbers of annual operations are illustrated in Graph A, each of which follow.

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[37] Flight Plan EIS at 2-12.

[38] Id. The main quantitative decision tool used for airport planning is the airport's target level of service measured in average minutes of delay per aircraft. Neither the methodology for measuring delay nor the threshold for acceptable delays, however, is standard in the industry. Consequently, it is difficult, and generally unhelpful, to compare delay figures calculated by one airport proprietor or operator with those calculated by another. Compare Puget Sound Air Transportation Committee, Phase II: Development of Alternatives (1991) App. I (hereinafter referred to as "Phase II Report") with RCAA Report, J. Richard Aramburu, Review of Flight Delay Information (Jan. 21, 1993). Were the same methodology used to calculate average aircraft delay, there would be considerable variation among airports and air carriers as to what constitutes an unacceptable level of delay. Definition of acceptable delay is important because even small differences in the threshold (e.g., from four to five minutes average delay per aircraft) could fundamentally change the planning constraints for airport capacity.

TABLE A

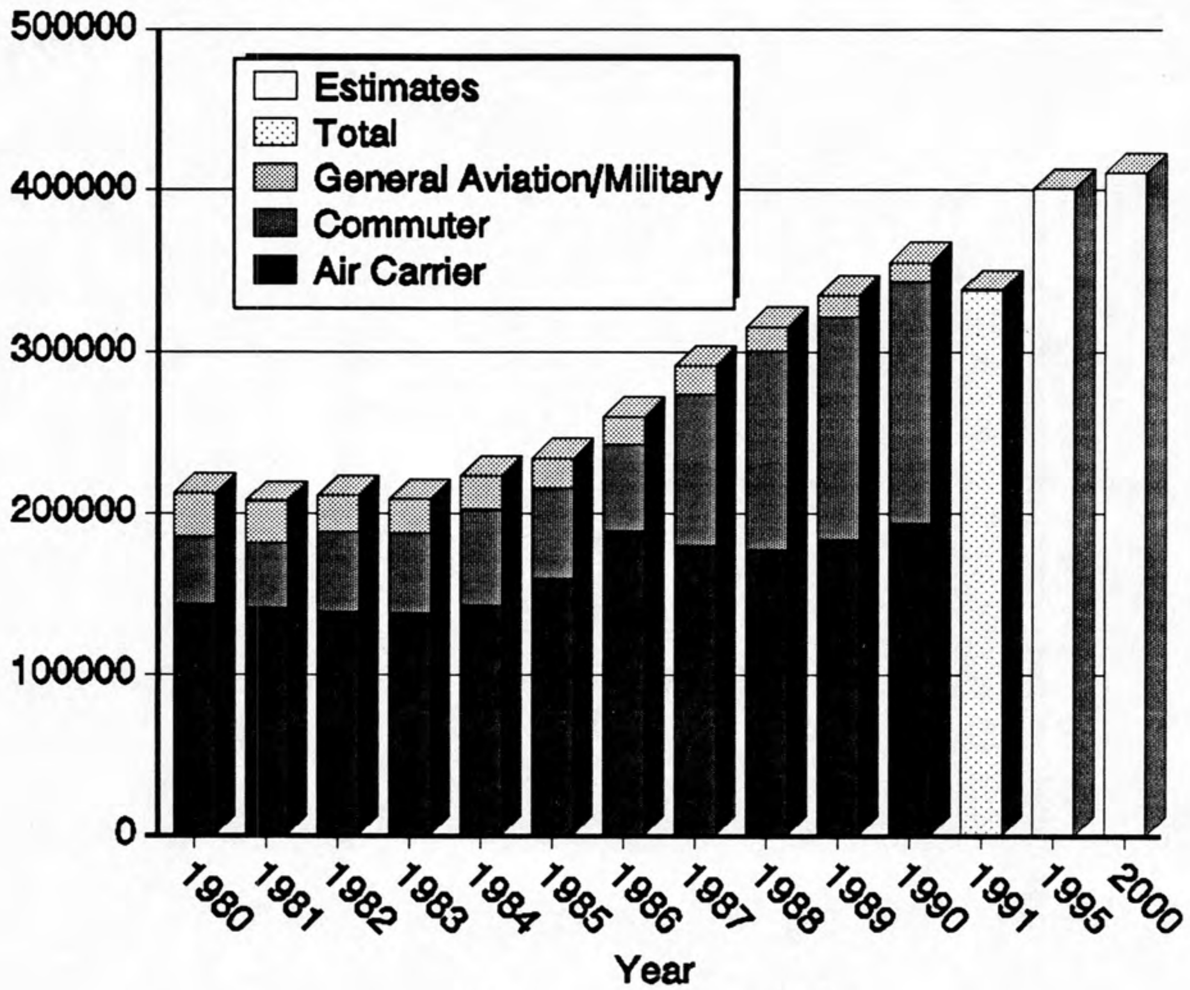
Annual Aircraft Operations at SEA[a]

Year	Air Carrier[b]	Commuter	General Aviation & Military	Total
1980	143,646	40,681	28,417	212,744
1981	141,015	39,400	27,530	207,945
1982	138,415	49,040	23,939	211,394
1983	137,920	48,757	22,576	209,253
1984	142,717	59,824	21,287	223,828
1985	158,904	56,954	18,864	234,722
1986	187,870	54,977	17,092	259,939
1987	178,682	95,337	18,026	292,045
1988	176,732	124,245	14,967	315,944
1989	182,460	139,215	13,249	334,924
1990	193,482	150,376	11,149	355,007
1991	n/a	n/a	n/a	338,600

[a] The data contained in Table A is derived from SEA Traffic and Operations Reports, which have been summarized in several studies of the airport. See Peat Marwick Main & Co., Final Report, Phase I Forecasts - Flight Plan Study, Puget Sound Region (1990) at 17 ("Phase I Forecasts"), Table 6; 1991 NEM Update at 16, Table 1C; Flight Plan EIS at 2-4, 2-15 .

[b] Operations by "air carriers" include both passenger and cargo aircraft operations.

Graph A



Operations at SEA

Table A and Graph A illustrate that in recent years, SEA commuter operations have increased fairly rapidly, while general aviation and military aircraft operations have been declining. Air carrier operations at SEA show only a slight increase over the period 1986 to 1990. It is apparent, moreover, that the increase in commuter operations at SEA is the principal factor contributing to the growth in operations at SEA. In 1991, however, the total number of operations at SEA dropped by nearly 5 percent, reflecting sluggish demand for air transportation in the Pacific Northwest and the nation generally.

2. Weather and Airport Layout

There are two fundamental constraints which affect the capacity of an airport. The first is the layout of the airport. The location, orientation and length of runways are critical determinants. Second is weather. As a general principle, airport planning decisions are based upon an airport's airfield capacity during times of poor weather. Weather determines such important capacity-affecting factors as the in-trail separation of aircraft, the lateral separation of aircraft, and the permissible frequency of arrivals and departures.

The capacity of SEA is determined largely by two factors: 1) the lateral separation of the existing runways; and 2) the frequency with which poor weather conditions occur. Both of these factors are considerably constrained: the existing runways are too close together for maximum operational efficiency; and, poor weather is a relatively common phenomenon at SEA.

Weather conditions which allow for two arrival paths (5,000-foot minimum cloud ceiling and five miles or greater visibility) occur approximately 56 percent of the year.[39/] Under all other weather conditions, because of the proximity of the two runways, only a single aircraft arrival path is permitted at SEA.[40/] As a result, 44 percent of the year airport capacity is restricted to that provided by a single runway.

[39/] Flight Plan EIS at 2-17. These weather conditions are characterized as visual flight rule ("VFR") conditions. Id.

[40/] See n.17, supra. FAA rules permit simultaneous IFR operations on parallel runways separated by between 2,500 and 4,300, if the landings or takeoffs are staggered. See 1991-92 Aviation System Capacity Plan at 3-5.

Aircraft at SEA generally operate in a south flow configuration -- in 1990, 69 percent of all aircraft arrivals and departures were to the south.[41] Table B and Graph B show the monthly breakdown for south and north flow configurations at SEA. Under instrument flight rule ("IFR") weather conditions, Runways 16R and 34R are the preferred arrival runways; Runways 16L and 34L are the preferred departure runways under all weather conditions.[42] Runway use percentages for 1990 are provided in Table C.

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[41] 1991 NEM Update at 22.

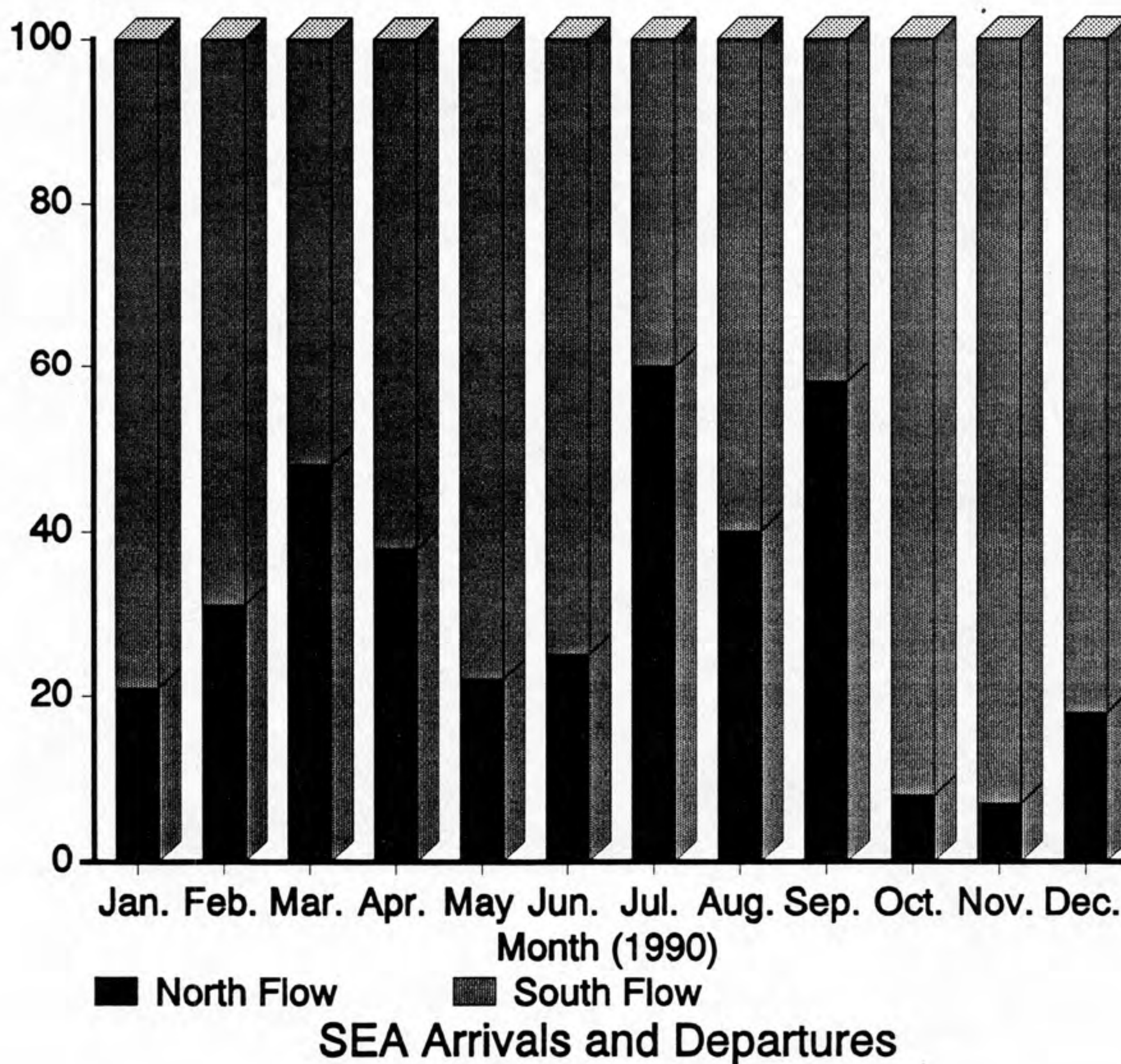
[42] Id. Nevertheless, because of its greater length, Runway 34R often is used for departures by large, wide-body aircraft on long-haul routes. Id.

TABLE B

SEA Flow Statistics (Arrivals and Departures)
(1990)[a]

Month	Percent North Flow	Percent South Flow
January	21%	79%
February	31%	69%
March	48%	52%
April	38%	62%
May	22%	78%
June	25%	75%
July	60%	40%
August	40%	60%
September	58%	42%
October	8%	92%
November	7%	93%
December	18%	82%
YEARLY AVERAGE	31%	69%

[a] 1991 NEM Update at 24.



Graph B
Percentage North or South Flow
100
80
60
40
20
0
Jan. Feb. Mar. Apr. May Jun. Jul. Aug. Sep. Oct. Nov. Dec.
Month (1990)
North Flow
South Flow
SEA Arrivals and Departures

TABLE C

SEA Runway Use
(1990)[a]

Runway	Arrival Percentage	Departure Percentage
16L (Southbound)	11.7%	66.0%
16R (Southbound)	57.3%	3.0%
34L (Northbound)	5.5%	24.6%
34R (Northbound)	25.5%	6.4%

[a] 1991 NEM Update at 23.

The data contained in Table B shows a relatively high variability in the month-to-month percentage of operations that occur in a south flow, ranging from 40 percent in July to 93 percent in November. This variability appears to reflect the fact that in poor weather (or IFR) conditions, the Federal Aviation Administration ("FAA") Air Traffic Control Tower at SEA prefers to route aircraft in a south flow.[43] Consequently, in months characterized by overcast weather conditions or poor visibility, the percentage of south flow operations generally are higher.

3. Use Restrictions and Noise Abatement Procedures

SEA operates under a set of use restrictions and noise abatement procedures that were developed over the past twenty years in an effort to moderate the effect of aircraft and airport noise on surrounding communities.

Many of the measures that have been implemented at SEA to control airport noise are the result of an agreement among the Port, airport users, the FAA, local governments and community groups.[44] The 1990 Mediation Agreement has several components, which collectively are designed to result, by the year 2001, in an overall noise reduction of approximately 50 percent to communities near SEA.[45]

The process that led to development of the Mediation Agreement was initiated in the fall of 1987 when the Port acceded to neighboring communities' and citizens' demands that a formal noise abatement program be adopted at SEA. After nearly two and a half years of technical reviews, consensus-building meetings and public hearings, the participants finally agreed upon the terms of the Mediation Agreement.

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[43] See Flight Plan EIS at 2-17, Table 2-5.

[44] See Mediation Committee, Final Package of Mediated Noise Abatement Actions for Seattle-Tacoma International Airport (1990) (the "Mediation Agreement"); 1991 NEM Update App. B.

[45] Mediation Agreement at 2.

Included among the components of the Mediation Agreement are:

a. A noise budget for all commercial aircraft operations, measured using average noise energy levels;[46]

b. A nighttime phaseout of stage 2 aircraft operations;[47]

c. An enhanced noise insulation program;[48]

d. Preferential flight tracks, supported by improved technology and FAA procedures;[49]

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[46] See Mediation Agreement App. A. The noise budget, which became effective January 1, 1991, requires a reduction in SEA's maximum airport noise exposure level from 74.53 dBA in the 1989 base period to 71.24 dBA in 2001. This reduction is to be achieved through a progressive reduction in the permissible noise each of the commercial carriers serving SEA may generate. Any airline that exceeds its annual noise allocation is subject to a fine not to exceed $ 1 million. The noise budget also contains an incentive for air carriers to use increasing percentages of stage 3 aircraft at SEA. If a carrier's operations at SEA exceed the stage 3 targets identified in the noise budget, then that carrier is allowed to exceed its noise allocation under the budget. The stage 3 targets range from 70 percent stage 3 operations at SEA in 1991 to 95 percent stage 3 in 1997. Id.; see also 1991 NEM Update App. A.

[47] The nighttime phaseout, which became effective October 1, 1990 is designed to occur over the course of several years:

- effective October 1, 1992, stage 2 operations are prohibited between midnight and 6am;
- effective October 1, 1993, stage 2 operations will be prohibited between 11pm and 6:30am;
- effective October 1, 1994, stage 2 operations will be prohibited between 10:30pm and 6:45am; and
- effective October 1, 1995 (and thereafter), stage 2 operations will be prohibited between 10:00pm and 7:00am.

Mediation Agreement App. B at 3.

[48] The noise insulation program called for in the Mediation Agreement includes doubling the rate at which the Port will insulate residences. Id. at 5. The Port also has committed to pursuing, with the FAA, the possibility of receiving federal funds for soundproofing public buildings other than public schools and hospitals (e.g., libraries, private schools, churches, auditoriums, etc.). Id.

[49] The flight tracks preferred under the Mediation Agreement are designed to moderate noise impacts of aircraft overflights on residential communities. Id. at 7, 9. These flight tracks call for the FAA to route aircraft over Elliott Bay and Puget Sound to the extent feasible. Id. To facilitate improved use of noise abatement flight tracks, the Port also committed to seeking FAA support for the installation of a microwave landing system ("MLS") at the airport. Id. at 8.

e. Ground noise controls, including penalties for violations of ground runup restrictions and a prohibition on the use of powerback procedures for gate departures;[50]

f. A state-of-the-art flight track and noise monitoring system;[51] and

g. Creation of a Noise Abatement Committee.[52]

Several noise mitigation measures specified in the Mediation Agreement are to be phased-in after the date on which Congress enacted the Airport Noise and Capacity Act of 1990 (the "Noise Act"),[53] and therefore, technically might be viewed as being subject to the Noise Act's detailed analysis and FAA review and approval requirements.[54] In adopting the Noise Act, however, Congress exempted certain airports from the limitations on airport noise and access restrictions imposed by the Act.[55] While the statute does not name the airports that qualify for particular exemptions, it nevertheless is understood that each exemption was designed to be applicable to certain airports, including SEA.

SEA's exemption applies to "a local action to enforce a negotiated or executed airport aircraft noise or access restriction the airport operator and the aircraft operators agreed to before November 5, 1990."[56] Pursuant to this exemption, noise and access restrictions on stage 2 and stage 3 aircraft that "enforce" one of the restrictions contained

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[50] The Mediation Agreement also requires that a hush house or similar facility be constructed at SEA if a new aircraft maintenance facility is built at the airport. Id. at 10.

[51] See id. at 11-13.

[52] Id. at 15. The members of the Noise Abatement Committee initially were drawn from the membership of the Options Subcommittee of the mediation process. Id. at 17. Subsequently, members of the Noise Abatement Committee have been appointed by the Port Commission to two-year terms and must constitute a "balanced representation of the Mediation Committee interests." Id.

[53] Pub. L. No. 101-508, 104 Stat. 1388 (1990) (codified in pertinent part at 49 U.S.C. app. §§ 2150-58).

[54] See 49 U.S.C. app. § 2153(a)(2)(A), (B). See also id. § 2153(c), (d); 14 C.F.R. Part 161.

[55] See 49 U.S.C. app. § 2153(a)(2)(C), (a)(2)(D), (h)(2).

[56] See id. § 2153(a)(2)(C)(ii).

in the Mediation Agreement (e.g., the noise budget or the nighttime phaseout of stage 2 aircraft operations) are exempt from compliance with Noise Act-specified procedures.

The exemption is not so broad, however, as to provide SEA with a blanket exemption from compliance with the Noise Act with respect to all future noise or access restrictions. Neither does SEA's exemption protect new noise abatement measures that were not included in the Mediation Agreement or do not "enforce" Mediation Agreement restrictions. Consequently, a determination of whether a proposed noise or access restriction's adoption will require compliance with the Noise Act will depend on that restriction's connection to the Mediation Agreement: noise abatement measures that enforce restrictions in the Agreement are exempt, regardless of the date on which they are adopted, but all other measures are not exempt.

Anticipating that future disagreements might arise regarding implementation of the foregoing measures and actions, the Mediation Agreement gives the Noise Abatement Committee authority to hear and address disputes. The Mediation Agreement provides in pertinent part that:

> For most parties to this mediation agreement there are one or more issues of fundamental importance which constitute the basis for moving ahead with this overall package. Any significant change in such an issue of fundamental importance to any party to this agreement from the manner in which this issue is treated in these recommendations or in the environment within which these agreements were reached would permit the affected party to reconsider its support for the package and relieve itself from the commitments undertaken in this agreement.
>
> Should a party affected by this agreement believe that such a significant change has occured [sic], they shall so inform the Noise Abatement Committee. The Committee shall have 30 days in which to address and seek to resolve this issue.[57]

Pursuant to the foregoing passage, therefore, any party to the Mediation Agreement may seek to enforce the Agreement's terms by taking its complaint to the Noise Abatement Committee. It is uncertain whether this Committee has yet been asked to resolve disputes over implementation of the Mediation Agreement.

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[57] Mediation Agreement at 16.

4. The Four-Post Plan

Another significant factor in determining SEA's total operational capacity is the so-called "Four-Post Plan." The Four-Post Plan, which first was proposed by the FAA during the fall of 1989, revised air traffic control procedures for SEA and high altitude aircraft routes used in the Pacific Northwest.[58]

The FAA stated that airspace revisions like those incorporated in the Four-Post Plan were needed "to reduce congestion, implement static high altitude routes which merge with the national Preferred Route System, and improve efficiency of air traffic operations."[59] In truth, the FAA's primary rationale for adopting the Four-Post Plan appears to have been simply to increase airport capacity at SEA and to provide its air traffic controllers with two separate arrival corridors northwest and northeast of the airport. The FAA asserted that then-existing air traffic control procedures for SEA[60] limited airport capacity when the airport was in a south flow configuration; operations were limited to 42 aircraft arrivals per hour in favorable weather conditions, versus a theoretical maximum of 56 arrivals per hour.[61] After preparation of an environmental assessment reviewing its effects, the FAA adopted the Four-Post Plan, which now governs air traffic routes and procedures for aircraft using Seattle-area airspace.[62]

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[58] The Four-Post Plan derives its name from the designation by the FAA of four aircraft arrival points located approximately 40 miles northeast, southeast, southwest and northwest of SEA. Aircraft enroute to SEA enter Seattle-area airspace at these four arrival points, and then are routed north or south of SEA depending on whether the airport is in south or north flow configuration. U.S. Dep't of Transp., Fed. Aviation Admin., Final Environmental Assessment, Proposed Changes to Air Traffic Arrival and Departure Routes at Seattle-Tacoma International Airport, Vol. I (1990) at 38 (the "Four-Post Plan EA").

[59] Four-Post Plan EA at 1.

[60] Air traffic control procedures for SEA at the time specified that when the airport was in a south flow configuration, all aircraft enroute to SEA were to be routed over Puget Sound and Elliott Bay (northwest of SEA and downtown Seattle) and were to follow a single approach path to the airport. This procedure was intended to preclude arrivals from overflying residential areas north and east of downtown Seattle. Id. at 9. Aircraft arrivals when the airport was in a north flow configuration were not similarly constrained. Id.

[61] Id.

[62] See Temple H. Johnson, Jr., Manager, Air Traffic Div., Northwest Mountain Region, Fed. Aviation Admin., Decision and Order (Apr. 2, 1990). There are two FAA offices that jointly implemented the Four-
(continued...)

Following approval of the Four-Post Plan a lawsuit challenging the FAA's adoption of the Four-Post Plan was filed in the United States Court of Appeals for the Ninth Circuit.[63] The suit sought to require the FAA to prepare a full environmental impact statement ("EIS") prior to implementing the Four-Post Plan, and to rely on noise measurements other than the L_{dn} contour of 65 dBA to evaluate the impacts of the Plan.[64] The Federal appellate court upheld the FAA's reliance on the L_{dn} contour of 65 dBA as a basis for concluding that implementation of the Four-Post Plan would not cause significant effects on the environment.[65] The court also affirmed the FAA's decision to prepare only an environmental assessment, and not an environmental impact statement, to satisfy its obligations under the National Environmental Policy Act prior to implementation of the Four-Post Plan.[66]

5. Part 150 Noise Compatibility Program

The Port has participated in the FAA's noise compatibility program for over a decade. This program, known as the Part 150 program,[67] was established by Congress as a means for encouraging airport proprietors and nearby jurisdictions to address airport noise concerns and to improve the compatibility of land uses near airports.[68]

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[62] (...continued)
Post Plan: the Seattle Terminal Radar Approach Control ("TRACON") and the Seattle Air Route Traffic Control Center ("ARTCC"). Seattle ARTCC handles the routing of high altitude aircraft to, from and through the Seattle-area airspace sector within its jurisdiction. Seattle TRACON oversees low altitude arrivals and departures at SEA. Four-Post Plan EA at 6-10.

[63] See Seattle Community Council Fed'n v. FAA, 961 F.2d 829 (9th Cir. 1992).

[64] Id. at 833.

[65] Id. The FAA had found that because none of the actions proposed in the Four-Post Plan would affect SEA's L_{dn} contour of 65 DBA, the Plan presumptively would not significantly affect the quality of the human environment. Id.

[66] Id.

[67] See 14 C.F.R. Part 150.

[68] See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin., Advisory Circular AC150/5020-1, Noise Control & Compatibility Planning for Airports (1983) ¶ 2.

The Port's most recent Part 150 noise compatibility plan for SEA was submitted and approved by the FAA in 1985.[69] The 1985 plan included a number of noise abatement and mitigation proposals, including the following:

- The potential rescheduling of nighttime flights;
- The elimination of flight training activities;
- The use of VOR radials to improve the ability of aircraft to use noise abatement flight tracks;
- The establishment of an airport noise abatement office;
- The acquisition of residential properties located within areas of high noise exposure;
- The installation of sound insulation in certain residential properties and a contribution towards sound insulation in other residential properties; and
- Implementation of a model transaction assistance/purchase assurance program for residences affected by high noise exposure.[70]

The Port currently is developing revisions to its 1985 Noise Compatibility Plan. These revisions are intended principally to incorporate several components of the 1990 Mediation Agreement, although the Port also is proposing to revise somewhat its noise insulation and purchase assurance programs.[71] Additionally, the Port has proposed insulating up to 5,000 single family residences prior to initiating construction of a third runway at SEA.[72]

The Port's Part 150 programs to date have resulted in the purchase and insulation of several properties in the vicinity of SEA, many of which are located in the Cities of SeaTac and Des Moines. The pace of the program has been quite slow, however, and this

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[69] Port of Seattle, Sea-Tac International Airport, Part 150 Airport Noise Compatibility Planning (1985) ("1985 NCP").

[70] 1985 NCP at chapter 6.

[71] See Draft Working Paper, 1992-93 Amendments to Sea-Tac's 1985 FAR Part 150 Airport Noise Compatibility Program.

[72] Port Commission Res. No. 3125 § 1(c) (Nov. 3, 1992).

has resulted in increased community pressure on the Port to expedite the insulation and acquisition process.[73]

D. Identification of Need for Additional Airport Capacity

Over the past several years, numerous studies have been performed that analyze SEA operations to determine whether and when additional air transportation capacity should be added at the airport.[74] As might be expected, these studies often reach vastly different conclusions based upon forecasts of the future demand and need for additional airport capacity. Table D provides a comparison of several of those forecasts in terms of aircraft operations, total passengers and enplaned passengers.

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[73] See RCAA Report, Hans Aschenbach, Estimated Remaining Mitigation Costs for the Second Runway at Sea-Tac Int'l Airport (Jan. 28, 1993).

[74] See, e.g., Phase I Forecasts; Phase II Report App. J; Flight Plan EIS; 1991-92 Aviation System Capacity Plan App. A at 2, Tables A-2 and A-3; Kurth & Company, Inc., Airline Market Potential and Operational Feasibility of Five Airport System Alternatives in the Puget Sound Region (1990).

TABLE D

Alternative Forecasts for Seattle-Tacoma International Airport Activity*

Forecast	1995		2000		2010		2020	
	Operations	Total Passengers or Enplanements	Operations	Total Passengers or Enplanements	Operations	Total Passengers or Enplanements	Operations	Total Passengers or Enplanements
Flight Plan (1990)	401,000	21 m. (total)	411,000	25.4 m. (total)	447,000	34 m. (total)	524,000	45 m. (total)
STIA Update (1992)	387,000		419,000		492,000		563,000	
FAA Draft (1992)			419,000		455,000			
FAA Aviation System Capacity Plan (1991)			427,000 (FY)	12.7 m. (enplan.)				
AIRTRAC Critique (1992)						25-35 m. (total)		
RCAA - Gibson Economics (1993)			346,000**	9.9 m. (enplan.)			438,000**	17.6 m. (enplan.)

* Source: Flight Plan EIS at 2-14, Table 2-4 (for Flight Plan, STIA Update and FAA Draft figures); Washington State Air Transp. Comm'n, "1991 Aviation System Capacity Plan" App. A at 5, Table A-2, and 6, Table A-3; Review of Flight Plan Demand and Capacity Analysis, Project II(b) Final Report (Oct. 31, 1992) at 36-37 ("AIRTRAC Critique"); RCAA Report, Gibson Economics, Inc., Review of Flight Plan Air Travel Demand Forecasts and Forecast Analysis Papers (Jan. 14, 1993) at 21 ("RCAA - Gibson Economics").

** These figures represent approximations. Gibson projected operational totals only for air carrier and commuter operations -- 325,000 in 2000 and 431,900 in 2020.

By the year 2000, the FAA forecasts that SEA will serve 12.7 million enplaned (departing) passengers and handle 427,000 aircraft operations.[75] The Port estimates that by 2020, approximately 45 million passengers will use SEA and 524,000 aircraft operations will occur annually.[76]

The Port's estimates of total operations and passengers are premised on a number of crucial assumptions:

- The number of origination passengers at SEA would grow from 4.95 million passengers in 1988 to 15.03 million passengers in 2020, based on assumptions about economic growth in the Pacific Northwest;[77]

- Connecting passengers would remain approximately one-third of total traffic;[78]

- The number of passengers per aircraft operation would rise from 50 in 1988 to 95.7 in 2020;[79]

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[75] 1991-92 Aviation System Capacity Plan App. A at 5, 8.

[76] Flight Plan EIS at 2-2, 2-4.

[77] Id. at 2-9 to 2-11. The number of destination passengers is assumed by the Port to equal the number of originating passengers. The total number of origination and destination passengers therefore is forecasted to equal approximately 30 million passengers. Id. at 2-10. At a commercial service airport, all passengers are categorized as origination/destination or connecting. The first category, as the term implies, are those whose origin or destination is the Puget Sound region. The second category are those passengers who are at SEA exclusively for the purpose of changing aircraft (i.e., connecting). A hub-and-spoke system characterizes most air carriers in the present market (with exceptions which are not generally applicable to SEA). Under this system, because of connecting passengers, hub airports serve comparatively more passengers than spoke airports whose traffic is exclusively origination/destination. SEA is a small hub for several airlines including United and Alaska and their commuter carriers; its proportion of connecting to origination/destination traffic is relatively low for a hub airport.

[78] Id. at 2-9. With respect to connecting passengers, a number of additional assumptions were factored into the Port's calculations. Connecting passengers were assumed to equal: (a) 27 percent of the total number of passengers using commercial air carriers at SEA; (b) 44 percent of the total number of passengers using commuter airlines; (c) 50 percent of the total number of passengers flying to or from Canadian locations; and (d) 54 percent of the total number of passengers flying to or from international locations. Id.; Phase I Forecasts at 46, Table 21.

[79] Flight Plan EIS at 2-12. This assumption is based on a forecast that, over time, the number of seats per aircraft operation at SEA will increase. This assumption is consistent with industry trends that newer aircraft are larger than older aircraft they replace. Phase I Forecasts at 45.

- Commuter operations would decline as a percentage of total operations from nearly 42 percent currently to 23 percent in 2020;[80]

- International operations would grow, but at a progressively slower rate, increasing 7 percent per year from 1988 to 1995, and 4 percent per year from 2010 to 2020;[81] and

- General aviation operations would equal 7% of total annual operations.[82]

Given that the Port maintains that SEA's operational capacity is approximately 380,000 annual operations, additional air transportation capacity may be needed in the Puget Sound region by 2000.

The Port and the PSRC have concurred in that conclusion based upon two analytical assumptions. First, aircraft delays at SEA would average roughly 9-10 minutes per aircraft operation when the number of annual operations reaches 411,000 in 2000; second, delays in excess of that level would be viewed by commercial air carriers as unacceptable.[83] Consequently, the Port argues, unless additional capacity is constructed in the Puget Sound region, commercial air carriers may begin to cancel and divert their operations to other airports.[84]

E. Planning to Meet the Puget Sound Region's Air Transportation Needs

Numerous state, regional and local governments in Washington have participated in planning for the Puget Sound region's air transportation needs. At the regional level, planning over the past several years has been sponsored by the PSRC, whose membership includes officials from each of the incorporated municipal and county governments in King, Kitsap, Pierce and Snohomish Counties. At the state level, the Washington State Air

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[80] Flight Plan EIS at 2-12.

[81] Id. at 2-9.

[82] Phase I Forecasts at 47.

[83] Flight Plan EIS at 1-5, 2-15; Phase I Forecasts at 47. See n.24, supra.

[84] Flight Plan EIS at 1-5, 2-15; Phase I Forecasts at 47.

Transportation Commission ("AIRTRAC") has been undertaking its own review of, and planning for, potential solutions to the Puget Sound area's need for air transportation capacity.[85]

1. PSRC/PSCOG Process

The PSRC's planning process began in 1988, when its predecessor agency, the Puget Sound Council of Governments ("PSCOG") adopted the Regional Airport System Plan. The Regional Airport System Plan was designed to serve as the interim air transportation element of the Puget Sound region's regional transportation plan required pursuant to state law.[86] In May 1989, PSCOG and the Port executed an interagency agreement, the principal purpose of which was to establish and conduct a joint planning process that would identify long-term solutions to the Puget Sound region's air transportation needs.[87]

The PSCOG and the Port then established a representative body, which came to be known as the Puget Sound Air Transportation Committee ("PSATC"), to carry out the initial development and evaluation of, and make recommendations about, airport capacity alternatives.[88] In June 1992, the PSATC completed its review and analysis of air transportation needs in the Puget Sound area, and recommended a preferred alternative under which:

(a) a third dependent runway would be constructed at SEA by 2000;

(b) scheduled air carrier service would be introduced at Snohomish County's Paine Field before 2000; and

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[85] See Chronology of Planning Process for Expansion of Seattle-Tacoma International Airport attached hereto as Appendix C.

[86] Puget Sound Council of Governments Res. A-88-13 (Sept. 29, 1988); See also RCW 47.80.030

[87] Port of Seattle and Puget Sound Council of Governments Interagency Agreement for Long Term Air Carrier System Planning (May 23, 1989) § 1 ("Interagency Agreement") . The Interagency Agreement subsequently was modified to include the preparation of draft and final environmental impact statements to review alternative airport capacity solutions, in accordance with the State of Washington's Environmental Policy Act of 1971. Id. § 3.1.1 (amended 1991); Chapter 43.21C RCW.

[88] Interagency Agreement § 2.

(c) a two-runway supplemental airport site in Pierce or Thurston County would be identified for development by 2010.[89]

This recommendation previously had been included in a January 1992 draft environmental impact statement issued jointly by the PSRC and the Port pursuant to their Interagency Agreement.[90]

After additional hearings during the summer and fall of 1992, the PSRC[91] and the Port published the Final Environmental Impact Statement for the Flight Plan ("Flight Plan EIS").[92] The Flight Plan EIS does not identify a preferred alternative. Rather, it includes analysis of a total of 34 different alternatives for addressing air transportation capacity needs in the central Puget Sound region, and does not recommend one alternative over the others.[93] Alternatives examined in the Flight Plan EIS included:

- Improvements involving operations at SEA:
  - System management options, including:
    - demand management options;
    - new technologies; and/or
    - high speed rail;
  - A new dependent third runway at SEA;

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[89] Puget Sound Air Transportation Committee, Motion to Transmit (June 17, 1992) (attached to Minutes of the June 17, 1992 Meeting - Puget Sound Air Transportation Committee).

[90] See Puget Sound Air Transportation Committee, The Flight Plan Project, Draft Final Report and Technical Appendices (Jan. 1992) at App. E ("Draft Flight Plan EIS").

[91] On September 30, 1991, PSCOG was dissolved, and on October 1, 1991, the PSRC was formed in its place. Seattle, Wash., Puget Sound Regional Council of Governments Res. A-91-01 (Mar. 13, 1991). The PSRC thereafter assumed PSCOG's role in the Interagency Agreement with the Port.

[92] Flight Plan EIS at 1-7.

[93] See, e.g., id. at 4-15, Table 4-2. Earlier analyses prepared for the PSATC examined six site locations for a potential new airport location, including Vashon Island, Olympia/Black Lake, Napavine Prairie, Fort Lewis/Spanaway, Enumclaw/Buckley, and Arlington/Stanwood. See Phase II Report App. D. All but Vashon Island were selected for further review and analysis. Id. at D-15. Additionally, a total of fourteen existing airport locations were evaluated for their ability to serve as primary, reliever or supplemental airports for the central Puget Sound region, including Arlington Municipal, Auburn Municipal, Bellingham International, Bremerton International, Grant County (Moses Lake), Boeing Field, McChord AFB, Olympia, Port Angeles, Renton Municipal, Seattle-Tacoma International, Skagit/Bayview, Paine Field, and Tacoma Narrows. Id. at App. E at E-1. After initial screening, and for a variety of reasons, the PSATC eliminated Auburn Municipal, Bellingham International, Port Angeles, Renton, and Tacoma Narrows from further consideration. Id. at E-13, E-15, E-27, E-29, E-37.

- A remote airport to operate in tandem with SEA:
  - Boeing Field - to receive commuter operations diverted from SEA; or
  - Moses Lake - for long-distance and hubbing operations.

- A 2-airport multiple airport system, consisting of:
  - SEA operations, with either no or one additional runway; and
  - Supplemental airport operations at one of five potential sites:
    - Arlington, with one or two runways
    - Paine Field, with one or two runways
    - McChord AFB, with one or two runways
    - Central Pierce County, with one or two runways
    - Olympia/Black Lake, with one or two runways.

- A 3-airport multiple airport system, consisting of:
  - SEA operations, with either no or one additional runway; and
  - Supplemental airport operations at two additional airport sites:
    - Arlington, with one runway and central Pierce County with one runway
    - Paine Field, with one runway and central Pierce County with one runway
    - Arlington, with one runway and Olympia/Black Lake with one runway
    - Paine Field, with one runway and Olympia/Black Lake with one runway.

- Replacement Airport
  - Central Pierce with 3 runways; or
  - Fort Lewis with 3 runways.

- No action.[94]

Currently, the PSRC is in the midst of considering which of the foregoing alternatives, or combination thereof, it will adopt as an amendment to its Regional Airport System Plan. That Plan can only be amended by vote of the PSRC General Assembly. A final vote by the General Assembly of the PSRC has been scheduled for April 29, 1993.

Chart 1 illustrates some of the valuables considered for the major categories of alternative proposals and their relative merits.

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[94] See id. at 4-15, Table 4-2; DEIS at 27-28.

CHART 1

RELATIVE MERIT AT REGIONAL LEVEL

(Subject to Additional Site Level Analysis)

Criteria \ Option	Sea-Tac International		Small Supplemental Airport(s)		Large Supplemental Airport	
		with major construction	Sea-Tac as is	with major construction	Sea-Tac as is	with major construction
Adequate capacity						
High Demand		○	▓	▓	■	■
Forecast Demand		▓	▓	■	■	■
Low Demand		▓	■	■	■	■
Environment						
Natural		▓	▓	▓	▓	▓
Human		○	▓	○	▓	○
Economic						
Employment/ Income		○	▓	■	■	■
Financial Impl.		▓	■	▓	○	○
Growth Mgmt. Act						
G.M.A. Requirement		▓	▓	▓	▓	▓
Governance						
Aviation System		■	▓	▓	▓	▓
Implementation		■	▓	▓	▓	▓

■	▓	○
More Acceptable	Feasible/Neutral	Less Acceptable

Source: Puget Sound Regional Council, General Assembly Flight Plan Workshop Packet (Mar. 11, 1993) at 3-6.

