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 Judge/Calendar: _____

6 SUPERIOR COURT OF THE STATE OF WASHINGTON
7 FOR THURSTON COUNTY

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

Petitioners,

v.

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

Respondent,

v.

14 PORT OF SEATTLE, a port district of the
15 State of Washington,; and STATE OF
16 WASHINGTON, DEPARTMENT OF
17 ECOLOGY, an agency of the State of
18 Washington,

19 Respondents Below.

NO. 02 2 01549 0

AIRPORT COMMUNITIES COALITION'S
AND CITIZENS AGAINST SEA-TAC
EXPANSION'S PETITION FOR JUDICIAL
REVIEW OF FINAL ORDER OF
POLLUTION CONTROL HEARINGS
BOARD

20 **I. INTRODUCTION**

21 1.1 Petitioners Airport Communities Coalition ("ACC," composed of the Cities of
22 Burien, Des Moines, Federal Way, Normandy Park and Tukwila, and the Highline School
23 District) and Citizens Against Sea-Tac Expansion ("CASE," a non-profit corporation composed
24 of citizens and residents in the communities surrounding Sea-Tac Airport), bring this petition
25

ACC/CASE'S PETITION
FOR JUDICIAL REVIEW - 1

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AR 000375

1 pursuant to the Administrative Procedure Act, Chapter 34.05 RCW, to obtain judicial review of a
2 final Order issued by the State Pollution Control Hearings Board ("PCHB" or "Board") on
3 August 12, 2002, in PCHB No. 01-160, *Airport Communities Coalition v. Dept. of Ecology and*
4 *Port of Seattle*. A true and correct copy of the PCHB's August 12 Order is attached to this
5 petition as Attachment A. The PCHB's August 12 Order conditionally affirmed the Washington
6 State Department of Ecology's ("Ecology," "Department") issuance of a federal Clean Water
7 Act § 401 water quality certification to the Port of Seattle for its "Master Plan Update" ("MPU")
8 projects at Seattle-Tacoma International Airport, including the Port's by-now-infamous proposed
9 third runway at Sea-Tac Airport. Under federal law, a § 401 Certification may not be issued
10 unless there is "reasonable assurance" that a proposed project will comply with all water quality
11 standards. In Washington, those standards include an explicit anti-degradation requirement,
12 generally prohibiting lowering the quality of state waters including wetlands.

13
14
15 1.2 Because of a reconsideration request by the Port to the PCHB, the PCHB's
16 August 12 Order did not become final for purposes of review under the APA until September 6,
17 2002. A true and correct copy of the PCHB's September 6 Order disposing of the Port's petition
18 for reconsideration is attached to this petition as Attachment B.

19 **A. Factual Background.**

20 1.3 The Port of Seattle's proposed Third Runway Project, if implemented, would be
21 unprecedented in scale and environmental impacts, particularly on the streams and wetlands that
22 surround Sea-Tac Airport. As the PCHB acknowledged in its Order:

AR 000376

24 The site of the proposed Third Runway is currently a wooded canyon encompassing
25 Miller Creek, the bottom of which lies approximately 150 feet below the level of the
Airport's existing runways. To provide the site for the Third Runway, the Port proposes

1 to fill the canyon with over twenty (20) million cubic yards of fill.

2 PCHB Order at 12. The fill (which would be retained in part by a 1,500-foot-long, 15-story-high
3 retaining wall) would provide the base upon which the Port plans to construct the 8,500-foot
4 dependent runway. Even based on outdated estimates, the cost of the 8,500-foot runway would
5 be over one billion dollars. According to Ecology itself, the fill placed by the Port would be the
6 equivalent of 40 football fields each piled 300 feet deep -- where Miller Creek and its associated
7 wetlands now exist. Tom Fitzsimmons, Director of the Department of Ecology, recognized the
8 enormity of the Project in a press release issued with the Section 401 decision, when he stated
9 that, "This is one of the largest public-works projects ever attempted in the state of Washington.
10 The potential effects on water quality and the natural environment are enormous . . ."

11
12 1.4 Sea-Tac Airport has a smaller land base (2200 acres) than virtually any other
13 major U.S. airport. The two existing runways are surrounded by three fish-bearing streams (Des
14 Moines, Miller and Walker Creeks), three watersheds and numerous wetlands which support
15 diverse aquatic life. The streams are classified as Class AA waters of the state -- the most
16 protected status the State affords. The streams and associated environment have long been
17 important to over 150,000 citizens, who along with their municipalities comprise Petitioners
18 ACC and CASE. These streams and wetlands are characteristic of the still viable -- but fragile --
19 aquatic systems which have been much in the news as the Puget Sound region awakes to the
20 consequences of their elimination.
21

22
23 1.5 The third runway project's potential impact on water quality and resources cannot
24 be overstated. It would impact over 700 acres, create over 300 acres of new impervious surfaces
25 with massive amounts of polluted stormwater runoff, starve dry-season stream flows, fill all or

