

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
Appellant,) PCHB 01-160
CITIZENS AGAINST SEATAC) ORDER PUBLISHING CERTAIN
EXPANSION,) PORTIONS OF DEPOSITIONS OF
Intervenor,) ECOLOGY MANAGERS AND CR 30(b)(6)
DESIGNATED WITNESSES
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY and THE)
PORT OF SEATTLE,)
Respondents.)

On March 19, 2002, during the hearing on the merits, the Board entered its ruling on appellant ACC's Motion To Publish Depositions of Ecology Managers and CR 30(b)(6) Designated Witnesses. The Board ruled that no deposition would be admitted carte blanche. Instead, the Board set forth a detailed process for publishing the depositions of Tom Fitzsimmons, Gordon White and Ray Hellwig under CR 32(a)(2), and Ann Kenny, Erik Stockdale, John Drabek, Kevin Fitzpatrick and Peter Kmet under CR 30(b)(6). The parties have submitted the materials as directed in the earlier order. The Board has reviewed the materials and enters this order based on the objections and responses raised. For ease in formatting, the order will be organized so that the objections with which the Board agrees will be described. All other objections are overruled by the Board. This order lists those segments of the depositions

1 that are admitted. Attached to this order is a copy of each of the depositions clearly showing
2 those portions that are not admitted.

3 **OBJECTIONS**

4 **John Drabek:** All Objections were overruled on Mr. Drabek's deposition.

5 **Kevin Fitzpatrick:** The following objections were upheld on Mr. Fitzpatrick's
6 deposition:

<u>FROM</u>	<u>TO</u>	<u>REASON</u>
Page 62, line 19	page 63, line 1	Foundation, speculation.
Page 79, line 18	page 80, line 1	Foundation, speculation, vague and ambiguous.
Page 82, line 2	page 82, line 15	Argumentative.
Page 88, line 15	page 88, line 21	Argumentative
Page 88, line 22	page 89, line 11	Argumentative.
Page 106, line 6	page 106, line 17	Argumentative.
Page 124, line 21	page 125, line 9	Not posed as question, argumentative.
Page 144, line 20	page 145, line 22	Foundation.
Page 145, line 23	page 146, line 10	Document speaks for itself.
Page 148, line 15	page 149, line 9	Foundation.
Page 149, line 10	page 149, line 19	Speculation.
Page 169, line 22	page 170, line 4	Compound

14 **Tom Fitzsimmons:** The following objections were upheld on Mr. Fitzsimmons'
15 deposition:

<u>FROM</u>	<u>TO</u>	<u>REASON</u>
Page 1	Page 20, line 9	No relevance to the factual or legal issues before the board.
Page 28, line 13	Page 31, line 5	No relevance to the factual or legal issues before the board.
Page 35, line 10	Page 36, line 2	No relevance to the factual or legal issues before the board.
Page 36, line 21	Page 39, line 10	No personal knowledge. No relevance to the factual or legal issues before the board.
Page 42, line 15	Page 51, line 24	No relevance to the factual or legal issues before the board.

1	Page 61, line 11	Page 77, line 4	No relevance to the factual or legal issues before the board.
2	Page 77, line 5	Page 84, line 3	No relevance to the factual or legal issues before the board.
3	Page 84, line 4	Page 93, line 3	No relevance to the factual or legal issues before the board.
4			

Raymond Hellwig: The following objections were upheld on Mr. Hellwig's deposition:

<u>FROM</u>	<u>TO</u>	<u>REASON</u>
Page 9, line 25	page 23, line 3	No relevance to the factual or legal issues before the Board.
Page 12, line 8	page 12, line 11	Mischaracterizes the witness' testimony.
Page 78, line 22	page 86, line 13	Calls for speculation; mischaracterizes testimony of the witness.
Page 83, line 16	page 83, line 22	Mischaracterizes the witness' testimony.
Page 84, line 2	page 84, line 9	Calls for hearsay; mischaracterizes the witness' testimony.
Page 85, line 19	page 85, line 25	Mischaracterizes the witness' testimony.
Page 88, line 15	page 88, line 19	Argumentative.
Page 97, line 24	page 98, line 4	Hearsay; calls for speculation.
Page 103, line 21	Page 103, line 23	Mischaracterizes the witness' testimony.
Page 105, line 7	page 105, line 10	Mischaracterizes the witness' testimony.
Page 105, line 25	page 106, line 3	Mischaracterizes the witness' testimony.
Page 109, line 7	page 111, line 25	No relevance to the factual or legal issues before the Board.

1	Page 114, line 18	page 114, line 23	Mischaracterizes the witness' testimony.
2	Page 115, line 10	page 115, line 23	No relevance to the factual or legal issues before the Board.
3	Page 121, line 23	page 123, line 9	No relevance to the factual or legal issues before the Board.
4	Page 125, line 8	page 126, line 11	Mischaracterizes testimony of another witness.
5	Page 130, line 17	page 131, line 5	No foundation.
6	Page 137, line 12	page 137, line 28	Mischaracterizes witness' testimony; argumentative.
7	Page 138, line 6	page 138, line 12	Calls for speculation.
8	Page 138, line 6	page 142, line 3	Mischaracterizes witness' testimony.
	Page 141, line 4	page 141, line 9	Mischaracterizes the witness' testimony.
	Page 141, line 16	page 142, line 3	Argumentative; mischaracterizes the witness' testimony.
9	Page 142, line 4	page 143, line 4	Argumentative
10	Page 143, line 17	page 143, line 21	Mischaracterizes the witness' testimony.
	Page 144, line 7	page 144, line 11	Mischaracterizes the witness' testimony.
	Page 145, line 11	page 146, line 4	Calls for speculation.
11	Page 151, line 17	page 151, line 23	Mischaracterizes the witness' testimony.
	Page 154, line 25	page 155, line 5	Mischaracterizes the evidence.
12	Page 154, line 25	page 156, line 13	Double hearsay.
	Page 155, line 14	page 155, line 17	Mischaracterizes the witness' testimony.
13	Page 156, line 5	page 156, line 13	Mischaracterizes the witness' testimony.
	Page 159, line 7	page 159, line 14	Lack of foundation.
14	Page 162, line 9	page 162, line 20	Argumentative.
15	Page 166, line 17	page 167, line 17	No relevance to the factual or legal issues before the Board.
16	Page 170, line 16	page 172, line 24	No relevance to the factual of legal issues before the Board.
17	Page 182, line 10	page 182, line 24	No relevance to the factual or legal issues before the Board.

Ann Kenny: The following objections were upheld on Ms. Kenny's deposition:

	<u>FROM</u>	<u>TO</u>	<u>REASON</u>
19	Page 27, line 24	page 35, line 10	Relevance.
20	Page 28, line 12	page 28, line 18	Vague.
	Page 38, line 1	page 39, line 13	Relevance.
21	Page 71, line 19	page 71, line 24	Asked and answered.

1	Page 77, line 21	page 77, line 23	Relevance.
2	Page 114 line 13	page 115, line 5	Speculation.
3	Page 190, line 1	page 191, line 20	No relevance to the factual or legal issues before the Board.
4	Page 198, line 24	page 199, line 5	Argumentative. No relevance to the factual or legal issues before the Board.
5	Page 200, line 25	page 201, line 5	Calls for speculation.
6	Page 201, line 17	page 201, line 22	Lack of foundation.
7	Page 214, line 19	page 215, line 2	No relevance to the factual or legal issues before the Board.
8	Page 218, line 18	page 225, line 5	No relevance to the factual or legal issues before the Board.
9	Page 219, line 1	page 219, line 15	Mischaracterizes the witness' testimony.
10	Page 240, line 22	page 241, line 9	Relevance.
11	Page 242, line 2	page 243, line 11	Relevance.
12	Page 249, line 16	page 249, line 18	Argumentative.

13 **Peter Kmet:** All Objections were overruled on certain portions of Mr. Kmet's deposition.

14 **Erik Stockdale:** The following objections were upheld on Mr. Stockdale's deposition:

15	<u>FROM</u>	<u>TO</u>	<u>REASON</u>
16	Page 7, line 43	page 11, line 21	No relevance to the factual or legal issues before the Board.
17	Page 66, line 16	page 71, line 7	Lack of foundation and of no relevance to the factual and legal issues before the PCHB.
18	Page 111, line 1	page 112, line 9	Relevance.
19	Page 117, line 15	page 118, line 16	Relevance. This testimony is of no relevance to the factual and legal issues before the PCHB.
20	Page 126, line 19	page 127, line 21	Misleading.
21	Page 129, line 17	page 130, line 8	Relevance.
	Page 129, line 17	page 130, line 9	Relevance.

1	Page 135, line 23	page 136, line 25	Relevance.
2	Page 138, line 23	page 139, line 11	Relevance.
	Page 142, line 19	Page 148, line 11	Relevance.

3

4 **Gordon White:** The following objections were upheld on certain portions of White's

5 deposition:

6	<u>FROM</u>	<u>TO</u>	<u>REASON</u>
7	Page 47, line 24	page 49, line 1	Hearsay.
8	Page 48, line 22	Page 49, line 1	Speculation.
	Page 68, line 19	page 69, line 3	Hearsay.
	Page 92, line 22	Page 93, line 20	Mischaracterizes witness' testimony.

9

PUBLISHED PORTIONS OF DEPOSITIONS

10 As a result of the Board's rulings on the above objections, the following portions of

11 depositions are published and admitted as part of the record in this case:

12 **John Drabek:**

13 Page 2, line 1 through page 12, line 5

14 Page 15, line 1 through page 20, line 12

15 Page 25, line 15 through page 28, line 18

16 Page 29, line 9 through page 36, line 1

17 Page 41, line 1 through page 45, line 10

18 Page 46, line 8 through page 48, line 16

19 Page 50, line 5 through page 61, line 20

20 Page 64, line 22 through page 70, line 13

21 Page 71, line 15 through page 73, line 25

Page 74, line 3 through page 82, line 16

Page 85, line 18 through page 86, line 13

Page 86, line 18 through page 92, line 5

Page 95, line 23 through page 96, line 23

Page 97, line 18 through page 98, line 17

Page 105, line 1 through page 109, line 2

Page 118, line 12 through page 125, line 25

Page 129, line 1 through page 130, line 7

1 Page 131 (Completed Correction and Signature page)

2 **Kevin Fitzpatrick:**

3 Page 1, line 1 through page 7, line 7
 Page 10, line 7 through line 24
 4 Page 11, line 25 through page 13, line 16
 Page 15, line 14 through page 53, line 17
 5 Page 54, line 23 through page 58, line 7
 Page 60, line 8 through page 62, line 18
 6 Page 63, line 2 through page 72, line 14
 Page 79, line 12 through line 17
 7 Page 80, line 2 through line 10
 Page 82, line 16 through page 88, line 14
 8 Page 94, line 9 through page 95, line 20
 Page 99, line 24 through page 106, line 5
 9 Page 106, line 18 through page 110, line 1
 Page 116, line 24 through page 119, line 12
 10 Page 122, line 17 through page 124, line 20
 Page 125, line 10 through page 126, line 22
 11 Page 135, line 24 through page 144, line 19
 Page 146, line 11 through page 148, line 14
 12 Page 149, line 20 through page 150, line 17
 Page 151, line 13 through page 169, line 21
 13 Page 170, line 5 through page 172, line 18
 Completed Correction and Signature Page

14 **Tom Fitzsimmons:**

15 Page 1, line 1 through page 5, line 20
 16 Page 7, line 8 through page 9, line 21
 Page 14, line 10 through page 19
 17 Page 17, line 1 through line 22
 Page 28, line 13, through line 22
 18 Page 36, line 3 through line 20
 Page 39, line 11 through page 42, line 14
 19 Page 51, line 25 through page 61, line 10
 Page 93, line 4 to page 121, line 7
 20
 21

Raymond Hellwig:

Page 6, line 1 through page 9, line 24
Page 23, line 4 through page 38, line 20
Page 66, line 20 through page 67, line 14
Page 75, line 16 through page 76, line 18
Page 77, line 1 through page 78, line 21
Page 86, line 14 through page 88, line 14
Page 88, line 20 through page 97, line 23
Page 98, line 5 through page 103, line 20
Page 103, line 24 through page 105, line 6
Page 105, line 11 through line 24
Page 106, line 4 through page 109, line 6
Page 112, line 1 through page 114, line 17
Page 114, line 24 through page 115, line 9
Page 115, line 24 through page 121, line 22
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Page 144, line 12 through page 145, line 10
Page 146, line 5 through page 151, line 16
Page 151, line 24 through page 154, line 24
Page 156, line 14 through page 159, line 6
Page 159, line 15 through page 162, line 8
Page 162, line 20 through page 166, line 16
Page 167, line 18 through page 170, line 15
Page 172, line 25 through page 182, line 9
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Page 249, line 19 through page 262, line 25

1 **Ann Kenny:**

2 Page 5, line 18 through page 24, line
3 Page 25, line 12 through page 27, line 23
4 Page 37, line 1 through 25
5 Page 39, line 14 through page 43, line 24
6 Page 44, line 23 through page 46, line 8
7 Page 47, line 23 through page 48, line 20
8 Page 61, line 4 through page 71, line 5
9 Page 71, line 9 through 18
10 Page 71, line 25 through page 75, line 16
11 Page 75, line 25 through page 77, line 17
12 Page 78, line 8 through page 82, line 24
13 Page 85, line 3 through page 89, line 21
14 Page 93, line 23 through page 101, line 9
15 Page 107, line 5 through page 109, line 16
16 Page 109, line 24 through page 112, line 25
17 Page 113, line 13 through 114, line 12
18 Page 115, line 6 through page 168, line 20
19 Page 172, line 13 through page 174, line 4
20 Page 174, line 10 through page 189, line 1
21 Page 190 (Complete Correction and Signature page)
22 Page 195, line 11 through page 209, line 25
23 Page 213, line 14 through page 215, line 24
24 Page 222, line 24 through page 223, line 8
25 Page 224, line 17 through page 232, line 18
26 Page 234, line 19 through 24
27 Page 236, line 17 through page 240, line 21
28 Page 241, line 10 through page 242, line 1
29 Page 243, line 12 through page 308, line 4
30 Page 308, line 22 through page 323, line 22

17 **Peter Kmet:**

18 Page 6, line 2 through line 5
19 Page 6, line 11 through page 6, line 13
20 Page 7, line 4 through line 17
21 Page 11, line 2 through line 23
22 Page 13, line 11 through Page 27, line 15
23 Page 28, line 20 through Page 43, line 6
24 Page 47, line 21 through page 48, line 9

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Erik Stockdale:

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Page 41, line 7 through page 66, line 15
Page 74, line 6 through line 19
Page 75, line 17 through page 80, line 19
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Page 196, line 18 through page 206, line 21
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Gordon White:

Page 5, line 1 through page 8, line 14
Page 10, line 8 through page 11, line 17
Page 12, line 6 through page 13, line 14
Page 13, line 22 through page 20, line 11
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4 Page 41, line 14 through line 20
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5 Page 49, line 17 through line 21
Page 50, line 1 through page 51, line 12
6 Page 53, line 6 through page 61, line 22
Page 62, line 15 through page 67, line 22
7 Page 68, line 8 through line 18
Page 69, line 4 through line 8
8 Page 70, line 2 through page 75, line 20
Page 77, line 11 through page 78, line 6
9 Page 79, line 8 through page 84, line 1
Page 85, line 17 through page 86, line 4
10 Page 86, line 10 through line 19
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11 Page 91, line 9 through page 92, line 21
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12 Page 99, line 4 through page 101, line 20
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13 Page 110, line 3 through line 8
Page 115, line 22 through page 116, line 4
14 Page 117, line 3 through page 120, line 1
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15 Page 121, line 18 through page 124, line 9
Page 129, line 3 through line 25
16 Page 132, line 17 through line 21
Page 135, line 13 through page 136, line 7
17 Page 139 (correction page)

18
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21

1 **ORDER**

2 The designated portions of the depositions of the named individuals in this order are
3 hereby published and made a part of the record in this case. Should a discrepancy exist between
4 the lists contained in this order and the attached copy of the marked depositions, the attached
5 marked depositions shall prevail.

6 SO ORDERED this 22nd day of April, 2002.

7
8 **POLLUTION CONTROL HEARINGS BOARD**

9 
10 _____
11 **KALEEN COTTINGHAM,**
12 Presiding

DEPOSITION UPON ORAL
EXAMINATION OF

John Drabek

Date: December 14, 2001

Case: Airport Communities Coalition v. State of WA, et al.

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AR 001506

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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2
3
4 AIRPORT COMMUNITIES COALITION,)
5 Appellant,)
6 vs.) PCHB No. 01-160
7 STATE OF WASHINGTON,)
8 DEPARTMENT OF ECOLOGY; and)
9 THE PORT OF SEATTLE,)
10 Respondents.)

DEPOSITION UPON ORAL EXAMINATION
OF
JOHN DRABEK

10:00 A.M.

DECEMBER 14, 2001

1325 FOURTH AVENUE, SUITE 1500
SEATTLE, WASHINGTON

DIANE MILLS, CSR# MI-LL-SD-M380N3

CORRECTION & SIGNATURE PAGE

RE: AIRPORT COMMUNITIES COALITION VS. STATE OF WASHINGTON, et al. BEFORE THE POLLUTION CONTROL HEARINGS BOARD DEPOSITION OF: JOHN DRABEK; DECEMBER 14, 2001

I, JOHN DRABEK, have read the within transcript taken DECEMBER 14, 2001, and the same is true and accurate except for any changes and/or corrections, if any, as follows:

PAGE	LINE	CORRECTION	ORIGINAL
0072	12, 13	<u>The fact you had to ask that question demonstrates for the record the Condition is confusing. It is open to interpretation. I never made an interpretation that construction stormwater monitoring is required to be submitted under this condition. I did not interpret the condition.</u>	
0073	18, 19	<u>The fact you had to ask that question demonstrates for the record the question is confusing. It is open to interpretation. I never made an interpretation that construction stormwater monitoring is required to be submitted under this condition.</u>	
125	24	<u>Yes. The reporting requirements are clear. Monitoring is required to be submitted every other month as opposed to the 402 which is open to interpretation. If you clearly had to submit your speed on the freeway every other month to the highway patrol you would be more likely to comply with State of Washington speed laws. Similarly the clear reporting requirements of the 401 which are not open to interpretation will make it more likely for the Port to comply with State of Washington effluent limitations.</u>	

Signed at Bellevue, Washington, on the 18 day of January, 2002.

[Signature]

JOHN DRABEK

AR 001508

1 APPEARANCES

2
3 FOR THE APPELLANT:

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7 Seattle, Washington 98112

8
9
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11 DEPARTMENT OF ECOLOGY:

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13 Assistant Attorney General
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15 Olympia, Washington 98504-0117

16
17
18 FOR THE RESPONDENT PORT OF SEATTLE:

19 ROGER A. PEARCE
20 Foster Pepper & Shefelman, P.L.L.C.
21 1111 Third Avenue
22 Suite 3400
23 Seattle, Washington 98101-3299
24
25

1 SEATTLE, WASHINGTON; DECEMBER 14, 2001

2 10:00 A.M.

3 --oOo--

4
5 JOHN DRABEK,
6 sworn as a witness by the Notary Public,
7 testified as follows:

8
9 EXAMINATION

10
11 BY MR. POULIN:

12 Q. Hi, John, I'm Rick Poulin and I'll be asking
13 you questions today on behalf of ACC. And I'm first
14 interested in having you state and spell your name for
15 the record.

16 A. My name is John Drabek. The last name is
17 spelled D like in David, r-a-b-e-k.

18 Q. John, have you ever had your deposition taken
19 before?

20 A. No, I don't believe I have.

21 Q. Have you ever served as a witness in a trial
22 or an administrative appeal?

23 A. An administrative appeal, yes.

24 Q. Well, I want to make sure you understand the
25 process here. I'll be asking you questions. We're

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5 MR. PEARCE 128
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9 EXHIBITS FOR IDENTIFICATION PAGE

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11 2 - Ltr, 8/10/01, Re: Water Quality Certification 87
12 3 - Ltr, 5/29/01, Re: Modification of NPDES Permit 14
13 4 - NPDES Permit 13
14 5 - WAC, Chapter 173-201A 36
15 6 - Annual Stormwater Monitoring Report 57
16 7 - STIA Construction Site Stormwater Monitoring 74
17 Reports, 10/16/00, 10/20/00, 11/8/00, 11/26/00
18 8 - e-mail correspondence 94
19 9 - Draft Meeting Notes, March 9, 2001 96
20 10 - Draft Meeting Notes, March 14, 2001 116
21 11 - STIA Construction Site Stormwater Monitoring 118
22 Report, 6/28/01
23 12 - STIA Construction Site Stormwater Monitoring 120
24 Report, 6/28/01
25 13 - STIA Construction Site Stormwater Monitoring 121
Report, 9/26/01

1 creating a record, so we need a spoken response, a yes
2 or no preferably, if that's what the question asks for,
3 but a nod or a shake of your head won't suffice. I'd
4 really like to make sure that you understand the
5 question, so would you please let me know if you don't
6 know what I'm asking?

7 A. Yes.

8 Q. And if there's anything confusing or unclear
9 about a question, would you tell me that?

10 A. Yes.

11 Q. Thank you. Is there any reason that you
12 wouldn't be able to give clear answers to questions
13 today? Are you feeling okay?

14 A. I'm feeling okay.

15 Q. Have you had any medications that might
16 affect your thought processes in the last 24 hours?

17 A. No.

18 Q. Had any alcohol to drink?

19 A. No.

20 Q. And otherwise feel fine?

21 A. Yes.

22 Q. Great. Could you please tell me about your
23 educational background.

24 A. I have a Bachelor of Science degree in
25 chemical engineering from the University of Washington.

1 Q. Is that your most advanced degree?
 2 A. It is.
 3 Q. Have you had any additional training beyond
 4 that Bachelor of Science degree?
 5 A. What do you mean by training? You mean --
 6 what kind of training?
 7 Q. Have you taken any additional course work?
 8 A. At a university?
 9 Q. Yes.
 10 A. No.
 11 Q. Have you participated in any certification
 12 programs?
 13 A. Certification programs?
 14 Q. Right.
 15 A. Certification, you mean certification in
 16 relation to -- oh, I'm registered in the state of
 17 Washington as a chemical engineer. I'm a professional
 18 engineer in the state of Washington.
 19 Q. And what does that involve? Is that a
 20 license?
 21 A. It is a license. It's a license granted by
 22 the Board of Licensing of the State of Washington.
 23 Q. And are there requirements to maintain or
 24 keep a certain level of proficiency? Do you have
 25 continuing educational requirements of any sort?

1 A. No.
 2 Q. So it's a one-time testing standard?
 3 A. Yes.
 4 Q. How long have you been with the Department of
 5 Ecology?
 6 A. Approximately 25 years.
 7 Q. And what was your position at the outset of
 8 your employment with Ecology?
 9 A. What did I do at the Department of Ecology at
 10 the beginning?
 11 Q. Yes.
 12 A. I was in the air program. I performed source
 13 tests, conducted source tests, and did air quality
 14 analysis.
 15 Q. What is your present position?
 16 A. My present position is an environmental
 17 engineer in the Water Quality Program.
 18 Q. You work out of the Northwest regional
 19 office; is that right?
 20 A. I do.
 21 Q. And please tell me about that in terms of who
 22 you work with, who you report to.
 23 A. I report to Kevin Fitzpatrick, my direct
 24 supervisor, section manager in the Department of
 25 Ecology for the Water Quality Program in the Northwest

1 regional office.
 2 Q. And do you supervise any staff or employees?
 3 A. Yes, I do.
 4 Q. Who are they?
 5 A. They are the Industrial Permit and Stormwater
 6 Unit.
 7 Q. Approximately how many people work in --
 8 A. Nine.
 9 Q. Nine in each unit?
 10 A. No, nine in my unit. I cut you off.
 11 Q. So between the industrial and the stormwater,
 12 is that nine people total or nine --
 13 A. Well, the name of the one unit that I'm the
 14 supervisor of is called the Industrial Permit and
 15 Stormwater Unit. So it's all one unit; that's the
 16 complete name.
 17 Q. And that one unit has nine employees that you
 18 supervise?
 19 A. Yes.
 20 Q. How long have you been at the head of that
 21 unit?
 22 A. Since approximately March of 2001,
 23 approximately.
 24 Q. And what did you do before that? Before
 25 March 2001, what was your position?

1 A. My position was an environmental engineer, a
 2 facility manager.
 3 Q. Was that in the Industrial Permit and
 4 Stormwater Unit?
 5 A. It wasn't called that at that time. At that
 6 time it was called the Industrial Permit Unit.
 7 Q. Are you generally familiar with the
 8 administrative appeal that this deposition is part of?
 9 A. Not completely familiar.
 10 Q. Well, do you understand that the Airport
 11 Communities Coalition has appealed the issuance of the
 12 Clean Water Act Section 401 certification that Ecology
 13 issued?
 14 A. I am.
 15 Q. And you understand that this deposition is
 16 part of that appeal?
 17 A. I am.
 18 Q. Have you been identified or designated as a
 19 witness in the appeal?
 20 A. No.
 21 Q. You don't believe you have been?
 22 A. A witness?
 23 Q. Yes.
 24 A. Well, I was required to be at the deposition.
 25 Is that being a witness?

1 Q. No, I'm referring to the upcoming hearing
 2 that is scheduled to take place in March.
 3 A. Oh, oh. I don't have a date to appear at the
 4 hearing. I know I had to give a deposition.
 5 Q. Do you know whether the legal team that is
 6 representing the Department of Ecology in the appeal
 7 intends to call on you to provide testimony to support
 8 the decision?
 9 A. I don't know they're going to call on me to
 10 support testimony at trial, no, I don't know that.
 11 Q. Well, let's talk about your familiarity with
 12 the operations at Sea-Tac.
 13 As part of your work in the Industrial Permit
 14 and Stormwater Unit, do you have occasion to review
 15 operations at Sea-Tac?
 16 MR. PEARCE: Rick, I'm sorry to interrupt.
 17 By "Sea-Tac" do you mean the airport or do you mean the
 18 City of Sea-Tac? If you could be more clear, I think
 19 it'll be more helpful for the record.
 20 MR. POULIN: Thank you, Roger. Yeah, I do
 21 mean Sea-Tac International Airport and the Sea-Tac Port
 22 of Seattle operations.
 23 MR. YOUNG: If you could ask him a more
 24 specific question.
 25 Q. (BY MR. POULIN) Do you have any oversight

1 role with respect to the Port of Seattle's NPDES
 2 Permit, National Pollution Discharge Elimination System
 3 Permit, under the Clean Water Act?
 4 A. I do.
 5 Q. Could you please tell me about that aspect of
 6 your job?
 7 A. I am responsible for -- I would be the
 8 facility manager for the NPDES, managing and
 9 implementation.
 10 Q. You are the permit manager?
 11 A. Yes. Well, I was. Excuse me. I was.
 12 Q. When was that?
 13 A. From March 2001 until October 2001.
 14 Q. Is the facility manager for the permit
 15 different than the permit manager?
 16 A. No, no.
 17 Q. Same thing?
 18 A. Yes.
 19 Q. So for this seven- or eight-month period you
 20 were the permit manager?
 21 A. Yes.
 22 Q. Who was the permit manager before you?
 23 A. Kevin Fitzpatrick.
 24 Q. And do you know who the permit manager is
 25 now?

1 A. Ed Abbasi.
 2 MR. YOUNG: Can you spell that?
 3 A. A-b-b-a-s-i.
 4 Q. (BY MR. POULIN) And the first name was Ed?
 5 A. Ed, E-d.
 6 Q. Thank you. What were your responsibilities
 7 as a facility or permit manager?
 8 A. I was responsible for answering questions
 9 concerning the interpretation of the permit for the
 10 Port of Seattle. I was responsible for ensuring that
 11 the conditions of the permit were adhered to.
 12 Q. Would it be accurate to describe that second
 13 element as compliance?
 14 A. Yes.
 15 Q. Permit compliance?
 16 A. Yes.
 17 Q. Does that include permit enforcement?
 18 A. Yes.
 19 Q. During your term as the permit manager, did
 20 you take any enforcement actions under the permit?
 21 A. No, no formal enforcement actions.
 22 Q. How do you go about determining whether a
 23 permittee is in compliance with the permit?
 24 A. Primarily through the monitoring requirements
 25 of the permit. Yeah, primarily through the monitoring

1 requirements of the permit.
 2 Q. With respect to this particular permit, are
 3 there -- well, let's introduce an exhibit, if we could.
 4 (Deposition Exhibit No. 4 was marked for
 5 identification.)
 6 Q. (BY MR. POULIN) Could you please take a look
 7 at this exhibit and tell me if you're familiar with it,
 8 if you recognize the document?
 9 A. Yes, I recognize it.
 10 Q. Could you please describe the exhibit for the
 11 record?
 12 A. Well, it's a little confusing. It says it's
 13 the old NPDES permit -- yeah, the old NPDES permit for
 14 the Port of Seattle, Seattle-Tacoma International
 15 airport. That's what it is.
 16 Q. And where does it say that's the old
 17 permit?
 18 A. On this sticky right here.
 19 Q. Oh, I see. Let me clarify. There's
 20 sticky. That's not actually part of the exhibit
 21 itself. But is there anything on the face of this
 22 permit that suggests to you that it's not the current
 23 permit?
 24 A. Yes, there is something on the face of it
 25 that suggests it's not the current permit.

1 Q. And what's that?
 2 A. The fact that it doesn't have the major
 3 modification date on here.
 4 Q. So does this appear to be the version of the
 5 permit that was in force prior to the most recent major
 6 modification?
 7 A. I think it is. I'd have to check our files
 8 to make sure, the files at the Department of Ecology
 9 records.
 10 Q. I'd like to introduce a second exhibit.
 11 (Deposition Exhibit No. 3 was marked for
 12 identification.)
 13 Q. (BY MR. POULIN) And would you agree that
 14 Exhibit 3 appears to be the current permit as most
 15 recently modified on May 29, 2001?
 16 A. Yes.
 17 Q. So as the permit manager, I think you stated
 18 that you would rely on monitoring to determine whether
 19 the permittee was in compliance. Where would you look
 20 to find monitoring requirements here?
 21 A. I didn't say that would be the way to rely on
 22 compliance but the primary way. And the monitoring
 23 requirements are in S2.
 24 Q. What else would you rely on?
 25 A. Periodic inspections.

1 Q. How does the monitoring system work?
 2 A. The permit requires the Port of Seattle to
 3 monitor wastewater discharges from Port of Seattle,
 4 Seattle-Tacoma International Airport.
 5 Q. Are there monitoring requirements that also
 6 apply to stormwater discharges?
 7 A. Yes.
 8 Q. And how are the monitoring requirements
 9 determined when the permit is developed or written?
 10 A. The permit manager develops them or the
 11 permit writer develops them.
 12 Q. Is the permit writer someone that's within
 13 the Industrial Permit and Stormwater Unit?
 14 A. The permit writer for this permit was in that
 15 unit that was named a slightly different name prior to
 16 that name. Industrial Permit Unit is what it was
 17 called.
 18 Q. So the responsibility for writing this permit
 19 was within that unit?
 20 A. Well, writing the major modification for the
 21 permit was within that unit, yes.
 22 Q. Were you personally involved in that process?
 23 A. Yes, I was.
 24 Q. And who else did you work with in that
 25 process of writing the major modification?