2. The Proposed Amendment to the Regional Airport System Plan

Various versions of an amendment to the Regional Airport System Plan have been proposed over the course of the last several months and considered by the Transportation Policy Board, PSRC Executive Board, and PSRC staff.

The two-page proposal approved by the Transportation Policy Board on March 4, 1993, proposed both development of a new airport and construction of a third runway at SEA.[95] The new airport would be pursued, however, only if, by April 1, 1996, the feasibility of that option had been determined.

PSRC staff proposed a revised nine-page version of this resolution[96] which contained considerable detail about the concept of "dynamic strategic planning," an approach which has been promoted by consultants for the PSRC and the Washington State Air Transportation Commission.[97] Under this concept, planning for a third runway at SEA would proceed simultaneously with planning for a new supplemental airport. Most importantly, this planning approach presumes that planning for the runway and new airport will proceed independently and each will not rely upon the results of the planning for the other.[98]

This approach is one which the Port apparently has been promoting and is certain to favor a third runway at the expense of a supplemental airport. The planning process has been structured so that development of a new supplemental airport must be found to be a substitute for a third runway at SEA in order for that option to be selected. Because

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[95] PSRC, Draft Regional Airport System Plan Resolution (Transportation Policy Board, Mar. 4, 1993).

[96] General Assembly Flight Plan Resolution Staff Draft for Consideration by the Executive Board (Apr. 1, 1993).

[97] See Memorandum from Dick Mudge, Apogee Research, Inc., to Transp. Policy Board, Options for Implementing the March 4 Resolution (Mar. 18, 1993); Washington State Air Transp. Comm'n, Review of Flight Plan Demand and Capacity Analysis - Project II(b) Final Report (Oct. 31, 1992).

[98] Recent indications are that elected officials in the region strongly favor resolving the present airport capacity dispute at this time, rather than postponing the decision pending further study. The dynamic strategic planning approach is inconsistent with this desire since the ultimate decision of whether to build a third runway, a new airport, or a combination of these options, will not occur until April 1996. It is reasonable to anticipate that the present debate over airport capacity options would be rekindled at that time.

it is likely that the planning, acquisition and development of a new airport could take as long as 10 years, a new airport cannot possibly be a substitute for any short-term capacity needs of the region.

The PSRC Executive Board approved a resolution at its April 8 meeting which closely resembles the resolution adopted by the Transportation Policy Board.[99] It appears likely that the Executive Board version will be adopted by the General Assembly at its meeting on April 29.

Like the Transportation Policy Board proposal, the Executive Board resolution approves both a third runway at SEA and development of a new supplemental airport. The resolution directs the approval of a third runway at SEA by April 1, 1996, unless it can be shown by that date that a supplemental airport would be a feasible substitute for a third runway. In addition, the Port is directed to consider, pursue, and implement demand management and system management programs, and is required to identify, schedule, pursue, and achieve noise performance reduction objectives.[100]

The resolution directs the Executive Board to negotiate with the Port and the Washington Department of Transportation to ensure the implementation of the resolution. Several weeks earlier, several members of the Executive Board had drafted a memorandum of understanding regarding division of responsibilities among the PSRC, the Washington State Department of Transportation and the Port,[101] under which the Department of Transportation would take the lead in planning for a supplemental airport. Disputes over demand management and noise performance conclusions would be subject to binding arbitration which could be initiated only by the Port or the PSRC.[102]

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[99] Regional Airport System Plan Resolution, Executive Board, Puget Sound Regional Council, (Apr. 8, 1993).

[100] Both demand and system management and noise performance objectives are to be independently evaluated, but no procedure is stipulated to ensure the independence of the review.

[101] Recommended Memorandum of Understanding for the Implementation of the Puget Sound Regional Council Transportation Board March 4 Resolution (Mar. 22, 1993).

[102] Id.

Several provisions of the proposed General Assembly resolution are biased strongly in favor of development of a third runway at SEA and against planning for a new supplemental airport:

- The resolution and accompanying draft memorandum of understanding contemplate that the PSRC and State will conduct planning for a supplemental airport while the Port will conduct the studies for a third runway. This division of responsibility gives the Port ample opportunities to control both the timing and the outcome of the entire planning process.
- It is highly impractical to complete all studies necessary for development of a third airport by April 1, 1996. Such studies for a third runway, however, can be completed by 1996.
- The supplemental airport will be approved only if it <u>eliminates</u> entirely the need for a third runway. Because a third runway is a short-term solution (and could be implemented within only a few years) and a new airport is a long-term solution (which could be 10 years from being reality) it would be difficult to show that a new airport would entirely eliminate need for a third runway.
- The resolution does <u>not</u> require a reevaluation of the need for a third runway after implementation of demand and system management programs.
- Site specific studies (including an EIS) for a third runway are authorized immediately, even before the 1996 date. It is likely that these studies will be completed before evaluation of demand and system management, of noise reduction objectives, and of a new airport is completed.
- The process is designed to create the appearance that the third runway and new airport options will be evaluated separately and independently. The timetable and division of decisionmaking responsibilities, however, would make it difficult to have adequate information about a new airport in time to make an informed decision between the options.

Although the proposed General Assembly resolution purports to be an amendment to the 1988 interim Regional Airport System Plan, it is unclear precisely what would be approved if the proposed resolution were adopted. The draft resolution appears to amend to the Regional Airport System Plan to include both a third runway at SEA and a new

supplemental airport, but that amendment is subject to conditions, the compliance with which may not be known until April 1, 1996. For the reasons discussed, infra, regarding the Growth Management Act,[103] it may become important to define with greater specificity what action is proposed to be taken by the General Assembly on April 29.

3. The Port

Soon after the Flight Plan EIS was published in October 1992, the Port Commission passed a resolution that, among other things, "adopted" the PSATC's recommendation that a third runway be constructed at SEA, and called for the staff of the Port to initiate preparation of a site-specific environmental impact statement to review the anticipated impacts of a third runway at SEA.[104]

Although a precise layout of a third runway at SEA has not been identified, the Port has suggested that the runway would be located along the western boundary of SEA, at least 2,500 feet west of existing runway 16L/34R.[105] The runway would be 7,000 feet long[106] and would lie adjacent to 12th Avenue South.[107] Under existing FAA Regulations, such a runway would be a dependent runway.

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[103] See section IV.A., infra.

[104] Port Commission Res. No. 3125 § 1(a), (b) (Nov. 3, 1992). The ACC Cities filed suit in King County Superior Court contesting the Port's action, asserting violations of the State Environmental Policy Act and the Growth Management Act. See City of Normandy Park et al. v. Port of Seattle et al., No. 93-2-04001-6 (Superior Ct. 1993). Soon after the lawsuit was filed, the ACC Cities, the Port and the PSRC agreed to stay all judicial proceedings in the case until May 1, 1993 (i.e., after the PSRC General Assembly votes on an amendment to the Regional Airport System Plan).

[105] Flight Plan EIS at 3-7. In order to provide SEA with an increase in capacity, the separation between a new runway and Runway 16L/34R must be a minimum of 2,500 feet; the FAA requires a minimum separation of 2,500 feet between parallel runways that receive staggered arrivals. The precise north-south and east-west location of a new runway has not been determined and is subject to change. It is apparent, however, that the location tentatively identified by the Port is the farthest east that a runway could be located and still provide the desired capacity enhancement benefits.

[106] Id.

[107] Id. at 4-60.

The Port estimates that construction of a 7,000 foot dependent runway would allow SEA's capacity to increase from 380,000 to 480,000 annual operations.[108] Passenger capacity would increase in 2020 from 35.8 million to 41.8 million annual passengers.[109] The Port recognizes that construction of a third runway at SEA would fail to satisfy the central Puget Sound region's long-term air transportation capacity needs.[110] In fact, a dependent runway at SEA would provide only approximately ten years of additional operational capacity for the airport, extending from the year 2000 to the year 2010 the time at which the airport would experience excessive delays.[111] Superficially, it is difficult to understand why the Port of Seattle would be willing to spend the fiscal and political capital to build a new dependent runway on the west side of SEA. The capacity gains achieved from use of an additional dependent runway are not likely to be great. The Port may, however, be gambling on two potential regulatory changes. The FAA recently has announced that it has reduced the separation required for new independent simultaneous operations from the existing 4,300 feet to 3,400 feet.[112] There also is considerable discussion in the industry that new technology will allow the FAA to reduce the required separation to 2,500 feet within the next ten years. If that change were implemented, the Port would be able to use a third runway for independent operations, with considerable capacity-enhancing benefits. While such a change is speculative at this time, it is likely that the Port will be able to make an accurate forecast of its likelihood before construction on a new runway would begin.

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[108] Id. at 3-7.

[109] Id. at 2-15, 3-7. The 2020 passenger capacity figure for the existing configuration of SEA -- 35.8 million -- reflects a revision of the Port's original estimate of 25 million passengers as the airport's annual capacity. Id. at 2-15. The revision resulted from the Port's assumption that the average size (and passenger seating capacity) of aircraft using SEA will increase significantly between now and 2020. Id. While such assumptions are standard in the industry, there is considerable disagreement about the magnitude of the increase in average aircraft seating capacity.

[110] See, e.g., id. at 2-2.

[111] See, e.g., id. at 2-7, Table 2-5.

[112] The reduction in required separation has not been officially promulgated at this writing.

In order to construct a new dependent runway along SEA's western boundary, the Port would have to acquire approximately 110 acres of additional property, on which currently are located 230 residences.[113] The property to be acquired would lie between 9th Avenue South and 12th Avenue South, and between State Route 518 and South 176th Street.[114] The land between 9th and 12th Avenues South would be necessary for construction of the runway itself, while additional land might have to be acquired west of 9th Avenue South to provide an adequate buffer zone between the runway and neighboring properties.[115] It appears that nearly all of the land that may be needed for construction of a third runway lies within the corporate boundaries of the City of SeaTac.[116] A small portion (land north of Des Moines Memorial Drive, east of 9th Avenue South and south of State Route 518) lies within the City of Burien.[117]

A significant amount of fill -- at least 13.7 million cubic yards according to Port estimates[118] -- would be needed to build up the land between 9th Avenue South and 12th Avenue South, in order to provide a level surface for construction of a runway.[119]

4. State of Washington

AIRTRAC was created by the Washington Legislature in 1990 for the purpose of developing a state-wide air transportation strategy. The Legislature directed AIRTRAC to

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[113] Port of Seattle, Sea-Tac Forum (Feb. 1992).

[114] Flight Plan EIS at 4-60.

[115] Id. App. E at E-8.

[116] See, e.g., City of SeaTac, Department of Planning & Community Development, Zoning Map (Nov. 27, 1992).

[117] See, e.g., City of Burien Map (1993)

[118] The Regional Commission on Airport Affairs ("RCAA") disputes the Port's estimate of the fill required for construction of a third runway. Instead, the RCAA contends that runway construction would need about 17.8 million cubic yards of soil. The RCAA's estimate is derived by multiplying the Port's estimate by 130 percent. According to the RCAA, in order to achieve the total of 13.7 million cubic yards of densely compacted soil required for runway construction, the Port must begin with about 130 percent more loose soil. See RCAA Report, Sea-Tac Third Runway Landfill Requirements and Impacts (Jan. 26, 1993).

[119] Flight Plan EIS at 4-109, Table 4-21.

develop this strategy through consultation with private business as well as with local and regional governments.

In April 1992, the State Legislature passed S.H.B. No. 2609,[120] which delegated additional responsibilities to AIRTRAC. It also prohibited the initiation of new runway construction at SEA prior to December 1, 1994.

AIRTRAC was instructed pursuant to S.H.B. No. 2609 to perform several essential functions:

a. assess the state-wide implications of local and regional air transportation planning;

b. recommend specific goals for air transportation;

c. define the relationship between air transportation and environmental and economic policy goals;

d. formulate state-wide policy recommendations; and

e. coordinate air transportation with state-wide transportation system planning.[121]

One of the principal purposes for AIRTRAC's involvement in the development of state-wide air transportation policy has been to ensure that decisions made by the Port and the PSRC are justified and will not result in a flawed solution to the region's and the state's air transportation needs. AIRTRAC was directed by S.H.B. 2609 to prepare two reports to the Legislature's Transportation Committee, one due December 1, 1992 and the other by December 1, 1994. These reports must include an independent analysis of the PSATC's forecasts for air transportation demand and capacity in the Puget Sound area, as well as evaluations of the ability of high speed rail, intermodal and air transportation options to satisfy Washington's long-term transportation needs.[122] AIRTRAC has hired several consultants to review the analyses prepared by the PSATC, the PSRC and the Port

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[120] Wash. Legis. Serv. ch. 190, S.H.B. No. 2609 (1992).

[121] Id. § 1.

[122] Id. §§ 2, 3.

concerning alternative means for increasing airport capacity in the Puget Sound region; these consultants have begun to present their evaluations of those analyses.[123]

F. Geographic and Environmental Conditions of the SEA Area

The Port's proposal to construct a dependent runway along SEA's western boundary would have a number of significant effects on various geographic and environmental conditions in the vicinity of SEA. The Port, however, has not yet undertaken a detailed analysis of the environmental impacts of its runway proposal, and thus the discussion of likely impacts that follows is preliminary in nature, and should be supplemented by further investigation.

The precise physical and environmental characteristics of the area which would be affected by a new runway are critically important. Those characteristics will determine whether, and to what extent, various local, state, and federal environmental protection statutes would affect the ability of the Port to construct a third runway. The existence of various environmental attributes and the extent of any impacts to those attributes will be important to the ACC in its strategy for controlling the outcome of the Port's planning process. For that reason, it will be necessary to develop a more detailed technical survey of those attributes which are protected by statute.

1. Parklands

It appears that no parks are located within the area likely to be acquired by the Port for construction of a third runway at SEA.[124] However, the siting of a runway along the western boundary of SEA is apt to generate higher noise exposure for a number of parks that are located to the south, west and north of the airport property.

For example, Woodmont Park, Saltwater State Park, Zenith Park, Des Moines Beach Park, and Des Moines Creek County Park (all within the City of Des Moines and all

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[123] See, e.g., Washington State Air Transp. Comm'n, Review of Flight Plan Demand and Capacity Analysis - Project II(b) Final Report (Oct. 31, 1992).

[124] See maps of SEA and the surrounding communities attached hereto as Appendix B (reviewing property bracketed by 12th Avenue South, South 176th Street, State Route 509 and 9th Avenue South, and State Route 518).

currently exposed to considerable noise impacts)[125] presumably would be exposed to increased noise levels from aircraft arrivals and departures associated with a new west-side runway. Similarly, other parks which are currently noise-affected, such as Airport County Park and Southern Heights Park (both of which are located in unincorporated King County) and the City of SeaTac's Sunset Park, also would be subjected to additional noise from operation of a third runway. Moreover, a west-side runway at SEA could cause noise impacts to several additional parks which are currently not affected by airport noise, such as Normandy Park's Marine View Park, Civic Site Park, and Nature Trails Park, Burien's Kiwanis-Schonwald Park, Lakeview Park, and Burien Park. The nature and severity of impacts to any of these facilities has not been determined.

2. Wetlands

As discussed above, the Port would have to use more than 13 million cubic yards of fill to build a third runway along the airport's western boundary.[126] This extremely large amount of fill is required because the runway would be sited along (and beyond) the edge of the plateau on which SEA is located.

The placing of fill in that location is likely to affect several local streams and their associated wetlands. One stream, Miller Creek, drains two small lakes (Lake Reba and Lora Lake) near the northwestern boundary of SEA, and flows along the base of the hillside along SEA's western border and through Normandy Park before it empties into Puget Sound. U.S. Fish and Wildlife Service maps identify several types of palustrine wetlands along a portion of Miller Creek lying between South 156th Way and State Route 518 and within the City of SeaTac's corporate boundaries.[127] Additional wetlands are located on SEA property east of State Route 509 and north of 12th Place South.[128] Wetlands at

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[125] See 1991 NEM Map. These parks all lie below anticipated flights paths for aircraft using a west-side runway at SEA.

[126] See RCAA Report, Sea-Tac Third Runway Landfill Requirements and Impacts (Jan. 26, 1993).

[127] U.S. Dep't of Interior, Fish and Wildlife Serv., National Wetlands Inventory Map, Des Moines, Wash. (1987).

[128] See City of Des Moines Comprehensive Plan (Update), Ordinance 861 - Wetlands Map attachment (Oct. 14, 1992).

both locations are situated on property that the Port has proposed to acquire for construction of the third runway, and likely would be destroyed to make way for the runway.[129]

Other wetlands in the vicinity of the probable location of a third runway, which may be affected by its construction, are found (a) west of State Route 509, bounded by South 176th Street and Des Moines Memorial Drive (these are located within Burien and appear to drain into a stream that is a tributary of Miller Creek), and (b) south of South 192nd Street, between 16th Avenue South and 24th Avenue South (these are located within the City of SeaTac).[130] Stormwater from the airport may flow through the latter wetlands and into Des Moines Creek.[131] Impacts to these wetlands could be expected to increase upon construction of a third runway because of increased stormwater runoff.

3. Water Quality

As noted above, Miller Creek and Des Moines Creek each drain a portion of the airport site and/or land in the vicinity of the airport. Airport operations already have had a significant and damaging effect on these creeks, and construction of a third runway at SEA could exacerbate existing surface water quality problems.

Of particular concern is the Port's industrial wastewater treatment facility that discharges into Puget Sound and a fuel tank farm located along the southeastern portion of the airport property. In reports submitted to the Washington Department of Ecology ("WDOE"), the Port has admitted that the discharge from its treatment facility occasionally exceeds the volume authorized in its National Pollutant Discharge Elimination System ("NPDES") permit.[132] In addition, it is believed that the treatment facility is incapable of adequately treating or removing many of the contaminants it receives (e.g., ethylene glycol, surfactants, methylene chloride, petroleum-based products, oil and grease), and

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[129] See Flight Plan EIS at 4-60.

[130] U.S. Dep't of Interior, Fish and Wildlife Serv., National Wetlands Inventory Map, Des Moines, Wash. (1987).

[131] Flight Plan EIS 4-106.

[132] RCAA Report, Ingrid Hansen, Water Quality Issues (Jan. 26, 1993).

thus, such contaminants are passed-through the treatment system and discharged into Puget Sound in violation of the federal Clean Water Act.[133] Evidence also indicates that SEA operations and fuel spills from the fuel tank farm at the airport have contributed to the extirpation of a number of fish species (including coho salmon and cutthroat trout) in Des Moines Creek, despite efforts by Trout Unlimited and other groups to restore those species in the creek.[134]

In addition to surface water concerns, SEA operations also may have contributed to groundwater contamination in aquifers underlying the SEA area that are used for drinking water supply. The City of Seattle operates three groundwater wells in the Riverton Heights area of the City of SeaTac, taking water from those wells for municipal use during the months of July to October.[135] There is concern that these wells could become contaminated by leaking fuel storage tanks and improper handling of petroleum products and hazardous wastes at SEA.[136] At least in partial response to these concerns, the WDOE has asked the Port to undertake a soil contamination study at SEA.[137]

4. Air Quality

The vicinity of SEA currently experiences a number of air quality problems. According to the WDOE, the Puget Sound region as a whole fails to attain state and federal air quality standards for carbon monoxide, particulate matter and ozone.[138] WDOE identifies operations at SEA as a contributing factor to the Puget Sound area's failure to attain air quality standards. According to WDOE figures, activities at SEA are the source

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[133] Id.; see section V.B, infra.

[134] RCAA Report, Water Quality Issues.

[135] Id.

[136] Id.

[137] Id.

[138] Flight Plan EIS App. D at D-6.

of approximately 5 percent of all nitrogen oxide emissions in King County, and about 8 percent of all carbon monoxide emissions.[139]

By enabling SEA to increase its ability to handle greater numbers of aircraft per hour, a third runway would contribute to the Puget Sound region's air quality problems, particularly in the area surrounding SEA itself. Moreover, with greater numbers of aircraft operations, SEA likely would represent an even larger percentage of King County's total air pollutant emissions.[140]

5. Historic and Archaeological Resources

A number of historic sites have been identified within the vicinity of SEA, two of which may be located on property needed by the Port for construction of a new runway. The historic sites near SEA include

- Woods House, located at South 168th and Des Moines Memorial Drive South;
- Vacca Farm, located at South 152nd & Des Moines Memorial Drive South;
- Pepplow, located at South 174th and 9th South;
- L. Maye residence, located at South 152nd and Military Road South; and
- Hill Grove Cemetery, located at South 200th & 16th South.[141]

Of the five historic properties identified, the Vacca Farm and Pepplow appear to fall within the boundaries of the property to be acquired by the Port, or they are immediately adjacent to such property.[142] Construction of a third runway at SEA therefore could require the destruction of these two properties.

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[139] Id. at D-7.

[140] The effect of airport expansions on air quality is a controversial issue. Many airport proprietors take the position that air traffic will increase, with or without expanded facilities. Under this argument, construction of a new runway would actually reduce the regional air pollution burden by reducing the time that aircraft engines are idling. This argument presumes that an expanded airport itself does not encourage or assist in the growth in air traffic.

[141] See 1991 NEM Update App. D.

[142] See Flight Plan EIS at 4-60.

All five properties currently lie within the noise-affected area for SEA operations.[143] Given their proximity to the western and southwestern boundaries of SEA, the Woods House property and the Hill Grove Cemetery in all probability would experience significant increases in their noise exposure if a third runway were constructed at SEA.

Additional information should be collected about other historic properties, as well as archaeological sites, in the vicinity of SEA. It is probable that a number of locations not yet identified may exist.

6. Noise-Sensitive Locations

One of the principal -- but not the only -- impact of an airport's operations is the impact of noise from aircraft operations. The FAA recognizes that certain land uses are more noise-sensitive than others and has established guidelines for determining whether noise exposure is incompatible with certain land uses.[144]

Although the FAA's land use compatibility guidelines are highly controversial and subject to considerable scientific criticism, they provide a useful initial benchmark for measuring potentially noise-affected areas. The FAA guidelines employ a metric which measures the weighted annual average day-night noise exposure level. The metric, abbreviated DNL or L_{dn}, is expressed in A-weighted decibels or dBA and represents an average of an average. The metric is calculated by averaging individual noise events for an average day, from which an average year is determined. Noise events which occur at night are accorded double weight in the calculation because nighttime noise events generally are more intrusive than daytime events.

The most common use of the L_{dn} metric is in the preparation of contours which depict noise-affected areas around an airport. The L_{dn} contour for 65 decibels (frequently abbreviated 65 L_{dn}) depicts those areas in which the average day-night noise level will equal or exceed 65 decibels.

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[143] 1991 NEM Update App. D.

[144] See 14 C.F.R. Part 150 app. A, Table 1.

It is important to recognize the limitations of the L_{dn} metric and the overused 65 L_{dn} contour:

- The metric does not consider the impact of individual noise events; because of averaging, 10 noise events with a certain noise level or 100 noise events with half that noise level are treated alike.
- Neither the scientific community nor other government agencies agree with the assumption in the FAA's guidelines that all land uses are compatible with noise levels less than an L_{dn} of 65 decibels.
- The L_{dn} contours which generally are mapped in conjunction with an airport expansion are projections of future noise levels. Consequently, their accuracy is a function of the assumptions upon which the projections are based.[145]

With this understanding of the limitations of the L_{dn} metric and the 65 decibel threshold for land use compatibility, the remainder of this discussion focuses on the presence of noise-sensitive sites (using the L_{dn} of 65 dBA as the threshold of compatibility) which would be affected by the proposed new runway.

a. Schools

It appears that the Port's proposal to construct a third runway at SEA would not require the acquisition and demolition of any public or private schools. No schools are located south of State Route 518 between 9th Avenue South and the airport's western boundary.[146]

However, several schools and school properties may be affected by the runway protection zone required for a new runway at SEA. Located southwest of the probable southern terminus of a new runway are the Highline School District's Maintenance,

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[145] Residents of the communities located near SEA have raised a number of criticisms concerning the FAA's use of the 65 decibel level as a criterion of unacceptable levels of noise exposure, as well as the Port's modelling of noise exposure levels for SEA using the L_{dn} metric. See, e.g., RCAA Report, Dr. James D. Chalupnik, Comments on Noise Aspects of the Regional Airport System Plan (Jan. 14, 1993); RCAA Report, Errol Nelson, P.E., Analysis of Noise Impacts - The Flight Plan EIS, and Noise Report - Sea-Tac Noise Study (Jan. 28, 1993). These concerns may be raised effectively in the context of a challenge to the Flight Plan EIS or a subsequent site-specific EIS for the proposed construction of a third runway at SEA.

[146] See Appendix B.

Operations and Transportation Center, Highline's Occupational Skills Center, Woodside Elementary School and Satellite Alternative High School.[147] Depending on the precise location selected for a third runway at SEA, a runway protection zone for that runway could include one or a combination of the foregoing schools and school properties. If a school or school property were to lie within a new runway's protection zone, that structure may have to be demolished, depending on its height and potential interference with aircraft.

As noted in the Port's most recent noise exposure map, there are a large number of schools currently located within the L_{dn} contour for 65, 70 or 75 dBA.[148] Table E identifies the schools currently subjected to noise exposure of L_{dn} in excess of 65 dBA. Note that many of the schools identified in the table are anticipated to remain within the L_{dn} contour for 65 dBA even in 1996.

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[147] See Highline School District, Highline Public School Information and Map (APS).

[148] 1991 NEM Update App. D.

TABLE E

SCHOOLS EXPOSED TO NOISE LEVELS OF 65 LDN OR GREATER
(1991)

School	Address	District	1991 Noise Level (Ldn)	Projected 1996 Noise Level (Ldn)
Cascade View Elem.	13601 - 32nd South	South Central	65-69	<65
Cedarhurst Elem.	611 South 132nd	Highline	65-69	<65
Des Moines Elem.	22001 - 9th South	Highline	65-69	65-69
Hilltop Elem.	12250 - 24th South	Highline	70-74	65-69
Holy Innocents Elem.	2530 South 298th	Private	65-69	<65
Madrona Elem.	3030 South 204th	Highline	65-69	65-69
Mark Twain Elem.	2450 S. Star Lake Rd.	Federal Way	65-69	<65
Midway Elem.	22447 - 24th South	Highline	75+	70-74
New Life Christian Academy (Elem.)	21650 - 24th South	Private	75+	70-74
North Hill Elem.	19835 - 8th South	Highline	65-69	65-69
Olympic Elem.	615 South 200th	Highline	65-69	<69
Parkside Elem.	2104 South 247th	Highline	70-74	70-74
Riverton Hts. Elem.	3011 South 148th	Highline	65-69	65-69
St. Philomena Elem.	1815 South 220th	Private	75+	75+
Seattle Christian (K-6)	19835 - 8th South	Private	65-69	65-69
Southern Hts. Elem.	11249 - 14th South	Highline	70-74	65-69
Sunnydale Elem.	15631 - 8th South	Highline	65-69	<65
Wildwood Elem.	2405 South 300th	Federal Way	65-69	<65
Woodmont Elem.	26454 - 16th South	Federal Way	65-69	65-69
Pacific Middle School	22705 - 24th Place S.	Highline	75+	70-74
Evergreen Lutheran High School	2021 South 260th	Private	70-74	65-69
Mount Rainier High School	22450 - 19th South	Highline	75+	70-74
Satellite Alternative High School	440 South 186th	Highline	65-69	<65
Seattle Christian High School	19639 - 28th South	Private	75+	70-74
Sea-Tac Occupational Skills Center	18018 - 8th South	Highline	65-69	65-69
Hamlin Robinson	10211 - 12th South	Private	65-69	<65
Dominion College	21024 - 24th South		75+	70-74
Highline Community College	2400 South 240th		70-74	65-69

Source: Appendix D of the 1991 NEM Update.

If a third runway were constructed at SEA, many of the schools listed in Table E may continue to be exposed to high levels of aircraft noise, particularly those located under the more westerly flight paths of aircraft using a new west-side runway.

b. Churches

Current operations at SEA subject approximately 44 churches to average noise levels of 65 dBA or greater.[149] By 1996, the Port estimates the number of churches in the L_{dn} contour for 65 dBA will decline to 20 or 25.[150]

Operation of a third runway at SEA may expose those churches - generally located west of 16th Avenue South - to higher numbers of overflights (both arrivals and departures).

c. Health Care Facilities

The Port currently estimates that between 10 and 13 hospitals and nursing homes fall within the L_{dn} noise contour for 65 dBA.[151] Several of these facilities are located in the City of Des Moines, including the Masonic Home and Caldwell Care Center.[152] The Port anticipates that that number will decline to approximately 7 hospitals and nursing homes in the L_{dn} contour for 65 dBA by 1996.[153]

Aircraft departures and arrivals using a new west-side runway at SEA could cause several health care facilities in the area to remain in the L_{dn} contour for 65 dBA, and may contribute to additional facilities being exposed to high aircraft noise.

7. Hazardous and Toxic Waste

No known hazardous or toxic waste sites have been identified in the vicinity of the Port's proposed third runway location at SEA. Nevertheless, properties acquired for development of a new runway could include commercial properties that are contaminated

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[149] Id. at D-9, Table D-2.

[150] Id. at D-10, Table D-3.

[151] Id. at D-9, Table D-2.

[152] See 1991 NEM Map.

[153] 1991 NEM Update at D-10, Table D-3.

with hazardous or toxic wastes. Such wastes would have to be removed prior to site preparation for the runway.

For example, the Weyerhauser corporate hangar at SEA appears to be located in the general vicinity of where a third runway would be constructed.[154] It is reasonable to presume therefore that Weyerhauser's facility would have to be demolished and relocated if a new runway were to be built. Because many aircraft hangar facilities are associated with aircraft refueling (from above-ground or underground fuel storage tanks) and maintenance activities (using solvents and other hazardous materials), use of the Weyerhauser site for a new runway likely would require hazardous waste remediation.

Additional investigation should be conducted to evaluate whether development of a third runway at SEA would pose potential risks of releasing hazardous and toxic wastes.[155]

8. Endangered and Threatened Species

The Port and the PSRC undertook a preliminary investigation to determine whether endangered or threatened species are found in the vicinity of SEA. No species of concern were identified.[156] Nevertheless, given the airport's proximity to the Puget Sound, an investigation should be made to discern whether SEA operations could affect any endangered or threatened fish species (i.e., through the airport's effects on Des Moines Creek and Miller Creek). Moreover, because peregrine falcons and bald eagles are known to frequent the downtown Seattle area, an investigation should be conducted to determine how airport operations may affect those species. Analysis of the effects of airport operations and a proposed third runway on other wildlife or plant species also should be performed.

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[154] See Port of Seattle Comm'n, Seattle-Tacoma Int'l Airport, Airport Plan (rev. 1990) ("SEA Airport Plan Map") at O-4.

[155] As noted previously, current operations at SEA already have contributed to the release of certain hazardous or toxic substances into soils and surface water near the airport. See discussion in section II.F.3, supra. Additional information about regulatory enforcement taken with respect to each of those releases also should be collected.

[156] Flight Plan EIS at 4-97.

III. THE POWERS AND RESPONSIBILITIES OF GOVERNMENTAL ENTITIES INVOLVED IN CONSIDERING THE PROPOSED DEVELOPMENT OF A THIRD RUNWAY AT SEA

A. Federal Aviation Administration

The FAA has been empowered by Congress to oversee and regulate the national aviation system. Included among the powers delegated to the FAA is the authority to regulate airspace;[157] to certify and provide funding for public-use airports;[158] and to regulate and control noise from aircraft engines.[159]

The FAA possesses considerable authority over the construction of a third runway at SEA. The Port would have to obtain several procedural and funding approvals from the FAA before construction could proceed. In addition, the FAA would have to satisfy the requirements of the National Environmental Policy Act ("NEPA")[160] before approving any of the Port's proposals.

Pursuant to the Airport and Airway Improvement Act of 1982[161] ("AAIA"), the FAA provides federal funding under the Airport Improvement Program ("AIP")[162] to airport proprietors for airport master planning and airport development projects.[163]

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[157] 49 U.S.C. app. § 1348(a).

[158] Id. §§ 2201-27.

[159] Id. §§ 2122-23.

[160] 42 U.S.C. § 4321 et seq.

[161] 49 U.S.C. app. § 2201, et seq.

[162] AIP funds provided by the FAA to airports like SEA include both entitlement funds (those which are based on the annual number of passengers and the annual amount of cargo transported at the airport) and discretionary funds (those which are allocated by the FAA from the Aviation Trust Fund after all entitlement funds have been allocated). See U.S. Dep't of Transp., Fed. Aviation Admin., Order 5100.38A, Airport Improvement Program (AIP) Handbook (1989) ¶ 24 ("Order 5100.38A"). Entitlement funds account for approximately 50 percent of the total annual funds distributed by the FAA from the Aviation Trust Fund and discretionary funds account for approximately 15 percent. The remainder is allocated to system planning, state apportionments, set-asides for Alaska, noise compatibility programs, reliever airports and non-primary airports. Id.

[163] 49 U.S.C. app. § 2203. The AAIA also authorizes funds for noise compatibility planning and to carry out noise compatibility programs as set forth in the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. §§ 2101-25. Id. § 2204. The source of AIP funding is the Airport and Airway Trust Fund established by the Airport and Airway Revenue Act of 1970. 26 U.S.C. § 9502.

Projects eligible for AIP funding include runway and taxiway construction projects such as those contemplated by the Port for SEA.

The Aviation Safety and Capacity Expansion Act of 1990 provides airports with an additional source of revenues for airport development. Under that statute, airport proprietors may levy a tax of up to three dollars per passenger using its facility, subject to the prior approval of the FAA.[164] The statute provides that revenues derived from such passenger facility charges ("PFCs") may be expended upon "eligible airport-related projects."[165] An eligible airport-related project means: (a) an airport development project or airport planning project as defined under the AAIA; (b) terminal development pursuant to 49 U.S.C. app. § 2212(b); (c) airport noise capability planning and noise compatibility measures pursuant to 49 U.S.C. app. § 2104; and (d) construction of gates and related areas at which passengers are enplaned or deplaned.[166] Thus, the Port may use revenues collected from PFCs for construction of a third runway, as well as for noise abatement measures needed to mitigate detrimental impacts of both current and future airport operations at SEA.

As a condition of receipt of federal AIP funds, the FAA requires airport proprietors to sign grant agreements containing a number of grant assurances. Included among the grant assurances to which an airport proprietor must agree is the requirement to

> keep up to date at all times an airport layout plan of the Airport . . . . The Sponsor will not make or permit any changes or alterations in the airport or in any of its facilities other than in conformity with the airport layout plan as so approved by the FAA.[167]

Keeping an airport layout plan ("ALP") up-to-date requires amendment (and FAA approval thereof) whenever construction at an airport is contemplated that is not provided

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[164] 49 U.S.C. app. § 1513 et seq.

[165] Id. § 1513(e)(1).

[166] Id. § 1513(e)(2)(B); see also 14 C.F.R. §§ 158.13, 158.15.

[167] 14 C.F.R. Part 152 app. D ¶ 25; see also 49 U.S.C. app. § 2210(15) (containing similar language); Order 5100.38A app. 1, Grant Assurance 29a (containing similar language).

for on the existing airport layout plan.[168] FAA Regulations require that an amendment to an ALP be filed with the FAA regardless of whether a proposed project is to be funded with federal funds.[169] FAA approval of an ALP revision for SEA would be required in order for the Port to proceed with construction of a third runway.

FAA approval of a revised ALP, even where projects proposed in the ALP would not receive federal AIP funds, must be preceded by the preparation of an EIS or an environmental assessment pursuant to NEPA.[170] As the FAA explained recently in approving an airport layout plan for a new commercial service airport:

> No change may be made in the airport which is not in conformity with the approved [airport layout] plan and which, in the opinion of the FAA, would adversely affect the safety, efficiency, and utility of the airport. . . . All revisions to the airport layout plan are also subject to NEPA compliance, environmental permit requirements and compliance with applicable federal law . . . .[171]

Moreover, the FAA must prepare NEPA compliance documents prior to giving approval for AIP funding for airport projects.[172] An EIS is mandated for FAA funding of construction of runways and certain other projects with AIP funds.[173]

Assuming that it desires to use federal AIP funds for construction of a third runway at SEA, the Port would be required to seek prior approval by the FAA of a revised ALP

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[168] 49 U.S.C. app. § 2210(a)(15)(B).

[169] Id.; see also Order 5100.38A app. 1, Grant Assurance 29a.

> The sponsor will not make or permit any changes or alterations in the airport or in any of its facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility, or efficiency of the airport.

Order 5100.38A app.1, Grant Assurance 29a.

[170] See U.S. Dep't of Transp., Fed. Aviation Admin., Order No. 5050.4A, Airport Environmental Handbook (1985) ¶ 22a ("Order 5050.4A").

[171] U.S. Dep't of Transp., Fed. Aviation Admin., Record of Decision, Approval of Airport Layout Plan and Related Actions, Pease Air National Guard Base (Feb. 26, 1992) at 3-4.

[172] Order 5050.4A ¶¶ 21, 22.

[173] Id. ¶ 21a(2).

which showed the physical modifications to the airport site proposed by the Port. In addition, the FAA would have to prepare an EIS before approving federal AIP funding for new runway construction at SEA. The EIS process including the issues which the FAA must address, is discussed in section IV.C, infra.

B. State Government/AIRTRAC

As discussed in section II.E.3, supra, the Washington Legislature has directed AIRTRAC to develop a comprehensive statewide air transportation plan that incorporates airport improvements, as well as identifying opportunities for increasing the use of intermodal transportation options and high speed rail. Findings and recommendations developed by AIRTRAC are to be presented to the Transportation Committee of the Washington Legislature for its consideration and potential use in crafting substantive legislation to implement statewide transportation objectives. Guiding AIRTRAC through its deliberations and analysis are several goals for statewide transportation policy:

- Advancement of the state's competitive position in national and international trade;
- Promotion of the enhancement of an integrated transportation system;
- Advancement of the development of a highly efficient statewide passenger and cargo air transportation system;
- Promotion of economic development statewide through air transportation policy;
- Promotion of the mitigation of negative impacts on communities;
- Pursuit of means to reduce congestion resulting from rapid growth of air traffic operations in the Puget Sound region; and
- Improvement of coordination among local, federal, and state air transportation policy efforts.[174]

As a result of its role in the development of statewide air and intermodal transportation policies, AIRTRAC potentially could have a substantial effect on the Port's and the PSRC's decisions concerning expansion of operational capacity at SEA. AIRTRAC

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[174] State of Washington, Air Transp. Comm'n, Mission Statement (Apr. 25, 1991).

is scheduled to complete its analysis and submit recommendations to the Washington Legislature no later than December 1, 1994.[175]

The state government, moreover, possesses authority over the Port's proposal to develop a third runway at SEA. First, the Washington Legislature has placed a moratorium on any runway construction at SEA through December 1, 1994.[176] Second, the state has power to issue or deny certain permits that may be required under Washington environmental law before construction may begin. Those statutes are discussed in sections IV and V, infra.

State and regional agencies potentially having jurisdiction over construction of a third runway at SEA include the Washington Department of Ecology, the Washington Department of Transportation, the Washington Office of Archaeology and Historic Preservation, the Puget Sound Air Pollution Control Agency, and the Washington Department of Community Development. Pursuant to their statutory authorities, these agencies are required to protect, among other things, local, regional and state air and water quality, fish and wildlife habitat, historic and archaeological sites, and wetlands. Consequently, they would impose restrictions on the Port's ability to harm those resources and environmental conditions.[177]

Opposition to a new runway at SEA by the Washington Legislature, state agencies or Governor Lowry thus could have a significant impact on the ability of the Port to proceed with its airport development plans.

C. Puget Sound Regional Council

As discussed briefly in section II.E.1, supra, the PSRC is a regional planning agency made up of King, Pierce, Snohomish and Kitsap Counties and their incorporated cities and

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[175] Wash. Legis. Serv. ch. 190, S.H.B. No. 2609 § 1 (1992).

[176] See RCW 53.08.350.