1 portions of 50 wetlands totaling more than 20 acres and permanently impact an additional twelve
2 wetlands. If approved, the project would obliterate 980 linear feet of a fish-bearing stream,
3 Miller Creek, relocate it to a flat, fabric-lined ditch, and fill hundreds of feet of drainage channels
4 in the Miller Creek and Des Moines Creek basins. In sum, the Third Runway Project, if built,
5 would literally re-plumb the Miller, Des Moines and Walker Creek watersheds.
6

7 1.6 The affected waters, Des Moines, Miller, and Walker Creeks, all flow through
8 ACC member cities. The residents of the ACC cities including the students of the Highline
9 School District use these streams for recreational and aesthetic purposes. For example, Miller
10 and Walker Creeks flow around and through the Normandy Park community recreation center,
11 providing a beautiful, natural setting for community activities. From an early age children are
12 taught in the communities' schools about the surrounding streams through field trips and special
13 stream restoration projects. Over the years, community groups have undertaken significant
14 efforts to restore these salmon-bearing streams to levels of purity in which aquatic biota may
15 thrive. Residents flock to the streams in October to see the annual return of the salmon. Many
16 residents fish in them.
17

18 1.7 Notwithstanding the project's magnitude and impacts, Ecology's federal Clean
19 Water Act § 401 water quality certification review of it was typified by a persistent
20 unwillingness on the part of the Port to provide complete and accurate information for Ecology
21 and public review. Ecology nevertheless ultimately succumbed to pressure to issue a § 401
22 certification based upon studies, reports, and plans that were admittedly not complete in
23 fundamental respects. By doing so, Ecology effectively discarded public participation in the 401
24 review. Independent experts commissioned by ACC to comment on Port submissions as part of
25

1 the Ecology 401 review process could not do so because the necessary reports and data did not
2 yet exist. However, their future existence and validity were assumed by Ecology as a basis for
3 granting advance approval.

4 1.8 In reviewing the Ecology Certification at ACC and CASE's request, the PCHB
5 imposed sixteen new conditions. These remedy some -- but not all -- of Ecology's errors and
6 omissions. Several fundamental flaws in the Ecology Certification were left untouched, and
7 some new errors were inserted in the course of PCHB review. Therefore, while ACC/CASE
8 support several of the significant changes the Board has made, they seek review of other Board
9 findings and conclusions which leave the Certification in violation of the law.

11 **B. Procedural Background**

12 1.9 The Port's project requires a permit from the United States Army Corps of
13 Engineers ("Corps") under section 404 of the CWA (33 U.S.C. § 1344), which in turn requires
14 section 401 certification by the State that water quality standards including the anti-degradation
15 mandate will be met. 33 U.S.C. § 1341(d); 33 CFR § 320.4(d). In December 1997, the Port of
16 Seattle first applied for Clean Water Act ("CWA") approvals necessary to construct a third
17 runway at SeaTac Airport. Among the CWA approvals sought were a CWA § 404 permit from
18 the Corps of Engineers, required to fill wetlands at the project site, and a related CWA § 401
19 certification from the Department of Ecology that Ecology had, at the time of certification,
20 reasonable assurance that the project would comply with state water quality standards.

21 22
23 1.10 The Port's 1997 application was the first in a series of attempts to meet the
24 requirements of state and federal water quality law. Ecology in fact issued a § 401 certification
25 to the Port in July 1998, but the Port appealed it to the Pollution Control Hearings Board (PCHB

1 No. 98-150), delaying its own project. The Port's 1998 appeal and the underlying § 401
2 Certification were both withdrawn later that year when the Port discovered that it had
3 substantially underestimated the number of wetlands that would be impacted by the Project.

4 1.11 The Port re-applied for its Section 404/401 approvals in September 1999. After a
5 year-long investigation, and facing denial of certification by Ecology, the Port withdrew the
6 second application in late September 2000.

7
8 1.12 The Port applied yet a third time for a § 404 permit and § 401 certification in
9 October 2000. The same issues which had prevented approval of the earlier application
10 remained largely unresolved when, under pressure from the Governor and the Port, Ecology
11 issued the Port a § 401 Certification on August 10, 2001. This August 2001 Certification was
12 based on long lists of Port "IOUs" for reports and analyses needed to justify the approval it had
13 received in advance of their submission. Nevertheless, despite the unprecedented leeway
14 Ecology had given the Port, the Port once again appealed Ecology's Certification to the PCHB,
15 challenging requirements which Ecology had just touted as "scientifically sound, technically
16 feasible, and legally defensible." Ecology responded, once again after intervention by the
17 Governor's Office, by entering into closed-door negotiations and then a settlement with the Port,
18 withdrawing the August § 401 Certification it had just issued, and then granting a new,
19 weakened one more to the Port's liking on September 21, 2001.
20

21 1.13 ACC appealed the § 401 Certification to the PCHB, asserting, *inter alia*, that its
22 conditions did not provide reasonable assurance that state water quality standards would be met.
23 Petitioner Citizens Against Sea-Tac Expansion ("CASE") sought and was granted intervenor-
24 appellant status in December 2001.
25