1 A. In writing the final major modification, is
 2 that what you're referring to?
 3 Q. Well, the process involving both the draft
 4 and final modification.
 5 A. Kevin Fitzpatrick and Joan Marchioro.
 6 Q. So three people; yourself, Kevin Fitzpatrick
 7 and Joan Marchioro were --
 8 A. -- involved in the final permit language.
 9 And Ray Hellwig was also in on that a little bit too.
 10 He's the regional director.
 11 Q. How did the monitoring requirements in the
 12 permit change as a result of the most recent
 13 modification for, say, construction stormwater?
 14 A. There were conditions added to specify more
 15 precisely the monitoring requirements.
 16 Q. Do you know how the monitoring requirements
 17 translate into the actual physical activities of
 18 sampling stormwater discharges?
 19 A. It requires them to take samples at a
 20 specified frequency, so they must physically go out and
 21 take a sample.
 22 Q. And where do those physical sampling events
 23 take place? Does the permit specify where the Port
 24 should take the sample for a given outfall or discharge
 25 point?

1 A. For some of them it does.
 2 Q. Could you show me an example in Exhibit 3,
 3 the current permit?
 4 A. Yeah. It would be Condition S2, it's got A,
 5 B. Both have specifically identified outfalls that
 6 require monitoring; Page 13, 14 and 15.
 7 Q. Well, let's look at, for instance, Permit
 8 Condition S2.B.1.
 9 A. Okay.
 10 Q. On Page 14.
 11 A. Yes.
 12 Q. And do you see where it states, "The
 13 Permittee shall monitor the stormwater discharges at
 14 Outfalls 002, 005, 006, and 011"?
 15 A. Yes, I do.
 16 Q. Is there any further direction or
 17 specification of how those samples are to be taken?
 18 A. Yes. It's at the bottom, the footnotes. It
 19 gives the methodology for -- yes, in the footnotes.
 20 Q. Do you see any particular footnote that
 21 specifies where or how?
 22 A. Yes, I do.
 23 Q. Could you tell me which one?
 24 A. Yes. It's B, "Total Petroleum Hydrocarbons
 25 shall be measured using the Northwest Total Petroleum

1 Hydrocarbons-Diesel method or an equivalent method
 2 approved by the Department." That's B.
 3 And D, "BOD monitoring at Outfall 005 shall
 4 occur, to the extent practicable, during a
 5 precipitation event that coincides with a runway
 6 deicing event in those months in which a runway deicing
 7 event occurs."
 8 Q. Now, Footnote D, that pertains to when
 9 sampling should occur, doesn't it?
 10 A. It does.
 11 Q. Which provisions govern where, specifically
 12 where in the facility the sample should be taken?
 13 A. That would be No. 1. It would be above the
 14 table there. So each outfall is listed there.
 15 Q. Now, let's take a given outfall, for example,
 16 Outfall 002. Where is the sample of Outfall 2 taken?
 17 A. At Outfall 002.
 18 Q. Could you describe that physically? Is it a
 19 pipe that's raised above the ground?
 20 A. No, I can't.
 21 Q. Do you know with respect to any of these four
 22 identified outfalls what they're like, what they look
 23 like?
 24 A. No.
 25 Q. Well, an outfall is a place where the

1 and I'm referring again to the four outfalls identified
 2 in Permit Condition S2.B.1 on Page 14, can you tell
 3 from this permit where the samples are taken?
 4 A. They're taken at those four outfalls.
 5 Q. Do you know if they're samples of the
 6 discharge itself or of the --
 7 A. It's of the discharge itself.
 8 Q. Prior to any mixing?
 9 A. Correct.
 10 Q. And how are you sure of that?
 11 A. Because it says you have to measure the
 12 discharges at the outfall.
 13 Q. And is there any opportunity during the
 14 reports of monitoring that are submitted to the
 15 Department for the permittee to explain if they've done
 16 something different?
 17 A. What do you mean by "something different"?
 18 Q. Let's say again in a hypothetical if the
 19 actual discharge point of the outfall is not easily
 20 accessible so they go to the closest point in the
 21 stream. Would an event like that be described?
 22 A. The monitoring reports have a box, a line at
 23 the bottom of it for explanations.
 24 Q. What happens to the monitoring reports that
 25 are generated by the permittee?

1 discharge flows into surface waters; is that right?
 2 A. It could be that.
 3 Q. What else might it be?
 4 A. There's various interpretations of defining
 5 an outfall. That would be the traditional definition
 6 of an outfall.
 7 Q. Now, let's assume a hypothetical. If you
 8 have an outfall that's, say, a raised pipe that then
 9 flows into a stream and the permit requires sampling of
 10 that outfall's discharge, where does the permittee
 11 actually take the sample?
 12 A. Traditionally it would come out as it leaves
 13 the pipe.
 14 Q. So they would be sampling effluent
 15 discharging from the pipe?
 16 A. If it was a pipe it would take it as it's
 17 coming out of the pipe, yes.
 18 Q. Is it permissible to sample the discharge in
 19 the stream after the pipe's effluent mixes --
 20 A. Could you repeat the question, please?
 21 (Reporter read back as requested.)
 22 Q. (BY MR. POULIN) With the stream water?
 23 A. In certain situations monitoring requirements
 24 require that.
 25 Q. Now, with respect to these specific outfalls,

1 A. They are submitted to the Department of
 2 Ecology and entered into a database. Are you referring
 3 to the ones at the Port of Seattle?
 4 Q. Yes.
 5 A. That's what happens.
 6 Q. So when monitoring reports are submitted
 7 under this permit, they are sent to the Department of
 8 Ecology?
 9 A. Yes.
 10 Q. Is that always the case?
 11 A. It's a permit requirement.
 12 Q. Are there any kinds of sampling that are not
 13 subject to that requirement to submit monitoring
 14 reports to Ecology?
 15 A. For which part of the permit are you
 16 referring?
 17 Q. Any part. Are you aware of any part of the
 18 permit?
 19 A. Am I aware of any part of the permit that --
 20 Q. -- that creates an exception to that
 21 requirement you mentioned of submitting monitoring
 22 reports to the Department?
 23 A. Correct. That was referring to the outfalls
 24 that you were talking about here. I think that's what
 25 you were talking about.

1 Q. By "correct," you mean yes, there are, or --
 2 A. There are certain requirements -- monitoring
 3 in here that don't have a requirement to be submitted.
 4 Q. Let's consider the monitoring requirements
 5 for construction stormwater.
 6 A. Okay.
 7 Q. Would you agree that all of the monitoring
 8 requirements for construction stormwater are stated in
 9 Permit Condition S2.C?
 10 A. I do. Wait a minute. Excuse me, give me a
 11 second. Could you repeat the question?
 12 (Reporter read back as requested.)
 13 A. Yes.
 14 Q. (BY MR. POULIN) Now, in the first provision
 15 of this section, the permit refers to a monitoring
 16 plan.
 17 A. Yes, it does.
 18 Q. And it says that the permittee shall submit a
 19 monitoring plan which is submitted for review and
 20 approval. Are you involved in that review and approval
 21 process?
 22 A. I no longer am.
 23 Q. Were you at one time?
 24 A. Yes.
 25 Q. Did you ever review or approve a monitoring

1 Q. Don't think he has. Why do you say that?
 2 A. I don't recall that -- I've been talking with
 3 him a lot about the managing of the permit since I was
 4 the previous manager, and the subject has never come
 5 up.
 6 Q. While you were the permit manager -- scratch
 7 that, please.
 8 Could you describe what one of these
 9 construction stormwater monitoring plans looks like?
 10 A. It has a description of the monitoring
 11 locations and a map.
 12 Q. Is it an extensive or detailed document?
 13 A. Detailed enough usually. Detailed enough? I
 14 don't understand. What do you mean "detailed"?
 15 Q. I guess what I'm getting at is, how much
 16 effort does it take to review one of these plans?
 17 A. How much effort does it take to review one of
 18 the plans? How much effort does it take? I guess I
 19 don't understand what you're asking, how much effort
 20 does it take to review the plans. What do you mean? I
 21 don't understand.
 22 Q. Well, this permit requires the permittee, the
 23 Port of Seattle, to submit a monitoring plan.
 24 A. Yes, it does.
 25 Q. And it states that it's submitted to the

1 plan relating to this permit itself?
 2 A. I have reviewed the monitoring plans related
 3 to this.
 4 Q. Have you approved any monitoring plans under
 5 this permit?
 6 A. I don't recall having approved a monitoring
 7 plan under this permit.
 8 Q. At this time under the current permit when
 9 the Port of Seattle submits monitoring plans for
 10 construction discharges, who reviews them?
 11 A. As of now it would be Ed Abbasi.
 12 Q. Does he do that personally or does he have a
 13 staff to review monitoring plans?
 14 A. I don't think he's done it yet.
 15 Q. Do you know whether any monitoring plans have
 16 been submitted yet?
 17 A. Yes, monitoring plans have been submitted.
 18 Q. Since the date of the permit modification?
 19 A. I don't recall.
 20 Q. Now, you just stated that Ed Abbasi, the
 21 current permit manager, has not yet reviewed any
 22 construction stormwater monitoring plans.
 23 A. No, that's not what I said.
 24 Q. I'm sorry.
 25 A. What I said is I don't think he has.

1 Department for review and approval, and you work in
 2 management in a supervisory capacity in the section
 3 responsible for the permit.
 4 What I'm asking is, how much staff time would
 5 you expect it to take to review and approve one of
 6 these monitoring plans when they come in?
 7 A. I suppose it could depend on the time -- I
 8 don't think it would take more than -- unless you
 9 wanted to conduct a field inspection, it wouldn't take
 10 more than probably 30 minutes.
 11 Q. So really not much time?
 12 A. No. Well, 30 minutes. I didn't say it
 13 didn't take much time. Thirty minutes in our section
 14 is plenty of time.
 15 Q. Where does this Permit Condition S2.C which
 16 governs construction stormwater indicate whether
 17 sampling and monitoring results need to be submitted to
 18 Ecology?
 19 A. (Witness reviewing document). Would you read
 20 the question back, please?
 21 (Reporter read back as requested.)
 22 A. It does not.
 23 Q. (BY MR. POULIN) Are the results of
 24 monitoring of construction stormwater required to be
 25 submitted to Ecology under this permit?

1 (Reporter read back as requested.)
 2 A. Portions of it, yes. Some of it.
 3 Q. (BY MR. POULIN) And which portions are
 4 those?
 5 A. S3.C and S3.G.
 6 Q. Could you please describe how those permit
 7 conditions that you just identified operate?
 8 A. Every other month the Port of Seattle must
 9 support monitoring results for construction stormwater
 10 discharges to Walker Creek and tributaries and Gilliam
 11 Creek tributaries beginning July 1, 2001.
 12 And the other one is, "In the event the
 13 Permittee is unable to comply with any of the permit
 14 terms and conditions due to any cause, the Permittee
 15 shall," and it's No. 2, "Repeat sampling and analysis
 16 of any violation and submit the results to the
 17 Department within 30 days after becoming aware of the
 18 violation."
 19 Q. What happens if the permittee is not aware of
 20 the violation?
 21 A. Well, in the case of Walker Creek and Gilliam
 22 Creek, he has to submit it. But you're probably
 23 referring to G.2, evidently.
 24 (Witness reviewing document.) Then I
 25 guess -- well, if we -- well, then he would probably be

1 in violation of Condition S3.G.
 2 Q. How so?
 3 A. He would need to report violations to us.
 4 "In the event the Permittee is unable to comply with
 5 any of the permit terms and conditions due to any
 6 cause, the Permittee shall." So if he is in violation
 7 and he's not aware of it, he's not complying with S3.G.
 8 Q. Doesn't Condition S3.G.2 give the permittee
 9 30 days after becoming aware of the violation to repeat
 10 sampling and analysis on the violation and submit the
 11 results to the Department?
 12 A. (Witness reviewing document.)
 13 (Reporter read back as requested.)
 14 A. Yes.
 15 Q. (BY MR. POULIN) How would that requirement
 16 be triggered if the permittee didn't know, didn't
 17 become aware of the violation?
 18 A. It wouldn't be triggered.
 19 Q. It would not be triggered?
 20 A. No.
 21 Q. Now, you mentioned Permit Condition S3.C
 22 which requires that monitoring results for construction
 23 stormwater discharges to Walker Creek and tributaries
 24 and Gilliam Creek and tributaries to be submitted every
 25 other month.

1 A. Yes.
 2 Q. Why doesn't that reporting requirement also
 3 apply to construction stormwater discharges to
 4 Des Moines Creek?
 5 A. (Witness reviewing document.) The scope of
 6 the modification was Walker and Gilliam Creeks and
 7 tributaries.
 8 Q. Well, before the modification took place
 9 there were no authorized discharges to Walker and
 10 Gilliam Creeks, isn't that right?
 11 A. That's correct.
 12 Q. But there were authorized discharges for
 13 Des Moines Creek; right?
 14 A. Yes.
 15 Q. Is there a requirement to monitor the
 16 construction discharges to Des Moines Creek in some
 17 other provision of the permit?
 18 A. I'm not sure. I don't know.
 19 ~~Q. Condition S.C.1 (sic) refers to construction~~
 20 ~~projects required to have a Stormwater Pollution~~
 21 ~~Prevention Plan.~~
 22 A. There's no such condition.
 23 Q. Sorry?
 24 A. There's no such condition.
 25 ~~Q. Please explain.~~

~~1 A. S.C.12 S.C.1 is what you said.~~
 2 Q. I'm sorry, I misspoke. I mean Permit
 3 Condition S2.C.1 on Page 16.
 4 A. Okay, right. Yes.
 5 MR. YOUNG: Of which, 3 or 4?
 6 MR. POULIN: Could we go off record for just
 7 a moment, please?
 8 ~~(Discussion off the record.)~~
 9 Q. (BY MR. POULIN) In response to your
 10 question, I am asking about the current permit,
 11 Exhibit 3. And looking to Permit Condition S2.C.1 on
 12 Page 16, we see a reference to construction projects
 13 required to have a Stormwater Pollution Prevention Plan
 14 under Special Condition S13.
 15 Is it possible that the Stormwater Pollution
 16 Prevention Plan, or SWPPP as they're sometimes called,
 17 requires monitoring and reporting of monitoring results
 18 independently of the other conditions that we've looked
 19 at?
 20 A. (Witness reviewing document.)
 21 (Reporter read back as requested.)
 22 A. I don't believe it does, no. I don't think
 23 so. I may have to do a bit more reading on that, but I
 24 don't believe it does.
 25 Q. (BY MR. POULIN) Is it possible that this

1 NPDES permit as modified on May 29, 2001 does not
 2 require monitoring of construction stormwater
 3 discharges to Des Moines Creek?
 4 A. No, it does require. It requires a
 5 monitoring plan for -- my understanding is that this
 6 permit requires a monitoring plan for all construction
 7 stormwater discharges. My understanding of this permit
 8 is all construction stormwater discharges require a
 9 monitoring plan.
 10 Q. Doesn't Condition S2.C.1 in effect say that
 11 only those construction projects required to have a
 12 SWPPP under Special Condition S13 are required to have
 13 a monitoring plan?
 14 A. (Witness reviewing document.) That's
 15 correct.
 16 Q. And doesn't Permit Condition S13 say that a
 17 SWPPP is required only for construction activities
 18 which disturb five or more acres of total land area?
 19 A. Yeah, that's what it says.
 20 Q. It also says "or other minimum land area to
 21 be determined by federal regulation"?
 22 A. Yes, that's what it says.
 23 Q. As permit manager, what did you understand
 24 that language to mean, "minimum land area to be
 25 determined by federal regulation"?

1 A. I didn't have an interpretation. I did not
 2 have an interpretation.
 3 Q. Do you know whether federal regulations
 4 require SWPPPs for some construction projects that
 5 disturb less than five acres?
 6 A. Significant contributors. The general
 7 construction permit requires -- no, wait, excuse me.
 8 Yeah, the general construction permit requires a SWPPP
 9 for facilities that are significant contributors even
 10 though they're less than five acres. That's the
 11 general construction stormwater permit.
 12 Q. Does that permit apply to operations at
 13 Sea-Tac Airport?
 14 A. No.
 15 Q. Does this permit, Exhibit 3, require any
 16 SWPPP for construction projects that disturb less than
 17 five acres?
 18 A. (Witness reviewing document). Not to my
 19 knowledge.
 20 MR. POULIN: Could you repeat the question
 21 and answer, please?
 22 (Reporter read back as requested.)
 23 Q. (BY MR. POULIN) So is it correct to say that
 24 the permittee is not required to monitor construction
 25 stormwater discharges resulting from construction

1 activities that disturb less than five acres at Sea-Tac
 2 Airport?
 3 A. (Witness reviewing document). Yes, it does.
 4 I think it does.
 5 Q. You think it does require monitoring?
 6 A. I think it does require it, yes.
 7 Q. But you haven't been able to identify it
 8 specifically?
 9 A. Yeah, in S2.C.2.
 10 Q. Permanent Condition S2 --
 11 A. C.2.
 12 Q. -- C.2 does not apply to Des Moines Creek,
 13 does it?
 14 A. No, it doesn't.
 15 Q. So no monitoring requirement imposed by
 16 Condition S2.C.2 would apply to any construction
 17 project discharging to Des Moines Creek, would it?
 18 A. No, no.
 19 Q. Is it possible, then, that the permit does
 20 not require monitoring of construction-related
 21 discharges to Des Moines Creek resulting from projects
 22 disturbing less than five acres?
 23 A. What's the question again?
 24 (Reporter read back as requested.)
 25 A. Yes.

1 Q. (BY MR. POULIN) And I'd like to clarify that
 2 the question was "permit" not "department." Can we
 3 clarify that the question pertains to the permit
 4 requirements?
 5 A. Once again, please?
 6 (Reporter read back as requested.)
 7 A. Yes.
 8 Q. (BY MR. POULIN) If the permit does not
 9 require monitoring of those discharges to Des Moines
 10 Creek, how would the permittee or the Department know
 11 if those discharges were resulting in violations of the
 12 permit?
 13 A. Well, without the monitoring -- if the
 14 permittee did it without being required by the permit,
 15 then we could determine what the -- determine
 16 compliance that way.
 17 Q. Is that because Condition S3.F requires the
 18 permittee to include the results of monitoring when the
 19 permittee monitors more frequently than required?
 20 A. Yes.
 21 Q. So that's if the permittee engages in
 22 essentially voluntary monitoring beyond the
 23 requirements of the permit?
 24 A. Correct.
 25 Q. But if they don't then you wouldn't know,

1 isn't that right?

2 A. We get a lot of complaints. Perhaps a
3 complaint basis. We would know from a complaint basis
4 possibly, possibly. When we receive a complaint we
5 might know there's a -- and like I said, from one of
6 our inspections, we might know that way.

7 Q. Did you order any inspections of
8 construction-related discharges in response to
9 complaints?

10 A. I don't remember. I can't remember. I know
11 we've received complaints of pollution discharge from
12 Sea-Tac Airport.

13 Q. And whose responsibility is it to follow up
14 on that kind of complaint?

15 A. Well, one of the responsible parties that I
16 know of would be the Department of Ecology.

17 Q. And would that be your Industrial Permit and
18 Stormwater Unit or is there some other enforcement
19 branch?

20 A. There's another enforcement branch that we
21 now have.

22 Q. In your view as the former permit manager of
23 this NPDES permit governing Sea-Tac Airport, does this
24 permit require compliance with water quality standards?

25 A. The portion that I'm familiar with, the major

1 review the permit fairly carefully.

2 Q. Let's look at a new exhibit

3 (Deposition Exhibit No. 5 was marked for
4 identification.)

5 Q. (BY MR. POULIN) Exhibit 5 is a photocopy of
6 a chapter of the Washington Administrative Code
7 Chapter 173-201A. And that's the same chapter that's
8 cited in that construction stormwater monitoring
9 provision that we just read pertaining to Walker and
10 Gilliam Creeks, Condition S2.2.b (sic), is that right?

11 A. S2.C.2.b. Yes, that is the same.

12 Q. S2.C.2.b, thank you. So is this the relevant
13 source for water quality standards under state law that
14 you look to?

15 A. It's one of the regulations that we use to
16 protect waters of the state.

17 Q. Are you familiar with these water quality
18 standards?

19 A. What do you mean "familiar"?

20 Q. Have you worked with them and understand how
21 they're applied and defined?

22 A. Not all of them, not all of them.

23 Q. Well, let's look at some examples that are
24 relevant to the dispute.

25 A. Okay.

1 modification I'm most familiar with, as you say, states
2 that "Monitoring will be reviewed for compliance with
3 WAC 173" -- I'm looking at Page 17, S2.C.2.b.

4 "Monitoring will be reviewed for compliance
5 with WAC 173.201A. The Department will exercise its
6 enforcement discretion in the event of noncompliance
7 with these standards."

8 Q. Now, that provision that you've cited is part
9 of Condition S2.C.2, isn't that right?

10 A. That is correct.

11 Q. So that particular provision only pertains to
12 Walker Creek and Gilliam Creek, isn't that right?

13 A. That provision only applies to Walker and
14 Gilliam Creek, that is correct.

15 Q. How about discharges to Des Moines Creek?

16 A. WAC 173-201A applies to Des Moines Creek.

17 Q. If a discharge to Des Moines Creek exceeded
18 water quality standards or resulted in exceedance of
19 water quality standards, would that be a violation of
20 this permit?

21 A. It would be a violation of state law.

22 Q. Is there any provision of this permit itself
23 that would make that violation of state law also a
24 violation of the permit?

25 A. I'd have to look at the permit. I'd have to

1 Q. Let's look at the water quality standard for
2 some of the so-called toxic substances in WAC
3 173-201A-040 which you'll see on Page 480, 481 and 482
4 of this Exhibit 5.

5 A. Yeah, okay. I'm there.

6 Q. Now, initially Section 1 states that toxic
7 substances shall not be introduced above natural
8 background levels in waters in the state. Section 2
9 states that the Department shall employ or require
10 chemical testing as appropriate to evaluate compliance
11 with Subsection 1. And section 3 identifies the
12 specific water quality criteria.

13 In your view does this permit require the
14 kind of testing necessary to determine if these
15 criteria are being met by the discharges subject to the
16 permit?

17 A. For which parts of the permit?

18 Q. Well, let's look at non-construction
19 stormwater. That's Permit Condition S2.B beginning on
20 Page 14 of Exhibit 3.

21 A. I'm not that familiar with the development of
22 that section, that condition. It wasn't part of the
23 major modification.

24 Q. And your understanding of the permit to these
25 tables in Section S2.B 1, 2, 3 and 4 identify all of

1 the parameters for which the permittee is required to
 2 sample and monitor?
 3 A. Well, there's A. Isn't there A also?
 4 Condition S2 is the monitoring requirements for the
 5 NPDES permit.
 6 Q. Yes. And S2.A applies to industrial
 7 wastewater?
 8 A. Yes, sir.
 9 Q. S2.B is non-construction stormwater?
 10 A. That's right.
 11 Q. And S2.C is construction stormwater?
 12 A. Yes, sir.
 13 Q. And wasn't it the Department's position in
 14 the permit modification that some of the toxic
 15 substances that the community expressed concern about,
 16 including copper and lead and zinc, were not
 17 particularly relevant to the modification because those
 18 kinds of discharges don't typically result from
 19 construction activities?
 20 (Reporter read back as requested.)
 21 A. Construction stormwater discharges are not
 22 characterized for those pollutants.
 23 Q. (BY MR. POULIN) And for that reason, when we
 24 look to the monitoring requirements for construction
 25 stormwater under the permit, we don't see, there is no

1 parameters identified in the first column?
 2 A. Of S2.B.1?
 3 Q. Yes.
 4 A. Does the permit --
 5 (Reporter read back as requested.)
 6 A. S2.B.1 is a list of monitoring requirements
 7 for those four outfalls.
 8 Q. (BY MR. POULIN) And doesn't it say that
 9 permittee shall monitor for TPH, or total petroleum
 10 hydrocarbons?
 11 A. Yes.
 12 Q. And TSS, total suspended solids?
 13 A. Yes.
 14 Q. And it lists Turbidity, Fecal Coliform, BOD?
 15 A. Yes.
 16 Q. Ethylene Glycol and Propylene Glycol, and
 17 then Total Recoverable Copper, Lead and Zinc?
 18 A. Yes, it does.
 19 Q. Are there any other parameters that this
 20 provision requires permittee to sample for?
 21 A. I'm not sure. This provision, S2.B.1.,
 22 reading it over here, I don't see any other monitoring
 23 parameters that are required in S2.B.1 except what's in
 24 S2.B.1. Those are the parameters that are required for
 25 those outfalls under this condition.

1 requirement to sample for copper and lead and zinc is
 2 there?
 3 A. That's correct.
 4 Q. However, there is such a requirement under
 5 S2.B, isn't there?
 6 A. For copper, lead and zinc, yes.
 7 Q. And we see that requirement for monitoring
 8 stormwater discharges for copper, lead and zinc in both
 9 S2.B.1 and S2.B.2; right?
 10 A. S2.B.1 has monitoring requirement for copper,
 11 lead and zinc. And the next one you asked about was
 12 S2.B.2?
 13 Q. Correct.
 14 A. Also has monitoring requirements for copper,
 15 lead and zinc, that's correct.
 16 Q. And doesn't the permit explain that the
 17 requirements of S2.B.1 apply to four specified
 18 outfalls, Nos. 2, 5, 6 and 11?
 19 A. Yes, that's the outfalls that monitoring
 20 applies to.
 21 Q. Let's focus just on those four outfalls and
 22 the non-construction stormwater requirements of S2.B.1.
 23 A. Okay.
 24 Q. Does the permit require the permittee to
 25 sample for anything other than these specific so-called

1 Q. So is it correct to state that this Permit
 2 Condition S2.B.1 does not identify any effluent limits?
 3 A. That's correct, it does not.
 4 Q. Effluent limits are in a different part of
 5 the permit; right?
 6 A. That's correct.
 7 Q. They're identified in Special Condition S1
 8 which is called discharge limitations?
 9 A. That's where the NPDES permits put effluent
 10 limitations usually.
 11 Q. Condition S1.A applies to industrial
 12 wastewater, is that right, on Page 8?
 13 A. It applies to treated industrial wastewater.
 14 Q. And S1.B, Page 9, that's another provision
 15 for industrial wastewater; right?
 16 A. That's what it looks like. The answer is --
 17 that's what it says, Final Effluent Limitations. Yeah,
 18 that would be the final effluent limitations.
 19 Q. Is there any provision here in Condition S1
 20 that applies to stormwater?
 21 A. I would have to become more familiar with the
 22 discharge of the airport to make that -- answer that
 23 question.
 24 Q. Would you agree that if there were an
 25 effluent limitation for stormwater, a limitation on

1 specific parameters of the effluent, that numeric
2 criteria, for example, it would be stated in Permit
3 Condition S1?

4 A. That's where they usually go, in Condition
5 S1.

6 Q. Let's turn back to Exhibit 5 and the water
7 quality criteria for those toxic substances, copper,
8 lead and zinc.

9 Now, do you see in the first column of the
10 table where it identifies the substances
11 alphabetically?

12 A. Yes.

13 Q. And do you see that copper, lead and zinc
14 each has a note to the table, a little sort of a
15 footnote that's there on the same line?

16 A. Yes.

17 Q. And it says "dd"?

18 A. Yes.

19 Q. Have you ever reviewed that note to the table
20 to figure it out or see how it applies?

21 A. Yeah. I recognize what it's saying here.
22 Actually, no, no, I haven't. I'm familiar with the
23 first line in "dd." Cyanide, unfamiliar with that.

24 Q. Are there people within your staff at Ecology
25 that are considered expert in how these regulations

1 that's -- that is grabbed. You take it, put it
2 underneath the water coming out the outfall, make sure
3 that you follow the proper procedures. Take the sample
4 and just put it underneath the water coming out of the
5 outfall. That's a grab sample. Fill up the bottle.
6 Make sure you have the right bottle and the right
7 procedures.

8 Q. Do you have to do that more than once to get
9 a 1-hour average?

10 A. No. We haven't taken it more than once to
11 get a 1-hour -- we've applied the grab samples to the
12 criteria.

13 Q. So in your view if the grab sample satisfies
14 or meets the criteria, it's okay?

15 A. Exceedances will be determined -- we've
16 determined exceedances of the criteria by grab samples.

17 Q. So if the grab sample exceeds the criteria,
18 you don't need to measure again to determine the 1-hour
19 average?

20 A. Correct. Well, to determine violation.

21 Q. How about footnote "o"?

22 A. Yes.

23 Q. Does that make any sense to you?

24 A. Yeah, it does. Yes, it does. It is a -- the
25 criterion is dependent on hardness, so you need to know

1 work?

2 A. I don't know if there's anybody that's an
3 expert on everything in this regulation.

4 Q. Who would you go to to determine what the
5 water quality criteria is for copper in fresh water?

6 A. I would go to the regulation.

7 Q. And that's what we have here, isn't it?

8 A. Yeah.

9 Q. When we look at copper in the table, the
10 freshwater acute criteria is identified with two
11 letters, "o" and "c." Do you see that?

12 A. Yes, I do.

13 Q. And we can find those stated in the
14 regulation; right?

15 A. Yes.

16 Q. C states, "A 1-hour average concentration not
17 to be exceeded more than once every three years on
18 average"?

19 A. Yes.

20 Q. How do you take a sample to obtain a 1-hour
21 average concentration?

22 A. We have determined compliance with that
23 condition by grab samples.

24 Q. What's a grab sample?

25 A. A grab sample is a sample that you take

1 the hardness in order to determine the criteria.

2 Q. You need to know the hardness to determine
3 whether --

4 A. What the "o" is.

5 Q. You can't determine what the criteria is
6 unless you know the hardness?

7 A. Correct.

8 Q. Because does the criteria vary with the
9 hardness of the water?

10 A. Yes, it does.

11 Q. When the permittee samples non-construction
12 stormwater discharges, does the permit require them to
13 sample for hardness as well?