[177] The roles that these agencies could play with respect to a new runway at SEA is discussed in section V, infra.

towns joined by an interlocal agreement pursuant to state law.[178] The PSRC is the designated Metropolitan Planning Organization and the Regional Transportation Planning Organization for the central Puget Sound Region.[179]

1. The Interlocal Cooperation Act

The Interlocal Agreement establishing the PSRC was entered into pursuant to the provisions of the Interlocal Cooperation Act of 1967.[180] This statute was enacted to provide a formal mechanism whereby local governments could cooperate with one another on the basis of mutual advantage in order to provide services and facilities that will "accord best with geographic, economic, population and other factors influencing the needs and development of local communities."[181]

The Interlocal Cooperation Act does not confer any additional substantive powers or authority on the local governments cooperating in an intergovernmental entity, nor does it give the intergovernmental unit any specific power. However, it provides a mechanism allowing local governments to exercise their existing powers, privileges and authority jointly with other local governments and to finance the resulting joint projects.[182]

By virtue of the Interlocal Agreement establishing the PSRC, the member counties, cities, towns and Indian tribes agreed to

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[178] These counties, cities and towns recently adopted a revised interlocal agreement that makes the Ports of Seattle, Tacoma and Everett, the Washington Transportation Commission and the Washington Department of Transportation voting members of the Executive Board of the PSRC, and eligible to become members of PSRC General Assembly. Puget Sound Regional Council, Interlocal Agreement for Regional Planning in the Central Puget Sound Area (Mar. 11, 1993) § V. ("Interlocal Agreement") The revision to the Interlocal Agreement was necessitated by the PSRC's desire to comply with the provisions of the Growth Management Act relating to Regional Transportation Planning Organizations. Chapters 47.80 R.C.W. In order to qualify for state planning funds available to transportation planning organizations such as the PSRC, the members of the PSRC were required to include the ports and various state transportation agencies in the regional Transportation Planning Board and to provide voting membership to the port districts and the state agencies on the Executive Board of the PSRC. RCW 47.80.040,.060.

[179] Id. § VII(A)(3), (4).

[180] Chapter 39.34 RCW.

[181] Id. 39.34.010.

[182] Id. 39.34.030(1), (6).

prepare, adopt, and maintain goals, policies, and standards for regional transportation and regional growth management in the central Puget Sound area, in accordance with federal and state law and based on local comprehensive plans of jurisdictions within the region. The agency shall ensure implementation in the region of the provisions of state and federal law which pertain to regional transportation planning and regional growth management.[183]

2. Regional Transportation Planning Organizations

As the Regional Transportation Planning Organization for the central Puget Sound region,[184] the PSRC is the agency authorized under state law to develop and adopt a regional transportation plan, and to certify that the transportation elements of local comprehensive plans conform to requirements of state law and are consistent with the regional transportation plan.[185]

Washington state law requires Regional Transportation Planning Organizations to do the following:

1. Certify that the transportation elements of comprehensive plans adopted by counties, cities and towns within a region conform with the requirements of the Growth Management Act and are consistent with regional transportation plan;
2. Develop and adopt a regional transportation plan that is consistent with county, city and town comprehensive plans and state transportation plans; and
3. Ensure that all transportation projects within a region that have a significant impact upon regional facilities or services are consistent with the regional transportation plan.[186]

In order to meet its responsibilities for regional transportation planning, the PSRC is authorized to produce a Regional Transportation Plan establishing the planning direction for regionally significant transportation projects including major highways and roads, public

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[183] Interlocal Agreement § II.

[184] Puget Sound Regional Council Res. A-91-01. See also RCW 47.80.020.

[185] RCW 47.80.030(1)(a), (b); id. 36.70A.070(6). See also Interlocal Agreement § IV(21).

[186] RCW 47.80.030(1), (2).

transit systems, seaports, airports and other regional transportation facilities.[187] The Regional Transportation Plan must address transportation system demand management, levels of service and capital investments.[188]

Pursuant to the Interlocal Agreement creating the PSRC, the Council's professional staff makes the initial determination as to the consistency between transportation elements of municipal comprehensive plans and the Regional Transportation Plan.[189] If the staff finds these elements to be inconsistent with the Regional Transportation Plan, it will recommend against their certification. Should that happen, the local governments involved are notified and they may appeal the staff recommendation to the PSRC Executive Board for resolution.[190] A board of hearing examiners made up of members of the Executive Branch will attempt to resolve the conflict between the municipal plan and the Regional Transportation Plan.[191]

3. The Intermodal Surface Transportation Efficiency Act

The passage of the federal Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"),[192] greatly enhanced the powers of the PSRC, as the Regional Transportation Planning Agency and the Metropolitan Planning Organization. Under ISTEA, the PSRC is responsible for the adoption of a Transportation Improvement Program.[193] Projects included in the Transportation Improvement Program are eligible for federal transportation funding.[194] Therefore, the PSRC now has direct responsibility for determining many of

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[187] Interlocal Agreement § VII(1).

[188] Id.

[189] Id. § VII(5).

[190] Id.

[191] Id.

[192] Pub. L. No. 102-240, 105 Stat. 1914 (1991).

[193] 105 Stat. at 1959.

[194] Id.

the transportation projects in the region -- including certain airport-related projects[195] -- that will receive federal funds. The PSRC also must be involved in cooperative decisions about how the state spends its federal transportation dollars in the Puget Sound region, since ISTEA requires that all projects be consistent with the Regional Transportation Plan maintained by the PSRC.[196]

4. The Growth Management Act[197]

The Growth Management Act ("GMA") requires King, Pierce and Snohomish Counties to adopt multicounty planning policies.[198] In October 1992, the PSRC's Executive Board acted to affirm the PSRC as the governmental agency responsible for preparing multicounty planning policies.[199]

5. Responsibility for the Regional Airport System Plan

In 1989, the PSRC entered into an agreement with the Port to establish a joint planning process for developing a regional air carrier system plan for the Puget Sound region.[200] One purpose of this process was to provide input to the PSRC for updating and amending the Regional Airport System Plan.

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[195] Examples include highway and rail improvements designed to serve SEA.

[196] 105 Stat. at 1964-65.

[197] A more comprehensive discussion of the Growth Management Act is provided in section IV.A, infra.

[198] RCW 36.70A.210.(7). Kitsap County, the other member county of the PSRC, was not required to participate in the multicounty plan because its population is less than 450,000. Kitsap, however, voluntarily chose to participate in the multicounty plan. Puget Sound Regional Council Executive Board Agenda, Action Item 7, "Proposed Multicounty Planning Policies for King, Kitsap, Pierce and Snohomish Counties" (Jan 12. 1993) at 7a-5.

[199] Puget Sound Regional Council, Regional View (Dec. 1992) at 9. See also Puget Sound Regional Council Executive Board Agenda, Action Item 7.

[200] Interagency Agreement at 2. More precisely, it was the PSCOG that entered into the agreement with the Port. When the PSCOG was dissolved and the PSRC was formed in its place, the PSRC assumed PSCOG's role in the Interagency Agreement.

The Regional Airport System Plan is part of the larger Regional Transportation Plan. The PSRC, as the Regional Transportation Planning Organization under state law, is responsible for maintaining the Regional Transportation Plan.[201]

Because any new proposal for addressing the air transportation needs of the Puget Sound region must first be included in the Regional Airport System Plan, the PSRC General Assembly's decision on a Regional Airport System Plan amendment is a key step in the implementation of the PSATC's three-airport system plan. As both the regional transportation planner and the arbiter of the consistency of any single plan with regional plans, the PSRC can play a pivotal role in any air transportation expansion activities. The PSRC's role in the new ISTEA process should provide it with the authority to direct federal funds either towards or away from transportation projects according to its plans.

Moreover, because the PSRC possesses considerable responsibility under the GMA over the Port's ability to proceed with its desire to construct a third runway at SEA,[202] the PSRC must determine whether a third runway at SEA should be incorporated in the Regional Transportation Plan in the form of an amendment to the Regional Airport System Plan. The PSRC may take one of several actions open to it:

- it may amend the Regional Airport System Plan -- and thereby the Regional Transportation Plan -- to include a third runway at SEA; or
- it may adopt the resolution enacted by its Executive Board which allows the Port to continue to plan for the development of a third runway but prohibits construction of the runway until 1996, and then only if alternatives to the runway prove to be infeasible;[203] or
- it may amend the Regional Airport System Plan to include other alternatives -- such as the construction of a replacement airport or the development of sufficient reliever airport capacity to obviate the necessity for expanding SEA; or

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[201] RCW 36.70A.070(6), 210(7); id. 47.80.030(b).

[202] See discussion in section IV.A, infra.

[203] Executive Board, Puget Sound Regional Council, Regional Airport System Plan Resolution (Apr. 8, 1993).

- it may fail to amend the Regional Airport System Plan.

If the PSRC adopts the first alternative, the Port is free to proceed with the development of the third runway without concern about violating the GMA. If it adopts the second option, the Port may continue planning for the third runway, but may not implement those plans until 1996.[204] If, however, the PSRC chooses either of the two other actions, then Port actions to develop the third runway are subject to legal and administrative challenges pursuant to the procedures contained in the GMA.[205] Such a challenge may be brought by any city -- or a group of cities -- and/or by the PSRC.[206]

Further, even if the PSRC amends the Regional Airport System Plan to accommodate a third runway at SEA, nearby cities which believe that the new Regional Airport System Plan and Regional Transportation Plan are inconsistent with the comprehensive plans they have adopted pursuant to the GMA, may institute an administrative proceeding against both the PSRC and the Port alleging a violation of the GMA.[207]

However, the lack of administrative and judicial experience with the GMA provides little certainty about the PSRC's ability to enforce the authority it possesses as the Metropolitan Planning Organization and Regional Transportation Planning Organization or the ability of other parties to demonstrate that the GMA has been violated and to maintain an enforcement action. The proposal to expand airport system capacity in the Puget Sound region may prove to be a test case during which some of these issues will be resolved.

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[204] At present, the Port has no intention of beginning construction of the third runway before 1996. Therefore, this alternative would not impose any delay on the Port's existing timetable.

[205] RCW 36.70A.250-.340. See section IV.A, infra.

[206] RCW 36.70A.280(1). See section IV.A, infra.

[207] RCW 36.70A.280(1).

D. Port of Seattle

Under state law, port districts may be created only through the act of one of the various counties of the State.[208] Acting under this statutory authority, King County created the Port as the port district for King County.[209] Consequently, the Port's jurisdiction encompasses all of King County, and it may exercise authority as a port district throughout the County.

Port districts such as the Port are defined as municipal corporations under the laws of the State of Washington.[210] As the owner and operator of SEA, the Port also is classified as a "municipality" pursuant to the provisions of the Municipal Airports Act.[211] The Port's powers pursuant to the Municipal Airports Act and the state Ports statute are independent of, and supplemental to, one another.[212]

1. Powers Under Port District Statutes

The purposes for which port districts may be established include the

> acquisition, construction, maintenance, operation, development and regulation within the district of harbor improvements, rail or motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, or any combination of such transfer and terminal facilities, and other commercial transportation, transfer, handling, storage and terminal facilities, and industrial improvements.[213]

By virtue of its status as a municipal corporation, a port district

> possesses and can exercise the following powers and no others: First those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation -- not simply convenient,

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[208] Id. 53.04.010.

[209] See also section II.A, supra.

[210] RCW 53.04.060. Port districts are characterized as "special-purpose" municipalities, whereas political subdivisions like King County or the City of Des Moines are "general-purpose" municipalities.

[211] Id. 14.08.010.

[212] Port of Seattle v. Isernio, 435 P.2d 991, 993 (Wash. 1967). See also In re Port of Seattle, 495 P.2d 327, 330 (Wash. 1972).

[213] RCW 53.04.010.

but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.[214]

Applying the foregoing rule, Washington state courts limit the powers exercised by the Port to those that are expressly granted and those that are "necessarily or fairly implied in or incident to" the express powers.[215]

Although the statute as originally enacted in 1911 primarily dealt with activities more narrowly related to the traditional role of port districts,[216] the law was amended in 1963 to give port districts greater authority to provide air transportation services.[217] Pursuant to Title 53 of the Washington Code, the state legislature expressly has authorized the Port and other port districts to:

- Exercise the right of eminent domain to acquire by purchase or by condemnation, or both, all lands, property, property rights, leases, or easements necessary for its purposes;[218]
- Levy and collect property taxes to pay compensation to owners of property damaged or acquired by the exercise of eminent domain;[219]
- Construct, condemn, purchase, acquire, add to, maintain, conduct and operate harbor facilities and improvements, warehouses, storehouses, ferries, canals, bridges, subways, cableways, air transfer and terminal facilities, administration buildings and other buildings and structures -- or combinations of such facilities -- for the economical handling, packaging, storing and transporting of freight and handling of passenger traffic;[220]

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[214] State ex rel. Huggins v. Bridges, 166 P. 780, 781 (Wash. 1917) (citing Dillon, Municipal Corporations § 89); see also Port of Seattle v. Washington Util. & Transp. Comm'n, 597 P.2d 383, 386 (Wash. 1979).

[215] Washington Util. & Transp. Comm'n, 597 P.2d at 386.

[216] 1911 Wash. Laws ch. 92 § 1.

[217] 1963 Wash. Laws ch. 147 § 1.

[218] RCW 53.08.010.

[219] Id.

[220] Id. 53.08.020.

- Improve its lands by dredging, filling, bulkheading, providing waterways or otherwise developing such lands for sale or lease for industrial or commercial purposes;[221]

- Acquire, construct, install, improve and operate sewer and water utilities and other facilities for the control or elimination of air, water or other pollution to serve its own property and other property owners[222] provided that the cost of providing such facilities and services to others shall not be paid out of any tax revenues of the port;[223]

- Establish local improvement districts within the port district, levy special assessments on all property specially benefitted by the improvements and issue local improvement bonds to be paid from the local improvement assessments;[224]

- Improve navigable and nonnavigable waters of the United States and the state of Washington within the district, create and improve new waterways, regulate and control all such waters and all natural or artificial waterways and remove obstructions therefrom, straighten, widen, deepen and otherwise improve any water, watercourses, bays, lake or streams flowing through or located within the district;[225]

- Lease all lands, wharves, docks and real and personal property owned and controlled by the port for no more than a total of 80 years, except that airport property may be leased for its estimated useful life, but not to exceed 75 years;[226]

- Sell and convey any of its real or personal property upon a formal declaration by the port commission that the property is no longer needed for district purposes, provided that if such property is part of a comprehensive improvement plan, it may not be disposed of until the property is found to be surplus in a modification of the comprehensive plan;[227]

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[221] Id. 53.08.040.

[222] A port may not enter into an agreement or contract to provide these services and facilities to others, if substantially similar utilities or facilities are available from another source (or sources) willing and able to provide them, unless the other source (or sources) consents. Id.

[223] Id.

[224] Id. 53.08.050.

[225] Id. 53.08.060.

[226] Id. 53.08.080.

[227] Id. 53.08.090.

- Accept gifts of real and personal property for and on behalf of the port district and to expend funds for the improvement and betterment of such gifts;[228]
- Contract for the purchase of labor and materials, providing that contracts for work exceeding $100,000 are subject to a public bidding process;[229]
- Initiate and carry out necessary studies, investigations and surveys required for the proper development, improvement and utilization of all port properties, utilities and facilities, and assemble and analyze the data obtained and cooperate with the state and other port districts and other operators of terminal and transportation facilities;[230]
- Engage in economic development programs;[231]
- Construct, improve, maintain, and operate public park and recreation facilities (with the approval of the government agency with jurisdiction over the area) when such facilities are necessary to more fully utilize boat landing, harbors, wharves and piers, air, land, and water passenger and transfer terminals and other port facilities authorized by law pursuant to the port's comprehensive plan of harbor improvements and industrial development;[232] and
- Enter into a mutual agreement with another port district (or districts) for the joint exercise of all of their powers, providing that two or more districts acting jointly shall not acquire any real property interests or real property rights in any other port district without that district's consent.[233]

Thus, state law delegates a broad array of powers to the Port and other port districts in Washington to enable them to carry out their responsibilities for harbors and airport properties.

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[228] Id. 53.08.110.

[229] Id. 53.08.120.

[230] Id. 53.08.160.

[231] Id. 53.08.245.

[232] Id. 53.080.260, .270.

[233] Id. 53.08.240.

2. Powers under the Municipal Airports Act

The Municipal Airports Act provides a broad grant of powers to port districts and municipalities that own airports.[234] These powers include authority to acquire property for airport purposes, to operate and control airport facilities and to perform certain other activities.

a. The Acquisition of Property

Under the Municipal Airports Act, port districts may acquire property -- by purchase, gift, devise, lease, or by exercise of the power of eminent domain "for an airport, or restricted landing area, or for the enlargement of either, or for other airport purposes. . . ."[235] This power may be used to acquire property for airports "either within or without the territorial limits of such [port] and within or without this state,"[236] despite the fact that Title 53 restricts port actions to "within the district."[237]

The acquisition of property for airport purposes and the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and air navigation facilities are statutorily declared to be

> public, governmental, county and municipal functions, exercised for a public purpose, and matters of public necessity, and such lands and other property, easements and . . . privileges acquired and used by such municipalities [for airport purposes] shall and are hereby declared to be acquired and used for public, governmental, county and municipal purposes and as a matter of public necessity.[238]

Despite the broad language conferring eminent domain powers on port districts under the Municipal Airports Act, Washington courts strictly construe all delegations of

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[234] See Chapter 14.08 RCW.

[235] Id. 14.08.030(2).

[236] Id. 14.08.030(1).

[237] Compare RCW 14.08.030(1) with RCW 53.04.010. See also State v. Port of Peninsula, 575 P.2d 713, 715 (Wash. 1978). This means that the Port could acquire property outside King County for purposes of developing a supplemental or reliever airport.

[238] RCW 14.08.020.

eminent domain powers.[239] Additionally, the extraterritorial exercise of eminent domain power is expressly limited by the Municipal Airports Act, which requires that a municipality first obtain the consent of another municipality before it may acquire or take over any airport or other air navigation facility owned or controlled by the other municipality.[240] Nevertheless, beyond these limitations, there are few constraints on the ability of the Port to use any lawful means -- including condemnation -- to acquire property for an airport or airport-related purpose, without regard to the current use of such property or whether property is located within King County.

b. Operational Powers

The Municipal Airports Act additionally gives port districts comprehensive powers over the "management, government and use of any properties under [their] control, whether within or without the territorial limits of the municipality. . . ."[241] These powers include the provision of fire protection and police services, the power to enact and enforce criminal and safety ordinances and regulations and the control and management of "such part of all highways, roads, streets, avenues, boulevards, and territory as adjoins the limits of any airport or restricted landing area acquired or maintained under the provisions" of the Municipal Airports Act.[242]

Other operational powers granted by the Municipal Airports Act include authority to sell or lease airport property to private parties or governmental entities; to confer the privileges of concessions of supplying goods, commodities, things, services and facilities; and to "exercise all powers necessarily incidental to the exercise of the general and special powers granted [in this section]" of the statute.[243] The Municipal Airports Act also permits airport owners to engage in joint operations and activities with other municipalities

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[239] In re City of Seattle, 638 P.2d 549 (Wash. 1981).

[240] RCW 14.08.030(1).

[241] Id. 14.08.120(2). This authority enables the Port to operate an airport outside of King County.

[242] Id.

[243] Id. 14.08.120(4), (5), (7).

or with the state either under the terms of a formal agreement or by concurrent action by the governing bodies of each of the parties.[244] Municipalities or port districts acting in concert with others have the same powers under the Municipal Airports Act as those granted to individual municipalities or port districts, and those powers may be exercised within or outside the territorial limits of either or any of the municipalities and within or outside of the state, if the laws of the other state allow such joint action.[245]

c. Planning Powers

Both the Municipal Airports Act and Title 53 give airport-owning port districts wide latitude to conduct studies, investigations, and to engage in a multitude of planning activities similar to those which the Port and the PSRC have undertaken.[246] Thus, the Port has the power to undertake site-specific EISs for the third runway at SEA.[247] It is less clear whether the Port may produce site-specific EISs for the Snohomish or Pierce County components of the multi-airport system recommendation unless those jurisdictions are willing to allow it to do so. If the Port is not permitted to acquire or take over Paine Field without the consent of Snohomish County, it is unlikely that the Port may develop specific planning documents (such as an EIS) for the development of Paine Field for commercial air traffic without the consent of Snohomish County.[248]

3. Interjurisdictional Conflicts

Pursuant to RCW 14.08.330, which is found in the Municipal Airports Act, the Port has been given "exclusive jurisdiction" over the operation and control of SEA.[249] For purposes of the ACC Cities' concerns, this is an extremely significant provision, because it

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[244] Id. 14.08.200.

[245] Id.

[246] Id. 14.08.030; id. 53.08.160.

[247] Id. 14.08.030; id. 53.08.160.

[248] Id. 14.08.030.

[249] Id. 14.08.330.

suggests that apart from a few exceptions,[250] the Port's operation of SEA is exempt from all local land use, zoning and other regulatory controls.

Airports operated by one municipality (or port district) that are physically located within the territorial limits of another municipality are under the "exclusive jurisdiction and control" of the operating municipality.[251] One potential interpretation of this language would hold that SEA, which constitutes port district property and lies predominately within the physical and territorial boundaries of the City of SeaTac, cannot be regulated by the City of SeaTac or the ACC Cities.[252] Under the Municipal Airports Act, it is the port district-airport operator, not the general purpose municipality within which the airport is located, that exercises exclusive jurisdiction over the airport and air navigation

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[250] See discussion below regarding property acquired by the Port for noise abatement purposes and the zoning of airport hazards.

[251] RCW 14.08.330. See also King County v. Port of Seattle, 223 P.2d 834, 840 (Wash. 1950). RCW 14.08.330 provides:

> Every airport and other air navigation facility controlled and operated by any [port district], . . . shall, subject to federal and state laws, rules, and regulations, be under the exclusive jurisdiction and control of the [port district] controlling and operating it. . . . No other [port municipality] in which the airport or air navigation facility is located shall have any police jurisdiction of the same or any authority to charge or exact any license fees or occupation taxes for the operations. However, by agreement with the [port district] operating and controlling the airport or air navigation facility, a municipality in which an airport or air navigation facility is located may be responsible for the administration and enforcement of the uniform fire code . . . on that portion of any airport or air navigation facility located within its jurisdictional boundaries.

Id. (emphasis added).

[252] An alternative interpretation would be that the statute's reference to exclusive jurisdiction merely enables the Port to establish a police force at SEA to enforce airport rules and provide security. This interpretation is less persuasive, however, because the statute also prohibits the licensing and taxing of airport operations, activities that traditionally are included in the police powers of local jurisdictions. Nevertheless, this alternative interpretation could provide a basis for efforts by the ACC Cities to regulate airport activity at SEA to the extent that any such activity occurs within their jurisdictional boundaries.

facilities.[253] Moreover, the statute prohibits an airport host jurisdiction from imposing license fees or occupation taxes on airport operations.[254]

Only two court cases have discussed the exclusive jurisdiction of airport proprietors under the Municipal Airports Act, and each failed to do so with any clarity.[255] The decision in King County, which construed an earlier version of RCW 14.08.330 containing the same exclusive jurisdiction language, held that RCW 14.08.330 deprived municipalities and counties (in this instance King County) of their ability to impose licensing on airport taxi operators.[256] The decision did not state that the section deprived local jurisdictions of their police powers, and it also expressly declined to construe whether language similar to RCW 14.08.120 unconstitutionally conferred police powers on the Port.[257] Nevertheless, in discussing RCW 14.08.330, the court referred a number of times to appellant's challenge to that section's withdrawal of police powers from airport host municipalities, but did not expressly use that terminology in its decision.[258] Consequently, the precise legal interpretation of section 14.08.330 is unknown, but it is reasonable to conclude that it prevents airport host municipalities from exercising regulatory authority (i.e., police powers) over airport operations.

In the Normandy Park case, the court interpreted King County as "preclud[ing] other entities 'from interfering with respect to the operation of Seattle-Tacoma airport.'"[259] The court stated further that the statutory limitation on the exercise of police jurisdiction

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[253] RCW 14.08.030. It is uncertain as discussed infra, whether the Port's exclusive jurisdiction includes local government police powers.

[254] Id. See King County, 223 P.2d at 840 (finding that statute prohibits King County from imposing licensing requirements on taxicabs using SEA).

[255] City of Normandy Park v. King County Fire District No. 2, 717 P.2d 769, 772-3 (Wash. Ct. App.), rev. denied 106 Wash. 2d 1007 (1986); King County v. Port of Seattle, 223 P.2d at 840.

[256] King County, 223 P.2d at 840.

[257] Id. at 840-41.

[258] Id. at 840.

[259] Normandy Park, 717 P.2d at 772.

"merely means that the airport is 'responsible' for police operations at the airport, and no other municipality may interfere with those operations."[260] This latter comment by the court is unclear in its intent, and could be interpreted as imposing either few or significant restrictions on airport host municipalities.

Final resolution of the meaning of RCW 14.08.330 may provide little practical benefit to the ACC Cities' potential strategies for addressing the proposed construction of a third runway at SEA, however. All of the property currently used by the Port for airport purposes lies within the City of SeaTac, as does nearly all of the property that has been identified for acquisition for the Port's proposed new runway project at SEA.[261] The Port's acquisition plans for the new runway have identified only a small parcel of property that is located in one of the ACC Cities -- the City of Burien,[262] and that parcel likely would constitute part of the clear zone for the new runway.

The ACC Cities retain several means by which they could exercise local police powers to affect Port actions. First, the Municipal Airports Act provides that the power of port districts to control and manage streets and territories that adjoin the airport or a restricted landing area is not exclusive, but is concurrent with the jurisdiction of the neighboring city or county (for unincorporated areas).[263] ACC Cities that adjoin SEA property, therefore, possess concurrent jurisdiction over land and streets that lie along SEA's boundaries. This means that neither the Port nor the adjoining municipality may act unilaterally with respect to the use or control of adjoining streets and properties, but must work cooperatively with one another.

Second, the Port's power to acquire real property for airport purposes does not necessarily carry with it the power to override the zoning of the locality in which the

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[260] Id. at 773.

[261] See Appendix B; Flight Plan EIS at 4-60. The Port has acquired a number of properties in the Cities of Des Moines and Burien, pursuant to the Port's Part 150 program, but to date these properties have not been converted to airport uses.

[262] Potential acquisitions in Burien involve a few acres bound by Des Moines Memorial Drive to the east, SR 518 to the north and 9th Avenue South to the west. Flight Plan EIS at 4-60.

[263] RCW 14.08.330.

property is located. For example, Title 53 of the Revised Code of Washington authorizes port districts operating airports to undertake programs to alleviate and abate the effects of jet aircraft noise on areas surrounding an airport, including the acquisition of property or property rights and the redevelopment of such properties for uses consistent with airport operations.[264] The Port's ability to use property acquired for noise mitigation purposes is limited by the mandate that its redevelopment of such property adhere to local zoning regulations.[265] Consequently, municipalities within which acquisitions of property for noise abatement purposes take place, such as the ACC Cities, retain authority to control the use of such properties through zoning ordinances. Examples of the types of restrictions that a city conceivably could impose include a prescription of procedures and approvals required for demolition of residential property or a requirement that such property be used for public facilities or parkland.

Third, political subdivisions within which an airport hazard is located retain authority to enact zoning ordinances to remove or control the hazard, even though airport proprietors are authorized to acquire property interests -- by condemnation, if necessary -- in airport hazards outside the boundaries of the airports to insure the safe and efficient operation of airports and to provide safe approaches to airport runways.[266] Alternatively, a neighboring jurisdiction in which an airport hazard is located may choose to share its zoning responsibility with the political subdivision that owns the airport. Consequently, the Port could create a joint airport zoning board with the City of SeaTac

[264] Id. 53.54.010, .030. Aircraft noise abatement and mitigation programs are limited to an area no more than six miles from the paved end of any runway and no more than one mile from the centerline of any runway or from an imaginary runway centerline extending six miles from the paved end of the runway. Id. 53.54.020. Port districts may finance noise abatement and mitigation programs through federal grants or loans, by using revenues generated by rentals, charges or from the proceeds of general obligation or revenue bonds. Id. 53.54.040.

[265] Id. 53.54.030(6)(b).

[266] Id. 53.08.030(3). See also Port of Olympia v. Deschutes Animal Clinic, Inc., 576 P.2d 899, 901 (Wash. 1978).

or another local jurisdiction for purposes of regulating potential hazards to operations at SEA.[267]

4. Power to Implement the PSATC's Multi-Airport System Recommendation

The Municipal Airports Act and Title 53 provide the Port with sufficient legal authority to construct a third runway at SEA.[268] The Port is barred by state law from implementing any plan to construct an additional runway at SEA until December 1, 1994.[269] The moratorium on runway construction, however, does not prevent the Port from continuing to study, plan for, and develop a site-specific EIS for the proposed third runway.[270]

Notwithstanding the moratorium, the Port nonetheless possesses sufficiently broad statutory authority under the Municipal Airports Act to allow it to proceed with the acquisition of approximately 110 acres of property located in the SeaTac and Burien, particularly if it were acquire that property through eminent domain. The Port merely would be required to demonstrate that the acquisition was for a public purpose,[271] and neighboring jurisdictions would have little control over the property's acquisition. It is less clear, however, whether the Port could purchase property in SeaTac or Burien without first complying with the pertinent local regulations of those two jurisdictions.

Both Title 53 and the Municipal Airports Act also provide the Port with an array of financial and fiscal mechanisms by which it may pay for the expansion of SEA.[272] However, since Snohomish County owns Paine Field, the Port does not have the authority to implement the entire PSATC recommendation which includes the development and use

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[267] We are unaware of the creation of any such joint airport zoning board with respect to the Port's operations at SEA.

[268] See RCW 14.08.030,.120(1), (7); id. 53.04.010, .08.020.

[269] Id. 53.08.350.

[270] 1992 Wash. Laws ch. 190 § 1.

[271] See RCW 14.08.030(2).

[272] See id. 14.08.080, .100, .112, .160; id. 53.08.010, .050, .080, .36.020, .030, .040, .40.010, .020.

of Paine Field as a commercial airport. Although the Municipal Airports Act enables the Port to acquire and establish airports outside of its territorial jurisdiction of King County, it may not acquire or take over an airport owned or controlled by any other municipality without the consent of that municipality.[273] Given statements made by its political leadership, it is unlikely that Snohomish County would consent to a Port takeover of Paine Field that would allow commercial service to be initiated.[274] It is equally unlikely that Snohomish County would develop Paine Field in accordance with the PSATC's recommendation.

E. The Cities of Normandy Park, Des Moines, Burien and Tukwila

Under the Constitution and laws of Washington, the City of Normandy Park is a third class city and the cities of Burien, Tukwila and Des Moines are noncharter code cities. Although SEA is located within SeaTac, the constitutional and statutory powers possessed by the ACC Cities may be used to affect the proposed development of a third runway at SEA.

1. Authority to Exercise Municipal Powers

The Washington Constitution authorizes the State Legislature to provide for the incorporation, organization and classification of municipal corporations.[275] Pursuant to that authority, the Legislature has enacted several statutes delegating powers to particular classes and kinds of municipalities.[276] While all Washington cities have similar fundamental municipal powers, a city's particular classification will determine its authority to raise revenues and issue bonds.

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[273] Id. 14.08.030.

[274] See, e.g., Statement of Elizabeth McLaughlin, Councilwoman, Snohomish County Council (found in Puget Sound Air Transp. Comm., Minutes of Meeting (June 17, 1992)) (expressing opposition to development of commercial service at Paine Field).

[275] Wash. Const. art. 11 § 10.

[276] See, e.g., Titles 35 and 35A RCW.

a. Cities of the Third Class

As a third class city, Normandy Park has only those powers granted by Chapter 35.24 of the Revised Code of Washington, which specifically governs third class cities, and by Chapter 35.21 RCW, which applies to all classifications of non-code cities. The powers of third class cities include authority

- To establish, build and repair and generally manage and control public highways, streets and bridges;[277]
- To abate and prevent the pollution of streams, lakes, or other sources of water supply by exercising jurisdiction over all streams, lakes or other sources of water supply both inside and outside of the city limits and to enact ordinances which contain enforcement mechanisms;[278]
- To enact all ordinances, rules, and regulations to maintain the "peace, good government and welfare" of the city and its trade, commerce and manufacturers, and to enact and enforce within its limits all other local, police, sanitary and other regulations as do not conflict with general laws;[279] and
- To purchase, lease, or otherwise acquire real estate and personal property necessary or proper for municipal purposes and to control, lease, sublease, convey or otherwise dispose of such property.[280]

b. Noncharter Code Cities

A city initially may incorporate as a noncharter code city ("code city"), or, if already incorporated, may elect to be classified as a code city.[281] Code cities are governed by Title 35A of the Revised Code of Washington, which confers the broadest powers of local

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[277] Id. 35.24.290(3).

[278] Id.

[279] Id. 35.24.290(17).

[280] Id. 35.24.300.

[281] Id. 35A.01.020. As noted above, Burien, Des Moines and Tukwila are noncharter code cities. Any incorporated city or town may become a noncharter code city either by means of a petition signed by the number of residents equaling at least 50 percent of the votes cast in the last general municipal election, or by means of a referendum following the submission of a petition signed by the number of residents equaling at least 10 percent of the votes cast in the last general municipal election. Id. 35A.02.010-.020, .060.

self-government consistent with the state Constitution.[282] "[T]his statute frees code cities from the limiting doctrine of ejusdem generis, which requires that general words following specific words in a statute must be construed to include things of the general kind or class as the specific words."[283] The statute explains:

> Any specific enumeration of municipal powers contained in this title or in any other general law shall not be construed in any way to limit the general description of power contained in this title, and any such specifically enumerated power shall be construed as in addition and supplementary to the powers conferred in general terms by this title. All grants of municipal power to municipalities electing to be governed under the provisions of this title, whether the grant is in specific terms or in general terms, shall be liberally construed in favor of the municipality.[284]

The broad grant of powers to code cities enables their legislative bodies to exercise "all powers possible for a city . . . to have under the Constitution of this state, and not specifically denied to code cities by law."[285] A code city's exercise of particular powers, therefore, may include all those powers ever authorized under the state constitution and general laws of the state[286] for city government.[287]

The statute specifically provides code cities with the power to:

- create a municipal planning agency, engage in local comprehensive planning and issue development regulations consistent with the comprehensive plan;[288]

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[282] Id. 35A.01.010.

[283] City of Bellevue v. Painter, 795 P.2d 174, 175 (Wash. 1990).

[284] RCW 35A.01.010; see also id. 35A.11.050.

[285] Id. 35A.11.020.

[286] "The general law" means any provision of state law that is not inconsistent with Title 35A RCW, enacted before of after Title 35A, which is by its terms applicable or available to all cities or towns. Id. 35A.01.050.

[287] See Shaw Disposal, Inc. v. City of Auburn, 546 P.2d 1236, 1238 (Wash. 1976).

[288] Chapter 35A.63 RCW.

- protect waters within the city or comprising part of the city's water supply;[289]
- perform the duties imposed upon cities of like population relating to the public health and safety including exercising control over water pollution;[290]
- provide standards for the construction of buildings;[291]
- acquire and operate recreational facilities; [292]
- acquire, develop, improve and operate libraries and museums and preserve historical material, markers, graves and records;[293] and
- join with other municipalities for joint or intergovernmental cooperation, activities and enter into joint agreements for the acquisition, ownership, leasing, control, improvement, occupation and use of land or other property.[294]

2. Police Powers

The Washington Constitution contains a direct delegation of police power to local governments.[295] That delegation is limited only by the requirements that police powers be used to regulate local matters and that the exercise of such powers be reasonable and consistent with the general laws of the state.[296] The police powers of Washington

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[289] Id. 35A.70.010.

[290] Id. 35A.70.070.

[291] Id. 35A.70.040.

[292] Id. 35A.67.010.

[293] Id. 35A.27.010.

[294] Id. 35A.35.010.

[295] See Wash. Const. art. 11 § 11. This section provides any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Id.

[296] See Detamore v. Hindley, 145 P. 462, 463 (Wash. 1915). See also Hass v. Kirkland, 481 P.2d 9 (Wash. 1971); Tacoma v. Vance, 496 P.2d 534 (Wash. Ct. App.), review denied, 81 Wash. 2d 1001 (1972); Petstel, Inc. v. King County, 459 P.2d 937 (Wash. 1969); Seattle v. Long, 380 P.2d 472 (Wash. 1963).

(continued...)

municipalities have been described as extending not only to the protection of "public peace, health, morals and safety, but also to those intended to promote the general public welfare and prosperity."[297]

Although the general grant of police power appears broad, Washington common law applies Dillon's Rule to limit such power.

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.[298]

Unless the state leaves room for concurrent authority, a municipality's police power ceases when the state legislates on the same subject.[299] Nevertheless, "courts will not interpret a statute to deprive a municipality of the power to legislate on particular subjects unless that clearly is the legislative intent."[300]

a. Zoning and Planning as Police Powers

The principal local land use powers -- the power to plan and the power to zone -- are recognized in Washington as a "valid exercise of the police power, and will be upheld

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[296] (...continued)

As one court has written: "This is a direct delegation of the police power as ample within its limits as that possessed by the Legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws . . ." Lenci v. City of Seattle, 388 P.2d 926, 929 (1964) (quoting Detamore v. Hindley, 145 P. at 463).

[297] City of Tacoma v. Fox, 290 P. 1010, 1012 (Wash. 1930).

[298] State ex rel. Huggins, 166 P. at 781, (citing Dillon, Municipal Corporations § 89). See also Taxpayers of City of Tacoma, 743 P.2d at 796.

[299] See Southwick, Inc. v. City of Lacey, 795 P.2d 712, 715 (Wash. 1990) (citing Diamond Parking, Inc. v. Seattle, 479 P.2d 47 (Wash. 1971)).

[300] Id. (citing State ex rel. Schillberg v. Everett Dist. Justice Court, 594 P.2d 448, 450 (Wash. 1979)).

if there is a substantial relation to the public health, safety, morals, or general welfare."[301]

Because the police power comes directly from the state Constitution, Washington courts have held that a local government can exercise its zoning power pursuant to art. 11 § 11 of the Constitution instead of complying with statutory provisions that it must zone in accordance with a comprehensive plan.[302]

b. Planning and Zoning in Washington Cities

Third class cities such as Normandy Park exercise their general planning and zoning authority in accordance with Chapters 35.63 (Planning Commissions) and 36.70 (Planning Enabling Act) of the Revised Code of Washington. The power of such cities to plan for their physical development stems from RCW 35.63.080 which provides in pertinent part:

> For this purpose, the [city] council . . . in such measure as is deemed reasonably necessary or requisite in the interest of health, safety, morals and the general welfare . . . by general ordinances . . . may regulate and restrict the location and the use of buildings, structures and land for residence . . . and other purposes; the . . .construction and design of buildings . . . and the subdivision and development of land.[303]

Courts have found that third class cities exercise legitimate zoning authority when they act "to stabilize uses, conserve property values, preserve neighborhood characters, and promote orderly growth and development."[304]

Code cities receive their general planning and zoning authority from Chapter 35A.63 (Planning and Zoning in Code Cities) RCW. Each code city is required to develop a land use plan that outlines appropriate land development guidelines for properties within its

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[301] Lutz v. City of Longview, 520 P.2d 1374, 1379 (Wash. 1974) (citing McNaughton v. Boeing, 414 P.2d 778 (Wash. 1966)).

[302] See Barrie v. Kitsap County, 613 P.2d 1148, 1153 (Wash. 1980) (where court dismissed plaintiffs' argument that the County could only make zoning decisions that conformed to the comprehensive plan adopted under the Planning Enabling Act).

[303] RCW 35.63.080.