1 **III. ATTORNEYS FOR PETITIONERS**

2 3.1 The attorneys for Petitioner ACC are:

3 Peter J. Eglick
4 Kevin L. Stock
5 Michael P. Witek
6 Helsell Fetterman LLP
7 1325 Fourth Avenue, Suite 1500
8 P.O. Box 21846
9 Seattle, WA 98111

10 And:

11 Rachael Paschal Osborn
12 Attorney at Law
13 2421 West Mission Avenue
14 Spokane, WA 99201

15 3.2 The attorney for Petitioner CASE is:

16 Richard A. Poulin
17 Smith & Lowney PLLC
18 2317 East John Street
19 Seattle, WA 98112

20 **IV. AGENCY WHOSE ACTION IS AT ISSUE**

21 4.1 The agency whose action is at issue is the Pollution Control Hearings Board, part
22 of the Office of Environmental Hearings, an agency of the State of Washington. The address of
23 the Pollution Control Hearings Board is:

24 Pollution Control Hearings Board
25 Office of Environmental Hearings
Building 2, Rowe 6, MS 40903
4224 6th Avenue SE
Lacey, WA 98504-0903

AR 000382

1 **V. AGENCY ACTION AT ISSUE**

2 5.1 The agency action at issue in this matter is the PCHB's Findings of Fact,
3 Conclusions of Law, and Order ("Order") dated August 12, 2002, in PCHB Case No. 01-160,
4 *Airport Communities Coalition v. Dept. of Ecology and Port of Seattle*, including the various
5 pre- and post-hearing orders merged into the final Order.
6

7 **VI. PARTIES TO THE ADJUDICATION BELOW**

8 6.1 The State of Washington Department of Ecology ("Ecology") was a respondent in
9 the quasi-judicial proceeding before the PCHB. The address and mailing address of Ecology
10 Headquarters are:

11 Washington Department of Ecology
12 300 Desmond Drive
13 Lacey, Washington 98503

14 and

15 Washington Department of Ecology
16 P.O. Box 47600
Olympia, Washington 98504-7600

17 Ecology was represented before the PCHB by the Office of the Washington State Attorney
18 General, including Assistant Attorneys General Joan Marchioro, Thomas Young, and Jeff Kray.

19 6.2 The Port of Seattle was a respondent in the quasi-judicial proceeding before the
20 PCHB. The address and mailing address of the Port of Seattle headquarters is:

21 Port of Seattle
22 Pier 69
23 P.O. Box 1209
Seattle, WA 98111

AR 000383

24 The Port was represented before the PCHB by Linda Strout and Traci Goodwin of the Port of
25

1 Seattle, by Roger Pearce and Steven Jones of Foster Pepper & Shefelman PLLC, and by Jay
2 Manning and Gillis Reavis of Brown Reavis & Manning PLLC.

3 **VII. FACTS DEMONSTRATING PETITIONERS'**
4 **RIGHT TO JUDICIAL REVIEW**

5 7.1 ACC and CASE are entitled to judicial review pursuant to the Washington
6 Administrative Procedure Act, Chapter 34.05 RCW. The PCHB is an "agency" within the
7 meaning of RCW 34.05.010(2). The Order is an "agency action in an adjudicative proceeding"
8 within the meaning of RCW 34.05.010(1) and (3), because it is a final order issued following
9 administrative hearing. ACC and CASE were the appellants in that administrative hearing.

10 7.2 Pursuant to RCW 34.05.510, this petition for review is the appropriate means for
11 obtaining judicial review.

12 7.3 This petition for review is timely pursuant to RCW 34.05.542(2) and RCW
13 34.05.470. The final Order was entered on August 12, 2002. An order disposing of the Port's
14 petition to the PCHB for reconsideration of the Order was entered September 6, 2002, triggering
15 the 30-day appeal period.

16 7.4 Venue is proper in Thurston County pursuant to RCW 34.05.514(1)(a). Both
17 Ecology and the PCHB, the agencies issuing the § 401 Certification and the final Order
18 challenged here, are located in Thurston County. Venue is also proper in Thurston County
19 because appeals by both the Port and ACC of prior orders issued by the PCHB in this matter
20 remain open and pending in Thurston County Superior Court Cause Nos. 01-2-02386-9 and 02-
21 2-00029-8. **AR 000384**

22 7.5 As set forth in Section VIII, ACC and CASE are substantially aggrieved and
23
24
25

1 adversely affected by the Order within the meaning of RCW 34.05.530.

2 **VIII. REASONS FOR GRANTING RELIEF**
3 **UNDER THE ADMINISTRATIVE PROCEDURE ACT**

4 8.1 Certain of the factual findings, legal conclusions, and conditions imposed in the
5 Order are invalid for one or more of the reasons provided under RCW 34.05.570(3).