14 A. I don't know. I don't know. I'd have to
15 look at the condition.

16 Q. Where would you look to find that out?

17 A. I would look under S2, monitoring
18 requirements.

19 Q. And for non-construction stormwater, would
20 that be S2.B?

21 A. Yes. Yes, it would.

22 Q. Do you see any mention there of hardness?

23 A. I do not.

24 Q. Is there any provision that says the
25 permittee has to perform sampling sufficient to

~~1 determine compliance with water quality standards?~~
~~2 A. I'm not that familiar with all the conditions~~
~~3 of the permit.~~
~~4 Q. Do you know who would be within the~~
~~5 Department?~~
~~6 A. With all the conditions of the permit? You'd~~
~~7 have to look~~
~~8 Q. Well, this specific one. This issue of~~
~~9 applying the metals, toxic substances criteria under~~
~~10 173-201A-040, who is the go-to guy for that part of the~~
~~11 permit?~~
~~12 A. Well, it would be the facility manager would~~
~~13 be responsible for the compliance with the permit.~~
~~14 Q. And that would be Ed Abbasi?~~
~~15 A. Right now it's Ed Abbasi.~~
~~16 Q. Just to make sure we're reviewing this and~~
~~17 understanding the same way, back to the water quality~~
~~18 criteria, that table in Exhibit 5 on page -- well, the~~
~~19 table in WAC 173-201A-040.~~
~~20 A. Yeah, I'm there.~~
~~21 Q. Do you see that those two footnotes we looked~~
~~22 at, footnote "c" and footnote "o" -- well, let me~~
~~23 strike that.~~
~~24 Would you agree that footnote "c" applies to~~
~~25 the acute freshwater criteria for copper, lead and~~

1 A. I would probably talk to our Environmental
2 Assessment Program, our Manchester lab -- well, called
3 the Environmental Assessment Program is the only person
4 I would talk to. I might talk to a variety of people
5 about that.
6 Q. So if you don't know how the Department
7 determines the 4-day average concentration, do you know
8 whether the permit requires the sampling that you need
9 to determine compliance with the 4-day average
10 concentration?
11 A. I would have to look into it, make sure. I'd
12 have to look into it. I don't know if that answers the
13 question. Did that answer the question?
14 Q. It sounds like for today you're not sure at
15 present?
16 A. That's correct.
~~17 MR. POULIN: Well, this might be a good time~~
~~18 to break for lunch. It's 12:04.~~
~~19 (Deposition recessed at 12:04, to be~~
~~20 reconvened at 1:00 p.m.)~~
~~21~~
~~22~~
~~23~~
~~24~~
~~25~~

1 zinc, each one of those has a "c" as part of the
2 criteria?
3 A. Yes.
4 Q. And "c" is that provision referring to a
5 1-hour average concentration?
6 A. Yes.
7 Q. And that's the one where you said that the
8 Department would use a grab sample?
9 A. Yes. We use grab samples to determine
10 compliance with the criteria in 173-201A-040.
11 Q. Now, there's also a chronic criteria for
12 freshwater; is that right?
13 A. That's correct.
14 Q. And instead of footnote "c" and footnote "o"
15 now there's a footnote "d"?
16 A. Yes.
17 Q. That applies to both copper, lead and zinc?
18 A. Yes.
19 Q. So for the chronic criteria, footnote "d"
20 says, "A 4-day average concentration not to be exceeded
21 more than once every three years on average."
22 How does the Department determine a 4-day
23 average?
24 A. I don't know.
25 Q. Do you know who would know?

~~1 AFTERNOON SESSION~~
~~2 1:00 P.M.~~
~~3 --oOo--~~
~~4 CONTINUING EXAMINATION~~
~~5~~
~~6 BY MR. POULIN:~~
~~7 Q. Do you recall that you're still under oath~~
~~8 and sworn to give truth in testimony?~~
~~9 A. I am.~~
~~10 Q. We were reviewing the water quality criteria~~
~~11 identified in Chapter 173-201A, and specifically the~~
~~12 provisions pertaining to toxic substances under~~
~~13 173-201A-040.~~
~~14 A. Yes.~~
~~15 Q. On the subject of toxic substances, are you~~
~~16 familiar with General Condition G11 of the permit?~~
~~17 It's on Page 57 of 52 of Exhibit 3.~~
~~18 A. Well, I'm reading it now. (Witness reading~~
~~19 document). Not real familiar with that, no.~~
~~20 Q. Would it be your understanding that the toxic~~
~~21 criteria under state law are just as stringent as those~~
~~22 under federal law?~~
~~23 A. I think many of our criteria are based on The~~
~~24 Gold Book, which is a federal document. It's a~~
~~25 document that has limits -- that have numbers that are~~

1 ~~standards for protection of waters of the United States.~~
2 And I'm not an expert and we used those to derive
3 these limits, but they were used in that process
4 somewhere, I believe.

5 Q. In your view of the permit system, who has
6 the primary responsibility of determining whether the
7 permittee is complying with water quality standards?
8 Would that be Ecology or the permittee?

9 A. The one that's responsible for compliance
10 with the permit is the permittee, yes.

11 Q. Right, the permittee is responsible for
12 compliance, but who is most responsible for determining
13 whether the permittee is in fact complying?

14 A. That would be the Department of Ecology.

15 Q. That would be the Department. So in order to
16 do that, the primary tools that the Department relies
17 on are monitoring --

18 A. -- the permit. The permit and then -- yeah,
19 the permit and the conditions of the permit, including
20 the monitoring in the permit.

21 Q. And you also mentioned inspection?

22 A. Inspections. We also do inspections for
23 compliance with the permit. We also do -- yeah.

24 Q. Now, if you were to conduct an inspection to
25 determine compliance with water quality standards,

1 on the second column, it looks like fourth paragraph
2 down. So it would be 173-201A.030, I think it's 1(b)
3 -- it's in the second column, third paragraph down.

4 Q. I'm reading that as Section 1(c)(vi). Would
5 you agree you see that (c) is water quality criteria,
6 that's about halfway down the left-hand column?

7 A. Oh, yeah, I do see that (c). It's 1(c) --
8 yes, correct.

9 Q. 1(c)(vi)?

10 A. Yes, sir.

11 Q. And there it states, "Turbidity shall not
12 exceed 5 NTU over background turbidity when the
13 background turbidity is 50 NTU or less, or have more
14 than a 10 percent increase in turbidity when the
15 background turbidity is more than 50 NTU."

16 A. Yes, that's what it says.

17 Q. And is this criteria, is this like the others
18 we looked at where there's something like hardness or
19 some other information that you need to know before you
20 can apply this rule?

21 A. No, there's no hardness related to this.
22 It's a nephelometer that measures it. One way to do it
23 is take a sample per the method, and then within I
24 think it's two days or three days, you take it to a
25 laboratory and you analyze it in a nephelometer.

1 let's say the same non-construction stormwater-related
2 requirements that we reviewed earlier under Permit
3 Condition S2.B, how would you do that?

4 A. During the inspection there would have to be
5 a sample taken or review of their monitoring data that
6 they have on site. And sometimes you can find out if
7 there's turbidity problems by observations of the
8 turbidity in the discharges. The compliance method
9 isn't visual, but you can tell turbid discharges many
10 times when you see them. So if there's a lot of turbid
11 water coming out of one of these outfalls, you can see
12 turbidity. That's what it is is discoloration in the
13 water, discharge. It might appear as a plume in the
14 receiving water.

15 Q. Turbidity is not one of the toxic substances,
16 is it?

17 A. No, it's not.

18 Q. Where would you find the water quality
19 standard or criteria that applies to turbidity?

20 A. Up ahead there, I think it's 030. Yeah, it's
21 030, the various classes of waters in the state.
22 173-201A-030. So it's listed and it's divided by
23 classes of waters of the state. So you've got Class
24 AA, Class A, Class B, Class B, I think it is. And so,
25 for example, Class AA, it's in there someplace. It's

1 There's also -- yeah, that's what you do.

2 Q. And there's no temperature variation?

3 A. No, there's not.

4 Q. No hardness?

5 A. And we've taken enforcement on visual
6 turbidity also. Not here but at a construction site.

7 Q. Has the Port ever reported to you any
8 violations of the water quality criteria for turbidity
9 resulting from construction-related discharges?

10 A. I'd have to review the files. I'd have to
11 review the files.

12 Q. You don't have any recollection whether they
13 have or not?

14 A. There was a turbid discharge from I believe
15 it was the north employees parking lot a few years ago
16 that had turbidity violations associated with it that
17 was reported to the Department of Ecology.

18 Q. Can you think of any more recently? Have
19 there been any since the permit modification?

20 A. No.

21 Q. Now, we looked at the permit provisions for
22 construction stormwater in Condition S2.C on Pages 16
23 and 17?

24 A. Yes.

25 Q. And I believe you said those were the

1 provisions in the permit that you're most familiar with
2 because they were part of the recent modification?

3 A. That's correct.

4 Q. And this says that in addition to the
5 requirements of Special Condition S13.C.1.c, and I'm
6 reading here from Condition S2.C.2.a --

7 A. I'm with you.

8 Q. In addition to those requirements, "the
9 Permittee shall monitor turbidity and pH in any surface
10 water discharge from construction sites within 24 hours
11 after any storm event of greater than 0.5 inches of
12 precipitation per 24-hour period."

13 Does the permit require that kind of
14 monitoring to be reported?

15 A. Yes.

16 MR. PEARCE: I'm sorry, Rick. Did you say
17 "recorded" or "reported"?

18 MR. POULIN: Thanks, Roger.

19 Q. (BY MR. POULIN) I said "reported," and of
20 course I meant does it require the results of that kind
21 of monitoring to be reported?

22 A. Yes, it does.

23 Q. How and where do you find that?

24 A. Page 19, S3.C.

25 Q. And that's that provision that requires

1 Q. Because it's not subject to Permit Condition
2 S2.C.2; is that right?

3 A. That's correct.

4 Q. Those are the provisions we discussed earlier
5 where if it's a construction project that results in
6 the disturbance of less than five acres, it might not
7 be subject to any reporting requirements at all?

8 A. Well, the reporting requirements, you know,
9 the non-compliance notification requirements, that's a
10 reporting requirement. Oh, if it's less than -- okay.
11 Yeah, we've got the G that we talked about before,
12 S3.G, the non-compliance notification reporting
13 requirements. That's still there, the one that we went
14 over before.

15 Q. And just to clarify again in terms of
16 non-compliance notification, the only non-compliance
17 notification that you could recall today happened some
18 years ago with the employee parking lot incident?

19 A. Yes, that I can recall, that I can recall.
20 There's been discussions about problems that cropped
21 up, but your question refers to violations, I believe.

22 Q. Right. Notification of any non-compliance
23 that has been brought to your attention by the Port.

24 A. I can't recall any.

25 Q. Let's look at Permit Condition S2.E, that's

1 monitoring results to be submitted every other month?

2 A. Yes, sir.

3 Q. So if there's a storm event that exceeds this
4 half-inch-per-24-hour period threshold identified in
5 S2.C.2.a on Page 16, would that automatically be
6 reported along with the regular every-other-month
7 monitoring results reporting of S3.C?

8 A. What was the first part of the question?
9 Violations, you say? Or was it exceedances or what did
10 you say?

11 (Reporter read back as requested.)

12 A. The answer is yes, that does require that to
13 be reported to the Department.

14 Q. (BY MR. POULIN) Are you aware of any kind of
15 stormwater monitoring that is not required to be
16 reported to Ecology if taken by report under this
17 permit?

18 A. Well, yeah, because this -- well, what kind
19 aren't required to be reported? From construction
20 stormwater?

21 Q. Yes.

22 A. The monitoring that's outside of Walker Creek
23 and tributaries and Gilliam Creek and tributaries, that
24 construction stormwater isn't specifically required to
25 be submitted to the Department.

1 on Page 17 of Exhibit 3.

2 A. Yeah.

3 Q. This pertains to an Annual Stormwater
4 Monitoring Summary Report. Does this annual stormwater
5 report include both non-construction stormwater under
6 S2.B and construction stormwater?

7 A. No, it's just non-construction stormwater.

8 Q. So that annual reporting requirement for
9 stormwater does not apply to construction-related
10 stormwater?

11 A. That's correct.

12 Q. Have you during your employment with Ecology
13 reviewed any Annual Stormwater Monitoring Reports
14 submitted under this provision?

15 A. Yes, I have.

16 Q. Let's introduce a new exhibit.
17 (Deposition Exhibit No. 6 was marked for
18 identification.)

19 Q. (BY MR. POULIN) Exhibit 6 bears a title page
20 labeled Port of Seattle Annual Stormwater Monitoring
21 Report for Seattle-Tacoma International Airport for the
22 period July 1, 2000 through June 30, 2001, and dated
23 September 2001.

24 Have you seen this report before?

25 A. I have seen it before.

1 Q. How would you explain the intended purpose of
 2 this report? Why does Ecology require the Port of
 3 Seattle to submit these annual reports?
 4 A. To summarize the monitoring of the previous
 5 year.
 6 Q. Is there a compliance review or enforcement-
 7 related aspect to this report?
 8 A. I haven't conducted an enforcement action
 9 based on the review of this report.
 10 Q. Was it more of an educational or management
 11 tool, would you say?
 12 A. It's to inform the Department of the
 13 monitoring required under the permit -- the results of
 14 the monitoring under the permit for whatever purposes.
 15 Q. Would you use this report to determine
 16 compliance with water quality standards?
 17 A. I don't know what I would do. I haven't in
 18 the past.
 19 Q. Could you use this kind of report to
 20 determine compliance with water quality standards?
 21 A. I'd have to review it in depth before I would
 22 take such a step. My review has not been in that kind
 23 of detail.
 24 Q. Let's look at Page 32 of the report. If you
 25 look to the first paragraph of text, it states in

1 Paragraph 4.5.3, Metals, "All data reported below are
 2 for total recoverable metals. It is important to note
 3 that Washington State Water Quality Standards (WAC
 4 173-201A) apply to the receiving waters, not to the
 5 discharges from a particular outfall."
 6 Do you agree with that statement?
 7 A. Unless a mixing zone's been granted,
 8 compliance with surface water quality criteria is at
 9 the point of discharge.
 10 Q. So when we talked about this before, we used
 11 the example of a hypothetical pipe --
 12 A. Yes, we did.
 13 Q. -- that was above the stream --
 14 A. Yes.
 15 Q. -- and discharging.
 16 A. Yes.
 17 Q. Where would you sample to determine
 18 compliance with water quality standards --
 19 A. I would take this -- unless a mixing zone --
 20 well, even if -- if I was to determine compliance with
 21 surface water quality criteria without a mixing zone, I
 22 would take the sample at the point of discharge for the
 23 metals. Turbidity is different, as you know.
 24 Q. So for the metals you would sample the
 25 discharge directly from the pipe?

1 A. Yes.
 2 Q. Before it hit the stream?
 3 A. I don't understand that. That's where it
 4 does hit the stream. I mean, it does hit the stream.
 5 The pipe does hit the stream.
 6 Q. Yes. Referring to the discharge, are you
 7 measuring simply what is coming out of the pipe or do
 8 you measure in the stream where the pipe flows in?
 9 A. No, we measure it at the pipe. So the pipe
 10 is here, the stream is here. The flow of water from
 11 the pipe is going to the stream. I take a sample
 12 there.
 13 Q. Even before the discharge hits the stream?
 14 A. That's right, because then it's mixed. You
 15 wouldn't know what you're measuring.
 16 Q. Are you aware of any discussions or
 17 communication between Ecology and the Port where this
 18 point was raised and considered?
 19 A. Within Ecology, is that what you said?
 20 Q. Discussions between Ecology and the Port.
 21 Like, say, when you read this report and see this kind
 22 of statement, would you ever inform the Port, hey, wait
 23 a minute, that's not the way we think you should do it?
 24 A. They're doing it the way we want them to do
 25 it, but I didn't comment about this interpretation of

1 the state standards.
 2 Q. But your understanding is that you don't
 3 measure the receiving waters unless there's an approved
 4 mixing zone?
 5 A. Even if there was a mixing zone you still
 6 wouldn't be monitoring the receiving waters. As part
 7 of the mixing zone analysis you would be measuring the
 8 receiving waters, but once a mixing zone is granted by
 9 the Department, I wouldn't set it up so you'd measure
 10 it in the receiving water. I suppose you could but I
 11 wouldn't.
 12 Q. Do you know in fact with respect to a
 13 particular outfall, any particular outfall, where the
 14 sampling is done? How would you find that out?
 15 A. By looking at the condition that says you
 16 must monitor it at the point of discharge. You measure
 17 it at the outfall, the four we mentioned before. It's
 18 at the outfall, not in the receiving water. So it says
 19 in that Condition S2, you will measure the outfall.
 20 That's how I know.
 21 ~~Q. And do you just assume that the Port is~~
 22 ~~following those instructions or is there some way to~~
 23 ~~verify?~~
 24 A. The answer to your question is I have not
 25 personally witnessed them take a sample from the

1 outfalls. That's the answer to your question.
 2 Q. The next sentence here on Page 32 in that
 3 Paragraph 4.5.3 that we read says, "See the discussion
 4 in Section 3.3 concerning the STIA monitoring locations
 5 relative to the receiving streams." And if we look to
 6 that Paragraph 3.3 on Page 10, it states there, "The
 7 Port monitors stormwater discharges at 14 locations."
 8 A. Yes, sir.
 9 Q. "One for each subbasin."
 10 A. Yep.
 11 Q. And further states "Figure 1 shows the
 12 location of the outfalls and monitoring locations."
 13 I'd like to refer you to this foldout color
 14 copy of Figure 1 that follows Page 14 in the permit.
 15 A. All right, I'm there.
 16 Q. Are you generally familiar with these
 17 identified outfalls?
 18 A. I have toured the facility and drove around
 19 these outfalls and in fact got out of the car and
 20 looked at some of them.
 21 Q. And the outfalls here are identified by,
 22 looks like a blackish circle?
 23 A. Yes.
 24 Q. Where can you find this kind of information
 25 about the location of the construction-related

1 A. No, they don't.
 2 Q. (BY MR. POULIN) How about the monitoring
 3 plans for the Des Moines Creek basin?
 4 A. For which type of --
 5 Q. For construction-related.
 6 A. Construction-related, no. Hardness is not
 7 something that we need monitored for construction
 8 stormwater discharges, because turbidity, oil, grease
 9 and pH are not hardness dependent. The standards are
 10 not hardness dependent.
 11 Q. How about for non-construction stormwater
 12 discharges under S2.B?
 13 A. Well, I didn't see it under there when we
 14 went over it. I didn't see hardnesses required. And
 15 for the monitoring plans, I don't remember. I don't
 16 remember. I don't know.
 17 For the monitoring plans for non-construction
 18 stormwater, it's not required under the monitoring
 19 requirements. Do the monitoring plans have it? I'd
 20 have to -- I don't know, I don't know. I'd have to
 21 look.
 22 Q. And your understanding of the way the water
 23 quality criteria works for toxic substances under WAC
 24 173-201A-040, is it possible to determine whether the
 25 non-construction stormwater discharges comply with

1 discharge outfalls?
 2 A. In the monitoring plan submitted to the
 3 Department for review and approval, there's a map
 4 attached to it.
 5 Q. A map. And is that for each individual --
 6 A. Upstream, downstream and point of discharge
 7 are big black dots on the map.
 8 Q. Are there upstream, downstream and point of
 9 discharge sampling requirements for each approved
 10 construction outfall?
 11 A. Each reviewed outfall, yeah. Well, I think
 12 so. The ones I recall had it. They should. I'd like
 13 to see it. I'd want it that way. Yeah, I haven't seen
 14 them all, I guess is what I'm saying.
 15 Q. Are there construction-related discharges
 16 into Des Moines Creek?
 17 A. I'm not sure. I don't know. I'd have to
 18 review the files.
 19 Q. Do you know whether the construction
 20 monitoring plans for the projects in the Walker Creek
 21 and Gilliam Creek basins require monitoring of hardness
 22 data?
 23 A. No, I don't believe they -- did you say for
 24 the --
 25 (Reporter read back as requested.)

1 water quality standards if there is no hardness data?
 2 A. You need hardness data to determine
 3 compliance with WAC 173-201A-040 because the fresh
 4 water standards are hardness dependent. And whether
 5 hardness is in the monitoring plans, I don't know, I
 6 don't know. It's not in the S2.B that we were
 7 referring to.
 8 Q. You don't see it in the permit?
 9 A. I don't see it in S2.B.
 10 Q. If it's not in the monitoring plan, is there
 11 anywhere else that that requirement might exist?
 12 A. I'd have to look at the permit. I'd have to
 13 look -- if I was writing the permit it would be in
 14 S2.B. But I didn't write that portion of the permit.
 15 I don't know. Probably not, probably not.
 16 Q. We were looking at the requirement for the
 17 annual report under S2.E. Do you know if the annual
 18 report, Annual Stormwater Monitoring Report, requires
 19 reporting of hardness data?
 20 A. I don't recall seeing it. I don't know. I
 21 haven't reviewed that annual report that carefully.
 22 "This hardness value is the median of seven instream
 23 standards collected in Miller and Des Moines Creek."
 24 I'm looking at Page 20 of the annual report. Looks
 25 like they've got hardness data there, on Page 20 of the

1 annual report. I'm looking at (f) down at the
 2 footnote.
 3 Q. This is the Table 4 Stormwater Quality
 4 Comparators?
 5 A. Yes. "Washington state acute standards
 6 expressed as total recoverable, calculated at 56
 7 milligrams per liter hardness using generic translators
 8 in Ecology's TSDCALC8.XLW spreadsheet. This hardness
 9 value is the median of seven instream samples collected
 10 in Miller and Des Moines Creeks in 1999."
 11 So that is hardness data submitted in the
 12 annual report.
 13 Q. But that's not hardness data from this year
 14 or from the year that the report covers, is it?
 15 A. No, it's -- that's correct.
 16 Q. Do you think that kind of hardness data is
 17 sufficient to determine compliance with water quality
 18 standards? Are you comfortable taking a median, an
 19 average of seven samples conducted in one year?
 20 A. I would -- I believe the guidance is somewhat
 21 around that to determine background concentrations of
 22 hardness in receiving waters, something around seven,
 23 maybe ten samples. Or maybe four. I'd have to check.
 24 It's four to ten is the way the Department determines
 25 hardness in receiving waters, four to ten samples,

1 four to ten. I'd have to look at the guidances a
 2 little bit more, receiving water monitoring. I think
 3 it's four to ten.
 4 Q. Does that need to be contemporaneous with a
 5 particular sample or it's just they do one average and
 6 now they know what the typical hardness in the creek is
 7 and that's good for --
 8 A. Yeah, that is the way they would determine a
 9 mixing zone, in compliance using a mixing zone
 10 analysis, is they would take background samples of the
 11 metals and hardness. And I'd have to refresh myself on
 12 the exact number. But then that would be -- then that
 13 mixing zone established would then be established for
 14 after that period. I'm referring you to a way that we
 15 establish mixing zones.
 16 Q. Are you aware of any mixing zones that
 17 pertain to any of these outfalls?
 18 A. No.
 19 Q. Are there any mixing zones at all approved or
 20 authorized by this permit?
 21 A. No, there's not.
 22 Q. No mixing zones at all?
 23 A. Not to my knowledge. Not that I can recall.
 24 I'm not familiar with any.
 25 Q. Now, when you read this footnote (f) from the

1 Table 4 Stormwater Quality Comparators, there's a
 2 reference here to this Ecology spreadsheet, the
 3 TSDCALC8.XLW. Do you have any idea what that is?
 4 A. Yeah, that's the TSDCALC. I think that has
 5 an equation in it that aids that big long equation, I
 6 think it was -- you were referring in previous
 7 questioning to the letter that had a big equation, M, I
 8 think it was. Well, it's a formula that you plug in
 9 the hardness and you get the criteria. It's in that
 10 TSDCALC8.
 11 Q. And that's a workbook of some sort?
 12 A. It's a spreadsheet, Department of Ecology
 13 spreadsheet that would have that equation in an Excel
 14 file, and then you plug in the hardness and you get the
 15 copper receiving water acute standard or whatever.
 16 Q. So then is it your understanding that using
 17 this spreadsheet means you don't need specific hardness
 18 data?
 19 A. No, you need specific hardness data, but you
 20 need to plug it in -- you could do it by hand or you
 21 could plug it into the equation that's already
 22 developed for you. So you plug the hardness into that
 23 equation and you end up with the "o," you know, the "o"
 24 that's in the 173-201A-040, the "o." That's how you
 25 get "o". And you could try do it by hand or you can do

1 TSDCALC and it does it for you. But you've got to have
 2 hardness for it.
 3 Q. Do you need that from the same time, the same
 4 date that you take the sample?
 5 A. I am taking Department action on exceedances
 6 of the copper limit based -- I'm taking Department
 7 actions based on past hardness data for certain
 8 facilities without having it contemporaneous, at the
 9 same time. And I think it's -- if I knew -- if I could
 10 read this -- I think you take -- I think it's the lower
 11 10 percentile.
 12 I would have to review the -- there's a
 13 method of using that hardness to determine maximum
 14 concentrations to receiving water and maximum impacts
 15 to receiving water. And I think you take a certain
 16 percentile of the range of hardness in order to
 17 determine compliance. And I've taken actions based on
 18 that without it -- actions. I've taken -- yes, I've
 19 taken actions based on the fact that it's past hardness
 20 data without it being contemporaneously taken. I've
 21 done it a number of times.
 22 Q. And what kind of action is that?
 23 A. I've issued -- I've required -- I've told
 24 every boatyard -- I've mentioned to the Northwest
 25 Marine Trade Association that the copper limits that

1 they're measuring in their discharges exceed the water
2 quality standards based on a hardness of 50, and that's
3 for 81 boatyards in my region, 130 statewide, I put
4 that in a fax sheet, without it being measured
5 simultaneously with copper. So I'm telling the
6 boatyards, you are exceeding state water quality
7 standards because we're within assumption of 50 or with
8 a 50, you're over the standard.

9 Q. Does exceeding the water quality standards on
10 that basis constitute a violation of the permit?

11 A. I'd have to look at it, I'd have to look at
12 it. I haven't used TSDCALC to determine the
13 comparison, to make the comparison.

14 Q. Now, this Table 4 on Page 20 has comparative
15 study data that mentions Metro and Bellevue and highway
16 runoff and Portland.

17 A. Where is that, now?

18 Q. That's across the top column.

19 A. Oh, yes. Yes, okay.

20 Q. Why is that being reported here?

21 A. I'm not sure why. I think it's to compare
22 Sea-Tac Airport discharges to other discharges in the
23 area or that would be other types of non-point source
24 discharges. They're comparing Sea-Tac discharges to
25 non-point source discharges, it looks like to me.

1 Is that either/or, and/or?

2 A. That's a good question. (Witness reading
3 document). I'm not sure, I'm not sure. S2.B. Well,
4 when it says "or," that generally means either one.
5 You have to do S2.B or S3.B. That's my literal
6 interpretation of that requirement.

7 Q. So whether the sampling was conducted under
8 one or the other, essentially both need to be reported?
9 Does it mean either/or so that it could read stormwater
10 monitoring conducted pursuant to either Special
11 Condition S2.B or S3.E?

12 A. (Witness reading document). Well, I think it
13 would mean either/or. Both.

14 Q. Well, then let's consider this Permit
15 Condition S3.E, which is the second of those two,
16 addresses Recording of Results. And it says, "For each
17 measurement or sample taken, the Permittee shall record
18 the following information," including Part (6), "the
19 results of all analyses."

20 And that S3.E includes all the kinds of
21 sampling, doesn't it, construction and regular
22 stormwater and industrial wastewater?

23 A. Well, yeah, I think it would. I think that's
24 the kind of data that requires. So for -- yeah. Yes.

25 Q. So would you agree that if Permit Condition

1 I don't even know what NORP and BURP is. I have no
2 idea what that is. I know what Bellevue 95 probably
3 is. It's stormwater runoff samples from -- I don't
4 know.

5 Q. That's not information that Ecology
6 requested?

7 A. I didn't request it. I don't know what my
8 previous permit managers requested.

9 Q. Do you think that comparison is relevant to
10 determining permit compliance or water quality
11 compliance?

12 A. Well, if you're going to -- at this point no.
13 No. At this point no. If you're going to do a mixing
14 zone, maybe, but at this point no.

15 Q. Now, I'm curious. If I understood right, you
16 said that the Annual Stormwater Monitoring Report does
17 not include construction stormwater; is that right?

18 A. Yeah, that's what I said.

19 Q. Well, just looking at S2.E, Page 17, it says
20 in paraphrase, the Permittee shall submit a report
21 summarizing the results of stormwater monitoring
22 conducted pursuant to S2.B or S3.E.

23 A. Yeah.

24 Q. Now, the first, that word "or," does that
25 mean the permittee gets to pick which one it wants?

1 S2.E pertaining to the Annual Stormwater Monitoring
2 Summary Report, if that is read to mean either/or,
3 meaning the results of monitoring conducted either
4 under Condition S2.B or S3.E should be reported, then
5 the annual report should include construction
6 stormwater discharges?

7 A. S3.E has to do with recording -- well, I
8 don't see in there where it has anything to say about
9 reporting.

10 Q. Well, S3.E by itself just says "the Permittee
11 shall record."

12 A. Yes.

13 Q. Doesn't S2.E require a report summarizing the
14 results?

15 A. I see.

16 Q. A report summarizing the results recorded
17 under those other sections?

18 A. Yeah, you could look at it -- I guess the
19 answer to your question is -- yeah. The answer is yes.

20 Q. But evidently that construction, the results
21 of -- scratch that.

22 Evidently there is no report of any summary
23 of construction-related stormwater sampling?

24 A. That is correct.

25 Q. Let's look at a new exhibit.

~~1 (Deposition Exhibit No. 7 was marked for
2 identification.)~~

3 Q. (BY MR. POULIN) Would you please describe
4 the documents included here in Exhibit 7.

5 A. This is the construction site stormwater
6 monitoring for -- from the Sea-Tac Airport.

7 Q. Do you know whether you've seen these
8 particular documents before?

9 A. Don't recall seeing them before.

10 Q. Have you seen documents like these? Is this
11 format of reporting familiar to you?

12 A. (Witness reviewing document). Am I familiar
13 with the format. What this is the results of the
14 turbidity and results of pH monitoring.

15 Q. And how do you know that?

16 A. Well, it's got headings Turbidity and pH on
17 it, and Time.

18 Q. So this appears to report the results of
19 sampling --

20 A. Yes.

21 Q. -- for those two parameters, turbidity and
22 pH?

23 A. Yes, it does.

24 Q. And in the first column on the left, it
25 identifies the site where the sample took place?

1 Q. And can we make that comparison here for that
2 first site, the Logistics Site Development site?

3 A. Yes. Yeah, for the Tyee pond. Well, I'm
4 not -- I would have to take a look at the monitoring
5 plan, I think, just to make sure what these numbers
6 represent, the outfall location, the upstream,
7 downstream. Compare these numbers to what the big dots
8 are on the monitoring plan and make a call that way,
9 make a decision that way. That's what I would do.

10 Q. What would you be looking for in the
11 monitoring plan to add to the information?

12 A. The map. You've got Tyee pond south end,
13 Tyee pond outfall to Des Moines Creek. So what I would
14 look at is the Tyee outfall to Des Moines Creek, is
15 that reflected in the monitoring plan as the downstream
16 sampling location, and is the upstream location the
17 Tyee pond south end. I'd want to make sure that that's
18 in line with what the monitoring plan says. And if it
19 truly is upstream and downstream to the point of
20 discharge per the monitoring plan, then I could make a
21 call.

22 Q. And here, if there was nothing in the
23 monitoring plan to change your understanding of this
24 information, what would the call be? How do you make
25 the call?

1 A. Yes.

2 Q. Here in the first page which has a date of
3 October 16, 2000 --

4 A. Yes, I see that.

5 Q. -- under the first site, Logistics Site
6 Development, describes "unnamed catch basin d/s of
7 treatment facility." Do you what that means?