[304] Duckworth v. City of Bonney Lake, 586 P.2d 860, 866 (Wash. 1978) (citations omitted).

jurisdiction.[305] The principles established in these comprehensive plans typically are implemented through zoning and other land use ordinances.[306]

In addition to their generic planning and zoning powers, cities in Washington are required to adhere to the recently-enacted Growth Management Act.[307] As cities located within a county that is required to develop a comprehensive plan under the Growth Management Act, the ACC Cities also are required to develop such plans. The GMA provides detailed directions as to the elements to be included in such plans.[308] It requires that the comprehensive plans developed by cities be consistent with countywide planning policies.[309] The GMA also requires that comprehensive plans developed by cities conform to multiple requirements for consistency.[310]

3. Power to Affect SEA Operations or Third Runway Construction

a. Restrictions on Port-Acquired Land

As discussed supra in section IV.D.3, the ACC Cities would have few opportunities either presently or under the Port's planned expansion of SEA to impose land use restrictions on the airport because very little airport property is or would be located within their jurisdictional boundaries. Additionally, statutory and case law establish that port districts which own airports have, "subject to federal and state laws, rules, and regulations, the exclusive jurisdiction and control" of such airports. Municipalities in which port-owned

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[305] RCW 35A.63.060.

[306] Id. 35A.63.100.

[307] Chapter 36.70A RCW.

[308] Id. 36.70A.070.

[309] Id. 36.70A.210. See also City of Snoqualmie v. King County, Case No. 92-3-0004 (Wash., Central Puget Sound Growth Planning Hearings Bd., Mar. 1, 1993) (holding that countywide planning policies may directly govern the content of municipal comprehensive plans with respect to legitimate regional issues as long as they do not directly affect the provisions of municipal implementing regulations).

[310] A thorough discussion and analysis of the Growth Management Act is provided in section IV.A, infra..

airports are located have been divested of police jurisdiction over the airport and cannot impose license fees or occupation taxes on operations at the airport.[311]

Nonetheless, the ACC Cities possess authority over certain aspects of airport operations at SEA. For example, property acquired for noise abatement, interests in property acquired to safeguard runway approaches and property containing airport hazards are subject to the zoning ordinances of the municipalities within which they are located.[312] Regulations could be developed that prescribe procedural requirements for demolition of existing structures that would affect the redevelopment of property acquired by the Port under federal or state noise abatement programs.[313]

Moreover, to the extent that any property within their boundaries is acquired for airport purposes by the Port (e.g., a small parcel in Burien along Des Moines Memorial Drive), land use restrictions could be used to protect the land uses for which that property was designated at the time of the Port's acquisition. Regulatory protection of wetlands and critical areas that appear to be located on the property in Burien would be a valid use of local powers.

In addition, the GMA provides the ACC Cities with the opportunity to lodge administrative and legal challenges against the third runway proposal on the grounds that the expansion of SEA is inconsistent with the comprehensive plans adopted by the cities.[314]

b. Authority to Regulate Streets and Roads

The ACC Cities possess authority over streets and roads that lie within their municipal boundaries. This authority has four potential applications with respect to airport operations at SEA: (1) the ability to close roads that may be used for airport or runway

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[311] RCW 14.08.330.

[312] Id. 53.54.030(6)(b); id. 14.08.030(3), 14.12.030.

[313] Unfortunately, the State Building Code, which governs each of the ACC Cities, does not allow the imposition of new building requirements on buildings that have been moved from one location to another. RCW 19.27.180.

[314] See discussion in section IV.D infra.

construction traffic; (2) the ability to prohibit the Port from closing roads in neighborhoods where properties have been acquired under the Port's noise mitigation program; (3) the ability to impose weight restrictions on roads that may be used by construction traffic; and (4) the ability to restrict the access of over-size vehicles to city streets.

Third class cities in Washington are expressly authorized to establish, lay out, alter, keep open, vacate, improve and repair streets, alleys and other public highways within their boundaries.[315] They also have the power to remove all obstructions and "generally to manage and control all such highways and places. . . ."[316] Code cities do not have the same express powers,[317] but they are accorded all of the powers conferred on any city of any class, and thus possess the same authority as has been given third class cities.[318] Therefore, Burien, Des Moines and Tukwila are authorized to regulate and control the establishment and use of their streets, roads and highways in the same manner as is Normandy Park.

Pursuant to that authority, the ACC Cities could seek to close streets that would be used by runway construction traffic. That authority also would provide an opportunity to oppose efforts by the Port to close streets lying within property acquired under its noise mitigation program. Any effort to vacate existing streets, however, must conform to certain procedural requirements.[319]

While the ACC Cities would have considerable discretion concerning whether to approve a petition by the Port to close a street, their authority to proceed with street closings as a means for affecting airport activity appears to be limited. Administratively, written opposition filed by landowners holding fifty percent or more of the property abutting the street in question would preclude a city from proceeding with a resolution to

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[315] RCW 35.24.290(3).

[316] Id.

[317] See, e.g., Chapter 35A.47 RCW.

[318] Id. 35A.21.160.

[319] See, e.g., Chapter 35.79 RCW.

vacate that street.[320] Additionally, in a leading case on the topic, the Washington Supreme Court enjoined the City of Clyde Hill from vacating a street and thereby preventing access to a proposed 20-story apartment dwelling in the adjacent town of Houghton.[321] The Court stated that cities may not vacate streets when to do so would be detrimental to other citizens or municipalities in the state.[322] Streets are dedicated to public use, and therefore they must be maintained primarily as public ways.[323] Consequently, the courts likely would overturn efforts by the ACC Cities to vacate streets if the Port were opposed to the vacation.

Washington law also gives cities the power to regulate the weight of vehicles driving on its roads.[324] All classifications of cities may prohibit the operation of trucks and other vehicles on the public highways within their jurisdiction or they may impose limits on the weight of such vehicles "whenever any such public highway by reason of rain, snow, climatic or other conditions, will be seriously damaged or destroyed unless the operation of vehicles thereon be prohibited or restricted or the permissible weights thereof reduced."[325] Cities may not, however, impose weight restrictions on any city street which is part of the route of a primary state highway, without the written permission of the state Department of Transportation.[326] The power to regulate and even restrict heavy vehicles from using their streets could enable the ACC Cities to impede the transportation of the estimated 13,682,000 cubic yards of compacted dirt needed to construct the third runway.[327]

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[320] Id. 35.79.020.

[321] Yarrow First Associates v. Clyde Hill, 403 P.2d 49 (Wash. 1965).

[322] Id. at 53.

[323] Id. at 52-53.

[324] Chapter 46.44 RCW.

[325] Id.

[326] Id.

[327] Flight Plan EIS at 4-109, Table 4-21.

The cities already have used their authority over their streets and roads to regulate the moving of houses, via oversize vehicles, into their jurisdictions.[328] Ordinances adopted by Normandy Park and Tukwila require house movers to obtain permits from the city after first securing a surety bond and satisfying other conditions.[329]

c. Regulation of Ground Noise

The ACC Cities possess limited authority to impose restrictions on the generation of ground noise at SEA. Several of the cities already have adopted regulations concerning such noise.

Pursuant to the Washington State Noise Control Act, the Department of Ecology issued regulations that place restrictions on a number of noise sources. These regulations expressly exempt those sounds originating from aircraft in flight and sounds originating at airports which are directly related to flight operations from compliance with all maximum permissible environmental noise levels.[330] Sounds created by aircraft engine testing and maintenance not related to flight operations are regulated, however, to the extent they occur between the hours of 10 p.m. and 7 a.m.[331] King County has adopted a noise ordinance that parallels the Department of Ecology regulations, and which also imposes certain restrictions on ground noise generated at SEA.[332] King County's ordinance could serve as a model for the ACC Cities in developing restrictions on nighttime ground noise from the airport.

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[328] See, e.g., Chapter 11.28 Tukwila Municipal Code ("TMC"); Normandy Park Municipal Code ("NPMC") 14.04.230.

[329] TMC 11.28.010-020; NPMC 14.04.230.

[330] WAC 173-60-050(4)(b).

[331] Id. 173-60-050(1)(d).

[332] See King County Code ("KCC") 12.86.010, 12.94.040. The King County ordinance exempts noise created by the testing and maintenance of aircraft or components of aircraft from the ordinance's maximum permissible sound levels between the hours of 7 a.m. and 10 p.m. daily. Id. Noise associated with testing and maintenance of aircraft between 10 p.m. and 7 a.m. is not exempt. The ordinance also prescribes certain areas where testing or maintenance activities may be performed at SEA during daytime hours. Id.

The cities of Normandy Park and Tukwila have adopted their own local noise ordinances.[333] Normandy Park's ordinance makes it unlawful for any person to "make or continue, or cause to be made or continued, or to allow to be made or continued, any noise disturbance within the city limits," but does not address airport noise.[334] Tukwila's ordinance closely resembles King County's noise ordinance in structure, although it establishes slightly different maximum permissible sound levels.[335]

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[333] Chapter 7.94 NPMC; Chapter 8.22 TMC. Burien does not have a noise ordinance.

[334] NPMC 7.94.020(a).

[335] Compare TMC 8.22.040 with KCC 12.88.020(A).

IV. PROCEDURAL ENVIRONMENTAL PROTECTION REQUIREMENTS

A. Washington Growth Management Act

1. Overview

The State of Washington's Growth Management Act ("GMA") was enacted in 1990. The statute created an enforceable planning process administered principally at the county level, to ensure that county and city comprehensive planning are consistent and to make such plans binding on all jurisdictions, including the state.[336] The vehicles established by the GMA for accomplishing this objective are comprehensive plans prepared by counties and their constituent cities, and regional transportation plans, prepared by local jurisdictions on a countywide or multicounty basis. Land use development regulations adopted by city governments implement comprehensive planning on a local level.

The GMA addresses an extremely wide array of topics, including 1) coordinated planning among jurisdictions; 2) multiple modes of transportation, affordable housing and economic development; 3) natural resource-based industries; 4) open space, recreation, fish and wildlife; 5) air and water quality; 6) public facilities and services; 7) historical and archaeological sites and structures; and 8) citizen participation in planning.[337] Comprehensive plans developed pursuant to the GMA must address each of the foregoing topics,[338] and must designate where growth is to occur, where new capital facilities will be located and how they will be financed.[339]

2. Development of Comprehensive Plans Under the GMA

a. Planning Requirements

The GMA mandates the preparation of comprehensive plans by certain political subdivisions: counties with populations of 50,000 or more and a population increase

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[336] Chapter 36.70A RCW.

[337] See id. 36.70A.020.

[338] Id. 36.70A.070, .080.

[339] Id. 36.70A.070(3(d), .110, .200.

greater than 10 percent over the last 10 years, and all cities located within such counties.[340] Because King County satisfied these conditions, it and its constituent cities have been required to develop comprehensive plans. In addition, any county, regardless of population, that experienced an increase in population greater than 20 percent over the last ten years, and its incorporated cities, also must engage in the planning process mandated by the GMA.[341]

All local governments which are required to adopt plans must do so by July 1, 1993.[342] Counties not required to plan under the GMA but that have enacted resolutions agreeing to be governed by the requirements of the GMA must adopt their plans within three years of the adoption of the resolution.[343]

Comprehensive plans prepared and submitted pursuant to the GMA must consist of a map or maps and descriptive texts covering objectives, principles and standards used to develop the plan and a plan or design for a specific list of required elements and may include several optional elements as well.[344] Principles incorporated in comprehensive plans are given effect through their adoption in local zoning ordinances and land use regulations.

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[340] Id. 36.70A.040(1).

[341] Id. The GMA, however, gave any county with a population less than 50,000 that experienced 20 percent growth in the past 10 years the option to adopt a resolution by December 31, 1990 removing itself and its cities from the need to comply with the GMA.

[342] Id. 36.70A.040(3). Conversations with planners for Normandy Park and King County have indicated that the Washington Legislature currently is considering whether to extend statutorily the July 1, 1993 deadline for adoption of comprehensive plans by local governments. This effort in the Legislature is being driven by the difficulties that cities and counties are having in completing the required plans. Hence, it is uncertain whether such plans in fact will have been completed by King County and its municipalities by July 1, 1993.

[343] RCW 36.70A.040(2), (3).

[344] Id. 36.70A.070. Mandatory elements of comprehensive plans include sections addressing land use, housing, capital facilities, utilities, rural areas, transportation, urban growth areas, locations for siting of public facilities, locations for open space corridors, natural resource lands, critical areas, and procedures for siting essential public facilities. See id. 36.70A.070, .110, .150, .160, .170, .200. Optional elements include those that address physical development of the jurisdiction such as subarea plans, conservation, solar energy, recreation and environmental protection. Id. 36.70A.080.

Each jurisdiction that prepares a comprehensive plan pursuant to the GMA must comply with the State Environmental Policy Act before the plan may be adopted.[345] For example, GMA regulations provide that the initial adoption of a comprehensive plan "in most instances" will require the preparation of an environmental impact statement. While a more complete discussion of the State Environmental Policy Act is found in section IV.C, infra, compliance with that statute for all comprehensive planning actions under the GMA will impose substantial documentation and public comment requirements on local governments conducting GMA planning.

b. Coordination of Planning

A fundamental principle underlying the GMA is that the public interest is enhanced through coordination and cooperation among units of government at all levels. Therefore, the statute mandates a collaborative planning process in which the plans of cities and counties must be coordinated and made consistent with one another.[346] Even state agencies are required to comply with local comprehensive plans and development regulations adopted pursuant to the GMA.[347]

The coordination requirement under the GMA is limited to counties and cities that have common borders or are concerned about related regional issues.[348] Thus, two cities that neither share common borders nor share related regional planning issues are not required to coordinate their comprehensive plans. A county and each city therein,

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[345] WAC 365-195-610. This requirement is applicable to all GMA planning actions, whether initial adoption of a plan, its subsequent amendment, or adoption of zoning or other development regulations pursuant to a plan. Id.

[346] RCW 36.70A.100. This section of the GMA provides that

> [t]he comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues.

Id. (emphasis added).

[347] Id. 36.70A.103.

[348] Id. 36.70A.100.

however, necessarily share common borders, and therefore coordination is mandatory. This means, for example, that the GMA requires the City of SeaTac and the ACC Cities, which share common borders, to coordinate their comprehensive plans. The ACC Cities additionally must coordinate their comprehensive planning actions with King County.

Cities and counties are required to circulate their proposed comprehensive plans to their adjacent jurisdictions.[349] Reviewing jurisdictions must submit written comments identifying features of the plan that would preclude or interfere with the achievement of any features of their own plans.[350] The affected jurisdictions are encouraged under the GMA regulations to resolve their conflicts through negotiation,[351] but the reviewing jurisdiction nevertheless can challenge the plan before one of the Growth Planning Hearings Boards established by the GMA.[352] A reviewing jurisdiction that fails to comment on another community's plan is deemed to have concurred with the plan.[353]

To facilitate the coordination of planning between a county and its constituent cities, the GMA requires that countywide planning policies be developed.[354] These countywide policies are intended to guide broad countywide development concerns, while cities are left to specify zoning and land use restrictions at the local level.[355] The statute expressly provides that by requiring the development of countywide planning policies the GMA "shall not be construed to alter the land-use powers of cities."[356]

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[349] WAC 365-195-530.

[350] Id.

[351] Id.

[352] RCW 36.70A.280, .290(1). See discussion in section IV.A.2.d, infra, concerning Hearing Boards.

[353] WAC 365-195-530. It will be important to identify those comprehensive plans which are or soon may be available for public comment.

[354] RCW 36.70A.210.

[355] Id.

[356] Id. 36.70A.210(1).

Counties are required to set forth a process for developing, adopting and implementing their countywide planning policies.[357] For example, King County and its 31 cities created a Growth Management Planning Council composed of elected officials from the county, Seattle and suburban cities to draft countywide planning policies.[358] Following adoption by the County Council and ratification by at least 30 percent of the city and county governments representing 70 percent of the county's population, the King County Planning Policies took effect.[359] The Countywide Planning Policies for King County identify planning goals as well as generalized strategies and procedures for attaining those goals.[360]

In those Policies, the only reference to the airport occurs in the discussion of Transportation Policies, in the midst of a list of those facilities which should make up the County's transportation system.[361] The issue of siting regional and countywide transportation facilities receives minimal attention:

> King County, the cities, the Puget Sound Regional Council, the State, Metro, and other transportation providers shall identify significant regional and/or countywide land acquisition needs for transportation and establish a process for prioritizing and siting the location of transportation facilities.[362]

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[357] Id. 36.70A.210(2)(b), (e).

[358] King County Growth Management Planning Council, Countywide Planning Policies (1992) at 4.

[359] The countywide planning policies for King County were approved by the requisite number of jurisdictions in September 1992. According to Dale Gredler, the Director of Planning for Normandy Park, Normandy Park and Des Moines did not approve the countywide planning policies; Tukwila did approve them; and Burien was not incorporated and therefore was not involved in the approval process. Telephone interview with Dale Gredler, Director of Planning, City of Normandy Park (Mar. 17, 1993).

Countywide planning policies for Pierce County must be adopted by an affirmative vote of 60 percent of the affected governments (12 of 19) representing a minimum of 75 percent of the total population of the county. Pierce County Planning and Land Services, County-wide Planning Policies for Pierce County (1992) at 5.

[360] See, e.g., King County Growth Management Planning Council, Countywide Planning Policies.

[361] Id. at 30.

[362] Id. at 34.

In addition to countywide planning policies, the GMA requires that multicounty planning policies be developed and adopted when two or more counties, each with populations of 450,000 or more, have contiguous urban areas. In the Puget Sound region, King, Pierce and Snohomish Counties are required to form a single entity to develop a multicounty planning policy. Kitsap County chose to participate in this effort.[363] In October 1992, the PSRC reaffirmed its role as the agency responsible for preparing multicounty planning policies under the GMA for King, Pierce, Snohomish and Kitsap Counties.[364]

c. Consistency Requirements

One of the most important planning tenets expressed in the GMA is the requirement for consistency:

- consistency of city and county plans with the planning goals identified in the GMA;[365]
- internal consistency between plan elements;[366]
- consistency of the transportation element with the land use element;[367]
- consistency of the transportation element with the six year plans required by other state statutes;[368]
- consistency between county comprehensive plans and the comprehensive plans of all the cities within the county;[369]

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[363] Puget Sound Regional Council ("PSRC") Executive Board Agenda, Action Item 7, Proposed Multicounty Planning Policies for King, Kitsap, Pierce and Snohomish Counties (Jan. 12, 1993) at 7a-5. See also Puget Sound Regional Council, Regional View (Dec. 1992) at 8.

[364] PSRC Executive Board Minutes (Dec. 3, 1992) at 5a-14.

[365] RCW 36.70A.020.

[366] Id. 36.70A.070.

[367] Id. 36.70A.070(6).

[368] Id. 36.70A.070(6)(c)(ii); id. 35.58.2795; id. 36.77.010; id. 36.81.121. RCW 35.58.2795 requires the preparation of a six-year public transit development and financial plan. RCW 35.77.010 requires cities to prepare and adopt a comprehensive, six-year street program. RCW 36.81.121 requires counties to prepare and adopt of a comprehensive, six-year road program.

[369] RCW 36.70A.100.

- consistency of comprehensive plans of each city and county with comprehensive plans of neighboring cities and counties with common borders or facing related regional issues;[370]
- consistency of development regulations with comprehensive plans;[371]
- consistency of capital budget decisions with comprehensive plans;[372] and
- consistency of state agency actions in relation to the location, financing and expansion of transportation systems and other public facilities with county and city comprehensive planning.[373]

In addition, transportation plans have their own specific consistency requirements:

- The transportation elements of comprehensive plans adopted by counties, cities and towns within a region must conform to the requirements of the GMA and be consistent with regional transportation plans;[374]
- The Regional Transportation Planning Organization must develop and adopt a regional transportation plan that is consistent with county, city and town comprehensive plans;[375] and
- All transportation projects within a region having an impact on regional facilities or services must be consistent with the regional transportation plan.[376]

Despite the numerous "consistency" requirements found in the GMA, the statute contains no definition of the term. Regulations promulgated by the Washington Department of

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[370] Id.

[371] Id. 36.70A.120. The GMA gives counties and cities a one-year period to enact development regulations that are consistent with the comprehensive plan. Id. Those development regulations must also assure the conservation of agricultural, forest and mineral resource lands and the protection of critical areas designated pursuant to the statute. Id. 36.70A.060(1), (2).

[372] Id.

[373] Id. 36.70A.103.

[374] Id. 47.80.030(1)(a). See also id. 36.70A.070(6).

[375] Id. 47.80.030(1)(b). The Regional Airport System Plan must be consistent with both existing local comprehensive plans and those developed pursuant to the GMA.

[376] Id. 47.80.030(2).

Community Development, however, define consistency as meaning that "no feature of a plan or regulation is incompatible with any other feature or a plan or regulation."[377]

The GMA Regulations also address the need for internal consistency within individual comprehensive plans, and for interjurisdictional consistency among different jurisdictions' plans.[378] With respect to the requirement that comprehensive plans be internally consistent, the regulation states "this requirement appears to mean that the parts of the plan must fit together so that no one feature precludes the achievement of any other."[379] It also means that all elements of a comprehensive plan must be consistent with the future land use map.[380]

Determining interjurisdictional consistency, however, is complicated by differences in timing in the adoption of plans by separate jurisdictions. "Initially interjurisdictional consistency should be met by plans which are consistent with and carry out the relevant county-wide planning policies."[381] The regulation emphasizes that countywide planning policies are designed to ensure that city and county comprehensive plans are consistent; and therefore, each city plan should demonstrate that the countywide planning policies have been followed.[382]

d. Enforcement of the GMA

Amendments adopted by the Washington Legislature in 1991 added enforcement mechanisms to the GMA. Pursuant to these amendments, the Governor now possesses authority to cut off state funds to local governments that do not participate in the countywide planning process; that fail to meet planning deadlines; or that do not correct

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[377] WAC 365-195-210(5). The regulations also define "consistency" as meaning "not incompatible with." Id. 365-195-060(7).

[378] Id.

[379] Id.

[380] Id. 365-195-500.

[381] Id. 365-195-060(7).

[382] Id. 365-195-520.

"deficient" plans or regulations.[383] In addition, the 1991 legislation established three regional growth planning hearings boards to decide whether local comprehensive plans meet state standards.[384]

The Growth Planning Hearings Boards each consist of three individuals appointed by the Governor,[385] and exercise jurisdiction over a particular geographic region: 1) an Eastern Washington Board; 2) a Western Washington Board; and 3) a Central Puget Sound Board.[386] The Boards are authorized to hear and determine those petitions alleging either

- that a state agency, county, or city is not in compliance with the requirements of the GMA or State Environmental Policy Act as it relates to plans and regulations adopted under the provisions of the GMA; or
- that the 20-year growth management planning population projections adopted by the state Office of Financial Management should be adjusted.[387]

Petitions may be filed by the State,[388] a county or city that plans under the GMA, or a person[389] aggrieved or adversely affected by the actions of a city or county with

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[383] RCW 36.70A.250-.440.

[384] Id. 36.70A.250-.330.

[385] Id. 36.70A.250, .260. The members are appointed for six-year terms. At least one of the three Board members must be admitted to practice law in Washington, and at least one must have been a city or county elected official. Id. 36.70A.260.

[386] Id. 36.70A.250. The Central Puget Sound Growth Planning Hearings Board has jurisdiction over all political subdivisions in King, Pierce, Snohomish and Kitsap counties. Id. 36.70A.250(1)(b).

[387] Id. 36.70A.280(1).

[388] A request for review by the State may be submitted by the Governor, or with the Governor's consent, by the head of a state agency or by the Commissioner of Public Lands on matters dealing with state trust lands. Id. 36.70A.310.

[389] A person is defined as any "individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character." Id. 36.70A.280(3).

meet the requirements of the statute, the Board may transmit its finding to the Governor, with or without a recommendation for the imposition of sanctions.[397]

e. Sanctions for Noncompliance

The Governor may enforce the GMA through the imposition of a variety of sanctions, including:

- the revision of allotments of state appropriation funds;[398]
- the withholding of revenues to which the county or city is entitled under one or more of the following: 1) the motor vehicle fuel tax; 2) the transportation improvement account; 3) the urban arterial trust account; 4) the sales and use tax; 5) the liquor profit tax; or 6) the liquor excise tax;[399]
- the temporary recision of the county or city's authority to collect the real estate excise tax.[400]

3. Development of Regional Transportation Plans

In addition to prescribing a structure for developing, adopting and enforcing comprehensive plans, the GMA also calls for the coordination of transportation plans with local government comprehensive plans, and specifically for "a coordinated planning program for regional transportation systems and facilities throughout the state."[401]

The statute authorizes the creation of Regional Transportation Planning Organizations ("RTPOs") to be formed through the voluntary association of local governments within a county, or within geographically contiguous counties.[402] In the

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[397] Id. 36.70A.330(3).

[398] Id. 36.70A.340(1).

[399] Id. 36.70A.340(2).

[400] Id. 36.70A.340(3).

[401] Id. 47.80.010. The portion of the GMA that addresses regional transportation planning is codified at Chapter 47.80 RCW. The remainder of the GMA is codified at Chapter 36.70A RCW.

[402] Id. 47.80.020. There presently are 14 such RTPOs, covering all but one of the state's 39 counties. Washington State Air Transportation Commission, Governance Authority and Key Policy Issues, Discussion Draft Working Paper (1992) at B-9. In urbanized areas, the RTPO is the same body as the Metropolitan Planning Organization ("MPO") designated for federal transportation planning purposes. Id.

respect to matters within the purview of the GMA.[390] Requests for review submitted by the State are limited to addressing whether

- a county or city required or choosing to plan under the GMA has failed to adopt a plan or development regulations, or county-wide planning policies within the time limits established in the statute; or

- a county or city that is required or chooses to plan has adopted a comprehensive plan, development regulations, or countywide planning policies that do not comply with the GMA.[391]

The GMA prescribes specific rules of conduct for the Boards and the manner in which they must consider petitions for review.[392] Petitions relating to whether or not an adopted comprehensive plan, development regulation, or an amendment to either is in compliance with the goals and requirements of the GMA must be filed within 60 days after publication by the legislative body of the county or city.[393] Any party aggrieved by the final decision of a Board may appeal that decision to Thurston County Superior Court[394] within 30 days of the Board's final order.[395]

If a state, county, or city agency is determined not to be in compliance with the GMA, the agency is given 180 days to meet the statute's requirements.[396] After expiration of the 180-day period and issuance of a finding that the agency still does not

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[390] Id. 36.70A.280(2). See also id. 34.05.530.

[391] Id. 36.70A.310.

[392] Id. 36.70A.270-.320.

[393] Id. 36.70A.290(b). The date of publication for a city is the date the city publishes the ordinance -- or summary of the ordinance -- adopting the comprehensive plan, the development regulation, or an amendment thereto. The date of publication for a county is the date the county publishes a notice that it has adopted the comprehensive plan, development regulation, or the amendment. Id. 36.70A.290(2).

[394] Thurston County is the jurisdiction within which the State capitol is located.

[395] Id. 36.70A.300(2).

[396] Id. 36.70A.300(1).

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Puget Sound region, covering King, Kitsap, Pierce and Snohomish Counties, the PSRC is the RTPO.[403]

By entering into an Interlocal Agreement with other jurisdictions in King, Kitsap, Pierce and Snohomish Counties, the ACC Cities have consented to the coordination procedures prescribed by that Agreement.[404] The Interlocal Agreement, however, specifies procedures only for the transportation elements of the ACC Cities' comprehensive plans.[405] The remainder of such plans are to be coordinated pursuant to procedures discussed in section IV.A.2.b, supra.

Pursuant to the Interlocal Agreement, the PSRC has authority to determine whether the transportation elements adopted in the ACC Cities' plans are consistent with the Regional Transportation Plan adopted by the PSRC and with state comprehensive planning requirements.[406] This requirement is somewhat confusing, and is indicative of the uncertain compliance requirements mandated by the GMA, because the PSRC's Regional Transportation Plan is supposed to be derived from and be consistent with city comprehensive plans.[407]

Nevertheless, if the PSRC staff determines that transportation elements adopted by any of the ACC Cities are not consistent with the Regional Transportation Plan, then the staff must refuse to certify those elements of the ACC Cities' plans.[408] In such an event an ACC City could appeal the staff's determination to the PSRC's Executive Board, and a board of hearing examiners (constituted from the membership of the Executive Board)

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[403] PSRC Resolution A-91-01 (Mar. 13, 1991); Puget Sound Regional Council, Interlocal Agreement for Regional Planning in the Central Puget Sound Area (Mar. 11, 1993) §§ II, VII(A)(1), (3)-(5) ("Interlocal Agreement").

[404] The Interlocal Agreement dated March 11, 1993 revised an earlier interlocal agreement among jurisdictions in the four-county area. The new Agreement does not revise the previous agreement's provisions concerning coordination.

[405] See Interlocal Agreement § VII(A)(2), (4), (5).

[406] Id. § VII(A)(4)(a), (b).

[407] RCW 47.80.030(1)(b); see also Interlocal Agreement § VII(A)(1), (B).

[408] Interlocal Agreement § VII(A)(5).

would be appointed to hear the City's appeal.[409] No further recourse is provided for in the Interlocal Agreement, although an ACC City likely would not be foreclosed from pursuing the appeal procedures authorized in the GMA.[410]

In addition to certifying the consistency of local comprehensive plans, the PSRC also must ensure that all regionally significant transportation projects are consistent with the Regional Transportation Plan.[411] The PSRC thus has authority to determine whether to certify the Port's plans to develop a third runway at SEA. The GMA statute does not describe or define the certification process, nor does it explain the consequences of an RTPO's failure to certify consistency.[412] Moreover, the state Department of Transportation indicates that there is no uniform certification process and that individual RTPOs should "develop their own procedures and methods for certification."[413] Given the uncertain nature of certification, it is difficult to ascertain the likelihood of success of challenges to transportation developments (such as the proposed third runway at SEA) that are alleged to be inconsistent with adopted regional transportation plans.

4. Applicability of GMA Procedures to the Proposed Expansion of SEA

As the Port and the PSRC move forward with plans for the expansion of air transportation capacity in the Puget Sound region -- and as they try to implement those plans -- they must do so in compliance with the GMA.

The PSRC, with assistance from the Port, has initiated a regional planning process that seeks to comply with GMA requirements, by amending the Regional Airport System Plan (the air transportation component of the PSRC's Regional Transportation Plan) to

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[409] Id.

[410] See RCW 36.70A.280-.300; see also discussion in section IV.A.2.d, supra.

[411] RCW 47.80.030(2).

[412] See, e.g., Chapter 47.80 RCW.

[413] Telephone interview with Charles Howard, Washington State Dep't of Transp. (Mar. 19, 1993); Guidelines for WSDOT's Regional Transportation Planning Program (1991) at 3. The Interlocal Agreement, despite specifying the PSRC's certification requirements for local transportation elements of comprehensive plans, does not address the procedures or standards to be used by the PSRC to certify plans proposed by the Port.

identify long-term solutions to satisfy the region's air transportation needs. It is in the context of its amendment to the Regional Airport System Plan that the PSRC currently is considering whether to identify construction of a third runway at SEA as part of the Regional Transportation Plan for the four-county region under its jurisdiction. Pursuant to the GMA, as it proceeds with its Regional Airport System Plan amendment the PSRC must take into consideration city and county comprehensive plans and ultimately, city and county plans will have to reflect air transportation decisions reached in the Regional Airport System Plan.

a. Interaction Between the Regional Airport System Plan and Comprehensive Plans and Municipal Land Use Regulations

As discussed in section II.E.2, supra, the resolution adopted by the PSRC's Executive Board for consideration by the General Assembly on April 29, 1993, provides conflicting guidance as to its potentially binding effect on comprehensive planning by local, county and state governments.[414] The resolution states that it amends the existing Regional Airport System Plan; an amendment to the Plan legally would require all jurisdictions in the four-county planning region to conform their comprehensive plans to that amendment pursuant to the provisions of the GMA.[415] However, if adopted by the General Assembly, the Executive Board's resolution does not adopt specific options for meeting the Puget Sound region's air transportation capacity requirements. Rather, it merely provides conditional approval of the Port's third runway project, while expressing a preference for construction of a supplemental airport. Thus, it could be asserted that the Board's Resolution does not explicitly adopt either option -- a third runway at SEA or a supplemental airport -- because neither is certain to be developed. Consequently, local governments would not be required to amend their comprehensive plans and land use regulations to address either option, at least until the Resolution's conditions are resolved in 1996.

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[414] See Executive Board, Puget Sound Regional Council, Regional Airport System Plan Resolution (Apr. 8, 1993) ("Board Resolution").

[415] See RCW 47.80.030(a).

(1) Challenges to General Assembly Adoption of the Resolution Passed by the PSRC Executive Board

Assuming the Board's Resolution, or a similar resolution that provides for continued, parallel consideration of both a new runway at SEA and a supplemental airport, is adopted by the General Assembly, two possible approaches would be available for contesting the General Assembly's action. A party opposed to such action by the General Assembly could pursue administrative and judicial challenges to the legitimacy of that action, and/or it could work to enforce existing, and implement new, zoning or land use measures that affect or conflict with plans to approve and develop a third runway at SEA.

The development of planning policies and land use regulations that address inconsistencies between new runway construction and the character and quality of local land uses could enhance the ability of local jurisdictions to defeat the Port's proposal. A fundamental precept of the GMA is that individual cities and counties in their comprehensive plans and development regulations are to designate geographic areas for land uses that ensure sound, compatible development.[416] Zoning ordinances that comprehensively protect critical areas like wetlands, fish and wildlife conservation areas, and aquifer recharge zones from incompatible land uses or encroachment are examples of regulations encouraged by the GMA. The GMA also places importance on maintaining the integrity of residential areas, by requiring plans to include housing elements that recognize "the vitality and character of established residential neighborhoods."[417] Potential means by which a city could supplement its comprehensive plans and local land use regulations are discussed in section IV.A.4.b, infra.

The PSRC, the Port or other local jurisdictions may attempt to contest the foregoing actions if taken by the ACC Cities.[418] Those parties could be expected to assert that

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[416] See id. 36.70A.010.

[417] Id. 36.70A.070(2).

[418] Procedurally, such a challenge could occur in several different ways. For example, if asserted by the PSRC, a challenge to the consistency of actions taken by the ACC Cities with the Regional Airport System Plan must proceed under the terms specified in the Interlocal Agreement. Thus, PSRC staff first would have to find that plans or regulations adopted by the ACC Cities were inconsistent with the Regional Airport (continued...)

amendments to comprehensive plans and local land use regulations for the foregoing purposes would have the effect of precluding the siting of essential public services. Cities and counties are instructed by the GMA to give adequate consideration in their plans to the need for public facilities (like streets, street lights, domestic water systems, storm and sanitary sewers),[419] and are prohibited from "preclud[ing] the siting of essential public facilities" such as airports, state educational facilities and solid waste handling facilities.[420]

If a challenge were asserted by the PSRC, the Port or another local jurisdiction to comprehensive plans adopted by a local municipality, such a challenge could be opposed by emphasizing that the Resolution approved by the PSRC Executive Board does not adopt or otherwise make construction of a third runway at SEA a certainty.[421] Rather, the Resolution merely preserves that action as one option for providing future air transportation capacity, an option that the PSRC could reject. Consequently, any planning or zoning action taken by the ACC Cities that was inconsistent with development of a third runway could not be construed as inconsistent with the Regional Transportation Plan or the Regional Airport System Plan because the third runway at SEA would not yet have been adopted as a component of the Puget Sound's future air transportation system.

Moreover, the GMA prohibition concerning plans or regulations that preclude the siting of airports should not be interpreted so broadly as to forbid all restrictions on airport construction and siting. The GMA expressly authorizes cities and counties to specify a

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[418] (...continued)
System Plan, and therefore refuse to certify the Cities' plans. Interlocal Agreement § VII(A)(5). An appeal by the ACC Cities would go to a panel of hearing examiners constituted of members of the PSRC Executive Board. The Port is not authorized to contest local comprehensive plans under the Interlocal Agreement, and thus any challenge it asserts must go directly to the Growth Hearings Planning Boards. RCW 36.70A.280-.300.

[419] Id. 36.70A.070(1), .020(12).

[420] Id. 36.70A.200(2).

[421] The GMA also provides that comprehensive plans and development regulations adopted by cities "are presumed valid upon adoption." Id. 36.70A.320. Moreover, a Growth Planning Hearings Board is required to find that a comprehensive plan complies with the GMA "unless it finds by a preponderance of the evidence" that a city erroneously has interpreted its obligations under the GMA. Id.

process by which essential facilities may be sited.[422] Thus, the statute explicitly contemplates that local jurisdictions will regulate airport siting, and it leaves to each respective planning jurisdiction the decision of how extensive such regulation may be.

Very little property owned by the Port for airport operations at SEA is located within the ACC Cities. Thus, actions potentially taken by the ACC Cities could be justified as not precluding the siting of an airport within their jurisdictional boundaries, but as ensuring that any airport operations near or in their jurisdiction were compatible with the unique characteristics of those cities.

In addition to supplementing its comprehensive plans and land use regulations, a local municipality also may have the ability to assert administrative and judicial challenges to adoption of the Executive Board Resolution by the General Assembly. The language of the GMA strongly suggests that any challenge to the General Assembly's adoption of the Resolution first must be pursued before the Growth Planning Hearings Board for the central Puget Sound region.[423] The pertinent statutory provision of the GMA -- section 36.70A.280 -- establishes the right of the Growth Planning Hearings Boards to hear petitions filed by interested parties contesting a state agency's, a county's or a city's compliance with the requirements of the GMA and the State Environmental Policy Act with respect to comprehensive plans and land use development regulations.[424] The GMA does not expressly define RCW 36.70A.280 as the exclusive means by which a party may seek appellate review concerning comprehensive plans, but neither does it elsewhere establish an alternative right to judicial review or a private right of action.[425] Thus, the ACC

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[422] Id. 36.70A.200(1).

[423] Id. 36.70A.280(1), (2).

[424] Id. 36.70A.280(1). Despite the statute's reference to petitions contesting the GMA compliance of state agencies, counties and cities, a challenge to the PSRC's compliance with the GMA would not be foreclosed. The PSRC in this instance represents the four-county central Puget Sound region, and its actions must be considered for purposes of this section of the GMA to be those of a county government.

[425] See Chapter 36.70A RCW.

Cities could have difficulty if they sought to contest General Assembly action without first having contested and lost an appeal to the Growth Planning Hearings Board.[426]

An appeal of the General Assembly's adoption of the Executive Board Resolution or similar resolution could be premised on several legal grounds. First, the General Assembly's decision could be contested as violating its obligation under the GMA to develop a Regional Transportation Plan that is consistent with city comprehensive plans.[427] To the extent that plans and land use regulations adopted by a municipality prior to April 29, 1993 (the date on which the General Assembly is expected to make its decision), establish priorities and protections that conflict with the continued consideration of a third runway at SEA, then the General Assembly's action approving such continued consideration would violate the GMA.

In addition, a resolution adopted by the General Assembly that fails explicitly to approve or disapprove a new runway for SEA could be contested for failure to provide useful direction to jurisdictions potentially affected by expansion of SEA, and thus for violating the GMA. If the PSRC General Assembly authorizes continued planning and analysis of both a new runway at SEA and a supplemental airport, a municipality would be given no certainty as to whether a runway would be built at SEA. This would impair its ability to plan for essential services that may or may not be necessitated by the development of new operational capacity at SEA. The GMA requires cities to "[e]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use

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[426] The GMA provides that appeals of the decisions of all three Growth Planning Hearings Boards are to be filed in Thurston County Superior Court. Id. 36.70A.300(2). A determination would have to be made concerning whether an appeal taken to the Thurston County court could be transferred to another county's superior court (e.g., King County Superior Court) for purposes of consolidating a GMA appeal with a pending related action asserting GMA, SEPA and other causes of action.

[427] Id. 47.80.030(1)(b). The State Environmental Policy Act would provide an additional potential basis for contesting a resolution adopted by the PSRC General Assembly because such action presumably would rely on the Flight Plan EIS, which has been identified as having a number of flaws. See, e.g., memorandum from Cutler & Stanfield to City of Normandy Park (Feb. 8, 1993) attached hereto as Appendix A and the complaint in City of Normandy Park, et al. v. Port of Seattle, et al, (King County Superior Ct. filed Feb. 16, 1993). A full discussion of the State Environmental Policy Act is provided in section IV.C.2, infra.

without decreasing current service levels below locally established minimum standards."[428] Adoption of a resolution similar to the one approved by the PSRC Executive Board would not allow cities in the vicinity of SEA to comply with the foregoing GMA section. Until a final decision is made on construction of a new runway at SEA, such cities lack an adequate basis for developing plans that would be compatible with significant increases in the numbers of passengers and aircraft using the airport.