6 Accordingly, ACC and CASE seek relief pursuant to RCW 34.05.570(3)(b), (c), (d), (e), (f), (h)
7 and (i). Without limitation, the invalid provisions of the Order and the bases for their invalidity
8 include the following:

9 **A. The Board Committed Error by Failing to Vacate and Remand With Instructions**

10
11 8.2 Throughout its 140-page decision, the Board repeatedly criticizes the Port's
12 environmental practices and Ecology's 401 certification. Among other criticisms, the Board
13 found: 1) the Port's past practices in sampling and monitoring stormwater discharges were
14 inadequate to measure and monitor water quality; 2) the Port's best management practices "are
15 not effective in removing dissolved metals from the stormwater"; 3) the Port has not "done an
16 adequate job in sampling to ascertain the status of receiving waters"; 4) "the § 401 certification
17 contains no requirement for the Port to implement any stormwater treatment measures beyond
18 the King County Basic Water Quality list, despite the demonstrated problems of dissolved metals
19 in the Port's stormwater discharges"; 5) the Port's failure to monitor for hardness in receiving
20 water results in "at best, confusing and, at worst, inaccurate data"; 6) the Port's use of whole
21 effluent toxicity (WET) testing to measure only for mortality but not for impairment or loss of
22 function "does not measure injury to existing beneficial uses"; 7) the 401 certification allows
23 use at the site of fill containing pollutants at "higher than natural background"; 8) the 401
24
25

1 certification improperly allows deposit of oil- (total petroleum hydrocarbons) contaminated fill;
2 9) the 401 certification's sampling protocol for assessing the presence of contamination in the fill
3 is "inadequate"; 10) the SPLP testing procedure allowed by the 401 certification to avoid the
4 (inadequate) fill contamination limits is "ineffective at determining compliance with water
5 quality standards" for certain metals; 11) "the Port did not fully evaluate the headwater wetland
6 in the Walker Creek basin for its potential to serve as mitigation" 12) the 401 certification is
7 based upon improper wetland mitigation credit for Lora Lake, buffers and enhancement
8 activities; and 13) "the Port has not fully mitigated the impacts to the filled wetlands and wetland
9 functions."

11 8.3 In an effort to resolve such fundamental flaws, the Board imposes sixteen new
12 conditions on the Port. Many of the new conditions will require the Port to make sweeping and
13 as-yet-unknown changes. The Port will have to submit wholesale revisions to the plans and
14 reports upon which the 401 Certification is based including, but not limited to, the
15 Comprehensive Stormwater Management Plan, the Low Flow Plan, and the Natural Resources
16 Mitigation Plan.

18 8.4 Nevertheless, the Board failed to vacate and remand the 401 certification to
19 Ecology with instructions. Particularly in light of the history of this matter, the Board's failure to
20 vacate and remand the 401 certification with instructions violates the requirements of CWA §
21 401, particularly the requirement that reasonable assurance exist at the time certification is
22 granted. Further, the Board has failed to decide all of the issues requiring resolution, has
23 engaged in unlawful procedure or decision making process and has erroneously interpreted or
24

25 **AR 000386**

1 applied the law. In addition, the Board's decision to affirm the 401 certification rather than to
2 vacate and remand with instructions is arbitrary and capricious.

3 **B. Improper Application of *De Novo* Scope of Review**

4 8.5 Both the Administrative Procedure Act and the PCHB's rules and case law
5 provide that its scope of review is *de novo*, applied to the record made before Ecology. While
6 the PCHB properly concluded here that its review of the Port's § 401 Certification must
7 therefore be based only upon the record before Ecology at the time the Certification was issued
8 "including explanations of that information as may be offered as evidence to this Board," the
9 Board failed to apply properly this standard.
10

11 8.6 For example, at trial, Ecology and the Port offered, and the Board accepted,
12 several documents and related testimony that post-dated the § 401 Certification, including for
13 example, the December 2001 Low Flow Technical Analysis and Flow Impact Offset Facility
14 Plan and the February 2002 Seattle-Tacoma International Airport Third Runway Embankment
15 Fill Water Quality and Transport Analysis. Such post-hoc information was ultimately used by
16 the Board to affirm portions of Ecology's September 21, 2001, Certification. Pursuant to the
17 Board's review standard, they should have been excluded from the record. The Board's actions
18 in this regard constitute an unlawful procedure or decision-making process, an erroneous
19 interpretation or application of law, are inconsistent with a rule of the agency, and are arbitrary
20 and capricious.
21

22 **C. Erroneous Reliance on Future Plans, Monitoring and Adaptive Management**

23 8.7 The Clean Water Act and applicable federal regulations require Ecology to have
24 reasonable assurance that the project will not result in a violation of water quality standards at
25

1 the time Ecology issues a 401 certification. In recognition that the Port had yet to provide
2 information necessary to resolve fundamental uncertainties, Ecology included numerous
3 conditions in the 401 Certification that required the Port to submit the information -- after
4 certification was issued. The list of missing information Ecology sought was lengthy, and each
5 item noted addressed essential components of the project. Ecology repeatedly admitted at the
6 hearing and in depositions that the missing post-certification plans and reports were needed for
7 Ecology to have reasonable assurance that the project would comply with water quality laws.
8 Without the information, it was (and still is) pure speculation that the project would not result in
9 violation of water quality standards.
10