8 A. No.

9 Q. And then below that on the left there's one
10 line that says "u/s" and another again that says "d/s."
11 Is that upstream, downstream?

12 A. That's what it appears to be, yes.

13 Q. Would it make sense, if this is in fact
14 monitoring of stormwater at a construction site, that
15 they would take samples both upstream and downstream?

16 A. It would make sense for them to take -- yes.

17 Q. Is that because you want to make sure that
18 the conditions --

19 A. It's for direct comparison of the turbidity
20 standard.

21 Q. And how does that work?

22 A. Well, it's the 5 over background standard.
23 You take the background and then the downstream and you
24 subtract the two to see if it's 5 over background.
25 What we want is a turbidity comparison, and pH.

1 A. I would make the call by subtracting the
2 downstream from the upstream. If the downstream is
3 more than 5 over background of the upstream
4 concentration, and that's the Class AA waters in the
5 state standard that we're referring to here, then that
6 would be a direct comparison to the standard. So if
7 it's more than 5 over background, then it would be a
8 violation of the state criteria for turbidity.

9 Q. So this is the turbidity criteria that we
10 found in 173-201A-030(1)(c)(vi) back on Exhibit 5, Page
11 477?

12 A. That was that (vi) that we were referring to?

13 Q. Yes.

14 A. If in fact the receiving waters were Class AA
15 waters of the state, yes. I think Class A are the
16 same, though. I think it's 5 over background of Class
17 A also, which is what the receiving waters for the Port
18 is. So it's the turbidity standard in WAC
19 173-201A-030(1)(c)(vi), if the receiving waters are
20 class double A.

21 Q. And if it's class single A, then you look to
22 (2)(c)(vi); is that right?

23 A. Yes, yes.

24 Q. And as you've just pointed out, that's the
25 same standard, it's 5 NTU --

1 A. That's correct.
 2 Q. -- over background?
 3 A. That's correct.
 4 Q. And here, if you subtract upstream from the
 5 downstream --
 6 A. The downstream from the upstream. You
 7 subtract downstream from the upstream.
 8 Q. Well --
 9 A. It's 5 over background. So the upstream is
 10 the background. So you subtract the downstream from
 11 the upstream.
 12 Q. Well, aren't we looking to see if the
 13 construction site is adding more than 5 NTU to the
 14 upstream, to the background?
 15 A. Yes, we are. Yes.
 16 Q. So wouldn't we expect some downstream to be
 17 larger than some upstream?
 18 A. Yes. Perhaps I misunderstood you.
 19 Q. The question is, is that some downstream more
 20 than 5 above the upstream?
 21 A. That is the way I would determine compliance
 22 with the turbidity standard, yes, it is.
 23 Q. And that would involve subtracting upstream
 24 from the downstream, wouldn't it?
 25 A. That's right, that's right.

1 Q. And here, if we subtract the upstream
 2 turbidity sample of 13.2 from the downstream sample of
 3 18.4, that's more than 5, isn't it?
 4 A. Yes, it is. Yes, it is.
 5 Q. Let's look at the second page of this Exhibit
 6 7. Here we see another upstream and downstream pair of
 7 samples for a site that's identified as the Air Traffic
 8 Control Tower on October 20, 2000. Do you see that at
 9 the bottom of the second column, or rather, I guess the
 10 third column, the Turbidity column?
 11 A. Air Traffic Control Tower, yes, I do, I see
 12 that.
 13 Q. What do you see as the upstream monitoring
 14 result for that site?
 15 A. 50.6 nephelometric turbidity units.
 16 Q. And what is the downstream?
 17 A. 176.2.
 18 Q. And this is an instance where we have to look
 19 at that second half of the turbidity standard, don't
 20 we, because we're looking at a background that's higher
 21 than 50 NTU?
 22 A. Yes, that's right. Practically the same.
 23 Q. Right. And since we're looking at 10 percent
 24 of 50.6, it's basically 5.06?
 25 A. You've got to take into consideration the

1 accuracy of the instrument too. That last answer I
 2 might qualify. I'd have to take a look at the accuracy
 3 of the analytical method. I mean, is it close enough
 4 to make a compliance call on that.
 5 Q. Page 1, the difference was only 5.2?
 6 A. That's right.
 7 Q. So it's maybe questionable?
 8 A. I'd have to look at the analytical -- it may
 9 be questionable because the -- I'd have to look at the
 10 PQL, practical quantitation limit, et cetera, about
 11 that.
 12 Q. How about the results here on Page 2?
 13 A. I wouldn't have to look at that. I'd have to
 14 look at the monitoring plan again, like I said, to make
 15 sure that these are the right locations. But if this
 16 is the right location, yeah, that's over the turbidity
 17 criteria, yes.
 18 Q. That's a difference of 176.2 minus 50.6?
 19 A. Yeah.
 20 Q. That's over 125 NTU or higher, isn't it?
 21 A. Yes, sir. Yes, it is.
 22 Q. Looks like a violation, doesn't it?
 23 A. It looks like a violation, yes, it does.
 24 Q. And this took place on October 20, 2000?
 25 A. Yes.

1 Q. Is this the kind of monitoring result that
 2 should have been reported on that every-other-month
 3 report?
 4 A. No, because that isn't part of the permit
 5 that was in existence at the time of October 20, 2000.
 6 Q. What do you mean?
 7 A. The every-other-month requirement wasn't in
 8 the permit on October -- that was in the major
 9 modification. The every-other-month reporting is in
 10 the major modification, not in the permit effective
 11 10/20/00.
 12 Q. Would this be the kind of monitoring result
 13 that the Port would have to report under the
 14 non-compliance notification section --
 15 A. Yes.
 16 Q. -- of S3.G?
 17 A. Well, yeah. That's the non-compliance --
 18 S3.G, that's correct.
 19 Q. And Permit Condition S3.G requires more than
 20 just reporting, doesn't it?
 21 A. Yes.
 22 Q. It says "the Permittee shall," in Subsection
 23 1, "Immediately take action to stop, contain, and
 24 cleanup unauthorized discharges or otherwise stop the
 25 violation, and correct the problem."

1 A. Yeah. Maybe -- I don't know. I'm not an
2 attorney, but it says "terms and conditions" of this --
3 I would want it reported to me, this violation reported
4 to me, which I think your question is --

5 Q. Did you say you would or you would not?

6 A. I would want this violation of surface water
7 quality criteria reported to me. Your question had to
8 do with permit terms and conditions. And we talked
9 about that in the previous questioning about whether
10 the criteria are part of the permit terms and
11 conditions.

12 I want it reported to me. I want to know
13 where they violated, as an engineering manager, without
14 the legalese of, is it part of the permit or not part
15 of the permit. It's state law. I want it reported. I
16 want an explanation of why they violated.

17 Q. Let's look at the third page of Exhibit 7.

18 A. Okay.

19 Q. And here in the center there's several rows
20 of information for the South Terminal Expansion
21 Project. Do you see that?

22 A. Yes, I do.

23 Q. North Ductbank, it says? Because I guess the
24 final one on the page is also South Terminal Expansion
25 Project, but it doesn't say North Ductbank.

1 A. Okay. South Terminal Expansion Project,
2 North Ductbank. I'm there.

3 Q. And cutting to the chase, this appears to be
4 another instance where the downstream turbidity
5 sampling results are well over both 5 and 10 percent of
6 the upstream?

7 A. Yeah.

8 Q. Would you agree?

9 A. I agree.

10 Q. 61.6 over 31.5?

11 A. I agree, it appears to be a violation of the
12 5 over background standard which is the state water
13 quality standards for turbidity.

14 Q. If we look to the far column on the right
15 under Comments, it seems to say if downstream minus
16 upstream is greater than 5 NTU, notify KL. Do you have
17 any idea who KL is?

18 A. I don't. I don't know who KL is.

19 Q. And then on the previous page, I see now
20 there's a comment that says -- in the last two rows of
21 the last column, it says if downstream minus upstream
22 is greater than 5 NTU, notify KL and DJ?

23 A. No, I don't know who they are. Those aren't
24 the initials of me, Ed Abbasi or Kevin Fitzpatrick.

25 Whose initials they are, I don't know.

1 Q. Let's move on to Page 4. If we compare this
2 to Page 3, would you agree that this looks like more
3 sampling for the same three sites that's taken two or
4 three weeks later on November 8, 2000?

5 A. Could you give me that again?

6 (Reporter read back as requested.)

7 A. Doesn't look like the same as Page 3 to me.
8 I see Dobbs Flight Kitchen Remodel and Booster Pump
9 Station, and Page 3's got Feeder 104/204 Replacement,
10 South Terminal Expansion. Have I got the wrong Page 3?

11 Q. (BY MR. POUND) I'm sorry. We between us
12 have our last two pages switched. Unfortunately, these
13 pages aren't numbered, but do you have a page there
14 that has the date 11/8/00 on the upper left?

15 A. Yeah, I do. Oh, okay. Okay, the answer is
16 yes. There's 11/8 and 10/20 appear to be the same --
17 okay, my mistake. The answer to your question is yes.

18 Q. And if we could for convenience designate the
19 October 20 sample including the South Terminal
20 Expansion Project North Ductbank as Page 3 and the
21 November 8, 2000 sample as Page 4, that would I think
22 help.

23 A. Okay, I'm with you.

24 Q. Here again, the monitoring shows a downstream
25 of 74.0 and an upstream of 62.0. Does that appear to

1 exceed the relevant criteria for turbidity?

2 A. It does.

3 Q. And this one there's only a single comment,
4 "lots of flow." There's no indication that anyone was
5 notified, would you agree?

6 A. There's no indication that anybody was
7 notified on that line.

8 Q. Do you see any indications of notification
9 anywhere on this particular page?

10 A. No.

11 Q. This Page 4 has a pair of names at the top
12 after the word "Samplers." It says R. Simmons and
13 S. Currie. Do you know who any of those people are?

14 A. No, I don't.

15 Q. Well, let's look at the last page of this
16 exhibit, Page 5, with a November 26, 2000 date.

17 A. Okay.

18 Q. If we look here to the third site identified,
19 the Air Traffic Control Tower, how would you describe
20 that turbidity result?

21 A. It appears to be a violation of the 5 over
22 background turbidity standard for Class AA and Class A
23 waters of the state.

24 Q. And that's for the downstream sample result
25 of 45.0 and upstream of 36.0?

1 A. Yep.
 2 Q. And then there's a comment over on this one
 3 that says, "No access to site so sample taken at
 4 SDE4-930"?
 5 A. Yeah, I see that.
 6 Q. Does that make any sense to you?
 7 A. I'd have to look at the monitoring plan.
 8 Q. And again, what information would you look
 9 for on the monitoring plan?
 10 A. To see the location of this SDE4-930, if you
 11 could deduce where it was taken from in relation to the
 12 SDE4-948 sample. See if it was representative of
 13 background conditions.
 14 ~~Q. We may have occasion to come back to this~~
 15 ~~subject, but let's move on for now. Are you okay to~~
 16 ~~keep going?~~
 17 ~~A. Yeah.~~
 18 Q. Let's introduce Exhibit 1.
 19 (Deposition Exhibit No. 1 was marked for
 20 identification.)
 21 Q. (BY MR. POULIN) Could you describe that,
 22 please.
 23 A. This is the Water Quality Certification for
 24 the Construction of Third Runway and related projects
 25 at the Seattle-Tacoma International Airport, et cetera,

1 et cetera.
 2 Q. And this exhibit bears a date of September
 3 21, 2001, on the cover page?
 4 A. Yes.
 5 Q. Does that indicate that this is the revised
 6 water quality certification?
 7 A. I don't know. I don't know.
 8 Q. You don't know?
 9 A. Don't know.
 10 Q. Well, let's introduce Exhibit 2.
 11 (Deposition Exhibit No. 2 was marked for
 12 identification.)
 13 Q. (BY MR. POULIN) Could you please describe
 14 Exhibit 2?
 15 A. It's titled Water Quality Certification for
 16 U.S. Army Corps of Engineers Public Notice
 17 1996-4-02325, et cetera, et cetera.
 18 Q. And this one bears the date of August 10,
 19 2001?
 20 A. Yeah, it does.
 21 Q. Would you agree that Exhibit 2 was the first
 22 of two water quality certifications issued this year?
 23 A. I do not know. I'm not that familiar with
 24 the 401 certification orders that were issued.
 25 Q. Are you aware that the August 10 water

1 quality certification was revised after its issuance?
 2 A. Not really.
 3 Q. Tell me what role you played in the water
 4 quality certification decision.
 5 A. I aided the stormwater protection measures in
 6 the 401 certification, the monitoring that we had
 7 talked about -- the monitoring through the -- the
 8 monitoring requirements to protect the surface water
 9 quality.
 10 Q. Did those monitoring requirements cover both
 11 construction-related and non-construction-related
 12 discharges?
 13 A. I'd have to look at it. I'd have to make a
 14 more thorough review of this. I didn't really author
 15 this. I'd have to do a pretty -- that would certainly
 16 cover the construction-related activities, that I know.
 17 Q. But you're not certain without further review
 18 whether it covers non-construction?
 19 A. Correct.
 20 Q. How would you describe your level of
 21 involvement with the agency decision-making process
 22 that resulted in this certification order?
 23 A. I helped develop the provisions in the
 24 permit -- or in the Order, in the certification, to
 25 protect surface water quality.

1 Q. Do you have a sense of what part or portion
 2 of the whole decision that aspect of it is? Is it a
 3 major part, tiny part?
 4 A. No. I think it's important. It's an
 5 important part. It's an important part.
 6 Q. Were the provisions and conditions that you
 7 worked on intended to assure that the discharges
 8 resulting from the covered work would comply with water
 9 quality standards?
 10 A. Yes. Yeah, from that portion of the permit
 11 that it applies to.
 12 Q. Could you please describe the relationship
 13 between the water quality protective conditions you
 14 worked on in this certification and the things we've
 15 been looking at earlier today in the 402 permit?
 16 A. Yeah. We tried to make them pretty
 17 consistent.
 18 Q. You tried to make the conditions in this
 19 certification consistent with --
 20 A. -- the conditions in the 402 generally, at
 21 least not to be inconsistent.
 22 Q. So do these impose essentially the same
 23 conditions or do they impose additional conditions?
 24 A. You would have to do a side by side
 25 comparison between the two documents, but the idea was

1 to have consistent conditions between the two
 2 documents.
 3 Q. Did you do that kind of side by side
 4 comparison at the time these were drafted?
 5 A. I didn't, no. No, I did not.
 6 Q. Do you know if anyone in Ecology did?
 7 A. I don't know.
 8 Q. Well, who else did you work with?
 9 A. Ann Kenny.
 10 Q. And is she a part of your staff?
 11 A. No, she was the lead on the 401 certification
 12 in another program within Ecology.
 13 Q. Did she ask you to help her on this
 14 particular part of the 401?
 15 A. Yes, she did.
 16 Q. And were you directed to give her that
 17 assistance by your supervisor?
 18 A. Yes.
 19 Q. You said earlier that you were the facility
 20 and permit manager for Sea-Tac Airport up until
 21 October?
 22 A. Yes.
 23 Q. And that was after both these certification
 24 decisions came out; is that right?
 25 A. Yes. Yeah, up until October -- yes, up until

1 A. He came on board in October.
 2 Q. Where would you place him on that curve?
 3 A. I don't know. He's becoming more familiar
 4 with the certification as he works in his job as the
 5 facility manager for the NPDES permit.
 6 Q. Do you know whether Ann Kenny will be
 7 involved in the permit review?
 8 A. I don't know. I don't think she'll be very
 9 much involved in the -- maybe in the review capacity
 10 possibly.
 11 Q. Do you think the Port is going -- let me
 12 start that over.
 13 Do you think Ecology is going to attempt to
 14 incorporate the requirements and conditions of this
 15 water quality certification into the new permit that --
 16 A. We'll certainly look at doing that. We're
 17 going to look hard, long and hard at doing -- adding
 18 some of the conditions that are in the certification to
 19 the 402 permit, especially for construction, stormwater
 20 limitations and monitoring requirements, you bet.
 21 Q. You previously stated that the provisions
 22 that you worked on in the water quality certification
 23 needed to protect surface water quality.
 24 A. Yes.
 25 Q. Would you agree that the water quality

1 October.
 2 Q. Are you aware that the Port's current permit
 3 is set to expire on June 30, 2002?
 4 A. I am.
 5 Q. And do you recall that the Port is required
 6 to submit a new permit application 180 days before that
 7 expiration date?
 8 A. Yes, I am.
 9 Q. And that that's coming up here within just a
 10 couple weeks, isn't it?
 11 A. You bet, yes, sir.
 12 Q. Will you be involved in the review of that
 13 permit application?
 14 A. Maybe. Ed Abassi is the lead. I may be
 15 involved a little bit as supervisor, sure.
 16 Q. Ed Abassi is on your staff?
 17 A. Yeah, Ed Abassi is the current facility
 18 manager for the Sea-Tac permit, and he's the lead. And
 19 as the supervisor -- yeah, I'm probably going to be
 20 involved. How much, we'll see.
 21 Q. How would you describe Ed Abassi's
 22 familiarity with the conditions and requirements of the
 23 water quality certification?
 24 A. He's on a learning curve.
 25 Q. And where would you put --

1 certification is intended to go beyond the requirements
 2 of permit compliance to assure compliance with water
 3 quality criteria whether they are specified in the
 4 permit or not?
 5 A. Let me rephrase the question back to you and
 6 see if I understand what you're asking me. Is the 401
 7 permit going to be -- the 401 is already written.
 8 Q. Yes.
 9 A. So it's not going to be rewritten to be in
 10 conformance with 402. Is that what you're asking? It
 11 was quite a long question to answer. It was a
 12 mouthful.
 13 MR. POULIN: I'd appreciate having the
 14 question reread.
 15 (Reporter read back as requested.)
 16 A. I don't know what you're asking. Sorry,
 17 you've got to rephrase.
 18 Q. (BY MR. POULIN) I'm asking, as it's
 19 presently written --
 20 A. The 401?
 21 Q. Yes. Does the 401 go beyond requiring permit
 22 compliance?
 23 A. It's not a permit, it's an Order. It has
 24 conditions in it to protect water quality. That's what
 25 it has in it. But it's not a permit, it's an Order.

1 So the permit -- I think your permit is throwing me a
2 little bit.

3 Q. Well, I'm trying to explore the relationship
4 between the permit and the water quality certification.

5 MR. PEARCE: What permit are you talking
6 about?

7 MR. POULIN: Sorry?

8 MR. PEARCE: What permit are you referring
9 to?

10 MR. POULIN: The current NPDES permit at
11 Sea-Tac, yes.

12 MR. PEARCE: Thank you for clarifying that.

13 (Recess taken.)

14 (Deposition Exhibit No. 8 was marked for
15 identification.)

16 Q. (BY MR. POULIN) Could you describe Exhibit
17 8, please.

18 A. It looks like an e-mail I sent to Ann Kenny
19 on August 3, 2001, a question about AKART and the
20 reissuance of the NPDES permit.

21 Q. And this e-mail includes a previous message
22 from Ann Kenny to numerous people, including you; is
23 that right?

24 A. Yes.

25 Q. Dated July 29, 2001?

1 Q. -- of operations at Sea-Tac, or does it also
2 cover the --

3 A. I believe it covers construction stormwater
4 outfalls.

5 Q. Does it cover construction discharges to all
6 of the creek systems?

7 A. Construction stormwater outfalls to the creek
8 systems.

9 Q. Is that a yes?

10 A. What was the question?

11 (Reporter read back as requested.)

12 Q. (BY MR. POULIN) Meaning we looked at how the
13 recent NPDES permit modification only applies new
14 conditions to Walker and Gilliam Creeks.

15 A. Yes, sir.

16 Q. But the original permit applies somewhat
17 different conditions to Des Moines Creek. How does the
18 401 work? Does that apply the same conditions to all
19 three creeks? Does it in a sense retrofit?

20 A. I think it does. I believe it does. Without
21 a thorough reading here at the moment, I believe it
22 goes beyond the Walker and Gilliam Creek and
23 tributaries for construction stormwater outfalls.

24 Q. Let's introduce a new exhibit.

25 (Deposition Exhibit No. 9 was marked for

1 A. Yes.

2 Q. And she states, "The stormwater related
3 sections will require the most work at this point.
4 Some of the language in this draft permit is from the
5 old permit, some is from the Tacoma Narrows 401." And
6 here in bold she states, "We need to be sure that the
7 401 will be well integrated with the 402, the major
8 mod. and future 402 permits."

9 A. Consistence. I'm sorry you didn't ask a
10 question.

11 Q. I'd like you to address the importance, the
12 significance of that statement.

13 A. The 401 and 402 have to be consistent, so the
14 402 and 401 have to be consistent in protecting water
15 quality.

16 Q. What has Ecology done to assure the
17 consistency and integration that you're mentioning?

18 A. Well, I helped Ann with the construction
19 stormwater limitation language because I wrote language
20 in the major modification for construction stormwater
21 monitoring. And I helped her make sure that the 401
22 was consistent with that.

23 Q. Does the 401 apply only to the new
24 elements --

25 A. I don't believe so, no.

1 (Deposition Exhibit No. 9 was marked for
2 identification.)

3 Q. (BY MR. POULIN) Before we move on to Exhibit
4 9, let's look again at Exhibit 8. Your addition to
5 this e-mail is at the top where you wrote, "REW 90.48
6 required AKART implementation in reissuances of NPDES
7 permits. The Department will make this determination
8 at permit issuance. How is the 401 going to integrate
9 these determinations?"

10 What answer did you get to that question?

11 A. I don't remember. Honestly, I don't
12 remember. How is the 401 going to integrate these
13 determinations? I don't know if I got an answer.

14 I don't remember. I don't remember the context. I
15 don't remember. I was maybe -- I don't remember the
16 answer I got. I was trying to learn about the 401
17 process, and I get it in writing, I try to learn by
18 writing, so I shot a few questions to her.

19 Q. Has involvement in 401 certifications not
20 been part of your work with Ecology?

21 A. Not at all. Not a bit.

22 Q. Is this the first one you've had any part in?

23 A. Yes.

24 Q. And again, your part is focusing on surface
25 water?

A. Stormwater, surface water.

1 Q. How did you become involved in this 401 for
2 the first time?

3 A. Like I said, Kevin assigned it to me and
4 then -- because I was involved in the 402 permit, I
5 think we wanted to make sure that the 402 and the 401
6 were consistent. And so I got involved that way, to
7 make sure they're consistent and to aid Ann in
8 developing the condition that would be protective of
9 surface water quality, which is an important part of
10 the 401.

11 Q. Looking at Exhibit 1, the 401 certification,
12 which part is that? Which part did you work on?

13 A. The conditions for Construction Stormwater
14 Limitations Requirements and Monitoring Requirements is
15 one of the parts I worked on, Condition K.

16 Q. Is there a page number on that?

17 A. Yeah, Page 28.

18 Q. I see that the permit is organized in these
19 lettered Sections A, Water Quality Standard Conditions;
20 B, Permit Duration; on Page 5, C, Notification and
21 Reporting Requirements. Is K the first one that you
22 were involved in?

23 A. I haven't read the whole thing so I don't
24 know. I haven't read it.

25 Q. Well, this was just issued three months ago,

1 Part (f) is talking about the NPDES permit. But that's
2 not something you were involved on?

3 A. Let me read it. (Witness reading document).
4 No, I did not work on that.

5 Q. Section C starts on Page 5, it's Notification
6 and Reporting Requirements. Did you work on that?

7 A. No, I did not.

8 Q. Page 6 was the beginning of Section D for
9 Wetland, Stream and Riparian Mitigation.

10 A. No, no, I don't see anything.

11 Q. So when you say you worked on surface water,
12 you're really referring to a narrow slice or at least
13 not all of surface water related issues?

14 A. Yeah, correct. Wetlands would be considered
15 surface waters of the state. No, I didn't work on
16 Page 6, except I probably told her at one time that
17 wetlands are surface waters of the state, it's clearly
18 been determined to be waters of the state, and criteria
19 applies to waters of the state.

20 Q. And of course stream and riparian mitigation,
21 that's streams or surface waters, but you didn't work
22 on those?

23 A. What page are you on there?

24 Q. That's also part of Section D as in dog that
25 begins on Page 6.

1 right?

2 A. Yep.

3 Q. Did you work on Section A, the Water Quality
4 Standard Conditions, starting on Page 2?

5 A. Well, I didn't -- did I work on? It looks
6 like something I would want. Did I tell her about it?
7 I don't know. Well, I'm looking at A.1. That's
8 something I may have discussed with her at one time.
9 Did I work on it in the permit? No. That's not -- I
10 didn't write that.

11 That looks like, they talk about visual sheen
12 here from oil and grease. That's something I talked
13 with Ann about. That's (f), Page 3. Did I write that?
14 She may have taken the language from me. She may have
15 taken the language from me because we weren't sitting
16 side by side doing this. But that language I think I
17 gave her. That's (f) on Page 3.

18 Q. And Ann Kenny was the primary author?

19 A. Yes, that's correct.

20 Q. She was in charge of the actual language?

21 A. Yes.

22 Q. Section B is Permit Duration, that's starting
23 on Page 3 at the very bottom. Did you work on that?

24 A. No, I didn't.

25 Q. If you look to the middle of Page 4, Section

1 A. No. No riparian, I did not work on riparian
2 mitigation measures.

3 Q. How about this Borrow Site stuff, Pages 11
4 and 12?

5 A. Well, let me look at 12. (Witness reading
6 document). No. "Excess water from stormwater overflow
7 shall be diverted away from the wetland," no. "The
8 Port shall monitor hydrologic conditions of wetlands,"
9 no. "The wetland protection swale shall be inspected
10 and maintained at a minimum frequency twice a year,"
11 no.

12 Q. And you're reading --

13 A. I'm reading the first sentence of each of the
14 conditions on Page 12 to see if I worked on that
15 language, and the answer is no.

16 Increased Buffer Area, no. "Performance
17 standards," no. Wetland, Stream and Riparian
18 Mitigation Monitoring and Reporting, "Monitoring of all
19 wetlands," no. "The Port shall prepare and submit
20 annual monitoring reports to the Federal Permit
21 Manager," no. So I'm up to Page 14, and the answer is
22 no.

23 Q. Okay, so that brings us to the end of Part D.
24 So the next Section, E, Conditions for Acceptance of
25 Fill to be used in Construction of the Third Runway,

1 did you work on that?
 2 A. No, not the language specifically, no. No,
 3 that was not part of my involvement in the 401.
 4 Q. Did you work on some part of that besides
 5 language?
 6 A. No.
 7 Q. Is this also so far everything we've looked
 8 at was Ann Kenny or were there other people that --
 9 A. Chung Yee had some responsibility for the
 10 clean fill criteria.
 11 Q. Chung Yee?
 12 A. Yes.
 13 Q. And I've heard the name Elizabeth Leavitt.
 14 Do you know what her role was or what she --
 15 A. She was an attorney representing the Port of
 16 Seattle -- or, no, Elizabeth Leavitt is some kind of
 17 environmental supervisor at the Port of Seattle. I
 18 think she's an attorney, I'm not sure.
 19 Q. Do you know, was she involved in drafting
 20 some of these sections?
 21 A. We listened to public comment, including the
 22 Port of Seattle's public comment in drafting conditions
 23 for the 402. I don't know about the 401. I don't
 24 know. I don't know.
 25 Q. And the 402 is the NPDES permit?

1 A. Yes, the 402 is the NPDES permit. I don't
 2 know. The answer is I don't know.
 3 Q. So when comments came in on this 401
 4 certification, you didn't have any role in reviewing
 5 them?
 6 A. I don't know anything about that.
 7 Q. All through the clean fill you're saying you
 8 didn't have anything to do with that, these fill
 9 criteria limitations on Page 17?
 10 A. Let me look. No, I didn't.
 11 Q. How about fill sources on Page 18?
 12 A. No.
 13 Q. It's all still Chung Yee?
 14 A. I don't know, but he worked on this fill
 15 criteria.
 16 Q. We move on to Condition F, Page 19,
 17 Conditions to Prevent Transport of Contaminants.
 18 A. Did not work on it.
 19 Q. You didn't work on that section?
 20 A. No.
 21 Q. Would you know if anyone under you, anyone in
 22 your staff worked on any of these? Would that go
 23 through you?
 24 A. Yeah, I'd know about it. And there wasn't
 25 anybody to work on it under my staff -- in my staff

1 under my supervision.
 2 Q. And you said there wasn't anyone who did work
 3 on it?
 4 A. Right, right.
 5 Q. We have Dam Safety Requirements?
 6 A. Don't know anything about it.
 7 Q. You're not a dam safety guy?
 8 A. No.
 9 Q. Condition H, Conditions for Upland
 10 Construction Activities?
 11 A. I'm looking at the first line of every one of
 12 these. Yeah, 4, maybe 4. I think I had some input on
 13 4. Yeah, 4. That's on Page 21. "Stormwater Detention
 14 for New Outfalls: Any new diversion ditch or channel,
 15 pond, trap, or other detention or retention BMP
 16 constructed at the site for treatment of stormwater
 17 shall be designed, constructed, and maintained to
 18 contain and provide treatment for the peak flow for the
 19 10-year 24-hour precipitation event estimated from" --
 20 that's my language. I wrote that but she put it in
 21 there.
 22 Q. Where did you find that 10-year --
 23 A. The sand and gravel general permit.
 24 Q. The sand and gravel general permit?
 25 A. Yes, sir.