(2) Challenges to General Assembly Adoption of a Different Resolution -- One That Adopts the Third Runway Without Any Preconditions

The General Assembly could decide to reject the resolution passed by the PSRC Executive Board and instead adopt a different resolution. If the resolution adopted by the General Assembly did not allow continued parallel consideration of a supplemental airport and the third runway, but instead made the development of a third runway an explicit component of the Regional Airport System Plan, a municipality would have opportunities similar to those discussed in section IV.A.4.a.(1), infra, for contesting that action.[429]

As discussed previously, the ACC Cities would lack authority to develop a comprehensive plan that forbids airport operations at SEA (both because of RCW 36.70A.200(2),[430] and because the airport does not lie within their boundaries). The Cities nevertheless possess the power to establish within their jurisdictional boundaries restrictions on new airport development or the siting of airport-related facilities or improvements. A legitimate basis could be established for such actions, including the need to protect the integrity of residential areas, to limit the exposure of their residents to detrimental environmental impacts, and to apply reasonable weight and/or capacity limits on its surface streets.

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[428] RCW 36.70A.020(12).

[429] Opportunities would be available to pursue administrative and judicial appeals of the General Assembly action, pursuant to the terms of the Interlocal Agreement and the GMA, as well as to develop local land use and regulatory requirements that affect airport and airport-related activities.

[430] Id. 36.70A.200(2) provides that comprehensive plans cannot preclude the siting of essential public facilities like airports.

The difficult question arises, however, as to the ability of a city to adopt municipal plans that restrict airport or airport-related activities subsequent to the passage of an amendment to the Regional Airport System Plan which expressly adopts a third runway at SEA. The implementation of local land use restrictions that affect the Port's planned third runway likely would conflict with the foregoing amended Regional Airport System Plan. Pursuant to the Interlocal Agreement creating the PSRC, the staff of the PSRC must determine whether the transportation elements of plans and regulations adopted by cities in the four-county region are consistent with the Regional Transportation Plan (and also the Regional Airport System Plan).[431/] If PSRC staff determine that local plans adopted after a General Assembly amendment to the Regional Airport System Plan conflict with the Regional Plan, then they must recommend the local plans not be certified.[432/] Without certification, the transportation elements of local plans cannot be implemented, or if they are, the lack of certification would make the implementing government subject to state sanctions under the GMA, including the loss of revenues allocated by the state.[433/]

The extent to which a local plan will be interpreted as being inconsistent with a county or regional plan is illustrated by a recent decision of the GMA Hearings Board for the central Puget Sound region. In that case,[434/] the Hearings Board sought to delineate the respective duties of county government vis-a-vis municipal government under the GMA. In considering the City of Snoqualmie's challenge to King County's comprehensive planning policies, the court reviewed the GMA's requirement for consistency between and among comprehensive plans:

> To achieve the consistency requirement of the GMA requires more than simply a coordination of the mechanics of process, but rather a substantive and directive relationship between the policies in the [Countywide Planning

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[431/] Interlocal Agreement § VII(A)(5).

[432/] An appeal of a staff denial of certification must be pursued with a panel of hearing examiners constituted of members of the PSRC Executive Board. Id.

[433/] See 36.70A.330-.340.

[434/] City of Snoqualmie v. King County, Case No. 92-3-0004, slip op. (Central Puget Sound Growth Planning Hearings Bd., Mar. 1, 1993).

> Policies] and the policies in the comprehensive plans of cities and counties. Therefore, the Board concludes that the effect of the [countywide planning policies] is both procedural and substantive.[435]

In reaching its conclusion -- that the GMA intended the countywide planning policies to provide substantive direction to city comprehensive plans the Board first had to address the statutory provision stating that nothing in the section dealing with countywide planning policies "shall be construed to alter the landuse powers of cities."[436] The Board decided that in the absence of a GMA definition of "land-use powers of cities," the phrase must refer to development regulations and controls, such as rights-of-way or street vacation, annexation and environmental review procedures.[437]

The Board determined that because nothing in the countywide planning policies section of the GMA may be construed to alter the land use powers of cities, countywide planning policies neither may create new land use powers nor diminish or change those that presently exist.[438] However, countywide planning policies do provide substantive direction to the comprehensive plans being developed by the cities, and another section of the GMA stipulates that cities must adopt development regulations consistent with their comprehensive plans.[439] Therefore, the Board concluded,

> the [countywide planning policies] are part of a hierarchy of substantive and directive policy. Direction flows first from the [countywide planning policies] to the comprehensive plans of cities and counties, which in turn provide substantive direction to the content of local land use regulations, which govern the exercise of local land use powers, including zoning, permitting and enforcement.[440]

Notwithstanding the GMA's requirement for consistency between comprehensive plans and development regulations, the Board stated that "great deference must still be

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[435] Id. at 15-16.

[436] RCW 36.70A.210(1).

[437] City of Snoqualmie, slip op. at 16.

[438] Id. at 17; RCW 36.70A.210(1).

[439] RCW 36.70A.120.

[440] City of Snoqualmie, slip op. at 17.

given to local prerogatives and choices under GMA. Policies within countywide planning policies that needlessly or excessively intrude upon local prerogatives can have no substantive effect."[441]

The Board concluded that the King County Countywide Planning Policies could confine office building development primarily to urban centers and to so-called activity areas not located in urban centers. The Countywide Planning Policies could not prevent, however, municipalities from expanding existing land area zoned for business and office parks.[442] The former restriction was found by the Board to be a legitimate regional issue that did not directly affect development regulations and was consistent with the GMA.[443] The latter restriction was characterized as illegally directing the establishment of development regulations and, therefore, as improperly infringing on the land use power of cities.[444]

The City of Snoqualmie decision provides a means for balancing the competing planning interests of county or regional governments and the local land use control interests of city governments. The Hearing Board's analysis could be used to reach decisions if conflicts were to arise between the PSRC's Regional Airport System Plan or other regional plans, and local comprehensive plans, zoning ordinances and land use regulations adopted by local municipalities.

b. Interaction Between the Port's Proposed Third Runway and Local Comprehensive Plans and Land Use Regulations

In the absence of definitive action by the PSRC General Assembly either to approve or disapprove construction of a third runway at SEA, a city would possess authority to use certain provisions of the GMA to establish conflicts between its comprehensive plans and local land use regulations and the Port's runway development plans.

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[441] Id. at 18.

[442] Id. at 28-29.

[443] Id. at 28.

[444] Id. at 29.

Recently adopted regulations under the GMA require that where essential public facilities (e.g., airports) are provided by a port district (or other special districts), the plans under which the port district operates must be consistent with the comprehensive plan of the city and county. "Cities and counties should adopt provisions for consultation to ensure that such districts exercise their powers in way [sic] that does not conflict with the relevant comprehensive plan."[445]

Thus, plans adopted by the Port for essential public facilities -- such as SEA -- must be consistent with the comprehensive plans of King County and certain neighboring cities.[446] It is unclear which cities would be covered by the consistency requirement. An argument can be made, however, that those cities whose land uses would be affected by development at SEA should be those to which this consistency requirement applies.

Additionally, plans developed and ordinances adopted by local cities could provide protections for wetlands and other critical areas[447] that are located in the vicinity of SEA.[448] These types of protections are among the more important elements of GMA comprehensive plans, and could be useful in restricting efforts by the Port to acquire or affect lands containing designated critical areas.[449]

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[445] WAC 365-195-340(2)(b)(iv).

[446] At a recent meeting of its Commission, the Port indicated that it is initiating an airport comprehensive plan. The Port anticipates that development of its plan for SEA will take approximately one year. Commission, Port of Seattle, Minutes of the Special Meeting (Feb. 20, 1993) at 5. Because the Port is not included among the jurisdictions required to prepare comprehensive plans under the GMA, it is uncertain whether the Port's proposed plan will be prepared pursuant to the GMA. Additional information should be obtained about the Port's planning activities so that the ACC Cities may learn whether an opportunity may exist for them to provide comments on and possibly contest a plan for SEA, as would be allowed under the GMA.

[447] In addition to wetlands, critical areas include (a) areas with a critical recharging effect on aquifers used for potable water; (b) fish and wildlife habitat conservation areas; (c) frequently flooded areas; and (d) geologically hazardous areas. RCW 36.70A.030(5); WAC 365-190-030(4).

[448] See RCW 36.70A.170.

[449] As discussed in section II, supra, the property proposed to be acquired by the Port appears to include two wetlands areas associated with Miller Creek, and could affect wetlands that discharge into Des Moines Creek. Thus, Normandy Park, Burien and Des Moines (through which the two creeks flow) could adopt land use regulations that invoke the GMA's critical areas protection requirements for constraining actions by the Port that would affect the protected areas.

The classification and designation of critical areas are intended to assure the long-term conservation of such lands and to preclude land uses and developments which are incompatible with critical areas.[450] Precluding incompatible uses and development does not imply a prohibition on all uses or development, but means that counties and cities must exercise control over changes in land uses, new activities or development that could adversely affect critical areas, and must prohibit clearly inappropriate activities and must restrict or condition other activities as appropriate.[451] "Counties and cities planning under the [GMA] should define a strategy for conserving natural resource lands and for protecting critical areas, and this strategy should integrate the use of innovative regulatory and nonregulatory techniques."[452]

The adoption of critical area protections in their comprehensive plans and land use regulations may enable a municipality to use GMA procedures to prevent the Port from proceeding with actions that are inconsistent with, or that would impair land uses protected by, that municipality's plans and regulations.

c. Interaction Between the City of SeaTac's Planning and Adjacent Jurisdictions

As a municipality within King County, the City of SeaTac is required under the GMA to develop a comprehensive plan and land use regulations pursuant thereto. In fact, SeaTac currently is in the midst of developing revised land use plans for a segment of its jurisdiction that includes the western portion of SEA.[453] SeaTac has under consideration two proposals to revise its land use plans for the West SeaTac Sub-area to adopt land use designations that would facilitate construction of a third runway at SEA. Normandy Park has submitted comments in opposition to these two proposals.[454]

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[450] WAC 365-190-020.

[451] Id.

[452] Id. 365-190-040(h).

[453] See City of SeaTac, Public Notice, West SeaTac Sub-area Plan Environmental Impact Statement (EIS) Scoping Hearing (Feb. 10, 1993) ("West SeaTac Sub-area Proposal"). The relevant portion of SeaTac has been designated the West SeaTac Sub-area.

[454] Id.

It appears that SeaTac's proposed redesignation of land uses for the West SeaTac Sub-area may violate that city's own zoning code. The two proposals that would allow runway development along the SEA's western boundary[455] fail to conform to SeaTac ordinances that mandate that wetlands and other sensitive land use areas be protected.[456] Both proposals provide for land use classifications of "airport buffer" and "business park" for lands clearly delineated on SeaTac's maps as containing class III wetlands and class II streams used by salmonids.[457] Consequently, SeaTac's land use proposals (as well as the runway development they would allow) would permit the elimination and/or alteration of streams and wetlands in that area. SeaTac's zoning code authorizes alterations to wetlands only if

- the wetland does not serve any of the valuable functions of wetlands identified in this Chapter including, but not limited to, biologic and hydrologic functions; or
- the proposed development will protect or enhance the wildlife habitat, natural drainage or other valuable functions of the wetland and will be consistent with the purposes of this Chapter.[458]

Furthermore, class II streams used by salmonids are required by SeaTac's zoning code to have 100-foot buffers on either side of the streambank, and the relocation or replacement of any such stream must maintain these 100-foot buffers.[459] It does not appear that SeaTac's two runway development land use proposals conform to the foregoing requirements. The inconsistency between SeaTac's proposals and its zoning ordinance could be raised when the City of SeaTac solicits public comment on the environmental

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[455] See West SeaTac Sub-area Proposal, Land Use Alternatives 1 and 2.

[456] See generally City of SeaTac, Wash., Zoning Code chapter 15.30, §§ 15.30.290-.360 (1992).

[457] Compare West SeaTac Sub-area Proposal, Land Use Alternatives 1 and 2 with City of SeaTac, Map of Wetland & Stream Classifications (1991).

[458] City of SeaTac, Wash., Zoning Code § 15.30.300(A). This section of SeaTac's zoning code also requires that the development proponent prepare "detailed studies" and recommend mitigation to offset the effects of its proposal. Id.

[459] Id. § 15.30.340(A)(2), (5).

impact statement which it has proposed to prepare under state law to review the West SeaTac Sub-area Plan proposals, and could form the basis for litigation challenging SeaTac's compliance with both the GMA and the State Environmental Policy Act.

SeaTac's neighboring jurisdictions will continue to have opportunities to provide comments on, and oppose if necessary, land use plans developed by SeaTac that would allow the Port to construct a new runway at SEA. Participation in the SeaTac planning process is important because the Port ultimately will have to demonstrate that its third runway proposal is consistent with SeaTac plans. Proving inconsistencies would be instrumental in demonstrating that a third runway at SEA violates the GMA.

B. Section 2208 of the Airport and Airway Improvement Act

The Airport and Airway Improvement Act ("AAIA")[460] contains numerous restrictions on the use of federal monies for airport improvement projects. One of its provisions -- section 2208(b)(1)(A) -- limits the use of federal monies to projects that are compatible with local land use plans.

Section 2208(b)(1)(A) provides in pertinent part that:

> (1) No project grant application may be approved by the Secretary unless the Secretary is satisfied that --
>
> > (A) the project is reasonably consistent with plans (existing at the time of approval of the project) of public agencies authorized by the State in which such airport is located to plan for the development of the area surrounding the airport and will contribute to the accomplishment of the purposes of this chapter. . . .[461]

This provision contains two important restrictions. First, an airport development project must contribute to the purposes of the AAIA which Congress has stated to be:

> [T]o encourage and promote the development of transportation systems embracing various modes of transportation in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective, the Secretary shall cooperate with State and local officials in the development of airport plans and programs which are formulated on the basis of overall transportation needs and coordinated with other

[460] 49 U.S.C. app. § 2201 et seq.

[461] Id. § 2208(b)(1)(A).

> transportation planning with due consideration to comprehensive long-range land-use and access plans and overall social, economic, environmental, system performance, and energy conservation goals and objectives.[462]

The second, more important restriction is that the project must be "reasonably consistent" with local land use plans. While this section potentially imposes a substantial limitation on airport projects, it has been invoked rarely as a meaningful restriction on airport development proponents. In fact, only one reported court case has cited this provision.

In Suburban O'Hare Comm'n v. Dole,[463] the Court upheld the Secretary of Transportation's finding that an airport expansion project was reasonably consistent with local development plans under section 2208(b)(1)(A).[464] The Court's conclusion was based upon a finding by "the Northeastern Illinois Planning Commission, a state agency overseeing planning for the area of the State in which [the airport] is located, [which] concluded that the proposed project was 'consistent with plans and policies of the Commission.'"[465]

Although the FAA has published no regulations implementing section 2208(b)(1)(A), an airport proprietor who applies for federal grant monies must sign a certificate, known as Applicant Assurances, asserting that its proposed project is consistent with applicable federal laws. Among other assurances, an applicant must assert that:

> The project is reasonably consistent with plans (existing at the time of submission of this application) of public agencies that are authorized by the State in which the project is located to plan for the development of the area surrounding the airport. For noise compatibility program projects, other than land acquisition, to be carried out on property not owned by the airport and over which property another public agency has land use control or authority, the sponsor shall obtain from each such agency a written declaration that

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[462] Id. § 2201(b).

[463] 787 F.2d 186 (7th Cir.), cert. denied, 479 U.S. 847 (1986).

[464] Id. at 199.

[465] Id.

such agency supports that project and the project is reasonably consistent with the agency's plans regarding the property.[466]

An airport proprietor's ability to provide this required assurance will depend upon the land use plans for the vicinity of the airport. If a local agency with land use planning authority recognized by the state does not support an airport expansion project, and its land use plans so indicate, an airport sponsor may not be able to provide the required assurance, and the Secretary of Transportation may not be able to comply with his statutory obligation to approve only projects "reasonably consistent" with such plans. With the proper preparation and documentation, section 2208(b)(1)(A) can be used as an effective tool for communities in influencing airport expansion in and around their territory.

The requirements of section 2208(b)(1)(A) appear to parallel closely many of the requirements of the GMA. To the extent that local, county or regional comprehensive plans restrict or preclude new runway construction at SEA, the FAA may be prohibited under section 2208(b)(1)(A) from authorizing federal funding for the runway project. To satisfy section 2208(b)(1)(A), therefore, the Port would have to assure the FAA that the project is consistent with plans of the PSRC, King County and perhaps other jurisdictions with comprehensive planning authority implicated by third runway construction.

If, as expected, the PSRC amends the Regional Airport System Plan to allow for the construction of a third runway at SEA, the Suburban O'Hare Comm'n case strongly suggests that the Port would be able to rely upon the Regional Airport System Plan as the basis for its required assurance under section 2208(b)(1)(A). Notwithstanding the Suburban O'Hare Comm'n case, however, no court has addressed the problem which arises when more than one governmental entity is "authorized by the state" to plan for the development of the area around an airport. That issue is important because, under the GMA, a strong argument could be made that not only the PSRC, but also the nearby cities have planning authority. Since it is likely that those agencies will adopt inconsistent plans "for the development of the area surrounding the airport," it is an open question whether the courts

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[466] U.S. Dep't of Transp., Fed. Aviation Admin., Order No. 5100.38A, Airport Improvement Program (AIP) Handbook (1989) App. 1, ¶ 6 ("Order 5100.38A).

would look exclusively to the PSRC or whether they would insist that the FAA and the Port have an obligation to ensure that third runway development is consistent with all potentially applicable local plans.[467]

C. National Environmental Policy Act - State Environmental Policy Act

The National Environmental Policy Act ("NEPA")[468] and Washington's State Environmental Policy Act ("SEPA")[469] each represent an effort by the federal and state government, respectively, to require agency decisionmaking to consider the environmental effects of government actions.

NEPA has been interpreted as an essentially procedural statute that imposes no substantive obligations on federal agencies and agency decisionmaking.[470]

In adopting SEPA, the Washington Legislature sought to model its legislation after the federal statute. The Washington Legislature went further than its federal counterpart, however, and included among the legislative purposes for SEPA the following provision, which has been cited by commentators and courts as investing SEPA with substantive requirements:

> The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.[471]

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[467] The FAA has consistently left to the airport proprietor the designation of the public agency from which it will obtain the required certification of consistency. Most proprietors, for obvious reasons, seek such certifications from the regional planning organization rather than from neighboring municipalities. The propriety of ignoring local municipalities is presently the subject of litigation in which this firm is counsel to the affected local governments. See City of Grapevine v. FAA, D.C. Cir. Docket No. 92-1151.

[468] 42 U.S.C. §§ 4321-70c.

[469] Chapter 43.21C RCW. The State Council on Environmental Policy has promulgated rules which elaborate on SEPA's requirements. See Chapter 197-11 WAC.

[470] See, e.g., Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

[471] RCW 43.21C.020(3). See, e.g., Richard L. Settle, The Washington State Environmental Policy Act, A Legal and Policy Analysis, § 18 (Supp. No. 2, Mar. 1991) ("Settle") at 221-22.

1. NEPA

a. Overview

NEPA[472] "declares a broad national commitment to protecting and promoting environmental quality."[473] By enacting NEPA, Congress recognized the critical importance of environmental concerns to the well-being and development of our nation and its citizens. Accordingly, NEPA mandates detailed study and consideration of the direct and indirect impacts of proposed projects and their alternatives, as well as the relationship of short-term projects to long-term productivity. This process is intended to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans."[474]

To implement this policy, NEPA directs that, to the fullest extent possible:

> [A]ll agencies of the Federal Government shall -
>
> . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[475]

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[472] 42 U.S.C. § 4321 et seq.

[473] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989) (citations omitted).

[474] 42 U.S.C. § 4331(a).

[475] Id. § 4332.

The detailed statement on the "environmental impact of the proposed action" has come to be known in law and in practice as an environmental impact statement, or EIS.[476]

The regulations of the Council on Environmental Quality ("CEQ")[477] and of the FAA[478] describe an EIS as "an action-forcing device to insure that the policies and goals . . . [of NEPA] are infused into the ongoing programs and actions of the Federal Government."[479] The CEQ and FAA Regulations state that an EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[480]

As the Supreme Court recently stated: "simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die is otherwise cast."[481]

The federal courts consistently have emphasized that the federal agency charged with preparing an EIS cannot discharge its responsibilities merely by speculating on -- or by deferring an analysis of -- the possible environmental impacts of a proposed project:[482]

> [T]he very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need

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[476] The remainder of this section discusses EIS requirements because the FAA would be required to prepare an EIS in order to approve federal funding for the Port's proposed third runway at SEA. See discussion in section III.A, supra.

[477] 40 C.F.R. § 1500 et seq.

[478] U.S. Dep't of Transp., Fed. Aviation Admin., Order No. 5050.4A, Airport Environmental Handbook (1985) ("Order 5050.4A"); U.S. Dep't of Transp., Fed. Aviation Admin., Order No. 1050.1D, Policies and Procedures for Considering Environmental Impacts (1986) ("Order 1050.1D").

[479] 40 C.F.R. § 1502.1; Order 5050.4A ¶ 71.

[480] 40 C.F.R. § 1502.1; Order 5050.4A ¶ 71.

[481] Methow Valley Citizens Council, 490 U.S. at 349 (citations omitted).

[482] Jones v. Gordon, 621 F. Supp. 7, 12-13 (D. Alaska 1985), aff'd in part, rev'd in part on other grounds, 792 F.2d 821 (9th Cir. 1986).

for such speculation by insuring that available data is gathered and analyzed prior to implementation of the proposed action.[483]

The requirement that the [EIS] be detailed places a heavy burden on government agencies to gather for and include in the impact statement enough information to show that compliance has been genuine, not perfunctory.[484]

While the agency can rely on studies already conducted to show the environmental effects . . . "[i]f no such additional information is available, then [the agency] must see to it that the necessary research is conducted."[485]123

[T]he completion of an adequate research program [is] a prerequisite to agency action . . . [NEPA] requires a diligent research effort, undertaken in good faith, which utilizes effective methods and reflects the current state of the art of relevant scientific discipline.[486]

CEQ and FAA Regulations require every EIS to consider the purpose of and need for the proposed project,[487] alternatives to the proposed action,[488] the environment affected by the proposed action,[489] and the environmental consequences of the proposed action and its alternatives.[490] In addition to these general requirements, FAA Regulations list a number of specific environmental impact areas that must be considered in the EIS, such as noise, induced socioeconomic impacts and land use.[491]

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[483] Foundation for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1179 (9th Cir. 1982).

[484] Brooks v. Volpe, 350 F. Supp. 269, 276 (W.D. Wash. 1972), aff'd per curiam, 487 F.2d 1344 (9th Cir. 1973).

[485] Rankin v. Coleman, 394 F. Supp. 647, 656 (E.D.N.C.) modified on other grounds, 401 F. Supp. 664 (1975) (quoting Brooks, 350 F. Supp. at 280).

[486] Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1403 (D.D.C. 1971).

[487] 40 C.F.R. § 1502.13; Order 5050.4A ¶ 82.

[488] 40 C.F.R. § 1502.14; Order 5050.4A ¶ 83.

[489] 40 C.F.R. § 1502.15; Order 5050.4A ¶ 84.

[490] 40 C.F.R. § 1502.16; Order 5050.4A ¶ 85.

[491] Order 5050.4A ¶ 85.

The FAA would be responsible for preparing the EIS that ultimately would be required prior to the agency's approval of the airport layout plan or federal funding for a new runway at SEA. Although it need not conduct a "crystal ball inquiry" into every remote impact of the proposed project on the environment, the FAA must identify all foreseeable environmental impacts,[492] and conduct the research necessary for a thorough evaluation of these impacts consistent with the exacting requirements of NEPA.

No federal funds may be authorized for the proposed airport expansion and no new airport layout plan may be approved until (1) the FAA has prepared and approved a final EIS; (2) the Environmental Protection Agency has published notice in the Federal Register of the availability of the final EIS to the public; and (3) thirty days have elapsed following such publication.[493]

b. Judicial Review of EIS Adequacy

An agency's decision on an EIS under NEPA, unlike many administrative decisions reviewed by the courts, is the result of an informal administrative proceeding in which interested parties do not have a full opportunity to present their case. The standard by which a court reviews such non-adjudicatory, quasi-legislative decisions is governed by the Supreme Court's decision in Citizens to Preserve Overton Park, Inc. (Overton Park) v. Volpe,[494] in which the Court established a three-step analysis for reviewing agency decisions which do not fall within the definition of a formal agency action under the Administrative Procedure Act.[495] A reviewing court must decide (1) whether the agency acted within the scope of its authority; (2) whether the agency followed the necessary

[492] Town of Huntington v. Marsh, 859 F.2d 1134, 1141 (2d Cir. 1988), cert. denied, 494 U.S. 1004 (1990) (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978)).

[493] 40 C.F.R. § 1506.10(b); Order 5050.4A ¶ 96h.

[494] 401 U.S. 402 (1971).

[495] 5 U.S.C. § 500 et seq.

procedural requirements; and (3) whether "the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[496]

Legal challenges to the adequacy of an EIS tend to focus on the scope of the EIS or the adequacy of its examination of the alternatives rather than the substance of the scientific discussion in the EIS.[497] As the Ninth Circuit has explained,

> an environmental impact statement should accomplish its purpose, which is both to provide decision makers with enough information to 'aid in the substantive decision whether to proceed with the project in light of its environmental consequence,' and to provide the public with information and an opportunity to participate in gathering information.[498]

The Court also explained that in order to be adequate, an EIS must examine "not every possible alternative, but every reasonable alternative."[499] Accordingly, the "existence of a viable but unexamined alternative renders an environmental impact statement inadequate."[500]

c. The EIS Scoping Process

The earliest, and arguably most critical, step in the process of developing an EIS is the determination of the document's proper subject matter and scope. This determination will establish the breadth and depth of all subsequent environmental analyses for the proposed action, and often will frame the issues for potential litigation challenging the EIS.

The CEQ and the FAA have described scoping as "an early and open process for determining the scope of issues to be addressed" in an EIS.[501] The purpose of the

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[496] Overton Park, 401 U.S. at 415-16; see also Sierra Club v. Sigler, 695 F.2d 957, 964 (5th Cir. 1983) (quoting 5 U.S.C. § 706(2)(A)).

[497] See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[498] Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1056 (9th Cir. 1985) (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1282-83 (9th Cir. 1974)).

[499] Id. at 1057 (emphasis added).

[500] Id.; see Texas Comm'n on Natural Resources v. Marsh, 741 F.2d 823, 824 (5th Cir. 1984).

[501] 40 C.F.R. § 1501.7; Order 5050.4A ¶ 74a.

scoping process is not to reach any conclusions as to the environmental desirability of a particular proposal. Rather, the goals of scoping are to

> identify the public and agency concerns; clearly define the environmental issues and alternatives to be examined in the EIS including the elimination of nonsignificant issues; identify related issues which originate from separate legislation, regulation, or Executive Order . . .; and identify state and local agency requirements which must be addressed.[502]

CEQ Regulations state that "[s]cope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement."[503] The regulations further explain that to determine the proper scope of an EIS three types of actions, three types of alternatives and three types of impacts must be considered:

> (a) Actions (other than unconnected single actions) which may be:
>
> (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.
>
> (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
>
> (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or

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[502] CEQ Memorandum on Implementation of NEPA Regulations, 48 Fed. Reg. 34,263 (1983), reprinted in, Env't Rep. (BNA) 41:2841 ("CEQ Memorandum").

[503] 40 C.F.R. § 1508.25; see also Order 5050.4A ¶ 74a.

reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative; (2) Other reasonable courses of actions; (3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) direct; (2) indirect; (3) cumulative.[504]

The CEQ has stated clearly that scoping is a critical element in the environmental process because of its potential to "have a profound positive effect on environmental analyses, on the impact statement process itself, and ultimately on decisionmaking."[505] Moreover, the FAA's own regulations recognize that "[s]coping is a major element" in the preparation of an adequate EIS.[506]

In determining the proper subject matter and scope for an EIS, an agency is required to consider the extent to which it may address cumulative actions and cumulative impacts. CEQ Regulations view cumulative, similar, or connected actions[507] as the cause of the environmental impacts which are to be reviewed in an EIS. The number and nature of cumulative, connected, or similar actions to be addressed will affect the complexity the EIS document, since the impacts of all these actions and their alternatives must be examined. Strategically, it is advantageous to force an EIS to become more detailed and complicated, because a complicated document is likely to reveal more data on environmental impacts and is likely to provide more fertile opportunities for later judicial challenge.

The terms "cumulative impact" or "indirect impact"[508] are used to refer to the effects of the federal action being reviewed in an EIS. While the presence of cumulative actions affects the breadth of an EIS, the presence of cumulative impacts establishes the depth of analysis required in the EIS.

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[504] 40 C.F.R. § 1508.25.

[505] CEQ Memorandum, Scoping Guidance (Apr. 30, 1981) 17 Envtl. L. Rep. 35,031.

[506] Order 5050.4A ¶ 74a.

[507] See 40 C.F.R. § 1508.25(a).

[508] See id. § 1508.25(c).

The appropriate scope of an EIS addressing the Port's proposed new runway at SEA will generate considerable controversy, given the fact that a programmatic EIS already has been prepared by the Port and the PSRC which evaluates regional air transportation alternatives. Under NEPA, a programmatic EIS is used when an agency engages in "tiering."[509]

The Port and FAA may argue that under this understanding of tiering, an EIS prepared for the Port's third runway proposal may focus on site-specific issues only, and not regional alternatives. The programmatic EIS prepared by the Port, however, was prepared under SEPA, which does not impose the same requirements for analysis of alternatives as is mandated for EIS's prepared by the FAA under NEPA. For example, the FAA uniquely is required to undertake analysis of all feasible and prudent alternatives that would not require the use of Section 4(f) properties, as well as other environmental issues mandated by FAA NEPA guidance. Nevertheless, NEPA and the CEQ Regulations require that the FAA consider the cumulative impacts of its decisions concerning a third runway at SEA. Consequently, the FAA would have to consider regional alternatives to new runway capacity at SEA in order to address the near certainty that an additional runway at SEA will be inadequate to provide a significant long-term increase in air transportation capacity for the Puget Sound region.

d. Purpose and Need

CEQ Regulations provide that a fundamental element of an EIS is a statement articulating the "underlying purpose" and the "need to which the agency is responding" in

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[509] CEQ Regulations explain the tiering process:

> Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review . . . . Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement by reference and shall concentrate on the issues specific to the subsequent action.

Id. § 1502.20.

the major federal action.[510] In this context, the terms "purpose" and "need" have different meanings. A "need" is the lack of something requisite, desirable, or useful or a condition requiring relief.[511] "Purpose" is defined as an object or end to be achieved.[512] Consequently, in the preparation of an EIS, the two terms are complementary, but distinct. The EIS discussion of purpose and need should demonstrate that the purpose of a proposed federal action is to satisfy at least part of the underlying need for the proposed action.

The statement of need should be an objective description of the reason that the project (not necessarily the federal action) is being pursued. An EIS must include alternative methods of satisfying the need, including any reasonable alternative means which lies outside the jurisdiction of the federal agency. An adequate discussion of alternatives will respond fully to the statement of need.[513] Most importantly, the underlying need for a federal action must be examined without regard to the agency's policy aims or statutory mission and especially without regard to the airport proprietor's desires.[514] Similarly, the statement of need cannot be defined with regard to the FAA's statutory mandate or its limited role in reviewing and approving plans for airport projects.

Defining the need for a project is critical because both the CEQ regulations and case law recognize that the statement of need defines the scope of alternatives in an EIS.[515]

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[510] Id. § 1502.13.

[511] Webster's Ninth New Collegiate Dictionary.

[512] Id.

[513] 40 C.F.R. § 1502.14; see also Natural Resources Defense Council v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972) (alternatives analysis must include reasonable actions to satisfy the need even if they lie beyond agency's jurisdiction).

[514] Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980). See also Concerned About Trident v. Rumsfeld, 555 F.2d 817, 831 n.2 (D.C. Cir. 1976) (an agency should produce an EIS that observes "objective reasonableness" when evaluating the "concept" behind the action).

[515] See Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1047 (1st Cir. 1982). See also City of New York v. United States Dep't of Transp., 715 F.2d 732, 743 (2d Cir. 1983), ("The scope of alternatives to be considered is a function of how narrowly or broadly one views the objective of an agency's proposed action."), cert. denied, 465 U.S. 1055 (1984); Trout Unlimited, 509 F.2d, at 1286 (alternatives must be "reasonably related" to statement of purpose).

In other words, the broader the statement of need, the greater the range of alternatives which the EIS must examine. An EIS is adequate only if it examines all reasonable alternative methods for meeting the need for the project.[516]

The statement of purpose performs a different function and follows from the statement of need. It is the tool for understanding why the federal agency has selected the preferred alternative from among the alternative ways of meeting the need. The statement of purpose further should explain how the proposed federal action satisfies the need and should justify the decision to choose the preferred alternative.

In the present case, the need for the proposed action is the provision of additional air transportation capacity to meet the long-term commercial aviation needs of the central Puget Sound region through at least 2020.[517] The statement of purpose in an EIS prepared by the FAA should explain if, and to what extent, the Port's proposal (the addition of a third runway at SEA) would satisfy that articulated need. Even more importantly, the statement of purpose in the EIS should provide the reader with the key for understanding which alternative has been selected as the preferred alternative and for understanding the relationship between the need for the project and the preferred alternative. The statement of purpose should explain the economic, political, legal, and -- most importantly -- environmental constraints and criteria which led to selection of the preferred alternative. The statement of purpose, furthermore, should articulate the rationale which led to the rejection of reasonable alternative means of meeting all or part of the need.

The statement of purpose is required to respond to the FAA's statutory mandate, the agency's regulations, and policy statements by the Administrator, Secretary of Transportation and other relevant federal officials.[518] Unlike the Port, the FAA has been directed by Congress to implement certain policy goals and objectives with respect to

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[516] See Citizens Against Burlington v. Busey, 938 F.2d 190 (D.C. Cir.), cert. denied, 112 S. Ct. 616 (1991).

[517] See, e.g., Flight Plan EIS at 1-2.

[518] For a list of relevant statutory obligations see Order 1050.1D ¶ 6.

funding for airport expansions under the Airport and Airway Improvement Act.[519] These goals and objectives are among the policy objectives and statutory responsibilities to which the FAA must look in identifying under NEPA the purpose of this project. The Airport and Airway Improvement Act mandates that the FAA give "special emphasis" to the development of reliever airports; declares that the national interest requires the FAA to develop integrated systems of airports in metropolitan areas; instructs the FAA to develop airports in small communities; directs that the FAA encourage competition in the commercial aviation industry; and requires that the FAA encourage the entry of air carriers into new markets.[520] A statement of purpose which does not specifically respond to the FAA's mandate is objectionable and subject to challenge.

e. Reasonable Alternatives

NEPA directs federal agencies to examine all environmental impacts of proposed projects, to develop and explore all reasonable alternatives to such actions, and analyze the potential environmental impacts of those alternatives.[521] The federal courts have emphasized that NEPA's purposes "are frustrated when consideration of alternatives and collateral effects is unreasonably constricted."[522] NEPA further directs federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action . . ." whenever the proposed action "involves unresolved conflicts concerning alternative uses of available resources."[523]

> Where the objective . . . of a major federal project can be achieved in one of two or more ways that will have differing impacts on the environment, the responsible agen[cy] is required to study, develop and describe each alternative for appropriate consideration.[524]

519/ 49 U.S.C. app. § 2201 et seq.

520/ Id.; see also id. § 1302.

521/ 42 U.S.C. § 4332.

522/ Greene County Planning Bd. v. Federal Power Comm'n, 559 F.2d 1227, 1232 (2d Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

523/ 42 U.S.C. § 4332(2)(E).

524/ Trinity Episcopal Sch. Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975).

As the Fifth Circuit has stated, NEPA

> was intended to emphasize . . . that all change was not progress and to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means . . . . [T]he District of Columbia Circuit [has] recognized that this section did not intend to limit an agency to consideration of only those alternatives that it could adopt or put into effect. We agree. The imperative directive is a thorough consideration of all appropriate methods of accomplishing the aim of the action, including those without the area of the agency's expertise and regulatory control as well as those within it.[525/]

Thus, the analysis of alternatives can be seen as "the heart of the environmental impact statement."[526/]

The importance of the alternatives analysis is heightened by the requirements of substantive federal and state environmental laws which prohibit federal actions that cause specific types of environmental damage if alternatives exist to the federal action.[527/] In examining alternatives, an agency may not eliminate alternatives because they do not achieve all of the articulated needs for the proposed project or because the agency does not have the authority to implement them.[528/] The FAA furthermore must be mindful of the obligations imposed upon the agency not only by NEPA, but also by substantive federal environmental laws.

Under NEPA, an alternative is reasonable if it is "practical and feasible from a technical and economical standpoint."[529/] An alternative, therefore, is reasonable if it

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525/ Environmental Defense Fund, Inc. v. United States Army Corps of Eng'rs, 492 F.2d 1123, 1135 (5th Cir. 1979) (citing Natural Resource Defense Council, 485 F.2d 827).

526/ 40 C.F.R. § 1502.14.

527/ See, e.g., discussion in section V.D., infra, concerning section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c).

528/ See Town of Matthews v. United States Dep't of Transp., 527 F. Supp. 1055, 1057 (W.D.N.C. 1981); Save the Niobrara River Ass'n v. Andrus, 483 F. Supp. 844, 861 (D. Neb. 1977); Rankin, 394 F. Supp. at 659.

529/ CEQ Questions and Answers on National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (1981), reprinted in Env't Rep. (BNA) 41:2701.

meets at least some of the needs that the proposed action is intended to serve.[530] The Seventh Circuit stated this principle succinctly by explaining that "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant [or Sponsor] can reach his goals."[531]

There are numerous reasonable alternatives which the law would require the FAA to examine in an EIS prepared for new runway construction at SEA. These include the construction of a new air carrier airport; different runway locations; different runway lengths and uses; the accelerated development of supplemental or reliever airports for either commercial or non-air carrier use; and the imposition of operational restrictions at SEA to limit growth of demand. It is legally essential that an EIS prepared by the FAA explore all reasonable alternatives to the Port's proposed runway, not only to satisfy the legal requirements of NEPA and other substantive environmental laws, but also to educate the public and the applicable government agencies about the range of actions which are available to satisfy the stated purpose and need and the costs and benefits associated with these options.

f. Recent Developments In NEPA Cases Concerning Airport Development

Although the procedural requirements of NEPA are complicated and subject to frequent judicial scrutiny, it is unusually difficult to challenge an EIS prepared by the FAA on an airport expansion project. There are two principal reasons for this difficulty. First, unlike actions by most federal agencies, actions by the FAA are subject to review exclusively in the federal courts of appeals.[532] Because they generally review cases from district courts or formal administrative adjudicatory proceedings, and not informal

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[530] Environmental Defense Fund, Inc., 492 F.2d 1123; Joseph v. Adams, 467 F. Supp. 141 (E.D. Mich. 1978).

[531] Van Abbema v. Fornell, 807 F.2d 633, 638 (7th Cir. 1986).

[532] 49 U.S.C. § 1486.

administrative actions, appellate courts are particularly unaccustomed to the review of highly fact-intensive decisions such as those challenging EISs prepared by the FAA.

Second, the FAA has had remarkable success in recent years in litigation challenging its compliance with NEPA. The agency's success rate is in part attributable to the deference which courts pay to the agency's expertise in aviation matters and to the technical nature of airport expansion disputes.

Recent judicial decisions illustrate the difficulty of challenging FAA action based upon an inadequate EIS. These cases, however, also provide a useful roadmap for potential litigants so that the record in an EIS case can best be designed to take advantage of the vulnerabilities which prior courts decisions have identified.