11 8.8 In addition to its speculative reliance in some instances on essential data and
12 information not yet provided by the Port, the Board's decision in some instances approves post-
13 certification monitoring to determine the extent of harm and to provide a basis for future
14 discussions of mitigation as equivalent to the Clean Water Act's requirement for current
15 reasonable assurance that the harm will not occur in the first place.
16

17 8.9 As the Board acknowledged, "The §401 certification is a one-time opportunity for
18 the State to assure water quality standards will be met..." The Board's approval in some
19 instances of reliance on not-yet-in-existence processes, post-certification studies, plans, reports
20 and monitoring as bases for current reasonable assurance is inconsistent with a rule of the
21 agency, an erroneous interpretation or application of the law, not supported by substantial
22 evidence and is arbitrary and capricious. The Board has therefore also engaged in unlawful
23 procedure or decision-making process and has failed to follow a prescribed procedure.
24

25 **AR 000388**

1 **D. Dicta Concerning Presence of Contaminated Fill**

2 8.10 The Board properly found that the 401 certification issued by Ecology allows
3 contamination in fill material at levels above natural background levels and above calculated
4 values derived for the protection of surface water and/or groundwater. The Board also properly
5 found that the minimum number of samples required by the 401 Certification and previously
6 used by the Port to import contaminated fill to the site is “inadequate.” The Board also correctly
7 rejected use of the Port’s SPLP testing procedure to approve the importation of contaminated fill
8 when it found that the SPLP procedure is “ineffective at determining compliance with water
9 quality standards.”
10

11 8.11 The Board found that fill already at the site contains contamination in excess of
12 levels necessary for reasonable assurance. In this regard, the Board held that “nothing in this
13 opinion requires the Port to remove any fill that has already been imported to the Airport site.”
14 While the Board’s decision prohibits placement of contaminated fill already on the site in areas
15 subject to CWA § 401 jurisdiction, its statement concerning whether other fill on the site must be
16 removed is dicta.
17

18 **E. Error Regarding Stormwater Quality in Allowing Ecology to Change the Terms of the**
19 **§ 401 Certification in Future NPDES Permits, in Authorizing Illegal Mixing Zones,**
20 **and in Deferring Dam Safety Permits**

21 8.12 The Third Runway’s new impervious surfaces, totaling about 305 acres,
22 combined with existing impervious surfaces at Sea-Tac Airport, contribute enormous quantities
23 of polluted stormwater to the streams surrounding the Airport. Absent control and treatment, this
24 stormwater scours streambeds and deposits pollutants from airport operations into the water
25 column. Although the Port’s stormwater discharges have been the subject of a Clean Water Act

1 § 402 National Pollutant Discharge Elimination System (“NPDES”) water quality permit for
2 several years, the Board correctly found that existing discharges are likely violating water quality
3 standards for toxic pollutants, particularly copper. Based on this finding, the Board concluded
4 that the § 401 stormwater conditions, which perpetuate the status quo, are inadequate for a
5 finding of reasonable assurance.
6

7 8.13 The Board therefore imposed several new conditions on the § 401 Certification,
8 which ACC does not challenge here. These include a requirement that the Port’s new
9 stormwater facilities incorporate treatment mechanisms appropriate for controlling the types of
10 pollutants found at the Airport, that the Port retrofit its existing stormwater facilities to prevent
11 continued degradation of local streams, that the Port use appropriate scientific methods to
12 monitor stormwater quality, including expanded use of the Whole Effluent Testing (WET)
13 method to assess sub-lethal harm to aquatic biota, and that Ecology not utilize the Water Effects
14 Ratio Study (WERS) process to relax water quality standards for receiving waters to which the
15 Third Runway Project will discharge. These conditions are appropriate to ensure compliance
16 with state water quality standards, represent correct interpretation and application of state water
17 quality law, and are supported by substantial evidence.
18

19 8.14 The Board erred, however, with respect to other water quality findings and
20 conclusions. Most importantly, the Board erred in finding that Ecology could base reasonable
21 assurance of water quality compliance at the time of issuance of the § 401 Certification by
22 reserving authority to alter those terms of compliance in the Port’s future § 402 (NPDES)
23 permits. This overlooks the very distinct legal standards and purposes of the two separate federal
24 Clean Water Act approval processes -- one a certification (§ 401), and the other a permit (§ 402)
25

1 -- and disregards important evidence presented at the hearing.

2 8.15 The Board also erred in approving those parts of the § 401 Certification
3 challenged by ACC that authorize illegal instream “mixing zones” in violation of state water
4 quality regulations.

5 8.16 The Board further erred in finding that Ecology could defer its review of the Third
6 Runway stormwater facilities under state dam safety laws. Because the Port’s proposed
7 stormwater facilities would be among the largest such structures ever built, it was not reasonable
8 for Ecology to assume that dam safety requirements, which are intended to prevent failure of
9 water impoundments resulting in massive stream degradation, are simply ministerial decisions
10 not relevant to a finding of reasonable assurance.