1 Q. And has there been a determination that that
 2 10-year 24-hour precipitation event is adequate to --
 3 is it sufficiently conservative to protect against
 4 larger more frequent storms?
 5 A. Larger more frequent storms. The design
 6 doesn't have to meet -- well, yes, it would still be
 7 there for larger storms. You have to have a design
 8 requirement for facility, and that's the design
 9 requirement.
 10 Q. How do you decide that that standard is good
 11 enough?
 12 A. Well, it was from a similar facility, the
 13 sand and gravel general permit, so similar facilities
 14 would meet similar AKART conditions. And that is an
 15 AKART condition; it's a reasonably available
 16 technology. Retention detention for a 10-year storm
 17 event is a reasonable condition to protect water
 18 quality.
 19 Q. And has there been a determination that that
 20 standard is AKART?
 21 A. I believe it has been for the other exhibit.
 22 Let me look, let me look. I'm looking at the new
 23 permit. (Witness reviewing document).
 24 I can't find where it's been made in -- I
 25 can't find where it's been made. I can't find it. So

1 the answer is I can't find it. So the answer is
 2 probably not.
 3 Q. If I remember, does that mean you're not sure
 4 that the 10-year 24-hour precipitation event standard
 5 is AKART for stormwater detention?
 6 A. It is for sand and gravel, but you're
 7 referring to the Port, of course, Sea-Tac; is that
 8 right?
 9 Q. Uh-huh. Yes.
 10 A. No, it hasn't. I can't find it in here what
 11 has that. Probably not.
 12 Q. Here, based on that concern you raised in
 13 your e-mail that we looked at, Exhibit No. 8, is it
 14 your understanding that if this requirement is
 15 incorporated into the NPDES permit, then as per RCW
 16 90.48 under your e-mail citation, when the permit gets
 17 renewed they're going to have to implement whatever
 18 AKART is?
 19 A. They're going to have to implement whatever
 20 AKART is. That's a true statement.
 21 Q. Let's back up to the first part of Condition
 22 H here on Page 20 in the 401 certification, Exhibit 1.
 23 It says, "During construction the Port shall comply
 24 with all stormwater requirements within the National
 25 Pollutant Discharge Elimination System (NPDES) Permit"

1 mistaken, isn't it possible that the Port was in
 2 complete compliance with its permit and did everything
 3 it was supposed to do?
 4 A. I don't know. If we were to look at all the
 5 documents, I don't know.
 6 Q. Could it be that it implemented the BMPs and
 7 maintained its silt fences and did what it was supposed
 8 to and still the turbidity bumped up more than 5 NTU?
 9 A. Is it possible for a violation of the 402
 10 permit to occur? Probably it's possible for a
 11 violation of the 402 permit to occur.
 12 Q. What I'm asking, is it possible for
 13 violations of the water quality standards to occur even
 14 though the permittee is complying with the permit?
 15 A. I'd have to check in there to see -- because
 16 that gets back to your question about whether the
 17 surface water quality criteria are part of the permit.
 18 You asked that a while back and I said I'd have to look
 19 through the permit. So I'd have to look at the permit.
 20 Because you were asking that earlier.
 21 Q. But those apparent violations of the
 22 turbidity standard that we saw did take place under the
 23 permit, isn't that right?
 24 A. That's correct.
 25 Q. So the permit itself was not sufficient to

1 as modified -- I'm skipping language -- "as modified on
 2 May 29, 2001."
 3 So that's the most current permit that we've
 4 been looking at as Exhibit 3; is that right?
 5 A. Yeah, whatever it is. That's correct. The
 6 answer is yes.
 7 Q. And here's what we've talked about. By
 8 stating that the construction will comply with the
 9 permit, are you sure that it will also comply with
 10 water quality standards?
 11 A. The conditions of the 402 permit are designed
 12 to ensure compliance with surface water quality
 13 criteria for construction stormwater outfalls.
 14 Q. They're designed to ensure compliance?
 15 A. Yes.
 16 Q. But they don't always ensure compliance, do
 17 they?
 18 A. Well, violations occur under NPDES permits.
 19 Q. Right. And we saw some apparent violations
 20 of turbidity standards earlier?
 21 A. Yes, we did. Yes, we did.
 22 Q. Now, isn't it possible that if we all took a
 23 week off and examined, got a research team and looked
 24 at every fact and circumstance surrounding those
 25 incidents that were reported in Exhibit 7, if I'm not

1 keep them from happening, was it?
 2 A. No. No, they occurred under the permit.
 3 Q. Let's look at Condition I, Page 22,
 4 Conditions for Mitigation of Low Flow Impacts.
 5 A. All right.
 6 Q. Is this familiar as something you've worked
 7 on?
 8 A. No, I didn't work on it. I may have -- no,
 9 let me look at it here. (Witness reading document).
 10 The answer is no, I didn't work on this
 11 language.
 12 Q. Now, did you also look at Page 24 and 25
 13 where they're talking about Miller Creek?
 14 A. I did not draft this language.
 15 Q. Were you involved in reviewing it and
 16 deciding if it was adequate to do --
 17 A. No. I did not review the language.
 18 Q. Condition J starts on Page 25, Operational
 19 Stormwater Requirements. The first part involves the
 20 Approved Stormwater Plan and then two pages later it
 21 moves on to the Discharge of operational stormwater to
 22 state receiving waters. Is this something you worked
 23 on?
 24 A. No. (Witness reading document). No. The
 25 answer is no.

1 Q. So finally we get to Section K which you
 2 identified earlier as a section you did work on.
 3 A. Yes, sir.
 4 Q. What did you have to do with this section?
 5 A. I suggested language to Ann Kenny to include
 6 in the 401 permit, the 401 Order, certification.
 7 Q. And how did that happen? Did she give you an
 8 initial draft that you commented on?
 9 A. No. I e-mailed her the language, I think.
 10 Q. So she said --
 11 A. To the best of my recollection, I e-mailed it
 12 to her.
 13 Q. She said, in effect, John, please give me
 14 language that I can use for Section K?
 15 A. No, not K, but for protection of surface
 16 waters from construction stormwater discharges.
 17 Q. Here in K.1, it looks like we might be
 18 missing a word.
 19 A. True.
 20 Q. It looks like maybe it should say
 21 "requirements of the NPDES permit."
 22 A. Yes.
 23 Q. I see here that Section K.3 talks about
 24 Stormwater Monitoring Schedule for Construction and
 25 Stormwater Discharges. "The Port shall monitor each

1 A. Yes, it is.
 2 Q. "Monitoring shall be reviewed for compliance
 3 with WAC 173-201A," it says. Do you know, is there a
 4 provision that says that exceedances of the state water
 5 quality criteria are violations of these conditions and
 6 certification?
 7 A. Good question for Ann Kenny. Is that a
 8 smart-ass answer? I don't know, I don't know where it
 9 would be.
 10 Q. Any time you'd like to direct -- inform me of
 11 who the best person to ask is, that's welcome.
 12 A. Good question for Ann Kenny.
 13 Q. How about Condition L on Page 30?
 14 A. Okay, I'm there. (Witness reading document).
 15 (Long pause.)
 16 Q. I'm sorry are you still thinking?
 17 A. Did you ask me a question?
 18 Q. Yes, I did.
 19 A. I'm sorry, my apologies.
 20 Q. The question is, did you have anything to do
 21 with writing or reviewing Section L?
 22 A. No.
 23 Q. Let's back up, though, into Section K again.
 24 Looking at this language on Page 30, Section 7, talking
 25 about the use of additives in the treatment of

1 stormwater outfall discharge."
 2 Where does this condition talk about
 3 reporting the monitoring results?
 4 A. I don't know. A cursory look at this K.3
 5 doesn't have a monitoring report in it -- a reporting
 6 requirement in it.
 7 Q. Doesn't have a reporting requirement?
 8 A. I don't see that in K.3.
 9 Q. On Page 28. Is it anywhere in K? Did you
 10 write all of Section K?
 11 A. I'm unfamiliar with Section K as a
 12 designation.
 13 Q. Oh, I see.
 14 A. I just helped her with permit conditions to
 15 protect water quality. Here's something on reporting,
 16 6. This looks like something I wrote for her or helped
 17 her and then got the language to her somehow. Page 30.
 18 Q. This is K.6?
 19 A. K.6. That looks like something I would have
 20 written.
 21 Q. "Monitoring results for construction
 22 stormwater discharges shall be submitted every other
 23 month to Ecology's Federal Permit Manager, Sea-Tac
 24 Third Runway."
 25 Is that Ed Abbasi again?

1 discharge water, what's that all about?
 2 A. That's concerning polymers and coagulants
 3 that are used to settle out turbidity should be not
 4 harmful to aquatic organisms -- shall have low toxicity
 5 to aquatic organisms. And this is a condition to help
 6 implement that, to protect aquatic organisms.
 7 Q. How do you get the coagulants out of the
 8 water?
 9 A. They settle out with a particulate, with the
 10 solids. So the coagulants adhere the particles
 11 together and it stays there and they drop out. It aids
 12 settling. So they also settle out.
 13 Q. And is that standard procedure to add these
 14 things to reduce turbidity?
 15 A. Standard procedures? Yeah, it's used to
 16 settle out turbidity.
 17 Q. Did you write any of the general conditions
 18 in Section M?
 19 A. No.
 20 Q. How about Section N or O, the last two?
 21 A. No.
 22 Q. You did not. So really the only condition in
 23 this entire certification that you worked on is Section
 24 K?
 25 A. Yeah, I think it was that one section on the

1 10-year storm event that was in some other section, but
2 basically K, yes.

3 Q. Now, when we first started looking at these
4 certifications, it sounded like you weren't aware that
5 the certification was revised and reissued.

6 A. No, I think I read about it in the
7 newspaper.

8 Q. Do you know whether the section that you
9 wrote, Section K, was changed in that revision?

10 A. No, I do not. I do not know that.

11 Q. If it was changed you weren't consulted?

12 A. Correct.

13 Q. Some time ago we introduced Exhibit 9 right
14 before the break. Please tell me if you -- well, I
15 don't know that we need to do that.

16 Let me ask, direct your attention to a
17 statement first on Page 2 towards the bottom it says,
18 Technical meeting attendees will include John Drabek of
19 Ecology.

20 A. Yes.

21 Q. What was the technical group as described in
22 the next heading down?

23 A. What were they?

24 Q. Yes. What was its function?

25 A. The function was to review the hydrology

1 have been some brought to my attention.

2 (Deposition Exhibit No. 10 was marked for
3 identification.)

4 Q. (BY MR. POULIN) Exhibit 10 is identified as
5 Draft Meeting Notes of Technical Meeting of the 401
6 permit decision-making, and here you're identified in
7 the list of attendees?

8 A. Yes, sir.

9 Q. Do you remember being at this meeting?

10 A. No, but I suppose I was there.

11 Q. When these draft minutes came out, would you
12 review them?

13 A. What do you mean by "review"? If you could
14 clarify that, because there's various levels.

15 Q. Would you look at them to see if they were --
16 to see that they correctly reflected what you
17 remembered taking place at the meeting?

18 A. Not in great detail.

19 Q. Here on Page 3 there's a section that says,
20 "Regarding communication between technical group
21 members between meetings, the following rules apply:"

22 The first one says, "If a change in scope of

23 deliverable is needed, communication must include John

24 Drabek of Ecology and must be documented in an e-mail

25 sent to John D., Ann K. and Rachel M." And then the

1 study in the Stormwater Master Plan for conformance --
2 in regards to a Statement of Concurrence that the SMP
3 is in compliance with the technical requirements of the
4 1998 King County Surface Water Design Manual.

5 Q. And what's that you're reading from?

6 A. The first line of Page 2.

7 Q. So this involves that review process that
8 King County assisted in?

9 A. Yes.

10 Q. Also on Page 2, two-thirds of the way down,
11 these minutes state, "Requested changes with potential
12 'ripple effects' will be identified during the
13 Technical Group meeting. If 'ripple effects' are
14 detected outside of the Technical Group meeting, no
15 changes are to be made without first discussing with
16 both King County and Ecology's John Drabek."

17 Now, why would you be identified as the
18 person to bring these ripple effects up with?

19 A. I was the -- why would I be -- was there as
20 a representative of the Water Quality Program on the
21 technical committee. That's why. That would be the
22 reason. Water Quality Program.

23 Q. Do you remember any times when these ripple
24 effects were brought to your attention?

25 A. Not specifically, but I believe there may

1 second of the two rules states that, "All e-mail
2 interim communication must copy Ann Kenny and John
3 Drabek."

4 Were those rules in fact followed?

5 A. To the best of my knowledge, yes. I can't
6 remember them all, but to the best of my knowledge,
7 yes.

8 Q. Well, that seems to suggest that the
9 technical group members thought it was important for
10 you to know about these things, doesn't it?

11 A. Yeah. It suggested I needed to be notified
12 of it.

13 Q. And then what would you do with that
14 information? Were you in turn reporting to someone
15 else or reporting back to the group?

16 A. No, no. Ann Kenny was the lead on the 401
17 certification with Kelly Whiting as the principal
18 hydrology expert. So I received the interim
19 communications and noted them.

20 Q. Who is Rachel M.?

21 A. Oh, she would be one of the facilitators.

22 Rachel M., I don't know her last name, but Rachel was
23 one of the facilitators. Oh, Rachel McCrea, Floyd and
24 Snider.

25 Q. I see. Have you been involved in any other

1 processes where this kind of facilitated reading
2 arrangement was used?

3 A. You mean --

4 Q. I mean where a consultant came in to
5 essentially run the meeting?

6 A. Years ago maybe. Yeah, I think so. I can't
7 remember exactly. I'd have to refresh my memory.
8 Years ago I believe there was such a facilitated
9 meeting. I forgot what it was about.

10 Q. So it does not happen often?

11 A. No. No, it doesn't.

12 (Deposition Exhibit No. 11 was marked for
13 identification.)

14 Q. (BY MR. POULIN) I'd like to introduce
15 Exhibit 11. I have a few more of these STIA
16 Construction Site Stormwater Monitoring Reports.
17 Is this Exhibit 11 anything that you've seen before?

18 A. I don't recall seeing it before.

19 Q. Do you see where it identifies Site 21 as
20 SR 509/S?

21 A. Yes, I do.

22 Q. And do you see upstream and downstream
23 monitoring reports for turbidity in the third column?

24 A. Yes.

25 Q. And doesn't this show that there's a

1 previously aware of this exceedance?

2 A. Don't recall it. I don't recall seeing this
3 exceedance, that is correct.

4 Q. If this report had been submitted to Ecology,
5 who would it go to?

6 A. This report would go to the facility --
7 non-compliance notification goes to the facility
8 manager.

9 Q. And at the time that was you, right?

10 A. That was me, yes, sir.

11 Q. Not someone on your staff?

12 A. No.

13 Q. You personally?

14 A. Yes.

15 (Deposition Exhibit No. 12 was marked for
16 identification.)

17 Q. (BY MR. POULIN) Let's introduce Exhibit 12.
18 Now, on Exhibit 12, which shows sampling reports also
19 on June 28, 2001, the first group of rows addresses
20 Embankment Phase 3 Construction and Stockpile. And
21 while there's no upstream or downstream sampling
22 results, there's an indication of a site discharge at
23 the treatment facility outfall that indicates 2000 NTU.
24 Does that make any sense to you?

25 A. (Witness reviewing document.) I'd have to

1 downstream 33 NTUs and upstream just 9?

2 A. Yes, it does.

3 Q. Now, the upper left-hand corner of this
4 exhibit indicates that the sampling date or perhaps the
5 printing report date was June 28, 2001. Are you aware
6 of or can you think of any reason why the Port would
7 not be required to forward this kind of monitoring
8 results to the Department?

9 A. Well, perhaps -- it should -- I would like to
10 see it. Is there a reason why they wouldn't submit it?
11 I would have to -- I would like to see this kind of
12 data. I would want to see this kind of data. That
13 doesn't answer your question.

14 Q. Well, if in fact a violation of water quality
15 standards is a violation of the permit, they would be
16 required to inform Ecology about this, would they not?

17 A. Yes, they would. Yes, they would.

18 Q. And they would also have to take action to
19 stop the non-compliance?

20 A. That's correct.

21 Q. And they'd have to perform another sampling?

22 A. I believe that's what the condition says,
23 yes.

24 Q. And yet, even though you were the permit
25 manager through October of this year, you were not

1 take a look at the monitoring plan. I'd have to look
2 at the monitoring plan.

3 (Deposition Exhibit No. 13 was marked for
4 identification.)

5 Q. (BY MR. POULIN) Let's look at Exhibit 13.
6 Now, this STIA Construction Site Stormwater Monitoring
7 is dated September 26, 2001, and at the very bottom it
8 indicates that turbidity sample at the South Terminal
9 Expansion Project was 31 NTU downstream, 16.4 NTU
10 upstream.

11 Does that appear to be another violation of
12 the water quality criteria for turbidity?

13 A. I'd have to check the monitoring plan, but it
14 could be. I'd have to check the monitoring plan. But
15 if those were the proper monitoring locations for
16 determining compliance with turbidity standards, then
17 it would be.

18 Q. Who decides where those monitoring sites are?

19 A. Well, the Port submits a monitoring plan for
20 review and I review them.

21 Q. So they propose certain sites?

22 A. Yeah.

23 Q. And you say, It works for me?

24 A. Yes.

25 Q. What happens if they sample somewhere else?

1 A. Well, then it might not be a demonstration of
2 a violation of turbidity standards, it might be a
3 violation of their monitoring requirements. Or if it's
4 an equivalent location, if there's an obstacle to get
5 into the location, for example a background station,
6 they can perhaps sample in an alternate background
7 station which would still be representative of
8 background, not the exact monitoring plan. That might
9 be all right.

10 Q. Are you familiar with any circumstances where
11 the Port has monitored somewhere other than where it
12 said it would in the monitoring plan without stating
13 that on the face of the monitoring report?

14 A. I'm not aware of that.

15 Q. So in the absence of some comment or
16 indication that they were changing their approach, you
17 would assume that they're doing what they said they
18 would, right?

19 A. Yes, I would.

20 Q. And as you pointed out, if they're doing
21 something else --

22 A. You'd hope they'd tell me. I would be
23 expecting them to tell me that, if it's a different
24 monitoring location than in the monitoring plan.

25 Q. And if they're not monitoring where they said

1 latest conditions in the modified permit are still
2 showing exceedances of the turbidity standard?

3 A. Yes, that's what it appears to be.

4 Q. Has the Port proposed any additional BMPs to
5 keep this from happening, that you're aware of?

6 A. Not that I'm aware of.

7 Q. Would you think you would be aware of it if
8 they had?

9 A. Sometimes they take corrective action -- I
10 don't know. They could take corrective actions without
11 notifying me. They should, but --

12 Q. They're supposed to notify you, right?

13 A. They're supposed to notify me of corrective
14 actions for violation. But they could be taking
15 corrective actions without notifying me. They're
16 required to notify me.

17 (Discussion off the record.)

18 Q. (BY MR. POULIN) John, is there anything that
19 you're aware of in the 401 certification that would
20 apply to this kind of violation of water quality
21 criteria?

22 A. That would apply to -- there's monitoring
23 required for turbidity in the 401 certification.

24 Q. Right, but we already have provisions in the
25 permit that say that this isn't supposed to happen,

1 they would, that could be a violation?

2 A. It could be, or it could be another
3 representative spot that would be acceptable to an
4 engineer.

5 Q. So if they sample it at an alternate location
6 that's representative, that's okay?

7 A. Yes, it is.

8 Q. And if it's not a representative place then
9 they're --

10 A. They're violating.

11 Q. -- violating the permanent?

12 A. Yeah.

13 Q. So doesn't that mean that one way or the
14 other, it suggests a violation?

15 A. Oh, yes, it suggests a violation.

16 Q. And would you agree that both Exhibits 11 and
17 13 are samples of monitoring that have taken place
18 since the major mod went into effect back in May of
19 2001?

20 A. Yes, that's correct.

21 Q. And in fact, this apparent violation on
22 Exhibit 11 involves the State Route 509 interchange,
23 doesn't it?

24 A. Yes, it does.

25 Q. So even the sites that are governed by the

1 isn't that right?

2 A. It's a surface water quality criteria. And
3 we went over that, you know. Is it in the permit or
4 not, I'd have to look more carefully. But this is
5 surface water quality criteria violations, apparently.

6 Q. Are you suggesting that the Port doesn't have
7 to submit this information to you unless it's actually
8 a permit violation?

9 A. They have to submit it every other month.
10 Walker and Gilliam Creeks, they're required to submit
11 monitoring data for Walker and Gilliam Creeks and
12 tributaries to the Department every other month.

13 Q. But these reports haven't been submitted to
14 the Department, have they?

15 A. I haven't seen them. They would have come to
16 me. I don't remember seeing them.

17 Q. So the permit says they're supposed to submit
18 these reports to you, but they didn't. And you
19 apparently were not aware of these apparent violations
20 until today?

21 A. Correct.

22 Q. Is there anything you're aware of in the 401
23 certification that would change that?

24 A. No, I'm not.

25 Q. Now, there's talk in some of the e-mails and

1 The documents that includes your name about short-term
2 modification of water quality standards that will occur
3 during the construction related to this 401
4 certification.

5 Are you familiar with how that process will
6 take place, the modification?

7 A. No, I'm not.

8 Q. Will you be involved in deciding whether
9 water quality standards will be modified?

10 A. I will probably -- Ed Abbasi will be involved
11 in that.

12 Q. Now, is that a process that will take place
13 in the future or has approval for a short-term
14 modification already been granted in effect?

15 A. No, I don't know of any approval for a
16 short-term modification for the Port of Seattle,
17 Sea-Tac Airport.

18 Q. So that's something they'll have to apply for
19 in the future?

20 A. I don't know if they'll have to apply for it
21 or not.

22 Q. That's a part of the certification that you
23 didn't work on?

24 A. That's mostly correct. You're referring to
25 the water effects ratio, is that what you're referring

1 A. No. Deposition, for the deposition. That's
2 what I'm aware of.

3 MR. POULIN: If we could take a short break,
4 I'm on the verge of being able to wrap it up.

5 (Recess taken.)

6 Q. (BY MR. POULIN) John, could I just clarify
7 that you didn't work on any of the clean fill issues?

8 A. Correct.

9 Q. Related to the 401?

10 A. Correct.

11 Q. I don't believe I asked you who did.

12 A. Chung Yee.

13 Q. Chung Yee did.

14 Are you aware of any outfalls under the
15 permit other than construction related outfalls that
16 are not identified on the map that we looked at earlier
17 in the Annual Stormwater Monitoring Report?

18 A. I think -- no, not in detail, no.

19 MR. POULIN: I have no further questions.

20 MR. YOUNG: I have none.

21 MR. PEARCE: I have a couple. It'll be real
22 brief.

23 EXAMINATION

24 BY MR. PEARCE:

25 Q. John, you said that the Port's required to

1 to?
2 Q. I believe there's some relationship between
3 the so-called WERS study and the modification of water
4 quality standards?

5 A. No, I didn't work on that language in the 401
6 permit.

7 Q. And if the Port determines it needs a
8 modification of water quality standards, that won't
9 come to you?

10 A. Ed Abbasi would be involved in that, and I'm
11 his supervisor, so I might be involved.

12 Q. Now, I have been given a copy of Respondent
13 Department of Ecology's Revised Preliminary Witness and
14 Exhibit List, and in fact you are identified as a
15 witness.

16 A. For what?

17 Q. Doesn't say, and it doesn't explain whether
18 you're a fact witness or an expert witness. Do you
19 have any idea what you would be a witness --

20 A. I'm a witness here at the deposition, I know
21 that. And I'm a witness here at the deposition for my
22 involvement in the 402 permit and the 401 permit.

23 Q. But you haven't talked with anyone about
24 whether you'll be a witness at the hearing, the appeal
25 hearing of the 401 challenge?

1 submit Construction Stormwater Monitoring Reports, is
2 it every other month?

3 A. Yeah, for Walker and Gilliam Creek, yes.

4 Q. So if you hadn't seen one of these daily
5 reports, that doesn't mean the Port didn't give you
6 something they were supposed to give you; correct?

7 A. Well --

8 Q. I mean, just in terms of a piece of paper,
9 that type of reporting form?

10 A. Right. The type of form that's used for
11 reporting isn't in concrete. We don't have a -- it's
12 not like -- it's not in concrete, the type of
13 reporting. But I am the facility manager, and as the
14 facility manager I would have been the one to have been
15 notified of violations and the reports would have come
16 to me.

17 Q. The report of a violation would have come to
18 you?

19 A. Yes.

20 Q. And you said that these seemed like they
21 might indicate a violation, you weren't certain?

22 A. I'd have to check the monitoring plan.

23 Q. If these are violations, if they represent
24 violations, you said they took place I think under the
25 permit, or counsel said that and you agreed they took

1 place under the permit. You don't mean that the permit
 2 allows violations, do you?
 3 A. No, it doesn't. That's correct, it does not
 4 allow violations.
 5 Q. It does not allow violations of turbidity
 6 standards?
 7 A. It does not.
 8 MR. PEARCE: That's all I have. Thank you.
 9 (Deposition adjourned at 4:30 p.m.)
 10 (Signature reserved.)
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REPORTER'S CERTIFICATE

1
 2 I, DIANE MILLS, the undersigned Certified Court
 3 Reporter and Notary Public, do hereby certify:
 4 That the testimony and/or proceedings, a transcript
 5 of which is attached, was given before me at the time
 6 and place stated therein; that any and/or all
 7 witness(es) were by me duly sworn to tell the truth
 8 that the sworn testimony and/or proceedings were by me
 9 stenographically recorded and transcribed under my
 10 supervision, to the best of my ability; that the
 11 foregoing transcript contains a full, true, and
 12 accurate record of all the sworn testimony and/or
 13 proceedings given and occurring at the time and place
 14 stated in the transcript; that I am in no way related
 15 to any party to the matter, nor to any counsel, nor do
 16 I have any financial interest in the event of the
 17 cause.
 18 WITNESS MY HAND AND SEAL this 3rd day of
 19 January 2002.
 20
 21
 22 DIANE MILLS, CSR# MI-LL-SD-M380N3
 23 Notary Public in and for the State
 24 of Washington, residing in King
 25 County. Commission expires 10/10/02.

CORRECTION & SIGNATURE PAGE

1
 2 RE: AIRPORT COMMUNITIES COALITION VS. STATE OF
 3 WASHINGTON, et al.
 4 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
 5 DEPOSITION OF: JOHN DRABEK; DECEMBER 14, 2001
 6 I, JOHN DRABEK, have read the
 7 within transcripts taken DECEMBER 14, 2001, and the same
 8 is true and accurate except for any changes and/or
 9 corrections, if any, as follows:

10 PAGE LINE CORRECTION
 11
 12
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 14
 15
 16
 17
 18
 19
 20
 21

22 Signed at _____, Washington,
 23 on the _____ day of _____, 2002.

24 _____
 25 JOHN DRABEK

**DEPOSITION UNDER
ORAL EXAMINATION OF
KEVIN FITZPATRICK
JANUARY 16, 2002
ACC VS. STATE OF WA, et al.**

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JAN 31 2002

AR 001542

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,
Appellant,
vs.) PCHB No. 01-160
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY; and)
THE PORT OF SEATTLE,)
Respondents.)

DEPOSITION UPON ORAL EXAMINATION
OF
KEVIN FITZPATRICK

9:00 A.M.
JANUARY 16, 2002
1325 FOURTH AVENUE, SUITE 1500
SEATTLE, WASHINGTON

DIANE MILLS, CSR# MI-LL-SD-M380N3

JAN 31 2002

1

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2

A P P E A R A N C E S

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AR 001543

SEATTLE, WASHINGTON; JANUARY 16, 2002

9:00 A.M.

--oOo--

KEVIN FITZPATRICK,
sworn as a witness by the Notary Public,
testified as follows:

EXAMINATION

BY MR. POULIN:

Q. Could you please state and spell your name
for the record.

A. Yes. My name is Kevin, K-e-v-i-n, middle
initial C, last name Fitzpatrick,
F-i-t-z-p-a-t-r-i-c-k.

Q. Kevin, I'm Rick Poulin, I'm representing ACC
and also CASE in this appeal.

Have you had your deposition taken before?

A. Yes, I have.

Q. Are you somewhat familiar with the procedures
and the process, then?

A. Somewhat. I haven't had it taken that often,
but.

Q. When was the most recent deposition you've

1 participated in?

2 A. I believe it was five or six years ago.

3 Q. Well, in case it's helpful, I'd like to
4 explain some of the instructions. I will ask questions
5 and wait for a verbal response from you. We need to
6 make a record today, so head shakes and noises other
7 than yes or no may not be clear on the record.

8 It's important that you understand the
9 question that I'm asking, so if you don't know what I'm
10 getting at, please let me know. If you find anything
11 confusing, I hope you'll bring it to my attention.
12 Would you do that, please?

13 A. Yes, I will.

14 Q. Is there any reason you wouldn't be able to
15 give clear answers today?

16 A. No.

17 Q. Are you under any medications or prescription
18 drugs?

19 A. No.

20 Q. Have you had any alcohol recently?

21 A. No.

22 Q. Could you please explain what kinds of
23 preparation you've undertaken to get ready for today's
24 deposition?

25 A. Could you explain that question just now?

1 What do you mean by "preparation"? Do you mean -- --
2 related to what?

3 Q. What documents have you reviewed to come up
4 to speed for this session?

5 A. I think in the past several weeks what I
6 reviewed included a review again of the 401 Water
7 Quality Certification that was issued plus the amended
8 certification. I believe I also reviewed a Declaration
9 I gave earlier related to another case, actually, one
10 that was brought by CASE on the appeal of the major
11 modification to the NPDES permit.

12 I recall reviewing the NPDES permit and the
13 facts sheet. But in both instances those were I think
14 during the holiday period, so my recollection of those
15 may be a bit fuzzy right now. I reviewed those in
16 anticipation of what was supposed to be my original
17 deposition date which was back in December, and I
18 haven't done that much preparation since that time.

19 Q. Have you reviewed any of the transcripts of
20 the other depositions that have taken place in this
21 appeal?

22 A. I think I also glanced through the
23 deposition -- or I'm sorry, the Declaration of
24 Dr. Strand, Dr. Jonathan strand, and I glanced
25 through -- did not review in detail, certainly not in

1 the same way that I reviewed Dr. Strand's Declaration,
2 that of Tom Luster. And these were Declarations that
3 were made in support of ACC's Motion for Stay. And I
4 think I did read through the recent decision from the
5 PCHB.

6 Q. Is this the decision for the Motion for Stay?

7 A. Correct.

8 ~~Q. Have you also read the Board's ruling on the
9 Cross Motions for Summary Judgment in the NPDES permit
10 modification appeal that CASE brought?~~

11 ~~A. Yes, I did. That was probably the most
12 recent thing. In that case I was more focused on, you
13 know, what our obligations were from the PC H B
14 decision in terms of the corrections that they're
15 asking us to make to the facts sheet.~~

16 ~~Q. What do you understand those obligations to
17 be?~~

18 ~~A. The way I interpret that is that the facts
19 sheet was remanded to Department of Ecology to include
20 the outfall locations for stormwater outfalls
21 associated with construction activity.~~

22 ~~Q. Do you know whether the Department plans to
23 have a new public process as part of that facts sheet
24 correction?~~

25 ~~A. Whether we have -- what do you mean by "new~~

1 ~~public process"?~~

2 ~~Q. Does the Department intend to give the public
3 an opportunity to comment on the information that will
4 not be included in the facts sheet pursuant to the
5 Board's order?~~

6 ~~A. The way that we interpret this presently is
7 that what the PCHB is requiring of us is not a major
8 modification, therefore, we would not put this through
9 the public notice on draft. Certainly when we do issue
10 any modification, that action is subject to appeal
11 within 30 days after we issue it.~~

12 ~~But if your question is will we do a public
13 process similar to what is done for major permit
14 modification, the answer is no.~~

15 ~~Q. And understanding your point that the Board
16 has not mandated a major modification, will Ecology use
17 its discretion under the minor modification process to
18 determine that public notice is appropriate since the
19 Board determined that important information was
20 withheld from the public?~~

21 ~~A. Using our Department discretion, we feel it's
22 important to satisfy the Board's concerns here
23 immediately, and so we don't want to weigh this down
24 further or drag it out further through another lengthy
25 round of public notice process which would not be~~

1 ~~is required and as you rightly put it, is up to the~~
2 ~~discretion of the Department of Ecology, since this is~~
3 ~~a minor modification to the facts sheet.~~

4 Q. Back to your preparation for today's
5 deposition. Have you in fact reviewed any of the
6 transcripts of other depositions that took place in
7 this appeal?

8 A. No. None of those have been made available
9 to me.

10 Q. Could you please tell me about your
11 educational background.

12 A. Certainly. My undergraduate degree is a
13 bachelor of science from Loyola University in Chicago,
14 and I have a graduate degree M.A. in zoology, at
15 Southern Illinois University in Carbondale, Illinois.