(1) Communities, Inc. v. Busey

In Communities, Inc. v. Busey,[533] the United States Court of Appeals for the Sixth Circuit found the EIS prepared by the FAA for the proposed expansion of Standiford Field in Louisville, Kentucky to be adequate. The expansion proposal reviewed in the EIS required a complete runway realignment at Standiford Field, principally to accommodate increasing air cargo demand at the airport.[534] This realignment shifted air traffic flow directly over historic neighborhoods, and required the buyout of several residential neighborhoods surrounding the airport. The proposed realignment also allowed the airport to accommodate additional nighttime air cargo operations, which could lead nearby residents to experience considerable sleep loss.

The Sixth Circuit rejected each of petitioners' arguments, instead affirming that the FAA had reasonably exercised its responsibilities under NEPA. One of the more significant issues rejected by the Court was petitioners' contention that NEPA required the FAA to supplement its standard L_{dn} cumulative noise analysis with alternative noise metrics that more accurately measure single-event noise levels.[535] The Court also affirmed the FAA's

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[533] 956 F.2d 619 (6th Cir.), cert. denied, 113 S. Ct. 408 (1992). See discussion in section IV.A., supra.

[534] The airport was to be reconfigured from two intersecting runways to two parallel runways.

[535] 956 F.2d at 624.

reliance on the L_{dn} contour of 65 dBA as a threshold for determining the significance of noise impacts.[536]

The Sixth Circuit's decision in Communities, Inc. provides several valuable lessons for future challenges to EISs prepared by the FAA. First, the Court emphasized the petitioners' failure to introduce factual evidence on alternatives to the proposal. There also was no factual evidence in the record as to how single-event noise levels could significantly affect land outside of the L_{dn} contour of 65 dBA. Had the petitioners presented such evidence demonstrating the infirmities of exclusive reliance on the L_{dn} metric to measure noise events, the disposition of the case may have been different.

Second, the Court correctly observed that no court ever has prohibited the FAA from relying upon the L_{dn} metric and the L_{dn} threshold of 65 dBA. That is because no court has yet addressed the issue squarely; neither is there any case holding the opposite. The petitioners in Communities, Inc. attacked the L_{dn} metric and 65 dBA L_{dn} threshold essentially as a legal matter, without introducing evidence that the FAA's noise analyses was inappropriate for the Louisville situation.

Third, the Court's opinion reflects its unfamiliarity with NEPA and noise issues. Along with incorrectly defining technical aspects of noise measurement,[537] the opinion fails to distinguish among the requirements for noise analysis in NEPA, section 4(f) of the Department of Transportation Act and the National Historic Preservation Act.[538] Therefore, those seeking to challenge FAA NEPA decisions should exercise great care in clearly distinguishing the different standards of review and essential elements mandated by NEPA and other substantive and procedural statutes.

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[536] Id.

[537] For example, the Court inaccurately explained the L_{dn} metric as "adding up all the sound exposure during the daytime . . . plus 10 times the sound exposure occurring during the nighttime and averaging this total sum by the number of seconds during a 24-hour day." Id. at 623.

[538] Id. at 624.

(2) Other Recent Decisions

Several other decisions further illustrate what appears to be a growing trend of courts to defer to agency decisionmaking concerning NEPA. Despite the outcomes in these cases, NEPA remains a fertile area for judicial challenges to airport development, both as a strategic device for seeking concessions from an opponent, and as a procedural means for requiring airport proprietors to address more completely the myriad environmental consequences of their airport expansions.

In Seattle Community Council Fed'n v. FAA,[539] the Ninth Circuit heard a community group's challenge to the FAA's determination that the Four Post Plan would not significantly affect the environment. The Court simply chose not to question the FAA's discretion in limiting its noise measurement and impact analysis to the L_{dn} metric and its impact analysis to the area within the L_{dn} contour of 65 dBA. The Court also agreed with the FAA's determination that the proposal did not warrant the production of new contours by relying on two FAA-created assumptions: that aircraft flying above 3,000 feet do not create significant ground-level impacts and that there are no significant noise impacts outside of the L_{dn} contour of 65 dBA. Finally, the Court supported the FAA's failure to investigate significant cumulative and indirect environmental impacts of the proposal, concluding that because the anticipated growth in air traffic was expected to occur regardless of the proposal, the FAA did not have to examine the impacts that would result from the increased air traffic.

In Cottonwood Grove Dev. Corp. v. FAA,[540] a community group challenged the FAA's Record of Decision ("ROD") approving an EIS by alleging that (1) the FAA had failed in the EIS and ROD to discuss mitigation measures to minimize the environmental impacts of the proposal; (2) the EIS and ROD had failed to consider significant environmental impacts, including noise and air quality, and had failed to respond in good faith to public comments concerning these subjects; and (3) that the FAA had used the NEPA process as

[539] 961 F.2d 829 (9th Cir. 1992).

[540] 952 F.2d 409 (10th Cir. 1992) (citations are to slip opinion, Case No. 90-9556, 1992 U.S. App. LEXIS 733 (10th Cir. Jan. 13, 1992)).

an "after-the-fact justification of a decision already made" by failing to consider fairly several alternatives to the proposal.[541] In a brief, unpublished opinion, the Tenth Circuit rejected all three of these claims with little explanation. The Court did not address the petitioners' allegations regarding the fact that the entire EIS process was a post-hoc justification for a previously made decision. Further, it relied on the sheer number of alternatives studied by the FAA to uphold the adequacy of the EIS alternatives analysis, without considering whether the agency failed to address any reasonable additional alternatives. Thus, the decision in Cottonwood Grove Dev. Corp. does not add significantly to the existing law concerning the FAA's duty to study the impacts of airport expansion proposals.

In North Carolina v. FAA,[542] the State of North Carolina challenged a final rule promulgated by the FAA that revoked, realigned and established restricted airspace pursuant to a request by the U.S. Navy. North Carolina argued that the FAA had failed to examine independently the cumulative impacts of existing and proposed restrictions on airspace and had failed to prepare an EIS reflecting this examination.

Under somewhat unusual circumstances,[543] the Court concluded that the FAA was not required to examine the cumulative impacts of the FAA's action on behalf of the Navy, at least in part because the FAA's action could be revoked subsequently if unreasonable environmental consequences were uncovered in subsequent NEPA reviews of North Carolina restricted airspace.[544] The Court also affirmed the FAA's reliance on an earlier

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[541] 1992 U.S. App. LEXIS 733 at *2.

[542] 957 F.2d 1125 (4th Cir. 1992).

[543] The FAA's proposed assignment of restricted airspace for the Navy was but one of several pending actions by the federal government (others had been initiated by the Marine Corps and the U.S. Air Force) that would modify or increase the amount of restricted airspace over eastern North Carolina. Id. at 1131. An EIS reviewing the Marine Corps' proposal apparently was slated to address the cumulative impacts of restricting airspace over the eastern portion of the state. Id.

[544] Id.

Navy-prepared environmental assessment as the basis for the FAA's own Finding of No Significant Impact.[545]

It is clear from the deference accorded by the Fourth Circuit to the FAA in this case that a prospective petitioner must be careful to support its arguments fully with comprehensive legal arguments and independent factual data if it wishes to pierce the veil of agency discretion. This opinion also shows the willingness of courts to limit the scope of cumulative impacts and actions that an agency must consider in its examination of a project pursuant to NEPA. To overcome this tendency towards agency deference, a petitioner must be prepared to present clearly and thoroughly both the legal and factual bases for requiring the FAA to examine all potentially significant cumulative and connected actions and impacts of a proposal.

The preceding court decisions emphasize the difficulty of challenging any action by the FAA approving airport development and airspace reconfiguration proposals. They do not, however, foreclose the success of such challenges. In fact, these decisions illuminate the elements required to mount a successful challenge, especially by identifying the need to prepare a thorough record for the agency and the court, that demonstrates the infirmities in the FAA environmental impact analysis.

2. SEPA

Similarly to NEPA, SEPA requires governmental agencies within Washington to prepare a "detailed statement" or EIS, analyzing, among other things, the environmental impacts of recommendations, proposals and other major actions "significantly affecting the quality of the environment."[546] This requirement is applicable not only to <u>state</u> agencies, but also to municipalities, counties, port districts and other political subdivisions of the

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[545] Id. at 1130.

[546] See RCW 43.21C.030(2)(c).

State.[547] Furthermore, all state and local agencies are required to adopt their own regulations implementing SEPA's requirements.[548]

SEPA imposes both procedural and substantive obligations on state and local agencies. An agency must comply with the statute's procedural provisions, such as soliciting and responding to public comments on draft EISs and undertaking adequate analysis of environmental impacts of its proposed actions.[549] It also may be required to comply substantively with SEPA by undertaking mitigation for proposed actions, or by rejecting permit applications for proposed projects that would cause adverse environmental impacts that cannot be reasonably mitigated.[550]

To exercise its authority to reject or condition a development proposal on SEPA grounds, a local jurisdiction must comply with SEPA's formalities.[551] These formalities increasingly are being strictly construed by Washington courts.[552] An agency must have incorporated into its regulations, plans or SEPA policies that serve as a basis for the agency decision to deny or condition a permit.[553] Mitigation measures required as a condition of permit approval must be "reasonable and capable of being accomplished,"[554] and shall

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[547] Id. 43.21C.030(2). Actions taken by municipalities and port districts that may trigger compliance with SEPA include the adoption of comprehensive plans and zoning ordinances. See WAC 197-11-704(2)(b)(ii).

[548] These agency regulations must be consistent with the state-adopted SEPA Rules found at Chapter 197-11 WAC. See id. 197-11-020(1). The PSRC and the Port each have adopted regulations satisfying this requirement, as have Normandy Park, Des Moines, and Tukwila. Burien anticipates adopting final SEPA regulations.

[549] See, e.g., id. 197-11-402, -408.

[550] RCW 43.21C.060; WAC 197-11-660.

[551] See RCW 43.21C.060; WAC 197.11.660, .902(1), (2).

[552] See, e.g., Maranatha Mining v. Pierce County, 801 P.2d 985 (Wash. 1990) (overturning county council's denial of permit application for gravel mine and asphalt plant on grounds that council had provided no legal support for its denial); Levine v. Jefferson County, 772 P.2d 528 (Wash. Ct. App. 1989) (invalidating condition imposed by county on building permit for lumber mill), aff'd, 807 P.2d 363 (Wash. 1991); see also Settle § 6 at 37-38.

[553] RCW 43.21C.060.

[554] Id.; WAC 197-11-660(1)(b).

be "related to specific, adverse environmental impacts clearly identified" in writing by the agency decision-maker.[555] A decision to deny a requested permit may be made only upon a finding that:

- The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement . . . ; and
- [R]easonable mitigation measures are insufficient to mitigate the identified impact.[556]

With respect to procedural review under SEPA,[557] the statute allows for the preparation of EISs on specific projects as well as on broader programs that do not contemplate a specific government action. The EIS prepared for the Flight Plan Project by the Port and the PSRC is an example of a "programmatic or "nonproject" EIS.[558] Nonproject EISs are prepared pursuant to "phased review," under which "[b]roader environmental documents may be followed by narrower documents . . . that incorporate prior general discussion by reference and concentrate solely on the issues specific to that part of the proposal."[559]

By definition, the level and detail of analysis required for a nonproject EIS is less than that for a project-specific EIS.[560] A nonproject EIS is required to analyze the environmental impacts of "alternative means of accomplishing a stated objective," with such

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[555] WAC 197-11-660(1)(b).

[556] RCW 43.21C.060; WAC 197-11-660(1)(f).

[557] SEPA's procedural review requirements are fairly similar to those discussed more fully below with respect to NEPA.

[558] Compare WAC 197-11-774 ("'Nonproject' means actions which are different or broader than a single site specific project, such as plans, policies, and programs.") with WAC 197-11-704(2)(a) ("A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area.").

[559] Id. 197-11-060(5)(b).

[560] See id. 197-11-442 (specifying content requirements for nonproject EISs). In preparing nonproject EISs, an agency "shall have more flexibility . . . because there is normally less detailed information available on [a program or policy's] environmental impacts and on any subsequent project proposals." Id.

analysis being "limited to a general discussion of the impacts of alternate proposals."[561] The limited content and analytical requirements imposed on nonproject EISs help explain why judicial challenges to those types of EISs appear to be more difficult to win.[562]

Nevertheless, because a programmatic or nonproject EIS provides the basis for, and will limit the scope of, any subsequent site-specific EIS, judicial review of the nonproject EIS often is advisable. The SEPA rules address this specific point:

> When a project . . . is consistent with the approved nonproject action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the nonproject EIS. The scope shall be limited accordingly.[563]

Since a site-specific EIS may rely upon the scope of alternatives which has been examined in the prior nonproject EIS, any challenge to the range of alternatives under consideration should best be brought against the nonproject EIS.[564]

The Washington Legislature has authorized judicial review of EISs prepared pursuant to SEPA, and in so doing has imposed certain timing requirements for obtaining review.[565] If a governmental agency has issued a "Notice of Action,"[566] and the underlying agency action is not subject to its own statute of limitations, then a party must file its appeal within either thirty or ninety days of the last publication date of the Notice of Action.[567]

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[561] Id. 197-11-442(2), (4).

[562] See, e.g., Cathcart-Maltby-Clearview Community Council v. Snohomish County, 634 P.2d 853 (Wash. 1981) (finding to be adequate an EIS which identified the potential impacts of proposed rezoning amendment and provided a framework for further EIS preparation).

[563] WAC 197-11-443(2) (emphasis added).

[564] This was one of the principal reasons that the ACC, Normandy Park, Des Moines, Burien and Tukwila filed suit in King County Superior Court to challenge the Flight Plan Project EIS. See Appendix A.

[565] See, e.g., RCW 43.21C.075, .080; WAC 197-11-680.

[566] Governmental agencies taking action under SEPA may trigger a limited judicial review period in issuing a Notice of Action. RCW 43.21C.080.

[567] See RCW 43.21C.080(2)(a), .075(5). Judicial review pursuant a Notice of Action by governmental agencies concerning private proposals are subject to a thirty day appeal period. A lawsuit challenging a project to be performed by a governmental agency must be filed within ninety days.

The failure to challenge a governmental action, and an EIS prepared in support thereof, within the time specified by SEPA precludes all later attempts to overturn that action on SEPA grounds.[568] Furthermore, SEPA challenges to subsequent governmental actions on the same proposal are prohibited, unless (a) the proposal changes substantially between the date of the first governmental action and the later action, or (b) the EIS analyzing the first governmental action specifies that the action will require further environmental evaluation.[569]

3. The NEPA/SEPA Process for the Port's Proposed Third Runway at SEA

The parallel procedural requirements of NEPA and SEPA make it difficult to determine definitively how the Port and/or the FAA plan to develop environmental documentation to comply with those statutes. The Port already has announced that it plans to prepare a site-specific EIS to satisfy both NEPA's and SEPA's requirements for its proposed third runway project at SEA.[570] The Port noted that its preparation of an EIS will be coordinated with the FAA, reflecting the fact that FAA approval ultimately would be required prior to construction of a new runway at the airport.

The FAA would face its own independent obligation to prepare an EIS satisfying NEPA's requirements if it were to provide federal funding for a third runway at SEA before the Port obtains approval of an airport layout plan.[571] The FAA has not yet announced any plan to prepare an EIS.

A possible solution to the potential duplicate effort would be for the Port and the FAA to develop a memorandum of understanding under which they jointly would prepare an EIS to satisfy their respective obligations under SEPA and NEPA, perhaps as joint lead agencies. Alternatively, the Port could proceed with preparation of a draft and final site-specific EIS for a new runway project to comply with SEPA. The FAA then could adopt in

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[568] Id. 43.21C.080(2)(a).

[569] Id.

[570] See, e.g., Seattle, Wash., Port Commission, Res. No. 3125 (Nov. 3, 1992) § 1(b).

[571] See discussion in section III.A, supra.

toto the analysis prepared by the Port, supplementing the Port's analysis with whatever additional studies would be required under NEPA and the FAA's NEPA Regulations. At the completion of its supplemental analysis, the FAA would prepare draft and final EISs.

There are likely problems with either approach, given the sometimes identical, and sometimes dissimilar procedural requirements of NEPA and SEPA. Furthermore, while the Port appears to have authority to rely on the nonproject EIS for the Flight Plan Project as a basis for narrowing the scope of its site-specific EIS under SEPA, the FAA may be unable to do so. At most, the FAA could adopt the nonproject EIS by reference (much as it may adopt by reference environmental assessments and technical studies prepared by other federal agencies) and rely upon its analysis of alternatives for adding air transportation capacity to the Puget Sound region. The FAA arguably still would be required to conduct its own assessment of regional alternatives, however, as well as other mandatory NEPA EIS components not necessarily addressed in the Port's EIS.

(a) Scoping

The ACC's first opportunity to participate in the Port's and/or FAA's actions under NEPA and SEPA will be to submit comments during the scoping process. The scoping process begins with the Port's and/or FAA's publication of a notice of intent to prepare an EIS, which would describe the expected scope of the EIS. The comment period during the scoping process normally lasts between 30-60 days.

(b) Publication of and Comments on the EIS

Publication of a draft EIS would follow the conclusion of the scoping process by at least a month, and by as much as a year or more.[572/] Upon publication of a draft EIS, the ACC and other members of the public would be given at least 45-60 days to analyze the document and prepare detailed legal and technical comments with the assistance of experts.

[572/] In several recent controversial airport development projects, including the expansion of Dallas/Fort Worth International Airport, Phoenix Sky Harbor International Airport and Lambert St. Louis International Airport, the FAA has not released the draft EIS until more than a year after the close of the scoping comment period.

(c) Post-draft EIS Considerations

After the close of the comment period on the draft EIS, the FAA an.. would revise the document, if appropriate, and republish the document with revisions a.. responses to comments as a final EIS. Publication of the final EIS would follow the close of the comment period on the draft EIS by at least a month, but could follow by as long as a year. The publication of a final EIS by the FAA would be followed shortly by the agency's publication of a Record of Decision ("ROD"), which would constitute its approval of both the final EIS and the Port's proposal. Upon publication of the ROD, any interested party would have 60 days in which to seek judicial review of the final EIS (under federal law or 90 days in which to seek judicial review under state law if the EIS is prepared jointly with the Port.

V. SUBSTANTIVE ENVIRONMENTAL PROTECTION REQUIREMENTS

A. Federal and State Air Quality Protection

The federal Clean Air Act ("CAA"), as amended,[573] seeks to remedy the nation's air quality problems by regulating airborne emissions of pollutants. One of the CAA's primary means for regulating airborne pollutants has been the establishment of national ambient air quality standards.[574] In addition, the CAA imposes specific emission requirements for a variety of emission sources, including transportation projects, and comprehensively regulates the emissions of hazardous pollutants.[575] Amendments adopted in 1990 to the CAA have strengthened the requirements for attaining national ambient air quality standards, making it more difficult to implement new, or modify old, air pollution sources in areas not in attainment with the national ambient air quality standards. To implement the proposed expansion program at SEA, the Port would have to comply with these requirements.

The U.S. Environmental Protection Agency ("EPA") has established national ambient air quality standards for several pollutants regulated by the CAA.[576] Each of the 50 states, through EPA-approved state implementation plans, is required to adopt measures necessary to attain the national ambient air quality standards within its borders.[577] The State of Washington has received EPA approval for its state implementation plan, and for

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[573] 42 U.S.C. § 7401 et seq.

[574] See id. § 7409.

[575] See, e.g., id. § 7411 (new sources); id. § 7412 (hazardous air pollutants); id. §§ 7521-54 (motor vehicle sources); id. §§ 7571-74 (aircraft sources).

[576] See 40 C.F.R. Part 50. National ambient air quality standards have been established for sulfur dioxide (SO_2), id. § 50.5; particulate matter (PM_{10}), id. § 50.6; carbon monoxide (CO), id. § 50.9; ozone, id. § 50.8; nitrogen dioxide (NO_2), id. § 50.11 and lead, id. § 50.12.

[577] 42 U.S.C. § 7410.

several subsequent revisions that sets forth strategies for bringing areas of the state into attainment with national ambient air quality standards.[578]

Pursuant to the CAA, and its own Clean Air Act,[579] Washington has authorized the Puget Sound Air Pollution Control Agency ("PSAPCA"), a multicounty authority for King, Kitsap, Pierce and Snohomish Counties, to implement the requirements of the federal and state statutes on a regional basis.[580] The PSAPCA works with the Washington Department of Ecology (the agency that administers the state Clean Air Act) to ensure compliance with state and federal clean air requirements, and to develop local measures for attaining national ambient air quality standards.

Portions of King County in the vicinity of SEA currently are classified as failing to attain national ambient air quality standards for ozone, CO and PM_{10}.[581] The Port's property at SEA, however, lies just outside the nonattainment area for PM_{10}, and consequently SEA is located in a nonattainment area only for ozone and CO. Nonetheless, there are several provisions of the CAA with which the Port must comply in order to construct a third runway at SEA. The Port additionally would be required to fulfill registration and other regulatory requirements of the Washington Clean Air Act.

The CAA and the Washington Clean Air Act each raise significant issues that, unless satisfactorily resolved by the Port, would present obstacles to the Port's plans to construct a third runway at SEA. Although the Port's compliance with air quality requirements will be determined by the Washington Department of Ecology, the PSAPCA and the FAA, the ACC will have an opportunity to participate in these agencies' decisionmaking by submitting comments at appropriate times, and ultimately, by seeking judicial review of the

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578/ See, e.g., Envtl. Protection Agency, Approval and Promulgation of State Implementation Plan; Washington, Final Rule, 49 Fed. Reg. 27,750 (1984); Envtl. Protection Agency, Approval and Promulgation of Implementation Plans; Revision to Washington State Implementation Plan, Final Rule, 48 Fed. Reg. 8273 (1983); Envtl. Protection Agency, Approval and Promulgation of Implementation Plan Revisions; Washington, Final Rule, 46 Fed. Reg. 45,607 (1981).

579/ Chapter 70.94 RCW.

580/ See id. 70.94.053.

581/ 56 Fed. Reg. 56,694, 56,846-848 (1991); 57 Fed. Reg. 56,762, 56,777 (1992).

Port's proposal if it fails to address adequately, or comply with, air quality protection requirements.

1. Section 176(c)

One of the CAA's more significant provisions -- section 176(c) -- prohibits federal agencies from approving any activity which fails to conform to an approved state implementation plan.[582] The 1990 Amendments to the CAA modified section 176 to impose tough new responsibilities on federal agencies to assist states in achieving the national ambient air quality standards. Recognizing the difficult task facing states, Congress strengthened the so-called conformity requirement in the 1990 Clean Air Act Amendments to ensure that federal agencies do not take or support activities which are inconsistent with achieving air standards or fail to take opportunities to assist states in their efforts for cleaner air.

The 1990 Amendments broaden what is meant by conformity to a state implementation plan by clarifying that federal actions must conform not only with the letter of a state implementation plan, but also with the "purpose" of such a plan.[583] The purpose of a state implementation plan is timely attainment of the national ambient air quality standards.[584]

The new conformity requirement, section 176(c)(1) of the Clean Air Act, as amended,[585] provides:

> No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization . . . shall give its approval to any project, program, or plan which does not conform to an implementation plan. . . . The assurance of conformity to such an

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[582] 42 U.S.C. § 7506.

[583] Id. § 7506(c)(1)

[584] Id. § 7410

[585] Id. § 7506(c)(1).

implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality.[586]

The statute defines "conformity to an implementation plan" to mean:

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not --

(i) cause or contribute to any new violation of any standard in any area; or

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.[587]

Section 176(c)(1) also states that the assurance of conformity shall be "an affirmative responsibility" of the federal agency supporting or approving the activity.[588]

Under the conformity requirement, a federal agency must fully evaluate air quality impacts before supporting in any way a proposed activity and affirmatively find that the activity will not delay timely attainment of the national ambient air quality standards. If the activity does not conform with the purpose of a state implementation plan, the federal agency must implement measures to mitigate the air quality impacts.

Federal funding of airport projects clearly triggers the compliance obligations of section 176(c)(1) of the Clean Air Act.[589] Consequently, this statute would require the

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[586] Id. § 7506(c)(1).

[587] Id. § 7506(c)(1)(A).

[588] Id. § 7506(c)(1).

[589] See id. ("No department, agency or instrumentality of the Federal Government shall . . . provide financial assistance for . . . any activity which does not conform to an implementation plan . . . ."). See also Order 5050.4A ¶ 47e(5)(a) ("It is FAA's responsibility to assure that Federal airport actions conform to state plans for controlling areawide air pollution impacts.").

Port and the FAA to assure that increasing the aviation capacity of SEA by constructing a third runway (and enabling the airport to handle thousands of more aircraft operations per year), would not exacerbate current violations or cause any new violations of the national ambient air quality standards in the Seattle-Tacoma area.

There is no question that the Flight Plan EIS and other documentation prepared in connection with the proposed expansion of SEA contemplate a considerable increase in aircraft operations at SEA. It also is clear that the third runway is designed to accommodate this increased demand. Although it may be intuitively obvious that a third runway would contribute to increased aircraft activity at SEA, this is not the position taken by airport proprietors in other cities. Other airport proprietors have taken the position that airport expansion programs do not contribute to an increase in air traffic (and thereby increase air pollution) under the theory that the traffic will come regardless of the expansion. This theory postulates that aircraft operations would continue to increase without the expansion and that the expansion actually would <u>decrease</u> the regional air pollution burden because the project would help reduce the time that aircraft engines are idling on taxiways. This position has not been tested in court.

The FAA has identified several obligations it must fulfill with respect to section 176(c).[590] Prior to taking any action on the proposed construction of a third runway at SEA (e.g., approval of federal funding, approval of a revised airport layout plan), the FAA first must assure that its actions "conform to state plans for controlling areawide air pollution impacts."[591] The FAA further must require that the Port take all necessary actions to minimize adverse air quality effects.[592]

Section 176(c)(1) also provides that the assurance of conformity shall be "an affirmative responsibility" of the federal agency supporting the activity.[593] While not

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[590] Order 5050.4A ¶ 47e(5).

[591] <u>Id.</u> ¶ 47C(5)(a).

[592] <u>Id.</u> ¶ 47e(5)(d).

[593] 42 U.S.C. § 7506(c)(1).

expressly stated in the statute, such a duty arguably requires the agency to investigate or verify the air quality impacts of its federal activity independently. FAA guidance recognizes this requirement, and specifies that for projects at large airports, the FAA is required to prepare an emissions inventory for the existing airport conditions, as well as forecasts for future conditions with and without the proposed project.[594] The FAA also may be required to conduct dispersion modelling for carbon monoxide if the proposed project would fail to conform with the state implementation plan or would have potential for exceeding national ambient air quality standards.[595]

The new section 176(c) conformity requirements do not specify what actions the supporting federal agency must take if it determines that the activity does not conform with the purpose of the state implementation plan. A literal reading of the section 176(c)(1) of the CAA seems to forbid continued support by the agency, which in this case would mean that the FAA could approve neither federal funding for the new runway at SEA, nor revisions to the Port's airport layout plan for SEA.

EPA currently is working on a guidance document and/or draft regulations to assist federal agencies in determining conformity under the Clean Air Act. EPA has not yet issued official or draft guidance pursuant to the Clean Air Act Amendments, but a "predecisional" draft working document has been obtained and reviewed.[596] EPA's predecisional material indicates that actions initially deemed to fail the CAA's conformity requirement nonetheless may be approved if certain mitigation measures are taken to remedy the nonconforming status. According to EPA's predecisional draft, therefore, if the FAA were to determine that construction of the Port's proposed third runway would not conform to the Washington state implementation plan, it could require the Port to modify the proposed

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[594] Order 5050.4A ¶ 47e(5)(c)(4). The airport must handle more than 1.3 million passengers annually, and have in excess of 180,000 aircraft operations. Id.

[595] Id. ¶ 85e(2).

[596] See U.S. Envtl. Protection Agency, Draft Guidance (Nov. 18, 1992). The EPA predecisional draft guidance concerning the general conformity regulations are literally "drafts" of future draft regulations. As such, they are almost certain to change before promulgation of a final and binding guidance. They are, therefore, only helpful as an early indication of EPA thinking, but should not be relied upon as EPA policy.

design of the project or otherwise implement mitigation measures to alleviate air quality concerns, or else refuse to provide federal funding and approval for the project.[597]

2. Air Toxics

The CAA also closely regulates the emission of hazardous air pollutants commonly called "air toxics."[598] As recently amended by Congress, the CAA requires the EPA to determine emission standards for 189 specific air toxics, and to require the maximum degree of reduction deemed achievable for the emission by new sources of such toxics.[599] For existing sources of air emissions, EPA's toxic standards may be slightly less stringent and are to be tied to the average emissions of the best performing 12 percent of existing sources.[600]

It is not clear if the proposed runway project at SEA would result in the emission of any air toxics. It is possible, however, that toxics could be released into the air during construction of a new runway, perhaps as contaminated facilities are demolished or contaminated soils are disturbed. Additionally, emissions of airborne toxic pollutants from the airport may increase because of volatilization from the greater volumes of industrial wastewater and stormwater that will be generated by additional operations at SEA. If the new runway project would result in the release of such toxins into the air, the CAA's emission requirements could present a significant obstacle for the Port's implementation of its proposal.

3. Asbestos

Until the mid-1970s, asbestos was used extensively in building construction for fireproofing, soundproofing and heating and cooling system applications. The inhalation of even small quantities of asbestos fibers has been linked to serious lung disorders, including asbestosis, lung cancer and mesothelioma.

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[597] Id. at 44.

[598] 42 U.S.C. § 7412(b).

[599] Id. § 7412(d)(2).

[600] Id. § 7412(d)(3).

The Port's proposed construction of a third runway at SEA is anticipated to require the demolition of a number of structures west of the current airport boundary. Given the age of these structures, it is likely that many could contain asbestos materials.

EPA has promulgated a emission standards for asbestos handling and removal activities[601] pursuant to Section 112 of the CAA.[602] These standards impose detailed requirements upon the "owner or operator" of a "demolition"[603] or "renovation"[604] operation at any "facility."[605] The owner or operator must follow prescribed asbestos removal procedures designed to prevent the discharge to the ambient air of particulate asbestos material.[606] The owner or operator must comply with specified procedures for the collection, packaging, labeling, transportation and disposal of asbestos-containing waste materials generated during the demolition or renovation operation.[607]

Compliance with the asbestos emission standards during the construction and demolition activities at SEA would require extensive technical analysis and substantial financial resources.

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[601] 40 C.F.R. Part 61, Subpart M.

[602] 42 U.S.C. § 7412. The PSAPCA also has established an asbestos emission standard for applicability to the Seattle/Tacoma area. See Puget Sound Air Pollution Control Agency, Regulation III art. 4. ("PSAPCA Regulation III").

[603] "Demolition" means "the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations." 40 C.F.R. § 61.141.

[604] "Renovation" means "altering . . . in any way one or more facility components. . . . Operations in which load-supporting structural members are wrecked or taken out are demolitions." Id.

[605] The term "facility" means "any institutional, commercial, public, industrial or residential structure, installation, or building. . . ." Id.

[606] Id. § 61.150.

[607] Id.

4. State Requirements

Pursuant to the Washington Clean Air Act, the PSAPCA requires that the owner or operator of all air contaminant sources[608] register with the agency and comply with its reporting requirements.[609] In addition, the owner or operator of an air contaminant source must adhere to an operation and maintenance plan that includes monitoring, recording and repair requirements.[610]

A Notice of Construction and Application for Approval Notice of Construction must be filed and approved by the PSAPCA before any person may construct, install, establish, or modify an air contaminant source.[611] The public must be provided an opportunity to submit written comments on the Notice of Construction if: (1) it otherwise would be required by state or federal laws, (2) the proposed source would cause an annual increase of 10 tons in emissions of any air contaminant for which an ambient air quality standard has been established, (3) offsetting emission reductions are required or (4) the Board or Control Officer determines that public comment is appropriate.[612]

Within 30 days of receipt of a completed notice of construction, or 30 days after the close of the public comment period, the Board or Control Officer must issue either an order of approval or an order to prevent construction.[613] No order of approval will be issued unless the notice of construction demonstrates that:

> (1) The operation of the source at the location proposed will not cause or contribute to a violation of an ambient air quality standard;
>
> (2) The source meets the requirements of all applicable emission standards . . .;

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[608] SEA appears to qualify as a "source" for purposes of PSAPCA regulation. See Puget Sound Air Pollution Control Agency, Regulation I, § 1.07(xx) ("PSAPCA Regulation I").

[609] Id. § 5.03. A limited number of exclusions are listed in Exhibit A to section 5.03. Id.

[610] Id.

[611] Id. I, § 6.03.

[612] Id. § 6.06(a).

[613] Id. § 6.07(a).

(3) Best available control technology is employed for the construction, installation, or establishment of new sources and modifications of existing sources; and

(4) Reasonably available control technology is employed for the replacement of existing control equipment.[614]

The applicant also must demonstrate that: (1) the toxic air contaminant emissions will not exceed any specified Acceptable Source Impact Level or (2) the emissions will not cause air pollution.[615] Additional requirements will be imposed if the proposed construction constitutes a new major source or major modification and would be located in a nonattainment area.[616]

PSAPCA Regulations under the Washington Clean Air Act would add a further layer of regulatory obstacles to the Port's plans to develop a third runway at SEA. The construction of a new runway arguably would constitute a modification to an existing source of air pollutants, and clearly would cause the airport to generate in excess of 10 tons of air pollutants per year.[617] Thus, the Port would have to obtain the PSAPCA's approval, and satisfy the conditions thereof, prior to construction of a runway.

B. Water Quality Protection

As discussed in section II.F.3, supra, the proposed development of a third runway at SEA is likely to result in the release of pollutants from various sources into Miller Creek, Des Moines Creek, their tributaries and Puget Sound. Releases of pollutants into these water bodies is comprehensively regulated by the Federal Water Pollution Control Act ("FWPCA"), as amended by the Clean Water Act of 1977 ("CWA").[618] The state of

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[614] Id. § 6.07(c)(1)-(4).

[615] PSAPCA Regulation III, § 2.03(b).

[616] PSAPCA Regulation I, § 6.07(d).

[617] See, e.g., Flight Plan EIS App. D, Table D-6 (with construction of a third runway, SEA in the year 2000 would generate 19.2 tons/day of CO, 5.4 tons/day of NO_x, 0.7 tons/day of SO_x, 0.4 tons/day of ozone and 3.2 tons/day of hydrocarbons).

[618] 33 U.S.C. § 1251 et seq.

Washington has adopted comparable statutes for the protection of surface water bodies.[619]

The goal of the federal CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[620] The ultimate objective of the statute is to eliminate completely the discharge of pollution into navigable waters.[621] In light of the CWA's remedial nature, the courts uniformly have given it a broad interpretation.[622]

The Port would be required to comply with the various permitting requirements of the CWA in developing its proposed third runway at SEA. Additionally, the historically poor compliance record of the Port's industrial wastewater system may offer opportunities to challenge the Port's compliance with the CWA, independent of its plans to construct a third runway.[623]

1. Surface Water Protection

a. Federal and State Discharge Permits

There are two principal devices which the CWA uses to establish and enforce standards to abate and control water pollution. First, through the National Pollution

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[619] See, e.g., RCW 90.48 (Water Pollution Control Act); id. 35.67 (Sewerage Systems); id. 90.70 (Puget Sound water Quality Authority); id. 35.88 (Protection from Water Pollution); id. 36.70A.060 (protection of critical areas).

[620] 33 U.S.C. § 1251(a).

[621] American Paper Inst. v. Train, 543 F.2d 328, 333 (D.C. Cir. 1976), cert. dismissed, 429 U.S. 967 (1976). See also Quarles Petroleum Co. v. United States, 551 F.2d 1201, 1206 (Ct. Cl. 1977); Quivira Mining Co. v. EPA, 765 F.2d 126, 129 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986).

[622] Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1236 (10th Cir. 1979) ("[I]n construing the [CWA] 'the guiding star is the intent of Congress to improve and preserve the quality of the nation's waters. All issues must be viewed in the light of that intent.'" (quoting American Petroleum Inst. v. EPA, 540 F.2d 1023 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977))).

[623] Information about the compliance and environmental problems associated with the Port's industrial wastewater treatment plant has been collected by a community organization concerned about SEA operations. See RCAA Report, Ingrid Hansen, Water Quality Issues (Jan. 26, 1993). According to this report, the industrial wastewater treatment plant at SEA periodically is overloaded with too much stormwater inflow, frequently receives improper discharges of pollutants and hazardous wastes (which the plant is incapable of treating) from aircraft maintenance and de-icing activities, was found during a July 1992 inspection by the Department of Ecology to have been overloaded with oil and grease and improperly operating its treatment system, and has not been upgraded to treat fire-fighting foam that washes into its system.

Discharge Elimination System ("NPDES") permit program, the CWA attempts to quantify maximum "effluent limitations" on the discharge of "pollutant[s]"[624] into "navigable waters"[625] from "point sources"[626] and stormwater runoff.[627] Essentially, a limit is placed on the quantity of each pollutant that a pollution source may generate during a period of time. Each discharger's performance must be measured against strict technology-based effluent limitations to which it must conform.[628] It is unlawful for any "person"[629] to "discharge"[630] any "pollutant" without a NPDES permit.[631]

The second means of regulating discharges is the water quality standards program. Under Sections 402 and 301 of the CWA, the NPDES permitting agency must include in each permit "any more stringent" effluent limitations "necessary" or "required" to meet applicable state-adopted water quality standards.[632] These limitations are in addition to

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[624] The CWA defines the term "pollutant" to mean "[D]redged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

[625] The CWA defines the term "navigable waters" to mean "the waters of the United States." Id. § 1362(7). The term has been very liberally construed by the courts to include, for example, rivers, streams, lakes, man-made canals or ditches, dry arroyos, wetlands, swamps, marshes, and sloughs. See, e.g., Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982); United States v. Texas Pipe Line Co., 611 F.2d 345 (10th Cir. 1979); Weiszmann v. District Eng'r, 526 F.2d 1302 (5th Cir. 1976).

[626] The CWA defines the term "point source" to mean "[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[627] EPA Regulations define "stormwater" as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

[628] 33 U.S.C. § 1311.

[629] The term "person" means "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." § 1362(5).

[630] The term "discharge of a pollutant" is defined, in relevant part, to mean "any addition of any pollutant to navigable waters from any point source." Id. § 1362(12).

[631] Id. § 1311(a).

[632] Id. §§ 1342(a), 1311(b)(1)(C).

the required technology-based effluent limitations prescribed by the NPDES program. Water quality standards are developed by state governments pursuant to section 303 of the CWA.[633] Those standards must protect public health and welfare, enhance the quality of water and "serve the purposes" of the CWA.[634]

Washington has established water quality standards for state surface waters.[635] Of the waters affected by operations at SEA, Puget Sound has been assigned Class AA.[636] Because Class AA is Washington's most protective classification (intended to protect the highest quality waters), state standards for Class AA water bodies are quite stringent.[637] Although Des Moines Creek and Miller Creek are not specifically classified by the state's regulations, under Washington law they are given the water quality classification assigned to the water body into which they flow -- Puget Sound. Consequently, Miller Creek and Des Moines Creek each carry Puget Sound's classification of Class AA.[638]

Section 402 of the CWA makes EPA the NPDES permit-issuing authority unless the state has applied for and received authority from EPA to administer its own NPDES permit program.[639] Washington, acting through its Department of Ecology, operates an EPA-

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[633] Id. § 1313(a).

[634] Id. § 1313(c)(2); 40 C.F.R. § 131.2. To "serve the purposes" of the CWA

> water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

40 C.F.R. § 131.2.

[635] Chapter 173-201 WAC.

[636] Id. 173-201-085(21).

[637] See id. 173-201-045(1).

[638] Id. 173-201-070(6).

[639] 33 U.S.C. § 1342(a)-(b).

approved state NPDES permit program,[640] and thus regulates discharges from Port facilities at SEA into state water bodies.