11 8.17 For the foregoing reasons, the Board’s findings regarding water quality impacts of
12 the Third Runway Project reflect erroneous interpretation or application of law, are arbitrary and
13 capricious, and are not supported by substantial evidence in the record.

14 **F. Error in Certification of Deficient Low Flow Plan**

15 8.18 The Third Runway Project will add at least 305 acres of impervious surfaces to
16 the Des Moines, Miller, and Walker Creek watersheds. These surfaces, combined with the
17 emplacement of 20 million cubic yards of fill and construction of the MSE wall, will disrupt
18 ground and surface water flows around the Airport and reduce flow in the three affected streams.
19 This reduction of stream flow will degrade the characteristic uses of Des Moines, Miller and
20 Walker Creeks, including their suitability for fish, wildlife and recreational purposes, all in
21 violation of state water quality standards.

AR 000391

1 assurance that the Port can mitigate for low flow reductions in Des Moines, Miller and Walker
2 Creeks during the summer and autumn months, was issued prior to completion of the Port's
3 "Low Flow Plan" for doing so. The Certification assumed the Plan would be acceptable and
4 allowed the Port to complete it later.

5 8.20 The Port did issue a revised Low Flow Plan during the pendency of the PCHB
6 proceeding. The revised Plan did not support the September 2001 Certification's assumption. It
7 offered new modeling and technical analysis, and revised low flow mitigation figures, including
8 elimination of all mitigation for Miller Creek. The revised Plan was so riddled with errors that
9 Ecology staff and King County representatives themselves testified that they had not yet
10 accepted it and that it did not provide a basis for reasonable assurance that water quality
11 standards would not be violated as a result of low streamflow impacts.

12 8.21 The Board nevertheless ruled that the Low Flow Plan was adequate to support the
13 Port's revised mitigation figures. In doing so, the Board made erroneous findings regarding the
14 hydrology of the MSE wall, the accuracy of the multiple hydrologic models utilized to determine
15 impacts, the assumptions contained within or missing from the hydrologic models, and the
16 calibration of the models with observed data. It erroneously found that a post-Certification
17 "iterative process of continuous review" and "further refinement" allowed Ecology to have
18 reasonable assurance at the time the September 2001 Certification was issued. These findings
19 disregard critical testimony and documents presented at hearing, are not supported by substantial
20 evidence, and are contrary to law.

21 8.22 The Board also erred in ruling that the mitigation quantity for Walker Creek, and
22 the determination that no mitigation is required for Miller Creek, are adequate, and in finding
23

1 that the timing and location of mitigation releases as proposed in the Low Flow Plan provided
2 reasonable assurance that project impacts would be adequately mitigated. The Board further
3 erred in finding that the stormwater reserve vaults were feasible and constructable, and that the
4 quality of the water released from the vaults would not violate water quality standards.

5 8.23 The Board ruled that § 401 requirements concerning monitoring of low flow
6 impacts, and contingency measures in the event of miscalculation, were adequate to support a
7 finding of reasonable assurance. However, even the post-Certification Low Flow Plan does not
8 contain provisions to implement such requirements or to cure the harm caused by
9 miscalculations. The Board therefore erred in finding reasonable assurance.

10 8.24 Finally, the Board ruled, based on historical studies of Des Moines Creek stream
11 flow needs, that the appropriate mitigation for Des Moines Creek is one (1) cubic foot per second
12 (cfs). ACC does not challenge this.¹

13 8.25 The Board's assessment of the technical basis for and content of the Port's Low
14 Flow mitigation activities is not supported by substantial evidence in the record. The Board's
15 conclusions regarding the low flow plan also reflect an erroneous interpretation or application of
16 law and are arbitrary and capricious.

17 **G. Error in Finding Reasonable Assurance Regarding MSE Walls**

18 8.26 The Third Runway embankment would be retained to the West by a
19 mechanically stabilized earth ("MSE") wall 135 feet high at its tallest point (and further topped
20 with a twenty-foot-high sloped embankment for a total height of 155 feet), for a distance of
21
22
23

24 _____
25 ¹ In the event this ruling withstands legal attack by the Port of Seattle, ACC's claims respecting the Low Flow Plan in the Des Moines Creek basin will be moot.

1 1,500 feet. The embankment would be retained to the north by a wall 1,300 feet long and up to
2 90 feet high, and to the south by a wall 900 feet long and up to 50 feet high.

3 8.27 ACC presented substantial evidence that the Port's "design earthquake" for the
4 MSE walls did not meet the standard applied to such comparable public projects as the Tacoma
5 Narrows Bridge and the Alaskan Way Viaduct, and was insufficient to provide reasonable
6 assurance that wall deformation would not lead to collapse and result in a violation of water
7 quality standards. In response, the Board ruled that the Port's admittedly less protective design
8 standard (used typically for private high-rise office construction) was sufficient. The Board's
9 findings and conclusions in this regard are not supported by substantial evidence viewed in the
10 light of the whole record before the Board and is based upon an erroneous interpretation or
11 application of law.
12

13
14 **H. Errors in Wetlands Assessment and Compensation**

15 8.28 The Board properly found that the Port failed to evaluate fully all in-basin
16 mitigation opportunities, as required. However, the Board's Final Order erroneously fails to
17 ensure that such in-basin mitigation will occur.