16 In addition to that, I held a commission in
17 the United States Coast Guard completing Officer
18 Candidate School in the United States Coast Guard back
19 in 1980. And I retired from the United States Coast
20 Guard Reserve in December of 2000, retired as a
21 lieutenant commander in the United States Coast Guard
22 Reserve.

23 Q. Do you recall the years of your degrees?

24 A. Oh, certainly. My B.S. from Loyola
25 University was 1975, and my M.A. from Southern Illinois

1 parties in that appeal, or the year of the proceeding.

2 A. I remember that this may be -- my best
3 recollection is that it may have been back in '94 or
4 '95. It was at a time when our water resources prog
5 was putting out a number of decisions.

6 And I do recall what was being contested, and
7 what was being contested was the agency's assertion on
8 water continuity. And in particular I believe this was
9 in the Issaquah Subbasin, Issaquah Creek Subbasin, what
10 was being contested in the appeal by groups like the
11 East Lake Sammamish Water District. They were trying
12 to assert that there was no hydraulic continuity
13 between the stream and groundwater.

14 Q. I appreciate that. We don't really need
15 to --

16 A. Well, I do recall, though, that one of the
17 witnesses for the East Lake Sammamish Water District
18 who was trying to assert that there was no hydraulic
19 continuity was one of the consultants for ACC right
20 now, and that's Dr. Peter Welling. I thought that was
21 very interesting.

22 Q. And do you recall the ultimate decision in
23 that case?

24 A. Yeah. The agency was upheld by the PCHB.

25 Q. Thank you. Please tell me about your work

1 ~~University is in 1981.~~

2 Q. You stated earlier that you have been deposed
3 before. Have you served as a witness in any appeal of
4 a lawsuit?

5 A. I have not served as a witness in any appeal
6 of a lawsuit, no.

7 Q. Have you ever been qualified as an expert?

8 A. Yes.

9 Q. What were those circumstances?

10 A. The instance that I recall was a Pollution
11 Control Hearings Board series of cases in which some
12 water rights decisions were being appealed, and I was
13 called upon by Water Resources to act or to testify as
14 the water quality expert for water quality issues in
15 what we refer to the Cedar Green water quality
16 management areas. Because at that time I was acting as
17 a watershed lead for those water quality management
18 areas.

19 Q. And so you were qualified as a water quality
20 expert in that proceeding?

21 A. Yes. My recollection is is that I was
22 presented and then qualified before the PCHB as being
23 able to give expert testimony on water quality matters
24 within those watersheds.

25 Q. Do you remember any of the names of the

1 history with the Washington State Department of
2 Ecology.

3 A. I started working for the Department of
4 Ecology in 1986, coming off of active duty in the U.S.
5 Coast Guard. And my first job with the Department of
6 Ecology, I was the agency's first environmental crimes
7 investigator. At that time I was working for what was
8 then in the agency called central programs as the
9 agency's environmental crimes investigator. I did that
10 job from '86 until '88.

11 And then from '88 until -- I think that was
12 from '88 until 1990, I was a water quality inspector at
13 Ecology's Northwest regional office. Then I went back
14 for about a year and a half to serve on the -- again as
15 the state's environmental crime investigator on a
16 state/federal environmental crime task force that was
17 headed up by EPA's Office of Criminal Investigation.

18 And then I returned in about '91 to Ecology's
19 Northwest regional office to supervise the industrial
20 permit unit in the water quality section at the
21 Northwest regional office. And then from '91 until
22 2001, I was the unit supervisor for the industrial
23 permit unit. And in February of 2001 I became section
24 manager for the water quality program in the Northwest
25 region.

1 Q. What date in 2001 did that take place?
 2 A. February 18th.
 3 Q. And that was section head for the water
 4 quality --
 5 A. Program at Northwest region, section manager.
 6 I think it reads as section manager on my business
 7 card.
 8 Q. Have you ever served as the permit or
 9 facility manager for the Port of Seattle's NPDES permit
 10 at Sea-Tac International Airport?
 11 A. Yes, I did, on an interim basis. I'm trying
 12 to recall when that happened. I think in late 1999 I
 13 took on those responsibilities because the facility
 14 manager that we had for NPDES permit, Lisa Austin, left
 15 the agency, and so as the unit supervisor, I inherited
 16 those responsibilities.

17 Q. What is the relationship of unit supervisor
 18 to a facility manager?
 19 A. Unit supervisor is -- the way we're organized
 20 at Northwest regional office in our water quality
 21 section is the unit supervisor tries to do an -- or
 22 does an analysis of what the workload is out there with
 23 respect to permits and to equitably divide those up,
 24 and also to rely on particular people's expertise let's
 25 say in the industrial sector or stormwater engineering

1 expertise. And try to match up that workload and
 2 manage that workload as best they can with the
 3 available human resources that we have, which are for
 4 the most part what we have in the industrial unit, our
 5 facility managers who are either environmental
 6 engineers or environmental specialists.
 7 Q. Is the unit supervisor involved in oversight
 8 of permit management?
 9 A. The oversight that they provide is only as
 10 much as -- well, I shouldn't say "only." The facility
 11 manager is the individual with the primary
 12 responsibility of tracking compliance with a given
 13 permit, whether it be an NPDES permit or a state waste
 14 discharge permit, and also has different regulatory and
 15 administrative requirements come on line like the
 16 expiration of an NPDES permit.
 17 The unit supervisor works along with that
 18 facility manager to ensure that work deadlines are
 19 being met and that they'll do and manage peer review of
 20 a draft permit and ensure that public notice, you know,
 21 necessary public notice requirements are being met.
 22 And then that's all to prepare it for the actual
 23 issuance of that permit by the section manager. But
 24 the unit supervisor is a first-line supervisor.
 25 Q. And what does that mean, first-line?

1 A. Well, first-line supervisor is someone who is
 2 aware of the technical challenges that a facility
 3 manager is facing and, you know, tries to make the
 4 facility manager aware of program commitments that we
 5 have, work commitments that we have, and at the same
 6 time make management aware of the resource constraints
 7 and challenges that the facility manager is facing.
 8 Q. And in that sense, by "management" you mean
 9 upper management above the unit supervisor level?
 10 A. Well, you go the next chain up. You take
 11 that up to the section manager, and then the section
 12 manager in turn can relay that to the water quality
 13 program manager.

14 Q. With respect to NPDES permits, are all
 15 aspects of permit management such as enforcement,
 16 compliance and review of required submittals, is that
 17 all handled within the section or are there other
 18 branches, other units that participate?
 19 A. In the case of the Northwest regional office,
 20 that would all be handled -- if it is a permit assigned
 21 to the industrial permit unit, that would be handled
 22 within the industrial permit unit.
 23 Q. Do I understand that there's recently been a
 24 change in the name of the industrial permit unit; is
 25 that right?

1 A. Correct. It's now the -- because right now,
 2 or we have recently reorganized the section because of
 3 growth in the section, and now that unit is the
 4 industrial permit and stormwater unit. And that's to
 5 reflect some additional engineering review
 6 responsibilities that they've taken on. And that we
 7 also have another unit group which will assist that
 8 industrial permit unit on enforcement activities.
 9 Q. And which unit is that?
 10 A. And that's called the compliance and
 11 technical assistance unit. But that's a change that
 12 went into effect in September of 2001.
 13 Q. And in what sense is that a new change? Is
 14 that a new unit or is that a new role for a unit that's
 15 been around for awhile?
 16 A. It's a new unit.
 17 Q. So prior to -- before September 2001, all of
 18 those permit functions were performed by the industrial
 19 permit unit?
 20 A. Correct, if it was a permit assigned to the
 21 industrial permit unit.
 22 Q. And just to confirm, the NPDES permit for
 23 Sea-Tac International Airport is assigned to the
 24 industrial permit unit?
 25 A. Correct.

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1 Q. Let's talk about your role in the recent 401
2 certification process. Could you please tell me when
3 you first got involved in that process?

4 A. My recollection is that I first became
5 involved I believe in late 1999, in September of 1999.

6 Q. And at that time what was your level of
7 involvement?

8 A. I became involved because we had -- Lisa
9 Austin had left the agency. She previously had been
10 the one who was serving as the water quality expert to
11 the 401 water quality certification team. And with
12 Lisa's departure and, you know, being Lisa's former
13 supervisor, those responsibilities then fell to me.

14 Q. Who else was on that 401 certification team
15 at the time?

16 A. The other folks at that time that I recall
17 who were on it were Tom Luster from our headquarters
18 office with the shoreline and environmental assistance
19 program, Ray Hellwig as the regional director.

20 Q. And that's in the Northwest regional office?

21 A. At the Northwest regional office. When I
22 started I think those were the folks who made up that
23 team.

24 Q. So just the three of you?

25 A. Right. That's my recollection of what it was

1 decisions for which you had particular responsibility
2 in your water quality role?

3 A. The portion of the water quality
4 certification that had the greatest amount of review
5 and input from water quality program and water quality
6 section are the portions of the certification that deal
7 with clean fill criteria or what I believe is described
8 as -- I'm sorry, it's described as conditions for
9 acceptance of fill to be used in construction of the
10 third runway.

11 Q. And that would be Section E, beginning on
12 Page 14 of the amended certification?

13 A. Yes. And then the other section of that
14 water quality program I had some review and input on
15 was -- I'm trying to find the portions of this that
16 deal with stormwater impacts. I'm sorry. And that
17 would be Section J, operational stormwater
18 requirements.

19 Q. That's Section J on Page 25?

20 A. Yes, 25 of 33 in the September 21, 2001
21 document.

22 Q. Were you personally involved in the water
23 quality program's work on those sections?

24 A. I was personally involved, and then as well
25 as involved with an engineer in our section, John

1 in September '99.

2 Q. Did you write any part of the 401
3 certification?

4 A. No.

5 Q. And is that answer equally valid for the
6 August 10, 2001 certification and the amended
7 September 21, 2001 certification?

8 A. Correct. Now, you're referring to the --
9 okay, the August 2001 and then the amendments; correct?

10 Q. Yes.

11 A. And my role in that was to review proposed
12 language, and as I recall, Ann Kenny was the primary
13 author of those documents, and as she would come up
14 with draft language, she would ask for corrections.
15 So I guess technically you might say that I did write
16 part of it because, you know, I would propose -- you
17 know, I would make editing changes or suggest different
18 language for her when it was going through its draft
19 revisions.

20 Q. In the case it's convenient, I think it will
21 be before we're finished here today, I'll introduce two
22 exhibits. Exhibit 1 is the amended September 21, 2001
23 version of the 401 certification, and Exhibit 2 is the
24 August 10, 2001 certification.

25 Are there any parts of the certification

1 Drabek, and also in working with an engineering
2 consultant from King County who was working for
3 Department of Ecology particularly on stormwater
4 requirements, and that's Kelly Whiting.

5 Q. How about the conditions for mitigation of
6 low flow impacts in Section I which begins on Page 22?
7 Was water quality involved in that section?

8 A. Water quality had some involvement with that,
9 but my recollection is that on much of this for the
10 mitigation of low flow impacts, we were relying on
11 modeling expertise and input from our consultant from
12 King County, and that again is Kelly Whiting.

13 Q. And when you say "we" were relying, do you
14 mean the water quality program or --

15 A. No, I mean the Department of Ecology.

16 Q. The Department generally.

17 What do you understand the purpose of the 401
18 certification to be?

19 A. Well, my understanding of any 401
20 certification is that it is certifying that a project
21 and impacts from that project will comply with the
22 state's water quality laws and regulations. Hence,
23 they're called 401 certifications, because that's the
24 portion of the Clean Water Act that it comes from, that
25 speaks to the state's having to issue one of these

1 certifications in the federal permit. And the federal
2 permit involved in this case is the 404 permit from the
3 Corps of Engineers.

4 Q. Is part of that compliance objective assuring
5 compliance with the state water quality standards?

6 A. That's part of it, yes.

7 Q. And which water quality standards apply to
8 the Seattle-Tacoma International Airport?

9 A. Well, we have both our state surface water
10 standards which are in Washington Administrative Code
11 173-201A, and our groundwater standards which are
12 Washington Administrative Code 173-200.

13 Q. You'll see that Exhibit 5 is a copy of
14 Chapter 173-201A of the Washington Administrative Code.
15 Is this the section or chapter of the code that you
16 identified as applying at Sea-Tac Airport?

17 A. Yes.

18 Q. And where in this regulation do you find the
19 specific standards that Ecology certifies compliance
20 with under the 401 certification?

21 A. There's several different places where the
22 standards are articulated in this regulation. There's
23 no one particular section.

24 Q. Is Section 173-201A-030 one of the relevant
25 sections? It's on Page 477.

1 it calls for a legal conclusion.

2 A. Yeah, again, I'm not sure -- they're two
3 separate animals, okay? One is a permit which is
4 governing, and that is the NPDES permit. It is
5 governing the stormwater -- the industrial-related
6 stormwater discharges and the industrial wastewater
7 discharges from the Port of Seattle's facility, Sea-Tac
8 Airport.

9 The 401 water quality certification, as I
10 stated before, is certifying the fact, I guess, that
11 such a permit exists, you know, such a permit is
12 necessary and it does indeed exist.

13 But in terms of one ensuring compliance with
14 the other, my thinking is that they both have to stand
15 on their own in terms of ensuring that their terms and
16 conditions are being complied with. You know, they're
17 certainly related to one another, but -- and again, I'm
18 not sure I'm completely understanding this question, so
19 I'll just stop there. I don't understand this
20 question.

21 Q. (BY MR. POULIN) Would you agree that the
22 Port of Seattle's compliance with the NPDES permit does
23 not assure that the purposes of the 401 certification
24 are met?

25 A. Say that again.

1 A. Yes.

2 Q. Do you know whether the streams that flow
3 through or originate at the Sea-Tac Airport vicinity
4 are classified as Class AA or Class A?

5 A. They are classified as Class AA.

6 Q. Does that include Des Moines Creek and Miller
7 Creek and Walker Creek?

8 A. Yes.

9 Q. Is the 401 certification intended to assure
10 compliance with the NPDES permit governing Sea-Tac
11 International Airport?

12 A. I'm not sure I understand your question.
13 When you say "ensure compliance," the 401 water quality
14 certification is, at least my understanding of it, is
15 intended to determine if there is a suitable NPDES
16 permit in place, an appropriate NPDES permit in place.

17 And to answer your question as to what
18 ensures compliance with the NPDES permit is the NPDES
19 permit itself and how Department of Ecology then
20 manages that permit. We don't rely on the 401
21 certification to ensure compliance with our NPDES
22 permit.

23 Q. Does Ecology rely on the NPDES permit to
24 certify compliance in the 401 certification?

25 MR. REAVIS: I'll just object to the extent

1 Q. Sure.

2 (Reporter read back as requested.)

3 A. No.

4 Q. (BY MR. POULIN) And why not?

5 A. Because if the NPDES permit is being complied
6 with, that means that -- if the Port of Seattle is
7 complying with all the terms and conditions of its
8 NPDES permit, that tells us that Department of Ecology
9 has reasonable assurance that Port of Seattle's
10 complying with that permit.

11 Q. Do you mean to say that complying with the
12 NPDES permit guarantees compliance with water quality
13 standards?

14 A. What I mean to say is that the way that the
15 NPDES permit is structured right now is that -- and
16 this is something that we're able to do through our
17 water quality standards and through our NPDES permits
18 -- is that through a compliance schedule built into the
19 NPDES permit, we would in fact see compliance with
20 those standards, with those water quality standards.

21 Q. Does your reliance on a compliance schedule
22 indicate that the Port is not presently satisfying the
23 water quality standards?

24 A. Our reliance on a compliance schedule is a
25 recognition of reality of when you're dealing with

1 stormwater discharges.

2 Q. And is the reality that the Port is not
3 presently complying with water quality standards?

4 A. That is not my interpretation of -- in terms
5 of their stormwater discharges, it is difficult to
6 apply our standards, in particular the standards in WAC
7 173-040, to determine for a stormwater discharge
8 whether indeed that discharge is violating those
9 standards or not. And that's because the reality is is
10 that the stormwater event is a very dynamic event in
11 which you will see concentrations of some of these
12 constituents being highly variable. And so to try to
13 apply these standards to a stormwater discharge is an
14 extremely difficult process to do as opposed to trying
15 to apply these to your standard steady states
16 industrial discharge.

17 And what we have tried to do in the permit is
18 recognize the reality of that and build in what I will
19 call an adaptive management process of building toward
20 the types and numbers of stormwater best management
21 practices that would bring these stormwater discharges
22 into a level of assurance that we could be confident
23 that these standards are not being violated.

24 Q. Your reference to compliance schedule and an
25 adaptive management approach suggests to me that you're

1 A. It's the permittee's obligation to comply
2 with the permit, correct. And you're correct that it's
3 the permittee's obligation to not violate our state
4 water quality standards.

5 Q. And isn't it Ecology's obligation to ensure
6 that the permittee satisfies both --

7 A. Correct.

8 Q. -- the permit and the water quality
9 standards?

10 A. I believe we're fulfilling both of those
11 obligations the way that we presently have the permit
12 structured.

13 Q. Well, let's look at the relationship between
14 the permit and the water quality standards, focusing
15 first on the water quality criteria that you
16 identified. And before we proceed, I'd like to mention
17 that if at any time you'd like to take a break, we can
18 easily do that.

19 (Recess taken.)

20 Q. (BY MR. POULIN) It's 10:12. Let's continue.
21 Before we jump back in, let me ask that we try to avoid
22 situations when we're both speaking at the same time so
23 that the reporter can get an accurate record, and it's
24 also important that you allow me to finish a question
25 so that you know where I'm going with it. Also, I'll

1 anticipating future compliance based on the permit
2 management approach. Doesn't that indicate that you
3 don't believe there is present compliance today?

4 A. No, I don't believe that, because what we're
5 presented with right now in our standards and with the
6 technical limits that we're presented with, when it
7 comes to regulating stormwater, are pretty monumental.
8 Because what we've been presented with to regulate
9 stormwater discharges are a set of regulations that are
10 best suited to regulating a typical steady state type
11 of industrial or municipal wastewater discharge.

12 You don't have that with stormwater. It's a
13 whole different animal. And so, you know, we're out
14 there trying as best we can given the limitations of
15 where the regulations are at right now, where the
16 science is at right now, to ensure that these current
17 stormwater discharges and future stormwater discharges
18 will not adversely impact the water quality of the
19 receiving waters, in this case adversely impact the
20 receiving waters of Miller, Walker and Des Moines
21 Creeks.

22 Q. Isn't it the permittee's obligation to comply
23 with the permit requirements and the water quality
24 standards regardless of the subjective difficulty of
25 doing so?

1 try not to cut you off.

2 Am I correct to understand your testimony as
3 asserting that the Port's compliance with its NPDES
4 permit assures Ecology that discharges at Sea-Tac
5 International Airport comply with water quality
6 standards?

7 A. What it assures Ecology is that they are on a
8 compliance schedule by complying with the permit to
9 achieve compliance with these standards. And this is
10 in particular for the stormwater discharges from the
11 facility.

12 Q. I think the question fairly calls for a yes
13 or no answer. Do you feel unable to answer yes or no?

14 A. Well, you say it calls for a simple yes or no
15 answer, and I don't believe I can give you a simple yes
16 or no answer.

17 Q. Let's look at the Port's current NPDES
18 permit. This is Exhibit 3. Would you agree that
19 this --

20 (Discussion off the record.)

21 Q. (BY MR. POULIN) Is it your understanding
22 that the NPDES permit for Sea-Tac International Airp
23 includes a compliance schedule for stormwater
24 discharges?

25 A. Correct. That is my understanding.

1 Q. And what's your understanding of how that
2 compliance schedule works?

3 A. My understanding of how the compliance
4 schedule works is -- and without having the permit in
5 front of me, my recollection is that there's a section
6 for developing stormwater limits, stormwater discharge
7 limits in the current permit. So that says to me that
8 since we're developing stormwater limits, that that's a
9 compliance schedule.

10 Q. I'm sorry, I missed the end of your answer.

11 A. That says to me that we're developing --
12 since we're developing final stormwater limits, that
13 says to me that that is a compliance schedule, a
14 compliance track, if you will, for developing final
15 stormwater effluent limits.

16 Q. Is it your understanding that the permit does
17 not presently include effluent limits for stormwater
18 discharges?

19 A. That's my understanding, yes. Well, let me
20 correct that. Could I have a copy of the permit?

21 Q. Certainly. Here's a copy of Exhibit 3.
22 Please take a moment to review it and let me know if
23 you agree this is the current enforced permit.

24 A. (Witness reviewing document). Having had a
25 chance to look at the permit fresh here, you'll notice

1 day that exceeded 15 milligrams per liter. If they
2 were, they would be out of compliance with the permit.

3 Q. Are there both -- is it your understanding
4 that there are both numeric effluent limitations and
5 narrative effluent limitations?

6 A. You can have narrative effluent limitations,
7 yes, in a permit.

8 Q. Does --

9 A. I don't see any right off the bat here.

10 Q. Does this permit include either numeric or
11 narrative effluent limitations for stormwater
12 discharges at present?

13 A. No.

14 Q. Why doesn't the permit identify the water
15 quality criteria as effluent limitations?

16 A. Why would it?

17 Q. If the permit is intended to assure
18 compliance with water quality criteria, shouldn't those
19 criteria be identified as the not to exceed limits --

20 A. But as I stated before --

21 MR. YOUNG: You need to wait until he
22 finishes his question.

23 Q. (BY MR. POULIN) In fact, I was finished.

24 A. As I stated before, the way that our
25 standards are right now, okay, and the way we are

1 that with respect to stormwater, that there are no
2 final effluent limitations listed for stormwater. And
3 instead what you have are monitoring requirements for
4 stormwater under Special Condition S2 of the permit.

5 Q. What's your understanding of what an effluent
6 limitation is?

7 A. An effluent limitation is a regulatory
8 requirement usually in a permit that is a set limit
9 that the permittee is held to. For example, you'll
10 note that they have a set of effluent limitations for
11 the industrial wastewater system for oil and grease,
12 and they have both an average monthly limitation of 8
13 milligrams per liter and a maximum daily limitation of
14 15 milligrams per liter.

15 Q. And are you referring to Permit Condition
16 S1.A on Page 8?

17 A. Yes, I am.

18 Q. So that's a numeric cap on the amount or
19 volume of discharge that can be included --

20 A. On the monitoring that they do, the
21 monitoring that they do on their industrial wastewater
22 discharge, on their final treated industrial wastewater
23 discharge cannot, on an average monthly basis, that
24 concentration could not exceed for oil and grease 8
25 milligrams per liter. And they could never have one

1 technically limited right now, it is exceedingly
2 difficult, if not impossible, to try to apply those
3 standards to a stormwater discharge.

4 That is why this permit was designed, to
5 require the Port to do the type of monitoring and to
6 provide us with the type of data where down the line
7 once the science around stormwater improved, once our
8 knowledge around how contaminants are conveyed in
9 stormwater, once our knowledge around what the actual
10 impacts of stormwater are on a receiving water, we
11 could look to the day of establishing water
12 quality-based limits for stormwater discharges.

13 Where we were at when this permit was
14 developed, and I will say where we are at even now, it
15 is an extremely difficult prospect to develop water
16 quality-based stormwater limits.

17 Q. Haven't those water quality-based limits
18 already been established in the water quality criteria?

19 A. Not for stormwater discharge, no, they have
20 not.

21 Q. Can you show me anything in WAC 173-201A that
22 says the Washington state water quality criteria, water
23 quality standards, do not apply to stormwater?

24 A. I'm saying that the methodology for
25 developing those -- and you would not find the

1 methodology here, you wouldn't find them in the
 2 standards, okay? These are either strictly narrative
 3 or numeric standards.
 4 Q. The standards exist, don't they?
 5 A. Yeah.
 6 Q. My question is, are those standards imposed
 7 under this permit? Is the legal obligation to satisfy
 8 those standards imposed on the permittee by this
 9 document, Exhibit 3?
 10 A. They're imposed in that we are -- we put into
 11 the permit a mechanism to develop water quality-based
 12 limits, and that's what's under Condition S2.
 13 Q. And that's something that will happen in the
 14 future?
 15 A. Correct.
 16 Q. It's not happening today under this permit?
 17 A. If you're asking are there water quality-
 18 based limits for stormwater in the permit right now,
 19 no, there are not.
 20 Q. For the purpose of convenience, I'd like to
 21 focus on four different water quality standards that
 22 apply to stormwater. The first is the standard for
 23 turbidity. Do you see the stormwater -- sorry.
 24 Do you see the water quality standard for
 25 turbidity in WAC 173-201A-030?

1 Is that the way you understand it?
 2 A. That's correct.
 3 Q. Does your description of how difficult water
 4 quality standards are to apply applied in the turbid
 5 standard here?
 6 A. No, it doesn't apply to the turbidity
 7 standards. What I was referring to is the difficulty
 8 in applying the standards under 040.
 9 Q. Okay. We'll get to those in a moment.
 10 A. Okay.
 11 Q. Does the Port's current NPDES permit require
 12 the Port to satisfy the turbidity standard here in
 13 173-201A-030(1)(c)(vi)?
 14 A. I would say it does, because under Condition
 15 S13, the Port is required for their construction
 16 activities, which is where you would anticipate seeing
 17 problems with turbidity, the Port's required for these
 18 construction activities to come up with Stormwater
 19 Pollution Prevention Plans and employ all the necessary
 20 BMPs, and that would include sediment erosion controls
 21 that would bring them into compliance with the
 22 standard.
 23 Q. Is the standard identified as an effluent
 24 limitation?
 25 A. We did not put the standard in as an effluent

1 A. Yes.
 2 Q. Where do you see that standard?
 3 A. It's under 030. It's I guess Subsection
 4 (b)(vi), Turbidity should not exceed 5 NTU over
 5 background.
 6 Q. Would you agree that that section is properly
 7 designated as Section 030 (1)(c)(vi) for Class AA,
 8 extraordinary water quality criteria?
 9 A. Wouldn't that be (1)(b)(vi)? Oh, I'm sorry.
 10 Q. (1)(a) is general characteristics, (1)(b) is
 11 characteristic uses, and (1)(c) is water quality
 12 criteria? I believe you'll see there's an arrow.
 13 A. Oh, I see, okay.
 14 Q. So would you agree that (1)(c)(vi) is the
 15 right section?
 16 A. Correct.
 17 Q. And that section applies to discharges at
 18 Sea-Tac Airport?
 19 A. That section applies to -- yes, it would
 20 apply to discharges from any facility.
 21 Q. Now, this states, Turbidity shall not exceed
 22 5 NTU over background when the background turbidity is
 23 50 NTU or less. And paraphrasing, when background
 24 turbidity is more than 50 NTU, then turbidity shall not
 25 have more than a 10 percent increase.

1 limitation, no.
 2 Q. And why not?
 3 A. I don't see it included as -- I do not know.
 4 I did not write the permit.
 5 Q. Would you agree that monitoring and testing
 6 to determine compliance with the turbidity standard is
 7 a technically simple matter?
 8 A. Are you asking is it simple to do a turbidity
 9 test?
 10 Q. Yes.
 11 A. Yeah, in my opinion it is a simple thing to
 12 do a turbidity analysis test.
 13 Q. Would you agree that the requirements of
 14 Condition S13 for construction activities do not apply
 15 generally to non-construction-related stormwater
 16 discharges under this permit?
 17 A. Yeah, S13 applies to construction-related
 18 activities.
 19 Q. But not non-construction stormwater?
 20 A. S13 is particular to construction-related
 21 activities, so -- correct, S13 does not apply to the
 22 non-construction stormwater.
 23 Q. Let's look at those requirements in WAC
 24 173-201A-040, and let's focus today on the water
 25 quality criteria for copper, lead and zinc. And we can

1 look at those individually.

2 Now, you've described difficulties relating
3 to these water quality criteria. Could you please
4 explain what difficulties you are referring to?

5 A. Certainly. The difficulty in using these
6 criteria the way they're set up in our standards right
7 now -- and again -- did you want to start off with
8 copper?

9 Q. Yes.

10 A. Just to hold copper up as an example, if
11 you'll see there that copper has a couple of footnotes
12 attached to it. If you'll look under the Freshwater
13 Acute criteria, for example, you'll see that copper --
14 the acute criteria is a one-hour average concentration
15 not to be exceeded more than once every three years on
16 the average. Also it has a footnote D for the chronic
17 criteria, and that's a four-day average concentration
18 not to be exceeded more than once every three years on
19 the average.

20 Q. Now, with respect to copper, how does the
21 Department of Ecology --

22 A. I wasn't finished.

23 Q. Oh, I'm sorry.

24 A. So when you look at those footnotes, you
25 know, what that is telling you, or at least what it

1 standards, you have to approach it in a very different
2 way than the way that we've traditionally approached
3 wastewater discharges from municipal facilities or
4 industrial process wastewater discharges.

5 Q. Well, there's a lot to discuss in that
6 statement. I'd like to address many of those
7 components individually.

8 Is it your assertion that there's an
9 exception for stormwater so that stormwater discharges
10 are not subject to the obligation of meeting these
11 numeric effluent limitations?

12 A. No, that's not my assertion.

13 Q. Do you agree that all discharges in the state
14 are subject to the obligation to assure that their
15 discharges do not cause levels of toxic substances in
16 the receiving waters to rise above the levels
17 identified here in the water quality criteria?

18 A. You know, there's a lot of dischargers in the
19 state. You discharge from in front of your home every
20 day, the stormwater that comes off from your residence,
21 okay? So my particular take on this is that it's
22 Ecology's obligation to, you know, reach for what makes
23 the most sense in applying these standards to
24 stormwater. And in the case of Sea-Tac Airport, I
25 believe our permit that was originally issued back in

1 tells me is that you're dealing with a wastewater
2 stream that is coming from a source or sources that
3 have what I would describe as steady state or
4 predictable concentrations, in this case steady state
5 or predictable concentrations of copper.

6 And you would build your treatment system
7 accordingly to attempt to meet these particular -- or
8 attempt to treat that wastewater discharge in such a
9 way that statistically you could count on not exceeding
10 either the acute or chronic criteria that's described
11 here and then also footnoted in C and D here.

12 And so when you try to apply this same thing
13 to a stormwater discharge, it's not that easy -- in
14 fact, you really can't apply it to stormwater, because
15 what you see in a typical stormwater event are
16 concentrations for copper in this case fluctuating all
17 over the place. And typically what you might see is
18 perhaps in the first 15 minutes of the storm event you
19 may indeed see a higher concentration than the copper
20 acute or chronic concentrations. But then you may see
21 it actually tail off later on in a storm event to
22 virtually non-detect.

23 So, you know, what this tells me at least is
24 that we have to approach stormwater in a very different
25 way, especially when it comes to try to apply these

1 '98 is a very good first step in doing that.

2 Q. How does Ecology know whether the Port's
3 discharges cause exceedances of these water quality
4 criteria in the receiving waters?