The Port already possesses a state-issued NPDES permit for its industrial wastewater treatment facility, located on the southwestern portion of the airport property along 12th Place South and South 188th Street.[641] This facility collects wastewater and pollutant runoff from fueling, maintenance and de-icing activities at SEA.[642] The industrial wastewater facility discharges into Puget Sound,[643] and appears to have had problems complying with its NPDES permit limits.[644] Construction of a third runway at SEA may overload the current facility's treatment capacity and could contribute to additional permit violations. Enforcement of these violations would be the responsibility of Washington Department of Ecology, unless a citizen suit were initiated pursuant to section 505 of the CWA[645] demanding that the Port be assessed civil penalties for its permit violations.

Additionally, should the Port need to construct a new, or expand its existing, industrial wastewater facility, it would have to obtain either a new permit for a new facility, or a permit modification for its existing facility. The ACC would have an opportunity to comment on an application for a new permit or permit modification in such circumstances.

In the interim, because the Port's NPDES permit is due to expire on October 31, 1993,[646] the ACC soon may have an opportunity to submit its comments on a permit renewal for the industrial wastewater facility. Renewal applications must be filed at least

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[640] See RCW 90.48; Chapter 173-220 WAC.

[641] See SASA DEIS at 4-76.

[642] Flight Plan EIS at 4-106.

[643] Flight Plan EIS at 4-106; SASA DEIS at 4-76.

[644] RCAA Report, Water Quality Issues.

[645] 33 U.S.C. § 1365. Citizen suits under the CWA are discussed in section V.B.1.c, infra.

[646] This date was identified by the RCAA in one of its reports and should be verified. RCAA Report, Water Quality Issues.

six months prior to a permit's termination date, and Washington's notice and comment procedures are applicable to permit renewals.[647] Hence, the ACC will be given at least thirty days in which to provide any comments it may have on the proposed terms and conditions of the Port's permit. To the extent that the proposed permit fails to contain effluent limitations that are adequate to protect Class AA waters or the environment in the ACC Cities, the Washington Department of Ecology may be asked to revise the permit to include conditions that would be adequate.

The CWA and EPA's Regulations also require facilities to apply for a stormwater discharge permit for runoff associated with construction activity.[648] Given the vast amount of fill material needed for construction of a third runway at SEA, the Port not only would be required to obtain a special stormwater permit for its construction activities, but it also would have to comply with comprehensive management practices designed to protect against excessive sedimentation and erosion during construction.[649]

b. Local Government Pollution Abatement Powers

Third class cities, such as Normandy Park, are empowered to prevent and abate the pollution of surface waters <u>both inside and outside of their boundaries</u> and to enact ordinances which contain enforcement mechanisms.[650] Although there is no similar provision in the statute governing code cities (i.e., Des Moines, Burien and Tukwila), that statute clearly authorizes code cities to exercise "all powers possible for a city . . . to have under the Constitution of this state, and not specifically denied to code cities by law."[651] Therefore, code cities may exercise at least the same powers as third class cities with respect to the prevention and abatement of water pollution within and without their borders.

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[647] WAC 173-220-180(2), (4).

[648] 40 C.F.R. § 122.26(b)(14)(x).

[649] <u>Id.</u> § 122.26(c)(1)(ii).

[650] RCW 35.24.290(8).

[651] <u>Id.</u> 35A.11.020.

It has been reported that the discharge of stormwater and wastewater from SEA into Miller and Des Moines Creeks and to Puget Sound has killed nearly all aquatic life in Des Moines Creek, and has resulted in the discharge of petroleum and solvents into the Sound.[652] Miller Creek and its tributaries pass through both Burien and Normandy Park, while Des Moines Creek flows through Des Moines, and all three jurisdictions abut Puget Sound. Local authorities are available to the ACC Cities to enact ordinances to abate such discharges and to prevent additional discharges of pollutants into surface waters within their jurisdiction.

c. Citizen Suits Under the CWA

Pursuant to section 505 of the CWA, "any citizen" may initiate a lawsuit in federal district court (a so-called citizen suit) seeking the assessment of civil penalties against NPDES permit holders that are violating terms or conditions of their permit.[653] "Citizen" is defined for purposes of section 505 as "a person or persons having an interest which is or may be adversely affected"[654] and defines "person" to include municipalities and political subdivisions of a state.[655] Thus, Normandy Park, Burien, Des Moines and/or Tukwila would have authority to file a section 505 citizen suit should any or all of them decide to challenge the Port's compliance with its NPDES permit.

Before filing a complaint under section 505, a prospective plaintiff must provide 60 days' notice of its intent to file suit to three parties: (1) the prospective defendant (the permit holder); (2) the Administrator of EPA; and (3) the state in which the alleged violation of the CWA occurs.[656] The purpose of this notice is to allow the permit holder to come into compliance with its permit, and/or to allow either EPA or the appropriate

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[652] See RCAA Report, Water Quality Issues; SASA DEIS at 4-75, 4-143.

[653] 33 U.S.C. § 505(a). Citizen suits may be brought in federal district court even where a state agency has issued the discharge permit in question. See, e.g., Natural Resources Defense Council v. Vygen Corp., 803 F. Supp. 97 (N.D. Ohio 1992); Atlantic States Legal Found. v. Universal Tool, 735 F. Supp. 1404 (N.D. Ind. 1990).

[654] 33 U.S.C. § 1365(g).

[655] Id. § 1362(4).

[656] Id. § 1365(b).

state agency to commence their own action to bring the permit holder into compliance. If EPA or the State commences such action during the sixty-day notice period, the citizen suit is barred.[657]

A citizen suit cannot be initiated if EPA or a state has commenced and is diligently proceeding with judicial or administrative enforcement actions against the permit holder, where such actions have as their purpose the enforcement of the same permit terms that the prospective plaintiff seeks to enforce.[658] On-going or completed state administrative enforcement actions against a permit holder do not preclude citizen suits against the same permit holder, however, if the citizen suit seeks to enforce a different permit term, or if the state enforcement action has failed to provide an adequate opportunity for public comment on the proposed administrative order.[659]

Finally, the Supreme Court has held that, a citizen suit plaintiff cannot seek civil penalties for wholly past violations of the CWA.[660] Action can only be maintained if there is a good-faith allegation of present, on-going violations.[661]

There appear to have been no recent reports of violations of any terms of the NPDES permit for the Port's industrial wastewater facility. Moreover, it appears that the Washington Department of Ecology has been working with the Port to remedy some of its past violations of the permit. Hence, it is difficult to determine whether the ACC could bring a citizen suit against the Port for improper operation of the industrial wastewater facility. Additional investigation is warranted, however, so that the ACC may verify the availability of such an action against the Port.

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[657] Id. § 1365(b)(1)(B).

[658] Id. §§ 1319(g)(6), 1365(b)(1)(B).

[659] Vygen Corp., 803 F. Supp. at 101.

[660] Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987).

[661] Id. at 64.

C. Wetlands Permits Under Section 404 of the Clean Water Act

Every federal agency is obligated "to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for . . . providing Federally undertaken, financed, or assisted construction and improvements."[662] Federal agencies, including the FAA, are prohibited from providing funding or other assistance for the construction of projects in wetlands unless they find "(1) that there is no practicable alternative to such construction, and (2) that the proposed action include all practicable measures to minimize harm to wetlands which may result from such use."[663]

Because the Port's proposed third runway would be constructed in and adjacent to wetlands, the FAA would be required to demonstrate that no practicable alternatives are available to the Port's runway project that would avoid wetlands impacts before the agency could authorize runway construction. Additionally, the Port would have to obtain a wetlands permit and overcome state wetlands protection laws.

Section 404 the CWA requires that anyone proposing to discharge dredged or fill material into navigable waters must first obtain a permit from the U.S. Army Corps of Engineers ("Corps").[664] Section 502(7) of the CWA defines "navigable waters" as "waters of the United States."[665] In turn, "waters of the United States" has been interpreted by the Corps to include "wetlands,"[666] which are defined as

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for

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[662] Exec. Order No. 11,990 § 1(a)(2), 42 Fed. Reg. 26,961 (1977), amended by Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (1987), reprinted in 42 U.S.C. § 4321.

[663] Id.

[664] 33 U.S.C. § 1344(a).

[665] Id. § 1362(7).

[666] This interpretation was upheld by the Supreme Court as consistent with the broad statutory grant of authority to the Corps to regulate "waters of the United States." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985); see United States v. Akers, 785 F.2d 814, 818 (9th Cir.), cert. denied, 479 U.S. 828 (1986).

life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.[667]

For non-tidal waters, the limit of Corps jurisdiction extends to the ordinary high water mark and adjacent wetlands.[668] Given that wetlands are within the definition of navigable waters as used in section 404 of the CWA, a permit under that section must be obtained prior to locating a structure, or excavating or discharging dredged or fill materials from or into waters of the United States.[669]

A determination as to whether a site includes wetlands that are subject to the regulatory jurisdiction of the Corps is a highly technical matter.[670] Although identifying wetlands and wetlands characteristics of a property involves a technical process, a convenient rule of practice is that most blue lines (as shown on USGS topographic maps) fall within federal jurisdiction. Furthermore, the U.S. Fish and Wildlife Service has prepared National Wetlands Inventory Maps which identify wetlands locations throughout the United States.[671] On a local level in the Puget Sound region, both King County and some municipalities have prepared their own maps identifying the location of wetlands.[672]

Both the nature of the proposed activity and the size of the area that will be disturbed are used to determine the type of wetlands permit that is required. Two types

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[667] 33 C.F.R. § 328.3(b). The Corps shares jurisdiction over discharges into wetlands with the EPA. EPA Regulations contain an identical definition of "wetlands." 40 C.F.R. § 232.2(r); see 53 Fed. Reg. 20,764 (1988) (preamble to EPA regulations).

[668] 33 C.F.R. § 328.4(c).

[669] Id. § 323.6.

[670] See U.S. Fish and Wildlife Serv., Envt'l. Protection Agency, Dep't of Army & Soil Conservation Serv., Federal Manual for Identifying and Delineating Jurisdictional Wetlands (Jan. 1989). In fact, as a result of controversy about the January 1989 Wetlands Manual, the Corps and EPA recently agreed to stop using it to identify wetlands, and instead have reverted to use of the Corps' 1987 version of the Wetlands Manual.

[671] See, e.g., U.S. Dep't of Interior, Fish and Wildlife Serv., Nat'l Wetlands Inventory Map, Des Moines, Wash. (1987).

[672] See King County, Washington, Sensitive Areas Map Folio (Dec. 1990) at 4-5; City of Des Moines, Comprehensive Plan (Update), Ordinance 861 - Wetlands Map attachment (Oct. 14, 1992); City of SeaTac, Map of Wetland & Stream Classifications (1991).

of wetlands permits are available: preauthorized general permits, known as nationwide permits,[673] and individual permits.[674]

1. Nationwide Permit 26

To qualify for Nationwide Permit 26, "[t]he discharge, including all attendant features, both temporary and permanent, . . . [must be] part of a single and complete project."[675] Discharges into all other waters of the United States, unless covered by another nationwide permit, must receive individual permits. If a project affects at least one acre but fewer than ten acres of wetlands, the regulations concerning Nationwide Permit 26 require that the Corps be notified before any discharge or fill activity takes place but do not require an individual application for a permit.[676] Even if an activity may fall within the activities permissible under Nationwide Permit 26, however, the Corps has the discretion to determine that the specific activity requires the greater scrutiny that accompanies an individual permit.[677]

Although the wetlands to be affected or destroyed by the Port's proposed construction of a third runway likely could be characterized as headwater wetlands, it is extremely unlikely that the Port's activities would qualify for a nationwide permit. More than ten acres of wetlands likely would be affected, principally those wetlands in the Miller Creek drainage that are located east of Des Moines Memorial Drive between State Route 509 and State Route 518. A smaller area of wetlands west of Des Moines Memorial Drive between S.W. 152nd Street and State Route 518, and within the City of Burien, also may be affected by the Port's proposed actions. Consequently, the Port would be required to

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[673] 33 C.F.R. Part 330. Nationwide permits are available for a variety of actions affecting wetlands. The most commonly used nationwide permit is Nationwide Permit 26, which is used for actions that affect headwater or isolated wetlands of less than ten acres. Id. § 330 app. A, B(26) (hereinafter "Nationwide Permit 26"). Headwaters are defined at id. § 330.2(d), while isolated waters are defined at id. § 330.2(e).

[674] Id. Parts 320, 325.

[675] Id. Part 330 app. A, B(26)(c).

[676] Id. Part 330 app. A, C(13).

[677] Id. Part 330 app. A, C(13)(d)(1).

obtain an individual permit from the Corps before undertaking any actions affecting these wetlands.

2. Individual Wetlands Permits

a. Corps Regulations for the Issuance of Permits

To receive an individual wetlands permit, the Port would have to submit an application to the Corps that contains a complete and detailed description of its proposed activities.[678] The Corps would have jurisdiction to determine whether the Port would be allowed to fill wetlands as part of its runway construction proposal. Runway construction could not proceed until a wetlands permit was issued. The FAA would be required to withhold federal funds from the Port unless it could show that no practicable alternatives to the third runway project are found that would avoid destruction or alteration of wetlands, and that the Port would undertake all practicable measures to minimize wetlands impacts.[679]

The most important step in the individual permitting process is the "public interest review" which the Corps must conduct to determine whether to grant an individual section 404 permit. Corps regulations presume that a permit is in the public interest, unless the District Engineer concludes otherwise: "[A] permit will be granted unless the district engineer determines that it would be contrary to the public interest."[680]

The public interest review requires the Corps' District Engineer to evaluate all probable impacts of the proposed activity, including cumulative impacts. The factors to be considered include

> conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs,

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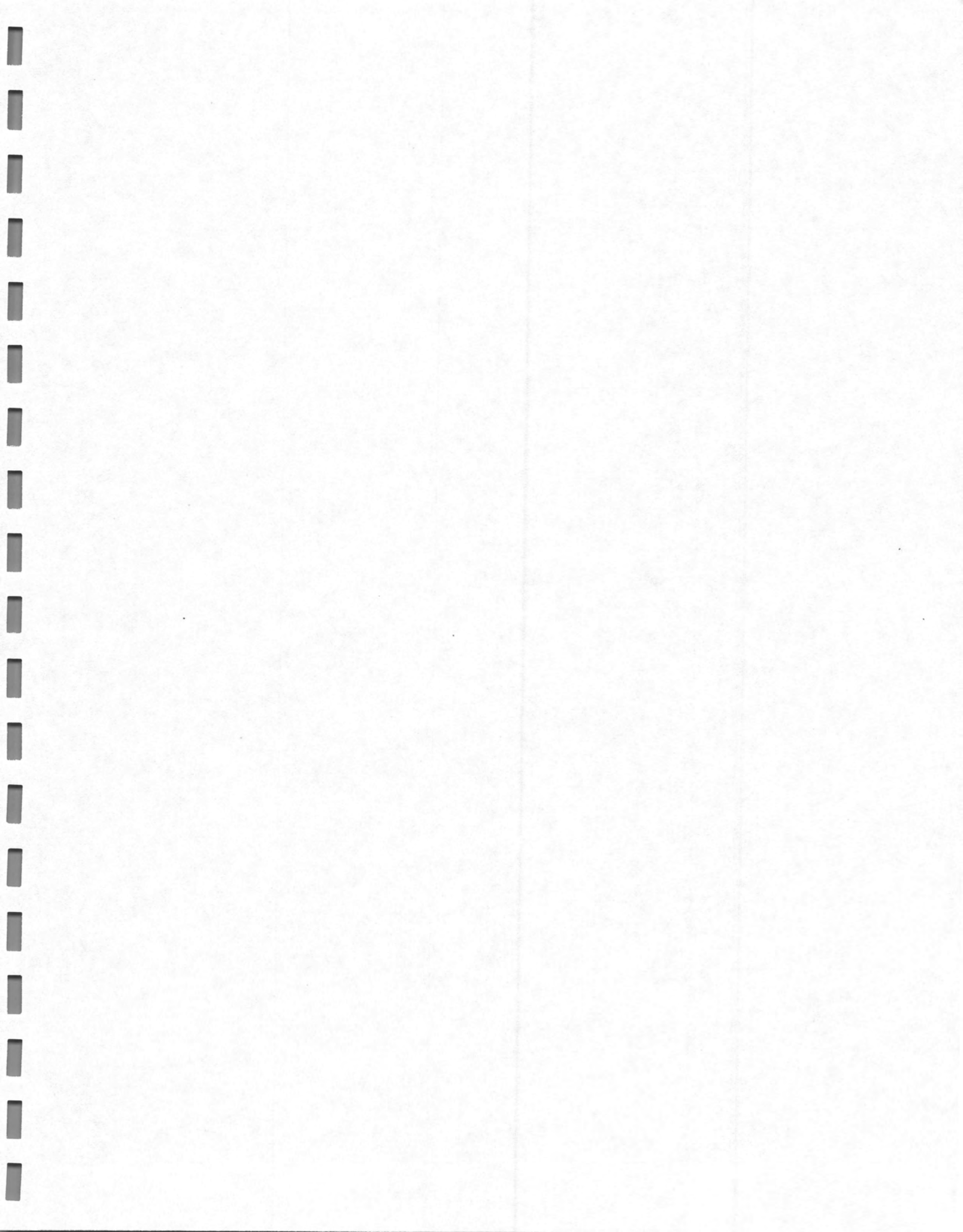
[678] The application must include drawings and plans; the locations, purpose and need for the proposed activity; scheduling of the activity; a list of authorizations required by other federal, interstate, state, or local agencies for the work, including all approvals received or denials already made; the names and addresses of adjoining property owners; and the location and dimensions of adjacent structures. Id. § 325.1(d).

[679] Exec. Order No. 11,990 (1977), reprinted in 42 U.S.C. § 4321. See also Order 5050.4A ¶ 47e.

[680] 33 C.F.R. § 320.4(a)(1).



> safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.[681]

Other factors to be considered include the need for the project, the practicability of using other alternatives and the extent of permanent damage to the environment from the project.[682]

Any person may request that a public hearing be held on the permit application. Requests for a hearing must be granted unless "the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing."[683]

Ultimately, the District Engineer must balance "[t]he benefits which reasonably may be expected to accrue from the proposal . . . against its reasonably foreseeable detriments."[684] The outcome of this balancing test determines whether the permit is approved.

b. EPA Guidelines on Issuance of Wetlands Permits

In addition to complying with the Corps regulations, the District Engineer must apply EPA standards for issuance of a wetlands permit.[685] These EPA rules are commonly referred to as Section 404(b)(1) Guidelines.[686]

Notwithstanding Corps administrative control over the application process, EPA may veto any permit approved by the Corps if the project "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[687] Although the EPA's veto authority

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[681] Id.

[682] Id.

[683] Id. § 327.4(b).

[684] Id. § 320.4(a)(1).

[685] Id. § 320.4(b)(4).

[686] 40 C.F.R. § 230.10.

[687] 33 U.S.C. § 1344(c).

is very rarely used, this statutory power affords EPA substantial influence and leverage over the wetlands permitting process.[688]

EPA's most important power is not, however, its veto authority but its authority to demand evaluation of alternatives to the issuance of a wetlands permit. EPA Regulations prohibit the issuance of a wetlands permit if there exists a "practicable" alternative to the proposal.[689] "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[690] A permit application also must be denied if the proposed discharge would violate state water quality standards, jeopardize an endangered species, or contribute to significant degradation of the waters of the United States.[691] The EPA Guidelines require that where non-water dependent activities are involved (i.e., an airport runway clearly is non-water dependent), the Corps must determine whether a "practicable" alternative site exists which would cause less environmental harm to wetlands.[692] The EPA Guidelines further provide that, if a project is not water dependent, practicable alternatives are (1) "presumed to be available" and (2) "presumed to have less adverse impact on the aquatic ecosystem."[693]

c. **Mitigation**

Following years of dispute between the Corps and EPA over appropriate mitigation for individual Section 404 permits, the two agencies entered into a memorandum, effective

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[688] See Avoyelles Sportsmen's League, Inc., 715 F.2d 897 (confirming that EPA has ultimate authority over defining wetlands jurisdiction).

[689] 40 C.F.R. § 230.10(a).

[690] Id. § 230.10(a)(2).

[691] Id. § 230.10(b)-(c).

[692] Id. § 230.10(a).

[693] Id. § 230.10(a)(3) (emphasis added).

February 7, 1990, on required mitigation.[694] The agreement is binding on all Corps and EPA personnel and "must be adhered to" when considering mitigation requirements for individual permits.[695]

The Memorandum describes the required process for review of an individual permit, also known as sequencing:

> [I]nformation on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. The Corps, except as indicated below, first makes a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, compensate for aquatic resource values. . . . It may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge . . . can reasonably be expected to result in environmental gain or insignificant environmental losses.[696]

The Memorandum establishes "no net loss" of available wetlands habitat as a principal policy objective.[697] Nevertheless, the Memorandum provides that the policy is a nationwide goal which on a case-by-case basis still may allow individual projects to cause a loss of wetlands.[698] Such loss may occur, however, only in instances where the Corps and EPA determine that mitigation measures necessary to maintain no-net-loss of wetlands "are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts."[699]

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[694] Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990) ("Memorandum").

[695] Id. at 1.

[696] Id. at 3. The three-part sequencing process establishes a prioritization of effort by the Corps, whereunder avoidance of wetlands impacts is to be the first priority, and only after all such impacts have been avoided may mitigation, and then compensation, for wetlands impacts be considered.

[697] Id. at 2.

[698] Id.

[699] Id.

3. Application of the Section 404 Process to the Proposed Third Runway at SEA

The construction of a third runway at SEA clearly would affect and likely destroy in excess of ten acres of wetlands along the airport's existing western boundary. Consequently, the Port would be required to obtain a section 404 wetlands permit from the Corps prior to initiating runway construction. The ACC may participate in the Corps' consideration and public interest review of a permit application, through submittal of comments and interaction with appropriate Corps officials. The most effective argument against a permit would be that practicable alternatives are available, (e.g., constructing a supplemental airport elsewhere) that would not require the destruction of wetlands.

4. State and Local Wetlands Protection Measures

A 1990 executive order issued by former Governor Booth Gardner directs all Washington state agencies to enforce rigorously their existing authorities to assure wetlands protection.[700] The Department of Ecology currently has under consideration the adoption of water quality criteria designed for the protection of wetlands.[701] Additionally, the Department of Ecology recommends that where wetlands would be affected or destroyed by construction activities, such wetlands must be replaced. The state's recommended wetlands replacement ratios range from one acre replaced for each acre destroyed (1:1) for open water habitats to 3:1 for forested wetland systems. The state also seeks to protect wetlands by requiring buffer areas around wetlands ranging from 25 to 300 feet depending on the quality of the wetlands affected.[702]

The Growth Management Act provides supplemental protection to wetlands by requiring cities and counties to designate critical areas -- including wetlands -- and to issue development regulations to protect these designated areas.[703] The GMA and its

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[700] See Flight Plan EIS 4-95.

[701] Washington State Dep't of Ecology, 1992 Statewide Water Quality Assessment, Section 305(b) Report (1992) ("305(b) Report") at 114.

[702] Flight Plan EIS at 4-105.

[703] RCW 36.70A.170, 36.70A.060(1); WAC 365-190-040. See also discussion in section IV.A.4.b, infra.

regulations require cities and counties to exercise control over changes in land uses, new activities, or development that potentially adversely affect critical areas, prohibiting clearly inappropriate activities and restricting, allowing or conditioning other activities as appropriate.[704]

The cities of Normandy Park and Des Moines have adopted ordinances dealing with environmentally sensitive areas which regulate and restrict development activities in these areas.[705] Each of these ordinances includes wetlands in the definition of environmentally sensitive areas.[706] Both cities restrict development in areas where "significant and important wetlands and their buffers" are located.[707] The cities also require that where development is allowed, buffers of 100 feet and 35 feet must be maintained for significant and important wetlands, respectively.[708] A similar regulatory regime is found in Tukwila's Sensitive Area Overlay Zone.[709]

Given the purpose of the cities' designation of wetlands as critical areas -- to ensure the long-term conservation of such lands and to preclude land uses and developments which are incompatible with critical areas[710] -- the cities may choose to enforce their land use designations wherever possible with respect to the Port's proposed acquisition and use of land for construction of a third runway.[711]

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[704] WAC 365-190-020.

[705] Normandy Park, Wash., Mun. Code Chapter 13.16 NPMC; Des Moines, Wash., Mun. Code Chapter 18.86 ("DMMC").

[706] NPMC 13.16.030(14); DMMC 18.86.252.

[707] Significant and important wetlands are defined in the NPMC 13.16.030(52)(A), (B) and DMMC 18.04.663(1), (2). NPMC 13.16.060(a)(1); DMMC 18.86.060(a).

[708] NPMC 13.16.070(a)(2)(A), (B); DMMC 18.86.070(2)(A), (B).

[709] See Tukwila, Wash., Mun. Code Chapter 18.45 ("TMC").

[710] WAC 365-190-020.

[711] Id.

D. Section 4(f)

Section 4(f) of the Department of Transportation Act prohibits the FAA from approving any transportation project (including an airport improvement project like new runway construction) which requires the "use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance" unless two conditions are satisfied.[712] First, there must be "no prudent and feasible alternative to using that land." Second, if no such alternative exists, the proposed project must "include[] all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use."[713] Only if both conditions are met may the FAA approve airport projects that would destroy or "use" protected property.

The Supreme Court has held that the enactment of section 4(f) "indicates that protection of [section 4(f) lands] was to be given paramount importance."[714] Property which comes under the protection of section 4(f) often is called section 4(f) property.

The proposed construction of a third runway at SEA may require the Port to acquire one or two historic sites -- the Vacca Farm and the Pepplow property -- each of which may qualify as section 4(f) properties.[715] In addition, aircraft using a third runway at SEA are likely to cause considerable increases in the noise level exposure at numerous parks near the airport, including Saltwater State Park, Zenith Park and Des Moines Creek County Park.[716] When exposed to sufficiently high noise levels, a park arguably is "used" within the meaning of section 4(f). Thus, the FAA would have to make the required section 4(f) findings before it could provide funding for or approve the Port's runway project.

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[712] 49 U.S.C. § 303(c). The Airport and Airway Improvement Act of 1982 ("AAIA"), 49 U.S.C. app. § 2201 et seq., contains similar protections for the same types of properties. See id. § 2208(b)(5).

[713] 49 U.S.C. § 303(c).

[714] Citizens to Preserve Overton Park, Inc. (Overton Park) v. Volpe, 401 U.S. 402, 412-13 (1971).

[715] See discussion in section II.F.5, supra.

[716] See discussion in section II.F.1, supra.

1. Necessary Elements for Section 4(f) Applicability

Each of the terms in section 4(f) has been subject to considerable judicial interpretation. First, for section 4(f) to be applicable, the subject property must be "used." The term "use" in section 4(f) has been construed broadly and has not been limited only to a physical taking of property.[717] Activities not literally occurring on section 4(f) land, but which nonetheless "impair substantially the value of the site in terms of its environmental, ecological, or historical significance" constitute "use" of the land.[718] For example, increased noise levels on section 4(f) land, resulting from activities in a proposed project, may constitute "use" of protected land.[719] The effects of a proposed project on the utility or value of the section 4(f) land -- not merely the distance between the proposed project and the protected land -- are determinative.[720] Whether a particular project uses section 4(f) land is a question of law to be determined by the court in the first instance.[721]

Second, the property must be locally significant. Whether or not a park is "of local significance," and thus triggers the requirements of section 4(f) before it can be "used," is to be "determined by the Federal, State, or local officials having jurisdiction over the park,

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[717] Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole, 770 F.2d 423, 441 (5th Cir. 1985); Adler v. Lewis, 675 F.2d 1085, 1092 (9th Cir. 1982); Louisiana Envtl. Soc'y v. Coleman, 537 F.2d 79, 84-85 (5th Cir. 1976).

[718] I-CARE, 770 F.2d at 441; see also Adler, 675 F.2d at 1092.

[719] Coalition Against a Raised Expressway, Inc. v. Dole, 835 F.2d 803, 810 (11th Cir. 1988); Louisiana Envtl. Soc'y, 537 F.2d at 85.

[720] Adler, 675 F.2d at 1091-92; see also Coalition Against a Raised Expressway, 835 F.2d at 810 ("[T]he proper test is whether the proposed [project] 'substantially impairs' the public utility or historical significance of the property in question.").

[721] See Brooks v. Volpe, 460 F.2d 1193, 1194 (9th Cir. 1972) (construing identical language in analogous statute).

area, refuge, or site . . . ."[722] There is some conflict as to whether a federal agency must make a section 4(f) determination in the absence of a local finding of significance.[723]

A finding by local officials that a park is of no local significance will be given little, if any, weight by a reviewing court in determining whether a federal agency conducted a proper section 4(f) review.[724] On the other hand, where local officials have determined that a park is significant, courts are likely to require greater deference by the federal agency.[725] It is clear, however, that a determination by appropriate jurisdictional officials that a parkland is of national, state, or local significance "is reviewable and reversible by the Secretary of Transportation."[726]

If a locally significant property is used, the next determination is whether there are alternatives to that use. The Supreme Court has held that the Secretary of Transportation (and hence the FAA) can make "only a small range of choices" with respect to section 4(f) land.[727] Section 4(f) "requires a finding of no feasible or prudent alternatives to the use of parklands and historic sites before the Secretary can approve the use of such property. . . ."[728] An alternative is "feasible" if it can be built as a matter of sound

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[722] 49 U.S.C. § 303(c).

[723] Compare Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.) (presumption that a public park is "significant" unless explicitly determined otherwise by relevant federal or local officials), cert. denied, 409 U.S. 1000 (1972) with Harrisburg Coalition Against Ruining Env't v. Volpe, 330 F. Supp. 918, 929 (M.D. Pa. 1971) (Section 4(f) "requires a finding of significance, either affirmative or negative, by the officials having jurisdiction" over the parkland).

[724] Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013, 1026-27 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972) (citing Overton Park, Inc., 401 U.S. at 408).

[725] Harrisburg Coalition Against Ruining Env't, 330 F. Supp. at 929 (holding that federal agency may engage only in narrow review of local finding of significance).

[726] National Wildlife Fed'n v. Coleman, 529 F.2d 359, 369 (5th Cir.), cert. denied, 429 U.S. 979 (1976).

[727] Overton Park, 401 U.S. at 416.

[728] Druid Hills Civic Ass'n v. Federal Highway Admin., 772 F.2d 700, 715 (11th Cir. 1985), cert. denied, 488 U.S. 819 (1988).

engineering.[729] An alternative is "prudent" unless there are "truly unusual factors present in a particular case or the cost or community disruption resulting from alternative[s] . . . reach[] extraordinary magnitudes[,]" or the other alternatives themselves "present unique problems."[730]

2. Applicability of Section 4(f) to the Port's Proposed Third Runway Project

Section 4(f) may prove to be a significant limitation on the ability of the Port to construct a third runway at SEA. The Port's preliminary plans for a new runway appear to require the acquisition and demolition of two historic sites -- the Vacca Farm and the Pepplow property. In addition, a new runway clearly would cause increases in the noise exposure at a number of parks located near the airport. Although it appears that the Port will not need to acquire any parks as part of the runway project, increased noise levels, if demonstrated to be significantly high, could trigger section 4(f) compliance. Accordingly, federal funding for the Port's runway proposal would not be available unless the FAA could demonstrate that there are no other feasible or prudent alternatives to the project.

E. Section 106 of the National Historic Preservation Act

The National Historic Preservation Act provides that every federal agency, prior to approving the expenditure of any federal funds on an airport project must "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register" of historic sites.[731] Property which is "eligible for inclusion" is not limited to property that officially has been determined to be eligible for inclusion in the National Register of Historic Places.[732] The FAA must consider the impacts which a project may have on both eligible and listed

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[729] Overton Park, 401 U.S. at 411; see also, Druid Hills, 772 F.2d at 715.

[730] Overton Park, 401 U.S. at 413.

[731] 16 U.S.C. § 470f. This provision was enacted as section 106 of the National Historic Preservation Act, and thus is commonly referred to as "Section 106."

[732] Boyd v. Roland, 789 F.2d 347, 349 (5th Cir. 1986).

historic sites, and must engage in consultation with the appropriate state historic preservation officer prior to the attempt to avoid or mitigate such impacts.[733]

The purpose of section 106 is to encourage federal agencies to avoid funding projects that would harm or destroy historic properties. In practice it tends to operate primarily as a procedural statute, and often will be inadequate to prevent the destruction of historic and archaeological sites. Nonetheless, section 106 would present procedural and logistical hurdles to the Port and the FAA if they were to agree that the third runway should be built at SEA.

Washington law designates the Office of Archaeology and Historic Preservation, within the Department of Community Development, as the state office with principal responsibility for protecting the state's historic and archaeological properties.[734] An employee of that office is the designated "preservation officer" for the State.[735] The Office of Archaeology and Historic Preservation is charged with responsibility for implementing state policy "to designate, preserve, protect, enhance, and perpetuate those structures, sites, districts, buildings, and objects which reflect outstanding elements of the state's historic, archaeological, architectural, or cultural heritage."[736]

As noted in Section II of this report, there are several historic sites that are located in the vicinity of SEA which may be affected by the airport expansion proposal.[737] Additional properties of historic or archaeological significance also may be affected by the Port's proposed project, and thus a thorough review of appropriate historic registries and eligible properties should be conducted.

The Archeological and Historic Data Preservation Act of 1974 provides for preservation of "historical and archeological data . . . which might otherwise be irreparably

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[733] 36 C.F.R. § 800.9; Order 5050.4A ¶ 47e(8)(b)(2).

[734] RCW 27.34.210-.220.

[735] Id. 27.34.210.

[736] Id. 27.34.200.

[737] See discussion in section II.F.5, supra.

lost or destroyed as the result of . . . any . . . federally licensed activity or program."[738] The law requires federal agencies to notify the Secretary of Interior of such possible loss or destruction and authorizes the use of funds appropriated for the project for the survey, recovery, protection and preservation of such data.[739] This Act requires the FAA to investigate the significance of any unlisted archaeological and historic sites and evaluate their importance before they are destroyed.

If the FAA concludes that the five historic properties (and any other yet-to-be identified sites) would be affected adversely by the Port's proposed construction of a third runway, it would be required to consult with the Secretary of the Interior, acting through the National Park Service, to minimize the loss of items or information of significant historical value before the runway could be constructed. Moreover, pursuant to Executive Order 11,593, the FAA would be obligated to locate the sites, structures and objects of historic, architectural or archaeological significance which may be affected by the runway project and to evaluate the impacts which the proposal would have on these sites.[740] Finally, the FAA would have to consult with the state historic preservation officer to develop a strategy for avoiding or mitigating impacts to historic and archaeological properties.

F. Hazardous Waste Requirements

Both federal and Washington law establish a number of regulatory requirements associated with the handling, treatment, storage, and disposal of hazardous wastes.[741] To the extent that hazardous or toxic wastes would be disturbed or disposed of during the Port's proposed third runway project, the Port would be required to comply with all applicable federal and state requirements pertaining to those wastes.

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[738] 16 U.S.C. § 469.

[739] Id.

[740] Exec. Order 11,593, 36 Fed. Reg. 8921 (1971), reprinted in 16 U.S.C. § 470.

[741] See, e.g., 42 U.S.C. §§ 6901-92k (federal Resource Conservation and Recovery Act ("RCRA")); Chapter 70.95 RCW (Washington Solid Waste Management Act).

No known hazardous or toxic waste sites have been identified in the vicinity of the Port's proposed location for a third runway at SEA. Nevertheless, residential and/or any commercial properties to be acquired by the Port for its project may contain hazardous substances that would require the Port to engage in hazardous waste compliance activities prior to commencing runway construction. Additionally, the Weyerhauser corporate hangar likely would have to be demolished to make way for a third runway. Underground storage tanks and other facilities associated with aircraft fueling and maintenance likely are found at the Weyerhauser hangar and removal of those structures also may necessitate compliance with federal and state hazardous waste regulations.

Moreover, the Port has identified the presence of underground storage tanks and on-site soil contamination as presenting existing problems at SEA.[742] By the end of 1994, the Port plans to remove nine underground tanks and replace five, as well as to clean-up contaminated soil and groundwater, as necessary.[743] Although these projects may be completed prior to runway construction, similar contamination problems may arise and require the Port's attention as a consequence of preparing property for siting a new runway.

If significant contamination is discovered, proper waste management and the remediation of environmental contamination would place significant financial burdens on the Port and other current and former owners and operators of contaminated sites. The application of remediation requirements to property on and around SEA also would significantly delay the implementation of the proposed runway project.

1. RCRA Regulation of Hazardous Waste

The federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA")[744] and the 1984 Hazardous and Solid Waste Amendments

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[742] See Port Commission of the Port of Seattle, Proposed Minutes of the Regular Meeting (Feb. 23, 1993) at 10-11.

[743] Id. at 11.

[744] 42 U.S.C. § 6901 et seq. The Solid Waste Disposal Act was completely revised and reorganized by RCRA. Thus, RCRA is used generally to refer to the Solid Waste Disposal Act as amended.

("HSWA"),[745] established a comprehensive framework regulating the handling, treatment, storage, disposal and transportation of "solid waste"[746] and "hazardous waste."[747] Congress' purposes in enacting RCRA was to reduce the generation of hazardous waste and to encourage the development of advanced techniques for its treatment, storage, and disposal. By strictly regulating each facet of hazardous waste handling from generation to disposal, RCRA seeks to reduce the threat to human health and the environment posed by hazardous waste .[748]

The RCRA regulatory regime has several important implications for the proposed development of a new runway at SEA, particularly with respect to the likelihood that prior to construction, contaminated soils, contaminated groundwater and underground storage

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[745] Pub. L. No. 98-616, 98 Stat. 3224 (1984).

[746] RCRA defines the term "solid waste" to mean:

> [A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section [402 of the Federal Water Pollution Control Act, as amended]. . . .

42 U.S.C. § 6903(27).

[747] "Hazardous waste" is by definition a subset of "solid waste." RCRA defines the term to mean:

> [A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--
>
> > (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> >
> > (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id. § 6903(5).

[748] See generally id. §§ 6901-02. EPA has certified Washington's Hazardous Waste Management Act, Chapter 70.105 RCW, and the regulations promulgated thereunder, Chapter 173-303 WAC , as establishing an authorized state hazardous waste program. 52 Fed. Reg. 35,556 (1987). The Washington Department of Ecology is charged with implementing and enforcing the state's program.

tanks all would have to be adequately remediated. Under RCRA's regulations, a solid waste is regulated as a hazardous waste if it is "listed"[749] by the EPA or if it demonstrates any one of four "characteristics" -- ignitability, corrosivity, reactivity, or toxicity.[750] The former are referred to as "listed wastes", while the latter are referred to as "characteristic wastes."

2. RCRA Regulation of Soil or Groundwater Contaminated with Hazardous Waste

EPA has developed rules which often result in the characterization of contaminated soil and groundwater as regulated hazardous waste. EPA's "mixture rule" provides that "a mixture of solid waste and one or more hazardous wastes listed" itself becomes hazardous waste.[751] Thus, listed hazardous wastes that are mixed with other substances transform the entire composite into a hazardous waste. EPA also has promulgated a "derived-from rule" which provides that "any solid waste generated from the treatment, storage, or disposal of a hazardous waste, . . . is a hazardous waste."[752] Thus, once a substance has been characterized as a listed hazardous waste, it remains so even after treatment.[753]

The RCRA hazardous waste management program does not impose upon the owner/operator of a site containing soil or groundwater contaminated with listed hazardous waste an affirmative duty to remove or remediate such soil or groundwater, unless obligations are imposed in the context of a RCRA corrective action. Once a person excavates soil or withdraws groundwater containing listed hazardous waste or exhibiting a hazardous waste characteristic and seeks to dispose of the materials, however, the person

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[749] 40 C.F.R. Part 261, Subpart D. EPA has promulgated three hazardous waste lists: i) hazardous wastes from nonspecific sources, id. § 261.31; ii) hazardous wastes from specific sources, id. § 261.32; and iii) discarded commercial chemical products, off-specification species, containers, and spill residues thereof, id. § 261.33.

[750] 40 C.F.R. Part 261, Subpart C.

[751] Id. § 261.3(a)(2)(iv).

[752] Id. § 261.3(c)(2)(i).