18 8.29 The Port's Natural Resources Mitigation Plan proposes 65 acres of wetland
19 mitigation at a site in Auburn, along the Green River, miles away from and in a different basin
20 than the proposed Third Runway site. While the Board concludes that "the Port's proposal does
21 not comply with the anti-degradation standard" and that the Port does not meet Ecology's 2:1
22 mitigation target for the project, the Board Decision allows the Port to take mitigation credit for
23 the out-of-basin Auburn site. In that regard, the Board's finding and conclusions are not
24 supported by substantial evidence, are based upon an erroneous interpretation or application of
25

1 law and are arbitrary and capricious.

2 8.30 The Port proposes as its key in-basin mitigation site 6.6 acres of what is known as
3 the Vacca Farm property. ACC presented substantial evidence that the Vacca Farm site cannot
4 be credited as a “restoration” project when it is, at best, an enhancement project. Substantial
5 evidence also established that the Vacca Farm site is a jurisdictional wetland under the
6 Department of Ecology guidelines and that the Port in condemnation proceedings in King
7 County Superior Court used the current existence of wetlands on the Vacca site to lower the
8 condemnation value of the property. The Board nevertheless allowed the Port to take full credit
9 for the Vacca Farm site as a “restoration” project. The Board’s findings and conclusions in this
10 regard are not supported by substantial evidence, are based upon an erroneous interpretation or
11 application of law, and are arbitrary and capricious.
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13 8.31 With respect to wetlands functions the Board stated: “A functional assessment is
14 a method used to evaluate and quantify the functions that wetlands afford. To determine whether
15 a wetland mitigation plan is consistent with water quality standards, it is necessary to know what
16 functions will be lost and then to assess whether those functions will be effectively replaced.” At
17 the hearing, ACC presented substantial evidence that the Port’s functional assessment did not
18 properly assess the critical functions of the sloped wetlands located west of the existing runways
19 that will be filled by the embankment. Despite acknowledging that the Board was “troubled by
20 the method used by the Port” and expressing concern about “the lack of a good tool for assessing
21 sloped wetlands,” the Board accepted the Port’s functional assessment and concluded that the
22 Port’s functional assessment of wetlands was sufficient to provide Ecology with reasonable
23 assurance. The Board’s findings and conclusions in this regard are not supported by substantial
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1 evidence, are based upon an erroneous interpretation or application of law and are arbitrary and
2 capricious.

3 8.32 Finally, in addressing the question of wetlands mitigation, the Board found
4 without any evidence of quantifiable benefit that the Port's project would result in a benefit
5 through removal of sources of pollutants. The Board's findings and conclusions in this regard
6 are not supported by substantial evidence, are based upon an erroneous interpretation or
7 application of law and are arbitrary and capricious.
8

9 **I. Timing of Low Flow Mitigation and Water Rights Requirement Imposed by Board**
10 **and Failure to Address SEPA Issue**

11 8.33 The Board ruled that the Port must obtain water rights for its late summer release
12 of water from stormwater vaults for low flow mitigation purposes. ACC does not challenge this.

13 8.34 However, the Board also appeared to say that the Port need not obtain water rights
14 until it commences release of mitigation water from the stormwater vaults, and that such water
15 rights would be "nonconsumptive." These findings and conclusions are in error.

16 8.35 Low flow impacts to Des Moines, Miller and Walker Creeks will begin to occur
17 once construction of the Third Runway Project commences and will continue through the six-
18 year construction period. To the extent the Board's statement regarding the timing of obtaining
19 water rights could be interpreted to mean that mitigation water for low flow impacts is not
20 required during the Third Runway construction period, such ruling conflicts with the
21 requirements of the Clean Water Act and the Water Pollution Control Act.
22

23 8.36 The Board's ruling that the Port's low flow mitigation right would be "non-
24 consumptive" is hypothetical and not supported by evidence in the record. Further, it cannot be
25

1 assumed that the Port will be able to obtain water rights as required by the Board. In the absence
2 of Port water rights at the time of § 401 Certification, there can be no reasonable assurance that
3 the Port is capable of fulfilling its low flow mitigation requirements and thereby prevent
4 degradation of state waters in violation of water quality standards.

5 8.37 Finally, the Stipulated Statement of Issues adopted by the Board specifically set
6 forth ACC's contention that the requirements of the State Environmental Policy Act (Ch. 43.21C
7 RCW) were violated because the failure of Ecology to require, and the Port to obtain, water
8 rights also resulted in a failure to perform required SEPA analysis related to the water rights
9 decision. The Final Order does not address this issue.

10 8.38 The Board's rulings with respect to the timing and impacts of the Port's
11 obligation to obtain water rights constitute an erroneous interpretation or application of law, are
12 arbitrary and capricious, are not supported by substantial evidence, and improperly fail to
13 address an issue on which review was required.