5 A. We don't know that. That's what we're
6 working on.

7 Q. You don't know?

8 A. No. That's what we're working on.

9 Q. The Port's discharges could be causing
10 violations of these criteria and Ecology --

11 A. Or they could not.

12 Q. -- wouldn't know?

13 A. Or they could not.

14 Q. But they could be?

15 A. Could be or they could not. We don't know.
16 That's what this permit is attempting to do.

17 Q. Hasn't Ecology certified that it has
18 assurance that the water quality criteria are being
19 met?

20 A. Could you say that again, please?

21 Q. Hasn't the Department of Ecology certified
22 that the water quality standards are being met at
23 Sea-Tac International Airport?

24 A. What we have certified in the 401 water
25 quality certification is that we have reasonable

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1 assurance that all our state water quality laws and
 2 regulations are being met, okay? I do not believe that
 3 we have certified that we know with absolute certainty
 4 that stormwater discharges are or are not, for that
 5 matter, exceeding these standards. But what we have
 6 done is say that we have reasonable assurance in
 7 finding that out, and in finding that out if it is
 8 indeed happening, correcting it.

9 Q. What steps has the Department taken to
 10 determine whether the water quality in the receiving
 11 waters meets these criteria in WAC 173-201A-040 for
 12 copper, lead and zinc?

13 A. Well, one of the steps is the NPDES permit,
 14 is putting this facility and all its stormwater
 15 discharges on that path to greater knowledge. And the
 16 other is -- I believe it's in the most recent water
 17 quality certification is a requirement to do a water
 18 effects ratio study or something similar to a water
 19 effects ratio study at the Port of Seattle.

20 Q. Well, we'll focus on that a bit later, but
 21 for now let's continue looking at the steps taken in
 22 the permit.

23 You focused initially in reviewing the water
 24 quality criteria for copper on the requirement of a
 25 one-hour average concentration and a four-day average

1 a steady state discharge.

2 Q. Even though it fluctuates wildly over the
 3 course of a day?

4 A. There's still far more predictable variables
 5 in that than there are in a storm event.

6 Q. What kind of sample does the water quality
 7 criteria apply to? Does it apply to a direct sample of
 8 the discharge or does it apply to a sample of the
 9 stream?

10 A. It applies to where the criteria is met or
 11 has to be met, and so I would say that if it's criteria
 12 that's being applied end of pipe then that would be the
 13 area where the sample would be taken. If it's criteria
 14 that are being applied at the edge of a mixing zone,
 15 then that's where the sample would be taken and where
 16 the criteria would need to be met.

17 Q. Where is the freshwater criteria for copper
 18 applied?

19 A. As I just stated, it depends on if it's an
 20 end of pipe water quality criteria sample. In that
 21 case you would be looking at where the discharge meets
 22 the receiving water. And if there's a described and
 23 permitted dilution zone, then you're looking at the end
 24 of the dilution zone.

25 Q. What kind of discharge is the stormwater

1 concentration. What kind of sample do you need to
 2 determine whether that one-hour average in the first
 3 instance is met?

4 A. I've got to tell you right now, I don't know.
 5 I don't know what that would take. I know what it
 6 would take at a facility where you have a steady state
 7 discharge, but I don't know what it would take for a
 8 stormwater discharge. And that's one of the things
 9 we're working on.

10 Q. Isn't it true that many different kinds of
 11 industrial facilities have discharges that are not
 12 steady state?

13 A. If they're stormwater discharges, yes, I
 14 would say that it is true, if it's an industrial
 15 facility with stormwater.

16 Q. Isn't it also true of industrial discharges?

17 A. No, because if it's a process wastewater
 18 discharge, they have control over that process and,
 19 therefore, I would consider that a fairly steady state
 20 predictable type of discharge.

21 Q. What about a facility that rinses down the
 22 shop floor once a day with a result that all the
 23 resulting pollutants are discharged in a single flush?

24 A. They still know how much water they're
 25 applying and when it's coming, so I would consider that

1 under the NPDES permit?

2 A. We don't have -- as I stated before, we don't
 3 have effluent limits for stormwater discharges. We're
 4 developing effluent limits for stormwater discharges.

5 Q. What does it mean to say that there are no
 6 effluent limits applicable to non-construction
 7 stormwater in the permit?

8 A. It means what's stated under S2.B, is that
 9 they are on a monitoring schedule.

10 Q. Is it possible for the Port of Seattle to
 11 violate this permit in any way with a non-construction
 12 stormwater discharge?

13 A. Oh, certainly. I mean, they could violate it
 14 with a discharge from their industrial wastewater
 15 system because there are limits for the water that they
 16 collect and treat in their industrial wastewater system
 17 so that they could violate those limits, be out of
 18 compliance with the permit.

19 Q. That would be a violation applicable to the
 20 industrial wastewater system?

21 A. Correct.

22 Q. How about for non-construction stormwater?

23 A. For non-construction stormwater, well, they
 24 could violate the conditions of the permit by -- they
 25 could violate this particular condition of the permit

1 and not do the required monitoring and reporting on the
2 stormwater discharges. And, you know, that goes for
3 all the parameters that are listed there under S2.

4 Q. Putting monitoring and reporting requirements
5 aside, let's consider a hypothetical for turbidity.

6 A. Okay.

7 Q. If the Port had a non-construction stormwater
8 discharge that raised the background turbidity by a
9 factor of 3, tripled the background turbidity in the
10 receiving water, would that violate this permit?

11 MR. YOUNG: I object to the extent it calls
12 for a legal conclusion.

13 Q. (BY MR. POULIN) Let me qualify the
14 hypothetical. If we assume a background NTU of 10 and
15 the Port's non-construction stormwater discharge caused
16 the turbidity in that receiving water to increase to
17 60, would that be a violation of this permit?

18 A. As I stated before, there's no effluent
19 standards for turbidity for non-construction stormwater
20 in the permit, okay? Department of Ecology is still
21 obligated, though, to ensure that our water quality
22 standards are being met exclusive of any permit. And
23 so if we had information of that, we would investigate
24 it and proceed with, you know, following our
25 investigation. We may well proceed with an enforcement

1 action on that.

2 Q. And what provision of this permit authorizes
3 Ecology to do that in the absence of an effluent limit?

4 A. There's no provision in the permit, but we do
5 have the provision in our water quality standards.
6 Again, it goes back to that there are not expressed
7 effluent limits for non-construction-related stormwater
8 discharges. But that doesn't tie Ecology's hands from
9 taking the necessary corrective action to correct that
10 hypothetical should it arise.

11 Q. But it does mean that the permit itself does
12 not require the permittee to avoid the exceedance we
13 described in the hypothetical?

14 A. Well, if you'll look -- there's a Condition
15 G6, Compliance with Other Laws and Statutes. "Nothing
16 in the permit shall be construed as excusing the
17 Permittee from compliance with any applicable federal,
18 state, or local statutes, ordinances, or regulations."

19 Q. In your review, do those applicable federal,
20 state and local statutes, ordinances or regulations
21 include the water quality criteria in 173-201A?

22 A. Yes.

23 Q. Does that answer apply equally to stormwater
24 discharges?

25 A. Yes.

1 Q. Are you familiar with the provision of the
2 Clean Water Act that states that compliance with the
3 terms of a NPDES permit is considered compliance with
4 the Act?

5 A. I'm not really familiar with that section.
6 No, I'm not well-versed in that.

7 Q. Have you heard reference to a provision
8 that's called permit shield?

9 A. You know, I just don't get in to that. I'm
10 not a lawyer.

11 Q. Fair enough.

12 A. I'm trying to get water clean.

13 Q. You previously mentioned a compliance
14 schedule. Is there a compliance schedule in the
15 permit?

16 A. Yeah, I would interpret what's under the
17 monitoring requirements, if you look at some of the
18 language under the monitoring requirements, and in
19 particular if you look at S2.C.b.

20 Q. Would that be S2.C.2.b?

21 A. Yeah, I'm sorry.

22 Q. On Page 17?

23 A. That's an example of, you know, what I would
24 consider a type of compliance schedule, that's entitled
25 Compliance Evaluation, of how we'll be using that data

1 that they generate.

2 Q. And this states that, "Monitoring will be
3 reviewed for compliance with WAC 173-201A. The
4 department will exercise its enforcement discretion in
5 the event of non-compliance with these standards."

6 A. Correct.

7 Q. Now, isn't it true that that provision,
8 S2.C.2.b, applies only to construction stormwater?

9 A. Yeah, I'm looking at that right now, and
10 that's right, that applies to construction stormwater.

11 Q. That's a provision, S2.C.2.b is a provision
12 that was just recently added by the major modification,
13 isn't that right?

14 A. Was it? I don't know.

15 MR. REAVIS: Can I ask a question here? You
16 said Page 17 a minute ago. Are you reading from which
17 exhibit now?

18 MR. POULIN: This is Page 17 of Exhibit 3.

19 MR. REAVIS: That's the major modification,
20 not the original permit; is that right?

21 MR. POULIN: This is the current modified
22 permit which includes the original permit.

23 Q. (BY MR. POULIN) If it's of help, I'll direct
24 your attention to Page 16, Provision S2.C.2, creates
25 the monitoring schedule for construction stormwater

1 discharges to Walker Creek and tributaries and Gilliam
2 Creek and tributaries. So seeing that, would you
3 agree --

4 A. Yeah, I would agree that this was part of the
5 recent modification.

6 Q. So not only does the compliance evaluation
7 provision that you've cited, S2.C.2.b, not only does
8 that not apply to non-construction stormwater, it only
9 applies to construction stormwater that occurs in
10 Walker Creek and tributaries and Gilliam Creek and
11 tributaries but not construction stormwater discharges
12 to Miller or Des Moines Creeks; would you agree?

13 A. Correct, yes.

14 Q. Now, before we move on, I want to get back to
15 your discussion of -- if I can paraphrase and hopefully
16 accurately characterize your statement -- the
17 stormwater quality criteria in Section 040 may not be
18 so appropriate for stormwater because of its
19 fluctuating nature.

20 Isn't it true that these state water quality
21 criteria are designed to protect water quality in the
22 receiving waters and to prevent degradation of
23 characteristic uses?

24 A. Of beneficial uses?

25 Q. Beneficial uses.

1 for copper is being met?

2 A. Yes. We need the hardness data from the
3 receiving water.

4 Q. And could you explain why that is?

5 A. Without getting too overly technical, you'll
6 note that for copper, like a lot of the metals for
7 freshwater and acute criteria, you're referred to
8 footnote -- at least for the acute criteria, you're
9 referred to footnote O. And you see that there's an
10 equation there in which the hardness value of the
11 receiving water is required for you to figure out the
12 exact numeric acute concentration.

13 Q. So the actual numeric criteria varies with
14 the hardness of the receiving water?

15 A. That's correct. The correlation is that as
16 hardness in the water column in the receiving water
17 increases, so too does the acute concentration
18 increase.

19 Q. Does the NPDES permit require the Port to
20 sample and report hardness in the receiving water?

21 A. In reviewing this right now, I do not see
22 where hardness of the receiving water under this
23 Condition S2.B for non-construction stormwater, I don't
24 see where that's required.

25 Q. S2.B, that's on Page 14?

1 A. Yes.

2 Q. And isn't that objective, independent of the
3 specific nature of any discharge, the goal is to make
4 sure in order to prevent harm to aquatic life and
5 environmental values, the goal is to make sure that the
6 water quality does not exceed these standards?

7 A. Yes.

8 Q. So shouldn't that concern override the
9 difficulty of fitting a square peg of stormwater
10 discharges into the round hole of compliance with water
11 quality standards?

12 A. I don't think we're in disagreement.
13 I agree. And that's what we're trying to do here. We
14 are trying to fit the square peg of stormwater into --
15 or to do the type of analysis that's required to
16 determine if stormwater discharges from the Port of
17 Seattle are or are not violating these standards. And
18 there's a lot of gaps in our knowledge right now. And
19 we're using our NPDES permit to fill in those gaps.

20 Q. Let's look at another aspect of copper
21 standard. Isn't it true that the Department of Ecology
22 needs hardness data -- scratch that question and let me
23 rephrase.

24 Does the Department of Ecology need hardness
25 data to determine whether the water quality criteria

1 A. That's correct.

2 Q. And that identifies a schedule according to
3 which the permittee shall monitor stormwater discharges
4 at four specified outfalls?

5 A. Correct.

6 Q. And then the listed parameters called TPH,
7 TSS, turbidity, also total recoverable lead, total
8 recoverable copper, total recoverable zinc?

9 A. Yes.

10 Q. But you don't see anything here that requires
11 sampling for hardness?

12 A. No.

13 Q. Doesn't that make it impossible for Ecology
14 to determine whether the discharges satisfy water
15 quality criteria?

16 A. It makes that type of analysis more difficult
17 with the absence of that information, and that is why
18 in the water quality certification we put the
19 requirement in for a study similar to a water effects
20 ratio analysis in which you would be taking and doing a
21 study of the receiving water hardness.

22 (Reporter read back as requested.)

23 Q. (BY MR. POULIN) It's not merely more
24 difficult, it's impossible, isn't it?

25 A. No, I wouldn't say it's impossible.

1 Q. How can you determine compliance with water
2 quality standards without hardness data?

3 A. Because we have other sources for hardness
4 data other than what the Port would be collecting for
5 hardness data.

6 Q. What are those sources?

7 A. There is, from other stream studies done in
8 King County, you know, studies of hardness values for
9 similar types of streams, similar streams to Miller and
10 Des Moines and Walker Creeks, depending on the season
11 that the samples were taken.

12 But I don't think I'm disagreeing with you
13 that that is a value or a monitoring requirement that
14 should be in this permit to make Ecology's job easier
15 in evaluating how these non-construction stormwater
16 discharges meet or don't meet our state water quality
17 standards.

18 MR. POULIN: That's fine, we can break. I'll
19 11:21. Let's go off record.

20 (Recess taken.)

21 Q. (BY MR. POULIN) Let's go back on record,
22 it's 11:29.

23 I believe you stated that you did not write
24 the permit?

25 A. No, I did not.

1 reference to a one-hour average concentration as well
2 as footnote D and its reference to a four-day average
3 concentration.

4 Do you know whether the permit requires
5 sampling sufficient to generate one-hour average
6 concentration?

7 A. The type of sampling that is required for
8 metals is composite sampling. And the difficulty comes
9 in that, again, how in a storm event do you take
10 discreet aliquots, samples, that are giving you an
11 accurate representation of what indeed the one-hour
12 average concentration is during that period of a storm
13 or any number of storms?

14 Now, what they are sampling here or what
15 they're required to do in their sampling is at least
16 eight times a year do this type of composite sampling.
17 And I do not know if -- because I have not recently
18 reviewed their stormwater sampling reports, I do not
19 know if you could rely on the data in those reports to
20 answer the question of whether you're exceeding the
21 one-hour average, and for that matter even more,
22 whether you're -- for chronic criteria whether you're
23 exceeding the four-day average.

24 Q. Aren't there standards governing how to
25 sample a creek to generate a one-hour average?

1 Q. Do you know who did?

2 A. Lisa Austin.

3 Q. And that was back in 1997 or '98; is that
4 right?

5 A. Yeah. She would have been writing it through
6 '97 to '98.

7 Q. She was an employee under your supervision at
8 the time?

9 A. Yes.

10 Q. Who is going to be writing the new permit
11 that presumably will be issued to replace this permit
12 this year?

13 A. His name is Ed Abbas.

14 Q. And he is the current facility manager and
15 permit manager for Sea-Tac International Airport?

16 A. Yes.

17 Q. Do you know whether the new permit will
18 include a requirement to monitor hardness?

19 A. I don't know what it will include right now.
20 I haven't seen a draft or anything of that nature. I'm
21 fairly certain that we will be addressing hardness in
22 any metals monitoring work that we do.

23 Q. Let's go back to the water quality criteria
24 in 173-201A-040. We've just looked at hardness. We
25 previously focused briefly on footnote C and its

1 A. Are there standards?

2 Q. Uh-huh.

3 A. On it?

4 Q. Yeah.

5 A. There are guidelines from EPA on how you
6 conduct stormwater sampling. Those guidelines are by a
7 number of experts in the field considered to be very
8 inadequate, especially when it comes to answering the
9 questions as to whether or not you're exceeding the
10 one-hour or four-day average concentration, and
11 inadequate and out of date, very dated guidelines.
12 Those are the only standards or guidelines that I'm
13 currently aware of that are out there right now.

14 There's a lot of work being done by -- well,
15 for example, the National Urban Stormwater Study of
16 where they're trying to develop the science further so
17 that we can get at some of these very thorny issues
18 relative to stormwater. And sampling stormwater events
19 is what I would characterize as very much a work in
20 progress and in its infancy and definitely at the
21 beginning here.

22 And we're hoping through this permit to
23 advance that science and knowledge even more, through
24 this permit and also through the water effects ratio
25 study that we're requiring as part of the water quality

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1 certification.

2 Q. Well, independent of stormwater, doesn't the
3 state have some agreed-upon protocols for determining
4 what the one-hour average concentration of pollutants
5 in a creek or other surface water body is?

6 A. Yes. We have what's called reasonable
7 potential determination procedures. And again, though,
8 those reasonable potential procedures are only for what
9 I called before steady state industrial process
10 wastewater discharges or municipal wastewater
11 discharges. We have not yet come up with a method for
12 applying a reasonable potential determination to
13 stormwater.

14 Q. Well, these criteria in the WACs, they were
15 created by the Department of Ecology, weren't they?

16 A. Yes, as we're obligated to do under the Clean
17 Water Act.

18 Q. And doesn't 173-201A-040 sub 2 say the
19 Department shall employ or require chemical testing,
20 acute and chronic toxicity testing, and biological
21 assessments, as appropriate, to determine compliance?

22 A. Sure does, yes. It says that.

23 Q. Are you telling me the Department doesn't
24 know how to do that?

25 A. No, I'm not telling you that. What I am

1 ~~not?~~

2 ~~A. No. And I'm not an attorney, but I believe
3 307(a) are the effluent standards on toxics establish
4 under effluent guidelines that are established by EPA~~

5 ~~Q. And isn't 173-201A-040 addressed to toxic
6 substances as required to implement that EPA directive
7 at the state level?~~

8 ~~A. I can't speak to -- I'd have to research what
9 307(a) is, but I think you may be -- I don't think what
10 is being referred to here, which I think are in fact
11 standards developed under effluent guidelines from EPA,
12 and that's what Section 307(a) of the Clean Water Act
13 is referring to, I don't think to say that those are
14 comparable to our water quality standards are the same.
15 What drives our water quality standards is actually a
16 different section of the Clean Water Act.~~

17 ~~Q. Do you know which section that is?~~

18 ~~A. No, I don't.~~

19 ~~Q. But you would agree that this particular
20 component, 173-201A-040, is the section of Washington's
21 water quality standards that addresses toxic pollutants
22 as designated by EPA?~~

23 ~~A. No, I don't agree.~~

24 ~~Q. You don't agree?~~

25 ~~A. No, I don't agree. I don't agree that this~~

1 telling you is that the science for doing the
2 appropriate level of testing is in development right
3 now. But I believe that we're employing all -- or
4 requiring of the Port all necessary chemical, acute,
5 chronic toxicity testing in this permit and in the
6 water quality certification to work on this evaluation
7 of their non-construction stormwater.

8 ~~Q. Let's shift gears briefly here. Let's turn
9 to Page 52 of the permit, Section G11, General
10 Condition G11.~~

11 ~~You can take your time to read this, but it
12 states, "If any applicable toxic effluent standard or
13 prohibition (including any schedule of compliance
14 specified in such effluent standard of prohibition) is
15 established under Section 307(a) of the Clean Water Act
16 for a toxic pollutant and that standard or prohibition
17 is more stringent than any limitation upon such
18 pollutant in the permit, the Department shall institute
19 proceedings to modify or revoke and reissue the permit
20 to conform to the new toxic effluent standard or
21 prohibition."~~

22 ~~A. Oh-huh.~~

23 ~~Q. Isn't WAC 173-201A, and in particular 040,
24 just such a toxic effluent standard of prohibition
25 established under Section 307(a) of the Clean Water~~

1 ~~Section G11 is referring to water quality standards
2 that the state's developed. These are standards that
3 we have set for toxics in Washington state waters. And
4 without the Clean Water Act available to me, I believe
5 307(a) actually refers to effluent standards that are
6 set under EPA's -- that EPA would set under effluent
7 guidelines.~~

8 ~~Q. Can you tell me what a composite sample is,
9 turning back to the sampling requirements in the permit
10 on Page 14?~~

11 ~~A. (Witness reviewing document). I believe
12 composite -- and I don't see the associated fact sheet
13 here -- but it used to have a list of definitions on
14 the fact sheet.~~

15 ~~Q. I have the fact sheet available here. This
16 is a new exhibit.~~

17 ~~(Deposition Exhibit No. 136 was marked for
18 identification.)~~

19 ~~Q. (BY MR. POULIN) Please take a look at new
20 Exhibit 136 and see if this appears to be the fact
21 sheet.~~

22 ~~A. Okay. In Exhibit 136, if you look on Page
23 47, there's a definition there of what we mean by
24 composite sample.~~

25 ~~Q. And it says it's "A mixture of grab samples~~

1 collected at the same sampling point at different
2 times, formed either by continuous sampling or by
3 mixing discreet samples. May be a 'time-composite'
4 (collected at constant time intervals) or 'flow-
5 proportional' collected either as a constant sample
6 volume at time intervals proportional to stream flow,
7 or collected by increasing the volume of each aliquot
8 as the flow increased while maintaining a constant time
9 interval between the aliquots."

10 Do you know whether this kind of composite
11 sample could be used to give you a one-hour average
12 concentration?

13 A. I don't know.

14 Q. Do you know if it could be used to give you a
15 four-day average concentration?

16 A. That would assume that you had a storm event
17 that lasted over four days.

18 Q. Who knows that kind of thing within the water
19 quality program?

20 A. I don't know who would know within the water
21 quality program. I know people who are working on this
22 within the water quality program to -- again, try to
23 advance a science here. The question comes in is,
24 especially in composite sampling on storm events,
25 whether you're answering the question better using

1 that right now.

2 Q. Is it possible that there is no answer?

3 A. It's possible, but I think that we can't
4 simply stand still and do nothing because it's not
5 possible right now to get this answer. But I think
6 it's very possible with further study, further
7 knowledge, to advance this whole issue and thereby --
8 you know, I'm optimistic that by working on these
9 things, you know, we will have an answer.

10 Q. Ecology could require the Port to collect a
11 grab sample instead of a composite sample, couldn't it?

12 A. Yes, they could, but grab sample doesn't tell
13 you anything. It doesn't tell you as much as a
14 composite sample does.

15 Q. Wouldn't a series of grab samples give you
16 the ability to determine four-hour or several one-hour
17 averages?

18 A. Now you're talking composites. A series of
19 grab samples combined is a composite sample.

20 Q. I'm not suggesting that they be combined but
21 that they be evaluated independently. Four grab
22 samples taken over the course of an hour, for example,
23 wouldn't that give you a one-hour average?

24 A. Then if you're taking the average of their
25 concentrations, you've just composited the sample.

1 time-composite or flow-proportional.

2 I do know that there is debate among the
3 sampling experts, the stormwater experts in the field,
4 that you most likely get a more accurate
5 characterization of just what the concentrations are in
6 a storm event if you were to use flow-proportional,
7 that that better gauges what the impact is. But then
8 that leads to a difficulty as to, you know, what is
9 really the associated time to your flow-proportional
10 sample and then whether that time then correlates with
11 something that you would see in the receiving water,
12 and again, the receiving water being where we're trying
13 to measure whether these impacts are occurring or not,
14 whether you can get all of those things to line up.

15 Again, this points to just how difficult and
16 complex true characterization of the impact of the
17 stormwater discharge, characterization of those
18 stormwater events can be on the receiving water.

~~19 Q. Is it possible that no one in Ecology knows
20 the answer to my question whether the composite sample
21 can be used to determine one-hour average or four-day
22 average for purposes of compliance with water quality
23 criteria for metals?~~

~~24 A. I think it's possible, yeah. I think it's
25 possible that you're -- that there's no one who knows~~

1 Q. Well, isn't that what the water quality
2 standard calls for, a one-hour average concentration?

3 A. Correct.

4 Q. So does that suggest to you, then, that a
5 composite may be adequate if it's a composite of a
6 one-hour time period?

7 A. It's a composite -- no, no.

8 Q. Okay, let's look at a different issue. The
9 monitoring requirements for non-construction stormwater
10 require the permittee, that is the Port, to monitor for
11 total recoverable copper, lead and zinc.

12 What does that mean, total recoverable?

13 A. Total recoverable is a measure of all the
14 metals that -- whether a dissolved or particulate, all
15 the metals -- or the -- let me back up.

16 Total recoverable is a measure of the entire
17 concentration of a metal regardless of the species of
18 that metal, whether it be dissolved or associated with
19 a particulate.

20 Q. Do you see that in the water quality criteria
21 Section 173-201A-040 that in the first column, both
22 copper, lead and zinc and other relevant metals are
23 followed by the footnote DD?

24 A. Yes, I do.

25 Q. Let's look at footnote DD. And for your

1 convenience, I have a new exhibit which you will see is
2 simply an enlarged photocopy of footnote DD.

3 (Deposition Exhibit No. 137 was marked for
4 identification.)

5 Q. (BY MR. POULIN) Could you please read the
6 first sentence of footnote DD aloud.

7 A. First sentence?

8 Q. Yes.

9 A. "These ambient criteria in the table are for
10 the dissolved fraction."

11 Q. And did you just explain that the total
12 recoverable is a whole that includes subparts?

13 A. It includes the dissolved fraction.

14 Q. So the dissolved fraction is just part of the
15 total recoverable?

16 A. Correct.

17 Q. Have you reviewed this footnote before?

18 A. Yes, I've had occasion to review this
19 footnote before.

20 Q. Let's focus on the third and fourth sentences
21 of the footnote. Those sentences state, "The metals
22 criteria may not be used to calculate total recoverable
23 effluent limits unless the seasonal partitioning of the
24 dissolved to total metals in the ambient water are
25 known. When this information is absent, these metals

1 Q. Would you agree then that the metals
2 criteria, since Ecology doesn't know the seasonal
3 partitioning, shall be applied as total recoverable
4 values instead of being applied as the dissolved
5 fraction?

6 A. Well, there's more to that sentence there.
7 "Determined by back-calculation, using the conversion
8 factors incorporated in the criterion equations."

9 Q. Okay. So are the criterion equations the
10 items we see in footnote O and, for example, P, and for
11 lead, Q and R, and for zinc, AA and BB? Are those the
12 criterion equations?

13 A. Yes, those are examples of criterion
14 equations.

15 Q. And do you understand the reference to back-
16 calculation to mean using this equation --

17 A. Yes.

18 Q. -- to identify the numeric criteria?

19 A. Yes.

20 Q. And do you understand this fourth sentence to
21 mean that because the Department does not know seasonal
22 partitioning of the dissolved metals, it should use the
23 total recoverable metal value rather than the dissolved
24 fraction?

25 A. Yes.

1 criteria shall be applied as total recoverable values,
2 determined by back-calculation, using the conversion
3 factors incorporated in the criterion equations."

4 A. Yes.

5 Q. What does that language mean to you, or what
6 do you understand it to mean?

7 A. I understand it to mean what it says.

8 Q. Does Ecology know the seasonal partitioning
9 of the dissolved to total metals in Miller and
10 Des Moines Creek?

11 A. No, we do not.

12 Q. Do you understand the phrase, this
13 information in the fourth sentence of footnote DD to
14 refer to the seasonal partitioning of the dissolved to
15 total metals in the ambient water?

16 A. Could you repeat that, please?

17 Q. Do you understand the phrase, this
18 information in the fourth sentence of footnote DD to
19 refer to the seasonal partitioning of the dissolved to
20 total metals in the ambient water?

21 A. Yes, I do.

22 Q. Would you agree that then in the meaning of
23 footnote DD, that information is absent because Ecology
24 doesn't know it?

25 A. Yes.

1 Q. So would you agree, then, that at least
2 insofar as our focus on footnote DD, the sampling
3 requirement in the permit for total recoverable copper,
4 lead and zinc, is sufficient to generate information
5 that we can use to determine the water quality criteria
6 with that back-calculation process?

7 A. That's if you're developing an effluent
8 limit.

9 Q. Or if you're determining compliance with the
10 standard?

11 A. Or if you're determining compliance with the
12 standard, yes.

13 Q. Because DD explains how to use the equation
14 to determine what the numeric criteria is?

15 A. Yes.

16 Q. So in summary, would you agree that footnote
17 DD can be understood to mean that you do not have to
18 know the dissolved fraction of the specific metal to
19 determine the applicable water quality criteria when
20 the seasonal partitioning of the dissolved to total
21 metals in the ambient water is not known?

22 A. That's what we're left with, yes.

23 Could I add something, please?

24 Q. Sure.

25 A. If you'll read the entire paragraph there,

1 going on from the fourth sentence, "Metals criteria may
2 be adjusted on a site-specific basis when data are made
3 available to the Department clearly demonstrating the
4 effective use of the water effects ratio approach
5 established by USEPA, as generally guided by the
6 procedures in USEPA Water Quality Standards Handbook,
7 December 1983, as supplemented." And that has been
8 supplemented and replaced since 1983.

9 Q. Have data been made available to the
10 Department in the sense of that sentence? Has the
11 water effects ratio approach established by USEPA and
12 as supplemented since 1983, has that taken place?

13 A. We have put requirements in the permit, in
14 the NPDES permit, and also in the water quality
15 certification to develop that information.

16 Q. We'll focus more on the 401 later, but where
17 is that relevant section or provision of the NPDES
18 permit?

19 A. Well, in my opinion, we are filling in that
20 data gap with the monitoring requirements under S2.B in
21 part. It's not perfect, but I think it gets us part of
22 the way there.

23 Q. Didn't you agree that S2.B doesn't even
24 require hardness sampling?

25 A. Sure, I agreed with you on that, but that

1 Do you understand that language to require
2 sampling of the receiving water?

3 A. Yes.

4 Q. Why is that?

5 A. Because they are taking the -- well, let me
6 back up on that. It's sampling of their acute toxicity
7 effects from the stormwater at the end of pipe, so it
8 would be just before it enters the receiving water.

9 Q. It's characterization of the effluent, not of
10 the receiving water, isn't that right?

11 A. That's correct. But what this effluent
12 characterization helps us to answer is whether or not
13 we'll see any acute toxicity effects in the receiving
14 water. If we're not seeing any acute toxicity in the
15 stormwater, in the stormwater effluent, then we would
16 not anticipate seeing any acute toxicity impacts in the
17 receiving water.

18 Q. But it doesn't necessarily tell you whether
19 water quality standards are being met in the receiving
20 water, does it?

21 A. Well, it tells us that one of the standards
22 is being met, and that's a narrative standard for acute
23 toxicity.

24 Q. But it doesn't tell you whether the numeric
25 criteria for the metals are being met?

1 doesn't say it's not telling us anything else.

2 Q. If Ecology wants to determine whether these
3 water quality criteria are being met in the receiving
4 water, shouldn't the permittee be required to sample
5 the receiving water in addition to the discharge?