[753] See, e.g., 53 Fed. Reg. 31,138, 31,142 (1988); 54 Fed. Reg. 48,372, 48,462 (1989); 55 Fed. Reg. 22,520, 22,623 (1990). This interpretation has been upheld by the United States Court of Appeals for the D.C. Circuit. See Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1539-40 (D.C. Cir. 1989).

becomes a generator of hazardous waste and must comply fully with the RCRA hazardous waste regulatory regime.

It is likely that the construction of a new runway at SEA would cause the removal and/or disturbance of soils contaminated with a mixture of hazardous waste and solid waste, consequently resulting in the generation of hazardous waste. The airport site historically is reported to have experienced a number of fuel and chemical spills that have contaminated soils and groundwater at SEA.

If hazardous waste is located during construction activities, the subsequent disposal of soil or groundwater excavated or withdrawn would be problematic. Under the land disposal restriction provisions of RCRA, the "land disposal" of hazardous waste is prohibited unless the waste is first treated by prescribed treatment methods or meets established constituent concentration standards.[754] Further, the land disposal restrictions also prohibit the storage of land disposal-restricted hazardous waste except where such storage is "solely for the purpose of the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment or disposal."[755] The application of the land disposal restrictions to the disposition of excavated soil or withdrawn groundwater potentially could add significant environmental restoration costs to the total expense of developing a third runway at SEA.

3. Federal and State Regulation of Underground Storage Tanks

In addition to contaminated soils and groundwater at the airport, there exist a number of active and inactive underground storage tanks ("USTs") on the Port's property at SEA. Many of these USTs may be leaking currently or may have leaked in the past. The Port recently has approved implementation of a two-year program under which some of these USTs, but likely not all, will be removed and/or replaced.[756] Construction of a new runway could require the removal of additional USTs, necessitating Port compliance

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[754] See generally 40 C.F.R. Part 268.

[755] 42 U.S.C. § 6924(j).

[756] Port Commission of the Port of Seattle, Proposed Minutes of the Regular Meeting (Feb. 23, 1993) at 11.

with applicable federal and state laws and regulations. Compliance with these requirements would add significantly to the cost of the runway construction project and delay the initiation of construction activities.

In the 1984, Congress added provisions to RCRA governing the remediation of environmental harm caused by leaking USTs.[757] RCRA defines an underground storage tank as:

> [A]ny one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground.[758]

RCRA authorizes EPA, or an authorized state, to undertake corrective action with respect to a release of a regulated substance from an UST or to order the owner/operator to undertake the required corrective action itself "when the Administrator (or the State) determines that such corrective action will be done properly and promptly by the owner or operator. . . ."[759]

When the owner or operator of a UST desires to terminate its operations, federal and state regulations require that all liquids and accumulated sludge first be removed from the UST, and then that the UST itself be removed from the ground or filled with inert solid material.[760] The owner/operator also must conduct an assessment of the UST site. If "contaminated soils, contaminated ground water, or free product as a liquid or vapor," are discovered, the owner/operator must commence corrective action.[761] If there is evidence

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[757] 42 U.S.C. § 6991. Washington has adopted a comparable statute and implementing regulations to regulate USTs. See RCW 90.76; WAC 173-360. Washington's program has been approved as an authorized state UST program.

[758] Id. § 6991(1).

[759] Id. § 6991b(h)(1)(A). The term "regulated substance" includes substances defined pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9601(14) § 9601 et seq., as "hazardous substances," id. § 6991(2)(A), and petroleum.

[760] 40 C.F.R. § 280.71(b); WAC 173-360-385(4).

[761] 40 C.F.R. § 280.72(b); WAC 173-360-390(4).

that the release has affected groundwater wells, that free product needs recovery, or that contaminated soil may be in contact with groundwater, owners and operators must investigate the release, the release site, and potentially-affected areas surrounding the site to determine the extent of soil contamination and the presence of the product in groundwater.[762]

The Port would be required to comply with the foregoing regulatory requirements for each and every UST or release from a UST that is discovered as it undertakes construction of a third runway at SEA. Although the Port's recently-announced UST removal program conceivably could address all potential UST contamination at the airport property, it nonetheless is likely that additional USTs would be discovered in the course of constructing a third runway. Consequently, the Port would have to comply with federal and state requirements for UST closure, removal and monitoring, and would incur considerable expense as a result.

[762] 40 C.F.R. § 280.65(a); WAC 173-360-370.

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M E M O R A N D U M

TO: City of Normandy Park

FROM: Cutler & Stanfield

DATE: February 8, 1993

RE: Analysis and Recommendations Concerning Litigation to Challenge the Flight Plan Project Final Environmental Impact Statement

I. SUMMARY AND RECOMMENDATIONS

Cutler and Stanfield has been asked to recommend whether the City of Normandy Park (the "City")[1] should file a lawsuit pursuant to the Port of Seattle's ("Port") November 6, 1993 "Notice of Action." This memorandum discusses and analyzes relevant legal, practical and strategic issues pertaining to a

[1] This memorandum has been drafted for the City of Normandy Park; we recommend that the memorandum be shared with the other affected cities once they enter into the proposed interlocal agreement.

potential lawsuit against the Port, and recommends that the City file suit in response to the Port's Notice of Action.[2]

We do not believe that the Port is either the best (or even the legally proper) party to sue over the adequacy of the environmental impact statement which has been prepared. Nevertheless, certain procedural limitations under Washington law raise the possibility that failure to file suit at this time may prevent the City from ever challenging the environmental impact statement. Our conclusion, therefore, arises from an abundance of caution designed to ensure that the City does not lose forever its opportunity to challenge that document.

As discussed below, from a litigation perspective, the decision of whether to bring an action against the Port is an extremely close legal question. When one adds practical and political concerns to the equation, however, it becomes clearer that a judicial challenge to the Port is necessary to protect the City's future legal options.

We believe that the Puget Sound Regional Council ("PSRC") is a necessary defendant in litigation challenging the environmental impact statement, even though the PSRC has yet to take any formal action. We therefore recommend that the City participate fully in future proceedings before the PSRC and the PSRC's

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[2] This memorandum does not address the larger strategic issues which the City faces. Because of the impending deadline for a decision on litigation, this memorandum addresses litigation against the Port in isolation. Our strategy report will place the present decision in the context of the entire matter.

Transportation Policy Board ("TPB"), for the purpose of creating an administrative record which demonstrates that regional air transportation plans should properly not include the construction of a third runway or other capacity expansion measures at Seattle-Tacoma International Airport ("Sea-Tac").

II. FACTUAL BACKGROUND[3]

In May 1989, the Puget Sound Council of Governments ("PSCOG") and the Port executed an interagency agreement "to establish a joint planning process between the Port and PSCOG for developing a regional air carrier system plan for the Puget Sound region."[4] The agreement was later modified to include the preparation of a draft EIS and Final Environmental Impact Statement ("FEIS") in accordance with the State of Washington's Environmental Policy Act of 1971 ("SEPA").[5]

PSCOG and the Port created a Regional Airport Planning Task Force -- subsequently called the Puget Sound Air Transportation Committee ("PSATC") -- to develop and evaluate alternatives and to present recommendations to the two agencies for meeting the

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[3] Although the matters described in this section of the memorandum may be familiar to the City, a brief discussion of the factual background is essential to understand the context in which the City is evaluating whether to initiate litigation against the Port.

[4] Port of Seattle and Puget Sound Council of Governments Interagency Agreement for Long Term Air Carrier System Planning ("Interagency Agreement") (May 23, 1989) § 1.

[5] See Interagency Agreement § 3.1.1 (amended 1991); Chapter 43.21C R.C.W.

region's long-term air transportation needs.[6] The agreement contemplated that the PSATC's recommendations would be considered by the Port and the PSCOG in accordance with each agency's statutory role with respect to long-term air transportation needs in the Puget Sound region.

A. <u>The Port of Seattle</u>

The Port of Seattle was organized and operates under the authority of the laws of the State of Washington.[7] Although ports generally are prohibited from operating outside of their districts (in this case, King County),[8] ports may build and operate airports outside of their own boundaries and may acquire the property necessary to do so by purchase or condemnation.[9] However, a port may not acquire or take over an airport owned or controlled by another municipality without that municipality's consent.[10] The Port presently is responsible for operating Sea-Tac.

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[6] Interagency Agreement § 2.

[7] Title 53 R.C.W.

[8] See R.C.W. § 53.04.010; see also State v. Port of Peninsula, 575 P.2d 713, 715, 89 Wash. 2d 764 (1978) (holding that the language of R.C.W. § 53.04.010 describing activities which port districts are organized to undertake "within the district," limits the exercise of port district powers specified under Chapter 53.08 R.C.W. to the district's boundaries).

[9] See R.C.W. 14.08.030.

[10] Id.

B. The Puget Sound Council of Governments

The PSCOG -- made up of King, Pierce, Snohomish and Kitsap Counties and their incorporated cities -- was the designated Metropolitan Planning Organization for transportation planning in the Puget Sound region.[11] In that capacity, the PSCOG was responsible for the development of the Regional Transportation Plan. It also was required to certify that the transportation elements of local comprehensive plans conformed to requirements of state law, that they were consistent with the Regional Transportation Plan, and that all transportation projects within the region having a significant impact on regional facilities or services were consistent with the Regional Transportation Plan.[12] The Regional Airport System Plan ("RASP"), adopted by PSCOG in September 1988,[13] is one element of the Regional Transportation Plan.

On September 30, 1991, PSCOG was dissolved and on October 1, 1991, the PSRC was formed in its place.[14] The PSRC was designated as the Metropolitan Planning Organization and the

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[11] PSCOG was designated by both the U. S. Department of Transportation and the office of the Governor of the State of Washington as the agency responsible for ensuring that transportation planning is conducted through a continuous, cooperative and comprehensive process.

[12] See R.C.W. 47.80.030; see also Interlocal Agreement for Regional Planning of the Central Puget Sound Area ("Interlocal Agreement") (1991) § VIIA(4)(c).

[13] Interagency Agreement at 1.

[14] Puget Sound Regional Council Res. A-91-01 (Mar. 13, 1991).

Regional Transportation Planning Organization for the central Puget Sound region.[15] It thereafter assumed PSCOG's role in the Interagency Agreement with the Port. In addition, under the recently enacted State of Washington Growth Management Act ("GMA"),[16] the PSRC, as the designated Metropolitan and Regional Transportation Planning Organization, must certify that transportation elements of local comprehensive plans are consistent with the Regional Transportation Plan (known as Vision 2020), that they conform to the comprehensive planning provisions of state law, and that transportation projects in the region that have an impact on regional facilities or services are consistent with the regional transportation plan.[17]

In addition, pursuant to the GMA, the PSRC is responsible for assuring that the comprehensive plans of each county, city and port district within the region are coordinated and consistent with the county, city and town comprehensive plans and with state transportation plans.[18]

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[15] Id. at 2; Interlocal Agreement §§ IV(15), (21).

[16] See R.C.W. Chapter 36.70A.

[17] See R.C.W. §§ 47.80.030(1)(b), 47.80.030(2), 36.70A.070; see also FEIS at B-1; Interlocal Agreement § 4.

[18] See R.C.W. §§ 36.70A.100, 47.80.020.

C. The PSATC Recommendations

On January 7, 1992, the PSATC issued its Draft Final Report and Technical Appendices.[19] This document included a programmatic draft EIS assessing a range of alternatives at the system planning level for providing sufficient airport capacity in the Puget Sound region beyond the year 2020 and recommended a preferred alternative: a phased, multiple airport system including a new dependent runway at Sea-Tac, scheduled airline service at Paine Field in Snohomish County by the year 2000 and the identification of a site for a third commercial airport in central Pierce County (most likely at McChord Air Force Base or at Fort Lewis) or in Thurston County to be developed by 2010.[20]

On June 17, 1992, PSATC formally recommended that the Port and the PSRC adopt the phased, three-airport system recommendation.[21] On October 6, 1992, the Port and the PSRC released their FEIS presenting and comparing system-level alternatives for meeting forecasted air travel needs. There was no agency-preferred alternative in this non-project FEIS.[22] The absence of a preferred alternative is important because, without such a recommendation, any future action based upon the non-

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[19] Puget Sound Air Transportation Committee, Draft Final Report and Technical Appendices (including Draft Programmatic Environmental Impact Statement) (1992).

[20] Draft Programmatic Environmental Impact Statement ("Draft EIS") at i, 2-1 through 2-2.

[21] FEIS at A-2.

[22] Id. at 1-7.

project EIS cannot assert that the three-airport system was endorsed by the FEIS.

D. The Port Action

It is important to note what the Port has, and has not, approved. Most importantly, the Port has not approved the three-airport system recommendation. The Port's action was very limited.

On November 3, 1992, the Port adopted Resolution No. 3125, adopting the portions of the PSATC's June 17 recommendations "that directly pertain to adding a dependent runway at Sea-Tac . . ."[23] The resolution also "call[ed] for the remainder of the regional solution to include a reconsideration" of high-speed rail links to Portland, Oregon and Vancouver, British Columbia, the diversion of all-cargo air carriers to an alternative airport site and the multiple airport system recommended by the PSATC.[24] In addition, the resolution directed the Port staff to 1) conduct studies and prepare plans for constructing a dependent air carrier runway at Sea-Tac; 2) begin preparing a site-specific EIS pursuant to SEPA and NEPA to consider the potential environmental impacts of the development of a third runway at Sea-Tac; 3) "work cooperatively" with the PSRC and state and local jurisdictions in an effort arrive at a facility plan consistent with other regional and local plans in accordance with the GMA; and 4) to develop and implement a plan for insulating up to 5,000 eligible

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[23] Port of Seattle Res. No. 3125 § 1(a) (Nov. 3, 1992).

[24] Id.

single family homes in the existing noise remedy program.[25]

Finally, the resolution states that the Port's action is taken

> with the full expectation that prior to Commission authorization for construction of a new dependent air carrier runway other public and private entities in the Puget Sound region will take actions toward providing the additional facilities and service needed to meet the region's long-term air transportation demand. . . . Without these other entities' action and support the Port shall reconsider this decision.[26]

Three days later, the Port issued a Notice of Action, which, under SEPA,[27] opens a ninety-day window for instituting a lawsuit challenging the Port's actions and the adequacy of the FEIS upon which they are based.[28]

E. PSRC Consideration of Amendments to the RASP

Subsequently, the PSRC held a series of workshops, open houses and information meetings as part of its process for considering amendments to the RASP to incorporate regional air transportation proposals, a variety of which are discussed in the FEIS. The RASP can be amended only with the approval of the PSRC's full General Assembly.[29] Amendments to the RASP must be reviewed by the PSRC's TPB and approved by the PSRC's Executive Board before the General Assembly acts. According to the PSRC's present schedule, the TPB should complete its deliberations by

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[25] Id. § 1(b)(i), (ii), (iii), (c).

[26] Id. § 2(c).

[27] Port of Seattle SEPA Notice of Action (Nov. 6, 1992).

[28] See R.C.W. 43.21C.080.

[29] See Bylaws of the Puget Sound Regional Council Art. V § 4.

early March. The Executive Committee will then decide on amending the RASP by mid-April, and the General Assembly will act on the Executive Committee's recommendation on April 29.

III. LEGAL ANALYSIS

A. SEPA Law Generally

The FEIS published by the PSRC and the Port was prepared pursuant to the statutory requirements of SEPA.[30] Under SEPA, governmental agencies within the State of Washington must prepare a "detailed statement" (commonly known as an environmental impact statement) analyzing, among other things, the environmental impacts of recommendations, proposals and other major actions "significantly affecting the quality of the environment."[31] This requirement is applicable not only to state agencies, but also to municipalities, counties, port districts and other political subdivisions of the State.[32] Furthermore, all state and local agencies are required to adopt their own regulations implementing SEPA's requirements.[33]

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[30] Chapter 43.21C R.C.W. The State Council on Environmental Policy has promulgated rules which elaborate on SEPA's requirements. See Chapter 197-11 W.A.C.

[31] See R.C.W. 43.21C.030(c).

[32] Id. at 43.21C.030(2).

[33] These agency regulations must be consistent with the state-adopted SEPA Rules found at Chapter 197-11 W.A.C. See W.A.C. § 197-11-020(1). The PSRC and the Port each have adopted regulations satisfying this requirement.

SEPA imposes both procedural and substantive obligations on state and local agencies. Not only must an agency comply with SEPA's procedural requirements, such as soliciting and responding to public comments on draft EISs, and undertaking adequate analysis of environmental impacts of proposed actions, but it also may be required to comply substantively with SEPA by requiring and undertaking mitigation for proposed actions.[34]

B. Programmatic or Nonproject EISs

SEPA allows for the preparation of EISs on specific projects as well as on broader programs which do not contemplate a specific government action. The FEIS at issue here is a "programmatic or "nonproject" EIS.[35] Nonproject EISs are prepared pursuant to "phased review," under which "[b]roader environmental documents may be followed by narrower documents . . . that incorporate prior general discussion by reference and concentrate solely on the issues specific to that part of the proposal."[36]

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[34] See W.A.C. § 197-11-660.

[35] Compare W.A.C. § 197-11-774 ("'Nonproject' means actions which are different or broader than a single site specific project, such as plans, policies, and programs.") with W.A.C. § 197-11-704(2)(a) ("A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area.").

[36] W.A.C. § 197-11-060(5)(b).

By definition, the level and detail of analysis required for a nonproject EIS is less than that for a project-specific EIS.[37] A nonproject EIS is required to analyze the environmental impacts of "alternative means of accomplishing a stated objective," with such analysis being "limited to a general discussion of the impacts of alternate proposals."[38] The limited content and analytical requirements imposed on nonproject EISs help explain why judicial challenges to those types of EISs appear to be more difficult to win.[39]

Although it generally is not advisable to challenge the adequacy of a programmatic or nonproject EIS, such an EIS does provide the basis for, and will limit the scope of, any subsequent site-specific EIS. The SEPA rules address this specific point:

> When a project . . . is consistent with the approved nonproject action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the nonproject EIS. <u>The scope shall be limited accordingly</u>.[40]

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[37] <u>See</u> W.A.C. § 197-11-442 (specifying content requirements for nonproject EISs). In preparing nonproject EISs, an agency "shall have more flexibility . . . because there is normally less detailed information available on [a program or policy's] environmental impacts and on any subsequent project proposals." <u>Id.</u>

[38] <u>Id.</u> at § 197-11-442(2), (4).

[39] <u>See, e.g.</u>, <u>Cathcart-Maltby-Clearview Community Council v. Snohomish County</u>, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20,167, 20,169, (Wash. Sup. Ct. Oct. 8, 1981) (finding to be adequate an EIS which identified the potential impacts of proposed rezoning amendment and provided a framework for further EIS preparation).

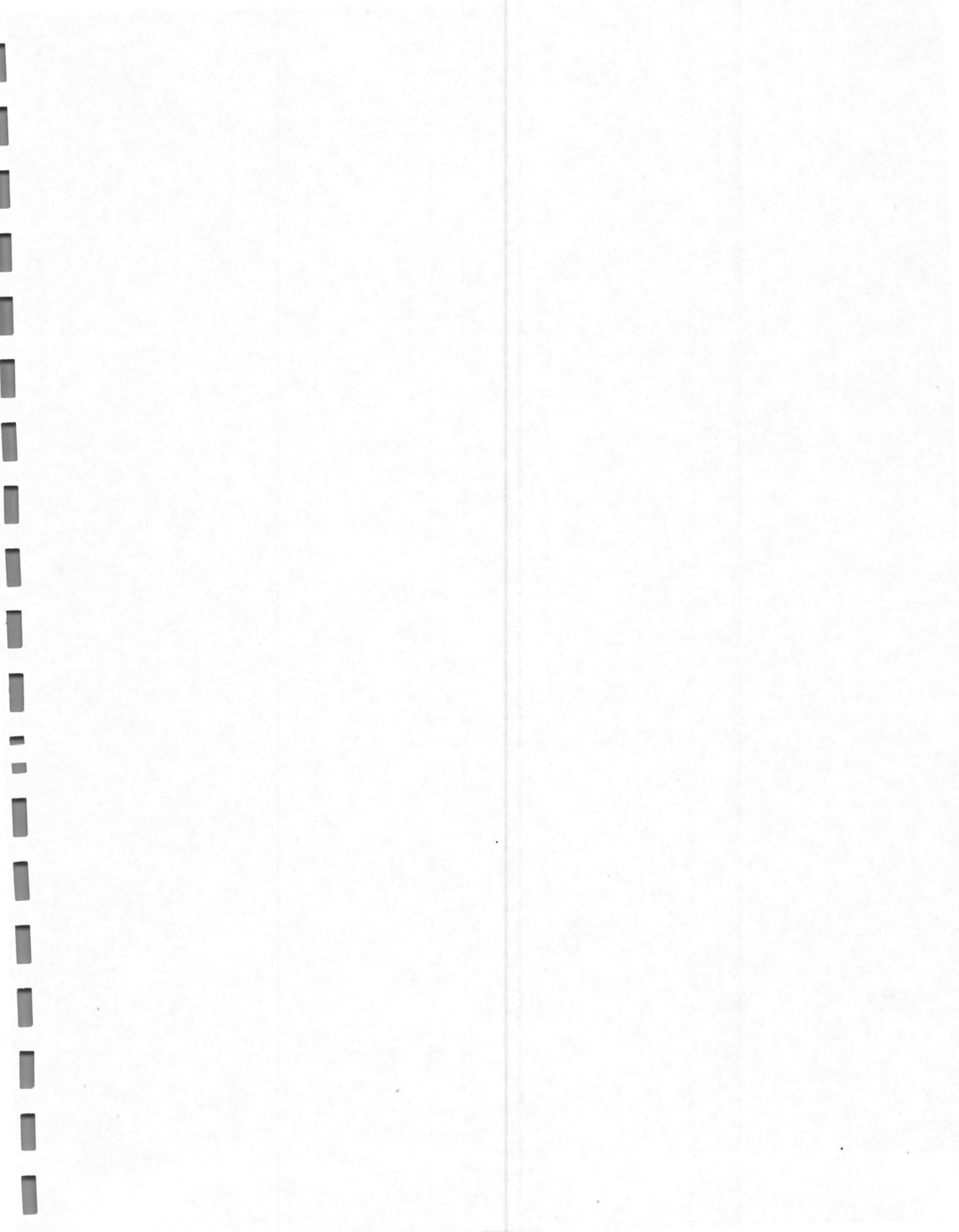
[40] W.A.C. § 197-11-443(2).

Since a site-specific EIS may rely upon the scope of alternatives which has been examined in the prior nonproject EIS, any challenge to the range of alternatives under consideration should best be brought against the nonproject EIS.

In the present situation, the foregoing principle is particularly important. The nonproject FEIS examines alternative ways of meeting the Puget Sound region's air transportation needs. One of the conclusions of that document is that a third dependent runway could be built at Sea-Tac to accommodate regional demand in the short term. Because the FEIS purports to examine alternative ways of meeting regional demand, the Port will argue that its own site-specific EIS on a third runway at Sea-Tac permissibly may be limited to the question of how best to site a third runway at Sea-Tac. It is reasonable to expect that the Port's EIS will not examine alternative ways of meeting short-term aviation demand, and will cite the conclusions of the nonproject FEIS as having raised, and resolved, that question. For that reason, if the City ever hopes to challenge the working assumption that a third runway is needed at Sea-Tac, it would be necessary to challenge the conclusion in the instant FEIS that a third runway could provide valuable assistance to the regional air transportation capacity problem.

C. Timing of Judicial Review Under SEPA

The Washington Legislature has authorized judicial review of EISs prepared pursuant to SEPA, and in so doing has imposed



certain timing requirements for obtaining review.[41] If a governmental agency has issued a "Notice of Action," and the underlying agency action is not subject to its own statute of limitations, then a party must file its appeal within either thirty or ninety days of the last publication date of the Notice of Action.[42]

The failure to challenge a governmental action, and an EIS prepared in support thereof, within the time specified by SEPA precludes all later attempts to overturn that action on SEPA grounds.[43] Furthermore, SEPA challenges to subsequent governmental actions on the same proposal are prohibited, unless (a) the proposal changes substantially between the date of the first governmental action and the later action, or (b) the EIS analyzing the first governmental action specifies that the action will require further environmental evaluation.[44]

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[41] __See, e.g.__, R.C.W. §§ 43.21C.075, 43.21C.080; W.A.C. § 197-11-680.

[42] __See__ R.C.W. §§ 43.21C.080(2)(a), 43.21C.075(5). Judicial review pursuant a Notice of Action by governmental agencies concerning private proposals are subject to a thirty day appeal period. A lawsuit challenging a project to be performed by a governmental agency must be filed within ninety days.

[43] __Id.__ § 43.21C.080(2)(a).

[44] __Id.__

D. Opportunities to Contest Governmental Actions Related to Regional Air Transportation Needs

1. Litigation Challenging the Port's Actions

By issuing its Notice of Action, the Port invoked SEPA's ninety-day time limit for judicial review.[45] Because the ninety-day period expires on February 15, 1993,[46] a federal and state holiday, the deadline for filing suit is Tuesday, February 16.

A lawsuit filed challenging the Port's Notice of Action would be required to contest one or more of the five actions which were undertaken by the Port, and which are subject to the ninety-day limit on judicial challenge:[47]

(a) The adoption of "portions" of the PSATC's June 17, 1992 recommendations, particularly the recommendation to construct a dependent third runway at Sea-Tac and the recommendation to develop a multiple airport system;

(b) The direction to Port Staff, in cooperation with the Federal Aviation Administration, to conduct necessary studies and prepare plans for constructing a dependent third runway at Sea-Tac;

(c) The direction to Port Staff to prepare a site-specific EIS pursuant to the National Environmental Policy Act ("NEPA") for constructing a dependent third runway at Sea-Tac;

(d) The direction to Port Staff to work cooperatively with the PSRC and state and local jurisdictions to develop an acceptable facility plan; and

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[45] Notice of Action; see also R.C.W. § 43.21C.080(2)(a).

[46] See Notice of Action.

[47] See R.C.W. §§ 43.21C.075(1), (6)(c); 43.21C.080(2)(a).

(e) The direction to Port Staff to develop and implement a noise insulation program for single-family residences.[48]

If a lawsuit challenging one or more these actions is not filed by February 16, 1993, the opportunity to contest the Port's actions would be lost.

In the present context, the Port's five actions are not themselves particularly significant, either legally or strategically. None of the actions provides particularly fertile ground for a judicial challenge or presents egregious violations of SEPA or other potentially applicable statutes. In isolation, therefore, there would appear to be little basis for initiating a challenge to the Port, particularly if it were possible later to bring suit against the PSRC when -- as we expect -- it approves the amendment to the RASP incorporating the three-airport recommendation.

Notwithstanding the relative insignificance of the Port's actions, a provision of the State SEPA rules could be interpreted as <u>requiring that any lawsuit challenging the FEIS be brought at this time</u> even though the PSRC has yet to take any action or otherwise approve the entire FEIS. The applicable SEPA rule appears to require a single lawsuit challenging an EIS, even if more than one government agency may take actions based upon the document:

> [i]f the <u>proposal</u> requires more than one governmental decision that will be supported by the same SEPA documents, then RCW 43.21C.080 still only allows one judicial appeal of

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[48] <u>See</u> Res. No. 3125 § 1; Notice of Action.

procedural compliance with SEPA, which must be commenced within the applicable time to appeal the first governmental decision.[49]

Conceivably, because the Port has relied, and the PSRC is expected to rely, on the same FEIS in support of their actions,[50] the foregoing rule could be read as requiring that suits contesting the adequacy of the FEIS must be brought within the ninety-day period triggered by the Port's Notice of Action. Because the language of this rule has not been subjected to judicial scrutiny, however, it is difficult to predict with any certainty the reach of its prohibition on multiple lawsuits against the same EIS.

It is apparent that one of the key terms in the rule is the word "proposal." The SEPA rules define "proposal" as meaning a "proposed action," and as including "both actions and regulatory decisions of agencies."[51]

As stated in the FEIS, the "proposed action" of the PSRC and the Port "is to comprehensively address and resolve the commercial air transportation capacity issues."[52] Stated

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[49] **W.A.C. § 197-11-680(4)(e) (emphasis added). This provision has been incorporated by reference in both the Port's and the PSRC's SEPA regulations. See PSRC Res. No. EB-92-01 § 16; Port Res. No. 3028 § 18.**

[50] **The Port relied on the FEIS as a basis for the 5 actions identified in its Notice of Action and Resolution No. 3125. The PSRC likewise is expected to use the FEIS to satisfy the SEPA obligations that would be triggered by amending the RASP.**

[51] **W.A.C. § 197-11-784.**

[52] **FEIS at 1-5.**

somewhat differently, the "proposal" that is analyzed in the FEIS is the development of a regional solution to the central Puget Sound region's current and future air transportation needs.[53]

This proposal would appear most clearly linked to the actions which will be taken by the PSRC when it adopts revisions to the RASP, which will establish formal plans addressing the region's air transportation needs.

In contrast, one could argue that the "proposal" that is the subject of the Port's Notice of Action relates only to the consideration of building a third dependent runway at Sea-Tac, and the development of a noise insulation program.[54] These actions are distinct from (although they may form a part of) the regional solution to the Puget Sound area's commercial air transportation needs.

Although we believe that the "proposal" which the Port adopted in Resolution 3125 is different from the "proposal" which the PSRC is considering in connection with the amendment to the RASP, we cannot with any certainty predict that a court would agree with this interpretation of the SEPA rules. A strong argument could be made that both the PSRC and the Port are working from the same PSATC proposal to develop the three-airport

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[53] See id. at 1-2 ("The purpose of the Flight Plan Project is to plan for the future air transportation needs of the central Puget Sound region through the year 2020 and beyond.").

[54] There exists some question whether the Port's so-called "actions" even require compliance with SEPA. None of the "actions" appear to involve an irretrievable commitment of resources or to cause significant impacts to the environment. R.C.W. § 43.21C.030(c); W.A.C. § 197-11-330(1), (3).

system. Under this interpretation of what constitutes the "proposal" for SEPA purposes, the SEPA rule would prohibit the City from contesting any action by the PSRC based upon the FEIS if it fails to file a timely suit against the Port.

A cautious litigation strategy dictates that the City not forego its opportunity to bring any challenge to the FEIS and to the scope of alternatives which was examined in that document, even though we believe that such a challenge may be premature. As a matter of good litigation strategy, it always is better to be premature (i.e., to bring suit too early) than to lose the opportunity to sue by being too late. The ambiguity of the SEPA rule quoted above presents the City with the difficult decision of whether to sue the Port at this time over actions which we believe are relatively innocuous, and thereby protect its ability eventually to challenge the PRSC's reliance on the FEIS, or whether to forego such litigation now, relying upon the argument that the PRSC action would be on a proposal which is distinct from that considered by the Port. We believe that the prudent course of action is to bring suit at this time.

2. <u>Challenges to Site-Specific Projects at Sea-Tac</u>

Because the FEIS contains numerous references to the need for additional site-specific analysis of future project actions,[55] it is apparent that the City will not be precluded

[55] <u>See, e.g.</u>, FEIS at 4-40 (surface transportation impacts), 4-56 (land use impacts), 4-83 (effects on public services and utilities), 4-95 (wetlands, water quality, plants and animal impacts), 4-107 (soil and construction impacts).

from pursuing a SEPA challenge to future site-specific or project-specific actions taken by the PSRC or the Port which relate to regional air transportation needs, including Port actions involving construction of a third runway at Sea-Tac.[56] As explained above, however, it is probable that the scope of the EIS on a third runway will be limited to examining alternative ways of building a runway at Sea-Tac and will not address alternatives to that runway. We believe that the City's case would be strengthened significantly if it is in a position to challenge first the scope of alternatives (which appear in the nonproject FEIS) before challenging the analysis of the specific impacts of a third runway.

3. Litigation Challenging PSRC Action

If the City does not file suit against the Port by February 16, 1993, it may have the opportunity to bring suit after the PSRC adopts amendments to the RASP. The City's judicial challenge to such action by the PSRC likely could include a claim premised on SEPA (i.e., that the FEIS provided inadequate support for the RASP amendments), although a contrary interpretation of the law is possible.

While a challenge to the PSRC's reliance on the FEIS would be distinct from a challenge to the Port's Notice of Action, the

[56] See R.C.W. § 43.21C.080(2)(a). As indicated in the discussion above at section III.C, R.C.W. 43.21C.080(2)(a) contains a provision which authorizes parties to challenge subsequent actions of governmental agencies if an EIS on an earlier action specified that the action being challenged would require additional environmental analysis.

SEPA rule discussed earlier suggests that the City can file one -- and only one -- lawsuit challenging the nonproject EIS. That suit must be filed by February 16. Because it is unclear whether a later suit could be brought against the PSRC, it would be advisable to include the PSRC as a named party in litigation against the Port.

IV. STRATEGIC ANALYSIS

From a purely strategic perspective, there are two reasons why the City would be best advised not to challenge the Port's recent actions on the basis of the FEIS.

First, the PSRC -- not the Port -- appears to be the appropriate defendant in a lawsuit contesting regional transportation planning matters. A suit against the PSRC would draw together in one action claims that the PSRC improperly exercised its statutory regional planning authority, and claims that the FEIS (as a document evaluating the environmental effects of regional air transportation solutions) failed to comply with SEPA. The PSRC, in point of fact, is the agency responsible for approving regional transportation plans and actions, not the Port.

Second, the administrative record which has been assembled for the Port's action (which we believe will not include the material which the Regional Commission on Airport Affairs presented to the PSRC during its workshops) is not particularly helpful to the City. In order to be successful in litigation

over an environmental impact statement, it generally is desirable to have placed in the administrative record technical material which demonstrates that the agency's decisionmaking is flawed and which shows (for example) that the agency improperly analyzed the alternative ways of meeting regional air transportation need. The City's probability of success would be considerably greater if it had placed in the record its own alternative for meeting regional needs.

We believe that it is unlikely that the City will have an opportunity to supplement the administrative record supporting the Port's decision. It is somewhat more likely that the City would be able to supplement the administrative record which will be compiled for the PSRC decision in April. For that reason, we will shortly be recommending that the City retain consultants to prepare an analysis of alternatives and proffer an alternative to construction of a third runway at Sea-Tac.[57]

Notwithstanding these apparently strong reasons not to sue the Port, we believe that there are compelling reasons which make such litigation a strategic necessity.

First, and most importantly, the unsettled state of the law would make it extremely risky to delay filing suit on the basis that the City would later be able to sue the PSRC when it completes its action on the RASP. Although we believe that such

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[57] Our recommendation on this point, along with other strategic recommendations not directly related to the February 16 litigation deadline, will be detailed in a comprehensive strategy memorandum which we will prepare over the course of the next eight to ten weeks.

litigation would be permissible, the down-side risk of being mistaken on that point would be a complete loss of the City's ability to challenge the FEIS. We believe that that risk is too great to be worth taking.

Second, we believe that it is important to preserve the City's right to challenge the FEIS because the scope of alternatives examined in the Port's EIS on the third runway will be determined by the scope of this FEIS. If the City does not challenge the FEIS, its litigation over the third runway EIS may be limited to issues related to the impacts of the runway, rather than the more fundamental issue of alternatives to the third runway.

Third, we believe that there are relatively few risks in initiating litigation at this time. Both the Port and the public fully expect that the City will file suit and the failure to do so may present an unwanted appearance of weakness. If the Port adheres to its public position that it voluntarily will stay the litigation until the PSRC acts, even the risk of litigating with a poor administrative record would be reduced.

We believe that the risks of not filing suit outweigh the cost and strategic disadvantage of challenging the Port's action without the best possible administrative record. Because failure to file suit may preclude a challenge to the FEIS altogether and because that eventuality would be strategically undesirable, we recommend filing suit by the February 16 deadline.

CHRONOLOGY OF PLANNING PROCESS FOR EXPANSION OF SEATTLE-TACOMA INTERNATIONAL AIRPORT

DATE	PORT OF SEATTLE	PUGET SOUND COG/PUGET SOUND REGIONAL COUNCIL (PSRC)	STATE OF WASHINGTON
7/12/88	Port Commission reviews recommendations of Airspace Study Update calling for work program to increase utilization of Sea-Tac's existing capacity		
7/26/88	Staff is authorized to negotiate an interagency agreement with PSCOG to establish planning process to develop an air carrier system plan for the Puget Sound region		
9/29/88		PSCOG Assembly adopts Regional Airport System Plan identifying need for air carrier capacity in Puget Sound region and recommends PSCOSG work with Port to evaluate and select long term regional air carrier system alternative	
5/23/89	Port and PSCOG enter into interagency agreement to establish joint planning process to develop regional air carrier system plan for Puget Sound region. PSATC appointed.		
9/23/91	Port and PSCOG amend interagency agreement to include preparation of programmatic DEIS and FEIS. Port and PSCOG to be co-lead agencies with PSCOG as nominal lead agency.		
9/30/91		PSCOG is dissolved.	
10/1/91		PSROC is established.	
1/92		Transportation Policy Board (TPB) is formed.	
1/7/92	Draft EIS is issued by PSATC recommending 3rd runway at Sea-TAC, initiation of commercial service at Paine Field by 2000 and the location of a third airport in Pierce County by 2010.		

DATE	PORT OF SEATTLE	PUGET SOUND COG/PUGET SOUND REGIONAL COUNCIL (PSRC)	STATE OF WASHINGTON
1/7/92-3/2/92	Comment period on Draft EIS		
4/12/92			Governor approves SHB # 2609 preventing construction of a new runway at Sea-Tac until Air Transportation Commission (AIRTRAC) submits final report.
6/17/92	PSATC recommends third runway at Sea-Tac and future Paine Field and Pierce County Airports		
10/6/92	Final programmatic EIS (Flight Plan) is issued		
11/3/92	Port adopts PSATC's 6/17/92 recommendation re: 3rd runway at Sea-Tac (Resolution No. 3125)		
11/6/92	Port issues notice of action adopting Resolution 3125 and sets down 90-day period to file suit		
12/1/92			AIRTRAC to submit interim reports to legislative transportation committee
1/14, 1/21, 1/28, 2/4/93		Transportation Policy, Board (TPB) workshops on adoption of Flight Plan	
2/15/93	Deadline to sue on Port's adoption of Resolution 3125		
2/16/93	Suit is filed in King County Superior Court, <u>City of Normandy Park, et al. v. Port of Seattle, et al.</u>		
2/25/93		TPB holds decision meeting #1 on incorporating Flight Plan into Regional Air System Plan (RASP)	

DATE	PORT OF SEATTLE	PUGET SOUND COG/PUGET SOUND REGIONAL COUNCIL (PSRC)	STATE OF WASHINGTON
3/4/93		TPB passes resolution endorsing major supplemental airport and third runway at Sea-Tac by 1996 if Airport adopts demand and system management programs and noise reduction performance objectives are achieved, unless EIS shows feasibility of supplemental site eliminating need for Sea-Tac expansion	
3/11/93		Revises Interlocal Agreement to include Ports of Seattle, Tacoma and Everett and state agencies as "statutory members"	
3/24/93		Public hearing on TPB's resolution	
4/1/93		PSRC's Executive Board holds decision meeting #1 on incorporating Flight Plan into RASP	
4/8/93		Executive Board passes resolution endorsing major supplemental airport and third runway at Sea-Tac by 1996 if Airport adopts demand and system management and noise reduction performance objectives are achieved, unless environmental assessment (including financial and market feasibility studies) shows supplemental site is feasible and eliminates need for third runway	

DATE	PORT OF SEATTLE	PUGET SOUND COG/PUGET SOUND REGIONAL COUNCIL (PSRC)	STATE OF WASHINGTON
4/29/93		PSRC's General Assembly decision Meeting on incorporating Flight Plan into RASP	
5/1/93	Expiration of stay of litigation, City of Normandy Park, et al. v. Port of Seattle, et al.		
Undetermined		Adopts multicounty planning policies under Growth Management Act	
Undetermined	Site-specific Draft EIS is issued for third runway		
12/1/94			Legislative Transportation Committee submits final reports
4/1/96		Adopts amendment to RASP authorizing either third runway or supplemental airport	

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SCALE IN STATUTE MILES