14
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16 **J. Erroneous Exclusion of Certain Deposition Testimony and Other Exhibits**

17 8.39 In making evidentiary rulings, the Board is directed to give consideration to the
18 Superior Court Civil Rules. WAC 371-08-500. Such Rules specifically permit depositions of
19 parties to be utilized for any purpose at trial. Here, the trial on the merits below was held before
20 the Board on March 18 through March 29, 2002. As part of the trial ACC offered various
21 parties' deposition testimony. Rather than admit such testimony, in an Order dated April 22,
22 2002, and in a Corrected Order dated June 11, 2002, the Board excluded certain deposition
23 testimony designated by ACC. Many of the Board's rulings are inconsistent. Further, they
24 exclude relevant testimony impeaching Ecology's claims of reasonable assurance by describing
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1 the political basis and pressure (rather than scientific deliberation) which actually resulted in the
2 issuance of the 401 Certification, while including deposition testimony making such claims. By
3 excluding deposition testimony designated by ACC, the Board engaged in unlawful procedure or
4 decision making process, erroneously interpreted or applied the law including the rules of
5 evidence, and engaged in arbitrary and capricious decision-making.
6

7 8.40 The Board further erroneously excluded other exhibits from the record including
8 for example ones demonstrating that Ecology knew water rights should have been required for
9 the project.

10 **K. Error in Admission and Reliance on Information Prohibited by Board Rulings and**
11 **Orders**

12 8.41 The Board's October 30, 2001, Pre-Hearing Order provided that, "Ecology and
13 the Port are prohibited from relying at the hearing upon any plan or report prepared after
14 February 1, 2002." In addition, the Pre-Hearing Order established February 1, 2002, as a
15 discovery deadline except for certain additional discovery which could occur prior to February
16 28, 2002, relating to plans or reports prepared between November 15 and February 1 and which
17 were previously identified by Ecology and the Port. ACC was precluded after February 28,
18 2002, from conducting any discovery. During the course of the hearing, the Board reiterated in a
19 March 22, 2002, Order that "any party is prohibited from relying on information created after
20 February 28, 2002."
21

22 8.42 However, during and after the hearing, the Board gave oral rulings and issued
23 written orders that allowed Port and Ecology witnesses to testify live and in revised pre-filed
24 testimony about plans and reports prepared after February 1, 2002, and information created after
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1 February 28, 2002. These rulings and orders include, but are not limited to, a March 19, 2002,
2 Order Denying Appellant's Motion in Limine to Exclude Late-Produced Plans and Reports and
3 an April 22, 2002, Order Denying ACC's Motion to Redact portions of the pre-filed testimony of
4 Paul Fendt. The Board's evidentiary rulings and orders allowing testimony relating to plans and
5 reports prepared after February 1, 2002, and information after February 28, 2002, prejudiced
6 ACC/CASE in the presentation of their appeal. The Board's actions were inconsistent with a
7 rule of the agency, constitute an erroneous interpretation or application of the law including the
8 rules of evidence, are an unlawful procedure or decision-making process and are arbitrary and
9 capricious.
10

11 **L. Error in Failing to Require New Public Notice for the Amended September 2001**
12 **Certification, and by Failing to Require EPA Regional Administrator Approval**

13 8.43 On August 10, 2001, Ecology issued the 401 certification. ACC appealed the 401
14 Certification to the Board on August 23, 2001. The appeal was assigned PCHB Case No. 01-
15 133. On September 4, 2001, a prehearing conference was conducted to establish a schedule for
16 hearing a motion by ACC to stay the effectiveness of the 401 Certification. The following week,
17 on September 10, 2001, the Port of Seattle filed its own Notice of Appeal of the August 401
18 Certification which was assigned PCHB Case No. 01-150. At the same time, the Port filed with
19 the Board a Stipulation with Ecology for entry by the Board of an agreed order that would
20 modify the 401 Certification and, on that basis, dismiss the Port's appeal. ACC objected.
21 Ecology then instead withdrew the August 401 Certification and issued a new one, on September
22 21, 2001, Order No. 1966-4-02325 (Amended-1).
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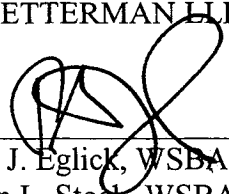
1 4. Such other relief as the Court deems just and equitable.

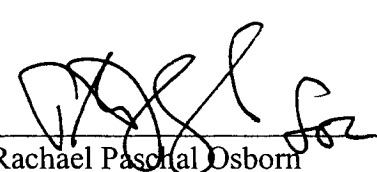
2 DATED this 12 day of September, 2002.

3 Respectfully submitted,

4 HELSELL FETTERMAN LLP

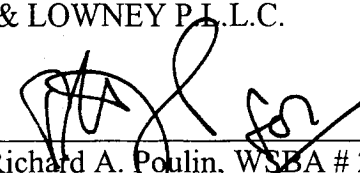
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ACC/CASE'S PETITION
FOR JUDICIAL REVIEW - 27

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