6 A. Correct.

7 Q. Does this permit require the Port to sample
8 the receiving water?

9 A. This condition in the permit does not require
10 that, no.

11 Q. Is there some other provision in the permit
12 that requires sampling of the receiving water for this
13 purpose?

14 A. That requires a receiving water study?
15 Yeah, we have other provisions in here, in particular,
16 the acute toxicity conditions under S10, acute toxicity
17 for stormwater. And some of the information generated
18 there helps tell us what's happening in the receiving
19 water, especially as it relates to acute toxicity
20 effects from stormwater discharges.

21 Q. That Provision S10 on Page 34 identifies two
22 acute toxicity tests listed below and says at the
23 outset that effluent characterization for acute
24 toxicity shall be conducted twice at each of the
25 following outfalls, and then identifies four outfalls.

1 A. No, it doesn't give us that type of
2 definition.

3 Q. There's a reference here at the bottom of
4 Page 35 to Department of Ecology publication
5 WQ-R-90-80, Laboratory Guidance and Whole Effluent
6 Toxicity Test Review Criteria. And it says that all
7 samples and test solutions for toxicity testing shall
8 have water quality measurements as specified in that
9 publication.

10 Do you know whether that publication requires
11 sampling of hardness or receiving water
12 characteristics?

13 A. I believe it requires sampling of the
14 hardness of the whole effluent.

15 Q. And in your understanding of Section 040
16 MR. YOUNG: Is it time to take a lunch break?
17 MR. POULIN: Oh, sure, we can break now, if
18 you'd like.

19 (Discussion off the record.)
20 MR. POULIN: It's 12:15. Let's break.
21 (Deposition recessed at 12:15, to be
22 reconvened at 1:00.)
23
24
25

AR 001560

AFTERNOON SESSION

1:00 P.M.

--oOo--

CONTINUING EXAMINATION

BY MR. POULIN:

Q. It's 1:06. Let's recap one or two matters. Before we get in to that, have you ever done a site visit at the Seattle-Tacoma International Airport?

A. Yes.

Q. How many times have you done site visits?

A. I'd have to say over the years, six to eight times.

Q. Six to eight times?

A. Uh-huh.

Q. Let's say in the past two years, how many site visits?

A. In the past two years, I believe it's been three times.

Q. What were the circumstances of those visits?

A. I believe the circumstance of one of the visits was to show our deputy director the types of sediment erosion control facilities that the Port of Seattle had in place for some of their construction activities.

A. We have to check in with Port personnel and be accompanied onto the secure areas of the facility.

Q. So did they identify -- verify your identification, make sure you were Kevin Fitzpatrick? Is that one of the things?

A. Yes.

Q. And did you have an escort from the Port throughout your visit?

A. Yeah. There's certain areas of the Port where escort's required, certain parts of the facility where an escort's required.

Q. And how did it work -- how did you move about the facility physically? Did you use your own vehicles or did the Port provide a vehicle?

A. It's been different on different occasions. At times we have followed in our own vehicle.

Q. Followed the Port?

A. Yeah. And at other times we've gone in a Port vehicle for convenience.

Q. What was the group size that you had? Well, I guess you said you had six to eight different visits. What was the largest entourage or group you ever did a site visit with?

A. Are you referring to the number from Department of Ecology?

The other was to follow up on a complaint that we had received about one of the construction activities. I think the other was to follow up on a concern that a citizen had. Brett Fish was the citizen who had a concern about what he was observing as presporum mortalities in Miller Creek. And so while I was visiting with him, I also did a drive-by inspection of some of the construction activities at the Port of Seattle.

Q. Where were those construction activities or which construction sites did you visit?

A. The construction sites that we visited for -- the most recent visit with our deputy director were in and around the developing embankment area and also in and around the interchange construction on State Route 509.

Q. Has the Port ever placed any restrictions on your access to any part of the airport grounds or facility?

A. The only restrictions we have is because of the security nature that the Port has, but we've never been denied access to areas that we wanted to have access to.

Q. What were those security conditions that you recall?

Q. The total number of people present.

A. Both Port personnel and Ecology personnel.

Q. Yes.

A. And I should say, and Port consultants?

Q. Yes.

A. The largest number I can recall is all total, I think there were about ten of us.

Q. And excluding Port and its personnel and consultants, what was the largest group of non-Port people that you did a site visit with?

A. What do you mean by non-Port people?

Q. Everyone other than Port staff employees or consultants.

A. Are you referring to the largest number of Ecology personnel?

Q. Well, you could tell me the largest number of Ecology personnel. I would also be interested to hear Ecology plus. If you had other people with you that were not Ecology people, I'd like to get their numbers.

A. Well, I guess exclusive of Ecology personnel -- I'm sorry, if you're talking about the largest group of Ecology personnel, I think including myself that would number about four.

Q. And if you expanded that to include people that were not Ecology?

1 A. I don't ever recall being on an inspection
2 where we had folks from other agencies other than Port
3 of Seattle or Port of Seattle and its consultants. I
4 just don't recall right now.

5 Q. Did you ever do a site visit with King County
6 personnel?

7 A. Well, I'm including in that group King County
8 personnel because the King County person who was along
9 with us -- I should say one of the King County persons
10 was not under contract to Ecology, so I guess that
11 would be one King County person.

12 When I was talking about Ecology personnel
13 before, and here I'm referring specifically to Kelly
14 Whiting because Kelly was under contract to Department
15 of Ecology, I considered him Ecology personnel even
16 though he works for King County.

17 Q. So on the site visit when Kelly Whiting
18 accompanied you, there were no more than four non-Port
19 people, as you recall?

20 A. As I recall.

21 Q. Did the Port ever place any restrictions on
22 where you could go?

23 A. No.

24 Q. Did they require any background checks?

25 A. They required that we submit our ID and then

1 Fitzsimmons?

2 A. Yes.

3 Q. And what prompted her visit?

4 A. She was on a visit of a number of different
5 sites in the Northwest region, and she expressed an
6 interest in, since she was brand new to the agency,
7 of -- and we thought it would be of interest to her
8 since she was brand new to the agency, to see the Port
9 of Seattle Sea-Tac Airport facility.

10 Q. Has Director Fitzsimmons done a site visit?

11 A. I don't know.

12 Q. To your knowledge, when did stormwater
13 discharges become subject to the Clean Water Act?

14 A. That's funny, because we just talked about
15 that at lunchtime. Stormwater discharges --

16 MR. YOUNG: Move to strike the privilege that
17 you just referred to.

18 Q. (BY MR. BOULIN) Without divulging any
19 privileged attorney-client information, do you remember
20 when Ecology started to focus on stormwater, if that
21 would be helpful?

22 A. Stormwater became an increasing concern --
23 and this is from my perspective now. Stormwater from
24 industrial facilities became an increasing concern I
25 believe starting with the shipyards, and that would be

1 you know, when we -- especially when we were in secure
2 areas of the airport, we had to have the necessary
3 badges to show that we were being accompanied by Port
4 personnel into those areas.

5 Q. Did the Port require the Department to
6 identify in advance where it would be going?

7 A. No.

8 Q. And did it require Ecology to identify in
9 advance who would be among the Ecology group?

10 A. No, I don't recall doing that in advance, you
11 know. They may have asked what number of people are
12 coming from Ecology so that they could make vehicle
13 arrangements, but I don't recall where we had to
14 identify them by name who was coming.

15 Q. Who is the deputy director that you
16 mentioned?

17 A. Linda Hoffman.

18 Q. And what's she a deputy director of?

19 A. She's deputy director of the Department of
20 Ecology.

21 Q. How many deputy directors does Ecology have?

22 A. One.

23 Q. Just one?

24 A. Yeah.

25 Q. So she's an assistant to Director

1 back in the mid to late '90s.

2 Q. Would you agree that Sea-Tac International
3 Airport is considered an industrial facility?

4 A. Yes. That's why we put it under permit.

5 In fact, I was the person at Ecology who first raised
6 the concerns about whether we were adequately
7 addressing stormwater runoff at Sea-Tac Airport. And
8 that goes back to '91/92.

9 Q. So ten years ago you raised that issue?

10 A. Yes.

11 Q. When did stormwater discharges become subject
12 to the requirement of complying with water quality
13 standards?

14 A. When did stormwater discharges? I'm not sure
15 I understand your question.

16 Q. Well, you would agree at one point stormwater
17 discharges were not regulated under the Clean Water
18 Act; is that right?

19 A. I believe it was always the intent to somehow
20 regulate the impacts of stormwater, you know, in the
21 Clean Water Act. I mean, the goal of the Clean Water
22 Act is to protect and restore the beneficial uses of
23 our nation's waters, the fishable/swimmable. And I
24 believe what was included in that is even to look at
25 the impacts that come from stormwater, whether it be

1 municipal stormwater sources or industrial stormwater
2 sources.

3 And so towards that end, EPA developed their
4 stormwater regulations which I believe were first
5 promulgated back in -- I don't recall exactly, I
6 believe in the early '90s. And so following in that,
7 we wanted to ensure that we were in step with those
8 regulations, especially with regard to industrial
9 stormwater discharges. But I would say that Ecology as
10 an agency may have even been ahead of EPA in that we
11 were looking at stormwater concerns at shipyards dating
12 back to the mid '80s.

13 Q. Do shipyards have particular issues with
14 metals in their stormwater discharges?

15 A. Yes, they do, because of the nature of their
16 industrial processes and because much of their work on
17 vessels, whether in dry-docks or out in their yards,
18 are exposed to weather. And because of one particular
19 type of industrial operation that they use which is
20 blasting with -- sandblasting, aggregate blasting
21 operations, and if they use a particular type of
22 blasting agent that has high copper concentrations in
23 it. So you put all those together and you get into
24 some really serious stormwater runoff concerns and
25 source control concerns.

1 our knowledge on the character of the stormwater
2 discharges from the Port of Seattle and what the
3 impacts of those stormwater discharges are to the
4 surrounding receiving waters, and with that increased
5 knowledge, how best then to regulate those stormwater
6 discharges given that, you know, what we require right
7 now is currently the best available science that we
8 have, the types of best management practices that they
9 should be putting into effect for treating those
10 stormwater discharges.

11 But again, I don't see the relationship
12 between the fact that, you know, we started working on
13 stormwater discharges at shipyards back in the mid
14 '80s, that we then were presented with a whole set of
15 new regulations from Environmental Protection Agency on
16 stormwater and how to manage stormwater.

17 If you'll look at those regulations, those
18 regulations don't speak at all to regulating stormwater
19 discharges with NPDES permits outside of issuing
20 general NPDES permits for industrial stormwater
21 discharges. And I think we've gone quite a bit further
22 than that by having an individual permit on Sea-Tac
23 Airport for their industrial stormwater discharges.

24 So I actually think we've done a commendable,
25 if not excellent job in controlling those discharges

1 (Recess taken.)

2 Q. (BY MR. POULIN) Back on at 1:28.
3 As something of a layman or at least a newcomer, it
4 seems amazing to me that 15 years after these shipyard
5 issues first arose and ten years after you say the
6 stormwater concerns at Sea-Tac were first raised,
7 Ecology still isn't requiring something as basic as
8 hardness sampling in the NPDES permit.

9 How can that be?
10 A. Well, it doesn't strike me as amazing at all.
11 And I don't see how the fact that EPA first promulgated
12 its first regulations on stormwater, what relationship
13 that has to do with whether or not we're putting
14 hardness monitoring requirements in the Sea-Tac permit.
15 I'm sorry, I just don't see the relation.

16 Q. Well, didn't you agree earlier that the
17 Department of Ecology has the obligation to ensure
18 compliance with water quality standards?

19 A. Yes.

20 Q. And didn't you agree that with respect to the
21 metals that we've looked at today, you can't determine
22 whether a discharge of the receiving water is meeting
23 water quality standards without hardness data?

24 A. Yes, I will agree with that, but I also
25 stated that this is all part of an effort to increase

1 and working for further controls on those discharges
2 from Sea-Tac Airport.

3 Q. Isn't it true that there are two kinds of
4 effluent limitations, generally speaking; there's
5 technology-based effluent limitations and surface water
6 quality-based effluent limitations?

7 A. Yes.
8 Q. If you look at Exhibit 136 which is the fact
9 sheet for the Port's permit, you'll see a discussion of
10 both kinds of effluent limitations; technology-based
11 effluent limitations beginning on Page 20, and water
12 quality-based effluent limitations beginning on
13 Page 22.

14 Isn't it true that the water quality criteria
15 and specifically the numeric limits on metals
16 concentrations identified in WAC 173-201A-040
17 constitute surface water quality-based effluent
18 limitations?

19 A. They go to how you develop those surface
20 water quality-based effluent limitations. They're
21 not -- they are not the surface water quality effluent
22 limitations. You use those standards to develop water
23 quality-based effluent limitations.

24 Q. And isn't it true that the effluent
25 limitations that are developed in that process must be

1 designed to ensure that the surface water criteria in
2 WAC 173-201A-040 are not exceeded?

3 A. If you develop effluent limitations, that's
4 the purpose of developing those effluent limitations.
5 Water quality-based effluent limitations are derived to
6 ensure that those standards are not violated.

7 Q. You've already agreed that the Port's NPDES
8 permit does not include any effluent limitations on
9 non-construction stormwater, isn't that right?

10 A. That's correct.

11 Q. And you've also stated that Ecology does not
12 know whether the receiving waters for the Port's
13 non-construction stormwater discharges meet the state
14 water quality criteria or not?

15 A. We don't know if they're meeting them or if
16 they're not meeting them, correct, but we're working to
17 find out.

18 Q. And you, I believe, agreed that you can't
19 know without hardness criteria -- sorry, without
20 hardness data from the receiving waters?

21 A. I'm saying that it is more difficult without
22 current hardness data on those receiving waters to
23 determine whether a stormwater discharge is impacting
24 the receiving water in such a way that it's exceeding
25 the criteria. But that is one of the reasons why, to

1 ratio study?

2 A. The purpose -- if you'll turn to Exhibit 137,
3 part of the purpose of this study is to calculate
4 seasonal partitioning of dissolved to total metals in
5 the ambient waters. That would be one of the purposes
6 of that study.

7 The other purpose of the study, and what I
8 should say, this study includes a water effects ratio
9 study, but it also is intended to evaluate or to help
10 us fill in data gaps that we have as to what the water
11 quality impacts of non-construction-related stormwater
12 discharges are to the surrounding receiving waters of
13 Miller, Walker and Des Moines Creeks.

14 Q. Isn't it true that the purpose of the WERS
15 study is to change the site-specific water quality
16 criteria applicable to metals in the receiving waters
17 at Sea-Tac International Airport?

18 A. No, I wouldn't characterize it that way.
19 I would say that the purpose of any water effects ratio
20 study is to determine how to apply our acute and
21 chronic criteria, especially for metals, at the site.

22 Q. I deposed a water quality specialist from
23 King County yesterday, and she told me that King County
24 simply requires permittees to sample the dissolved
25 fraction of metals. Why doesn't Ecology do that?

1 fill in that data gap, we put into the water quality
2 certification the requirements for a water effect ratio
3 study.

4 Q. Why doesn't Ecology simply require hardness
5 sampling in the permit?

6 A. Because when we issued the permit it wasn't
7 in there, so we're correcting that now by putting it in
8 the water quality certification.

9 Q. Ecology can modify the permit any time it
10 wants to, can't it?

11 A. That's true.

12 Q. And Ecology has an obligation to do so if
13 necessary to protect water quality, does it not?

14 A. And there's a number of avenues available to
15 Ecology to get that data, and the avenue that we chose
16 to take to get that data is through the water quality
17 certification requirement for a water effects ratio
18 study.

19 Q. Isn't the avenue that Ecology chose to wait
20 until the next permit cycle?

21 A. No. I just told you that we have the
22 requirement for a water effects ratio study in the
23 water quality certification which would get us this
24 hardness data.

25 Q. What is the purpose of the water effects

1 A. I don't know.

2 Q. Isn't it true that Ecology does not want to
3 know whether the Port's discharges comply with water
4 quality standards?

5 A. No. That is categorically no.

6 Q. Wouldn't it be easy to find out simply by
7 sampling dissolved fractions of metals and hardness in
8 the receiving water?

9 A. And that's what the water effects ratio study
10 requires them to do.

11 Q. You don't need a water effects ratio to get
12 that information, do you?

13 A. You need it in its totality to answer a lot
14 of other questions.

~~15 Q. But not these questions? For over ten years
16 Ecology has avoided requiring the Port to sample
17 hardness in the receiving waters --~~

~~18 MR. YOUNG Object. Argumentative.~~

~~19 Q. (BY MR. POULIN) -- isn't that true?~~

~~20 A. I'm sorry, what's your -- the point you're
21 trying to make is really lost on me.~~

~~22 Q. If Ecology really wanted to know if water
23 quality standards in the receiving waters at Sea-Tac
24 International Airport were being exceeded, wouldn't it
25 be much easier to require the Port to measure the~~

1 dissolved fraction of metals and hardness in the
2 receiving water instead of embarking on a complex WRS
3 study that's not needed?

4 A. Well, I don't agree with your
5 characterization of this at all. Ecology does want to
6 know and has made honest and forthright inquiry of what
7 the actual impacts of stormwater is from the Port of
8 Seattle facility. And I take great offense that you're
9 implying that somehow Ecology wants to keep itself in
10 the dark. That is 180 out from the way I know Ecology
11 goes about its business.

12 MR. POULIN: I'd like to introduce a new
13 exhibit.

14 (Deposition Exhibit No. 138 was marked for
15 identification.)

16 Q. (BY MR. POULIN) Exhibit 138 is a copy of a
17 certified letter that the Citizens Against Sea-Tac
18 Expansion organization sent to the Port of Seattle and
19 Director Fitzsimmons of Washington Department of
20 Ecology as well as relevant personnel in the regional
21 and national offices of EPA stating their notice of
22 intent to file suit for violations of toxic water
23 quality criteria for copper, lead and zinc, dated
24 September 7, 2000. And the exhibit also includes a
25 cover letter to Raymond Hellwig, director of Ecology's

1 letter, Exhibit 138 identifies 75 distinct violation
2 of water quality standards documented in the Port's
3 1999 Annual Stormwater Monitoring Report alone, and
4 that's based on sampled and reported metals
5 concentrations with contemporaneous hardness
6 information.

7 MR. REAVIS: I guess the document speaks for
8 itself. I'm not sure there was a question in there
9 anyway.

10 MR. POULIN: There hasn't been yet.

11 Q. (BY MR. POULIN) Can you tell me what action
12 you took when provided a copy of this letter during
13 your tenure as the facility manager of Sea-Tac?

14 A. I'm not sure that this letter -- this was a
15 notice of intent to sue that was filed against the Port
16 of Seattle, and I fail to see how that -- because this
17 is a third party -- or notice of intent of a third
18 party to take a Clean Water Act citizen suit against
19 the Port of Seattle, I'm unclear as to how that is
20 supposed to compel me to take some action on that.
21 In fact, you know, we are instructed not to interfere
22 with third party lawsuit actions.

23 Q. Did the Department -- did you consider taking
24 any enforcement action against the Port using your
25 authority under state and federal law?

1 Northwest regional office, and Tom Luster, then in the
2 permit coordination unit of Ecology.

3 Have you seen any part of this exhibit
4 before?

5 A. I think I have, yes.

6 Q. Could you please describe the circumstances
7 in which you saw this exhibit?

8 A. I believe I saw a carbon copy of the notice
9 of intent to file suit under the Clean Water Act,
10 carbon copy of the notice that was given to Port of
11 Seattle.

12 Q. I believe you testified earlier that at the
13 time, you were the unit supervisor of industrial permit
14 unit in the Northwest regional office; is that right?

15 A. At the time of this letter?

16 Q. Yes.

17 A. Of this notice of intent to file suit?

18 Q. Yes.

19 A. Yes, in September of 2000 I was a supervisor
20 in the industrial permit unit.

21 Q. And were you also the facility manager at
22 Sea-Tac at the time, Sea-Tac International Airport?

23 A. I believe I was filling in as the facility
24 manager then too.

25 Q. As described in the cover letter, the notice

1 A. Consider when? Because I mean, we've
2 considered and taken enforcement action against the
3 Port of Seattle on a number of occasions.

4 Q. I'm referring to enforcement action
5 addressing the violations identified or alleged in this
6 letter.

7 A. Yes, we did look at the information provided
8 in this letter. I think it also prompted me to go back
9 and review the permit and their annual water quality
10 monitoring reports and also to review actions that the
11 Port of Seattle had taken in working on the data that
12 they were developing in the stormwater monitoring
13 reports and to determine if some type of compliance or
14 enforcement action is warranted. I think I did
15 consider that at the time.

16 Q. And what was the result of that review?

17 A. As I recall, my thought processes at the time
18 were that the type of source control efforts that the
19 Port was going through and the types of actions that
20 they were taking to track down sources of these metals
21 in their stormwater, and in particular sources of zinc,
22 and then the control measures that they were putting
23 place to control those sources of zinc into their
24 stormwater discharges I felt was the type of
25 responsible -- or the type of response that we were

1 looking for from the Port. That is, that as their
2 monitoring data would show a problem in a particular
3 stormwater drainage, they then put investigation into
4 effect at the Port to determine where these sources
5 were at and then take measures to, where possible,
6 control those sources.

7 And the particular instance I remember is
8 that they were using their stormwater monitoring
9 results to track down, and track down rather
10 effectively, I believe, a zinc -- a roof on a building
11 on the north end of the airport. And then they
12 moved -- and this is my evaluation -- I thought they
13 moved rather expeditiously to control that source.

14 Q. What have they done to control that source of
15 zinc from rooftops?

16 A. My recollection is that they are going to put
17 some inert coating on that roof so that you don't have
18 the metals/zinc runoff into that. I'm not the permit
19 manager right now so I don't know if that's actually
20 been put into effect.

21 Q. Well, you just described the Port's actions
22 as rather expeditious. Do you know whether it's taken
23 place yet?

24 A. Expeditious in terms of tracking down the
25 source.

1 Q. But not expeditious in terms of implementing
2 a fix?

3 A. I don't know if they've implemented the
4 recommended source control measures to finally
5 eliminate it as a source.

6 Q. You don't know the schedule they've proposed
7 to retrofit the roof or the coating?

8 A. I don't know.

9 Q. What actions have they taken to address the
10 copper?

11 A. Well, some of the actions that they've
12 proposed to address the copper, where they've been able
13 to find a source problem with the copper, and if it's a
14 source that can't be easily ameliorated like they could
15 with the zinc roof, then their proposal is to route
16 those type of drainages into their wastewater
17 industrial treatment system.

18 In the case where they can't effect adequate
19 source control, they propose in their stormwater
20 management plan to upgrade treatment, stormwater
21 treatment being used for those areas.

22 Q. Isn't it true that one source of copper in
23 stormwater runoff at Sea-Tac is the runways?

24 A. That's a source area. But where that copper
25 is originating from, it could be a number of different

1 sources of where it's originating from. It could be
2 from aircraft tires, it could be -- copper is such a
3 ubiquitous metal that sometimes its anybody's guess as
4 to where it could be coming from. It could be actual
5 air deposition.

6 Q. Isn't it known that the non-construction
7 stormwater runoff from the runways includes elevated
8 levels of copper?

9 A. Yeah, they have levels of copper that are
10 similar to what you find in other urban stormwater
11 sources. And if you look at the data from other urban
12 stormwater sources, the levels of copper is actually
13 lower from the runway runoff than it would be for
14 runoff from a city street.

15 Q. Isn't it true that the levels of copper in
16 the runway area of runoff at Sea-Tac are higher than
17 the levels of copper in other stormwater runoff areas
18 at Sea-Tac that don't include runway runoff?

19 A. I don't know. I'd have to go back and look
20 at the data.

21 Q. What's the source of lead in the stormwater
22 runoff at Sea-Tac?

23 A. I don't know. In all earnest, I'd be curious
24 if you knew what the source of lead is.

25 Q. Well, if I understood the sense of your

1 previous response, you seemed satisfied with the source
2 control efforts that the Port has suggested to address
3 these metal concentrations. And if you don't know
4 where the lead comes from, I'm wondering how you could
5 be satisfied with their proposal to address the
6 problem.

7 A. Well, is lead a problem?

8 Q. Well, this Exhibit 138 identifies 21
9 violations of Washington's acute and chronic water
10 quality criteria for lead on Page 3 of the notice of
11 intent to sue. And that's from three different storm
12 drains at Sea-Tac Airport.

13 A. (Witness reviewing document). Well, my
14 recollection at the time is what I was really focusing
15 in on were the continual problems we were seeing with
16 copper and zinc, and I have not thought as hard on
17 lead.

18 And I think one of the things that may be
19 slightly flawed in this analysis that was done, what's
20 being reported back here is the total recoverable lead
21 discharge. And I don't believe that that -- and I
22 could be wrong, but I don't believe that that takes
23 into account the translator for lead which would tell
24 you what the actual dissolved portion of that total
25 recoverable lead value is.

1 Q. Isn't that another footnote DD issue?

2 A. Yeah, footnote DD gets in to that.

3 Q. That's Exhibit 137?

4 A. Uh-huh.

5 Q. Didn't you agree earlier that the total

6 recoverable value is acceptable and useful under the

7 criteria when seasonal partitioning data is not known?

8 A. Yeah, but again, it goes with the whole

9 sentence there that you're determining that value

10 through using conversion factors incorporated in the

11 criterion equations. So for lead, there's a -- when

12 you have the total recoverable value of lead measured,

13 you're then putting a translator to that, and then

14 that's what you compare to the actual criterion. Just

15 looking at this again after a couple of years, it looks

16 like that might not have been done here.

17 Q. Are you retracting your previous agreement

18 that footnote DD allows you to use total recoverable

19 metals in the conversion factor?

20 MR. YOUNG: I object. It mischaracterizes

21 the previous testimony.

22 A. No.

23 MR. YOUNG: Go ahead.

24 A. No, that's not what I'm saying. What I'm

25 saying is if you again read that whole sentence, "When

1 And it doesn't say that that -- it's not

2 expressed in there that then those values were further

3 back-calculated using the conversion factor from our

4 standards. It appears to me as if this column was

5 generated just using the raw data that was reported out

6 of the Annual Stormwater Monitoring Report which were

7 simply the total recoverable values.

8 Q. Isn't it true that the conversion factor

9 identified in footnotes Q and R in WAC 173-201A-040 is

10 a factor that's applied to adjust the applicable

11 numeric criteria, not the sample value?

12 A. You put the translator in front of that total

13 recoverable value -- okay. I don't want to get into

14 it. Do we have to get into a technical discussion?

15 MR. YOUNG: You have to answer his question.

16 A. I'm sorry, I'm --

17 Q. (BY MR. POULIN) Yeah. In other words, you

18 don't use the sample data in determining what the

19 criteria is under footnote Q or R, do you?

20 A. Okay, you're right, I'm wrong.

21 Q. So that basis you identified for discrediting

22 the apparent lead violations reported here is mistaken?

23 A. I'm mistaken.

24 Q. Did you take this issue up with the Port?

25 A. What issue?

1 this information is absent, those metals criteria shall

2 be applied as total recoverable values, determined by

3 back-calculation, using the conversion factors

4 incorporated in the criterion equations." And one of

5 the conversion factors that enters into this, and it

6 appears that it was not applied to this column on total

7 recoverable lead, the column marked Total Recoverable

8 Lead Discharge, is that it doesn't appear to me as

9 though that conversion factor was applied to those

10 total recoverable lead values.

11 Q. Why do you say that?

12 A. Because it appears that --

13 Q. And let me clarify. You're referring to the

14 far right-hand or sixth column of information on Page 3

15 of the notice of intent to sue in Exhibit 138?

16 A. Yes.

17 Q. Why do you assert that the conversion factor

18 was not correctly applied in generating those values?

19 A. Because I'm just going on the information

20 presented, and the column is headed TR, which I assume

21 is for total recoverable, lead discharge. And there's

22 footnotes on there of 1 and 4, 1 being from 1999 Annual

23 Stormwater Monitoring Report, Appendix B and Appendix

24 D; and then footnote 4, values stated in micrograms per

25 liter.

1 Q. The issue of the alleged ongoing and

2 continuing violations of water quality standards for

3 copper, lead and zinc as identified in this notice of

4 intent to sue. Did you ever say, Hey, we've got a

5 problem, we've got to get to the bottom of this?

6 A. Yes, on a number of occasions. And again, at

7 the time that I was the facility manager for the Port

8 or acting as the facility manager of the Port, I was

9 aware of what was coming through on their Annual

10 Stormwater Monitoring Reports, and I was satisfied with

11 the steps that the Port was taking to address and solve

12 those problems for these -- especially for two

13 particular metals, for copper and zinc, in those

14 discharges.

15 Q. I'm confused. You said you didn't know what

16 the source of the copper was.

17 A. No, I don't think I said I didn't know what

18 the source of the copper was. I suspected that one of

19 the sources of copper was probably in the --

20 Q. Aircraft tires?

21 A. Aircraft tire.

22 Q. Well, let's look briefly at the permit fact

23 sheet, Exhibit 136, on Page 27.

24 A. What was the page again?

25 Q. Page 26, I meant to say. But before we focus

1 on that, this fact sheet is as old as the permit
 2 itself, isn't that right? In other words, the fact
 3 sheet came out in 1998?
 4 A. Correct, along with the permit.
 5 Q. And in the discussion of the Stormwater
 6 Receiving Environment Monitoring Report, the fact sheet
 7 discusses the June 1997 report --
 8 A. That was required by the previous permit.
 9 Q. Yes, and states right up front in the second
 10 sentence, "The study found that concentrations of total
 11 recoverable copper in ambient waters both upstream and
 12 downstream of the stormwater discharges generally
 13 exceeded the water quality criteria."
 14 A. Uh-huh.
 15 Q. Boom, right there. So the water quality
 16 criteria for copper is not being met in the receiving
 17 water, and Ecology acknowledges that four years ago
 18 based on information it had five years ago.
 19 A. Uh-huh, yes.
 20 Q. And you've just stated that you believe one
 21 of the sources of copper is aircraft tires that work
 22 their way into the stormwater; is that right?
 23 A. Right, as they take off and touch down on the
 24 runway.
 25 Q. And the Port has proposed to build another

1 runway which will have more aircraft landing and
 2 depositing aircraft tire rubber on new impervious
 3 surface and resulting in additional copper-tainted
 4 stormwater runoff.
 5 A. But the Port has also proposed to continue to
 6 put in all necessary treatment BMPs since it's highly
 7 unlikely that they can adequately control that source,
 8 that particular source, that is, aircraft tires. But
 9 that they would in their stormwater management plan for
 10 the facility move to put in the necessary treatment
 11 BMPs to control for that copper runoff, to treat for
 12 that copper runoff.
 13 Not only is it in their stormwater management
 14 plan, but that is the intent behind our permit as well,
 15 is I'll go back to a statement I made earlier, is that
 16 with stormwater treatment controls, the permit drives
 17 adaptive management on stormwater treatment.
 18 Q. And you think the permit is effective in
 19 doing so without any other effluent limits on
 20 non-construction stormwater?
 21 A. The idea of the permit is it's an iterative
 22 process, and I didn't say that it's effective in doing
 23 it without effluent limits for stormwater. This permit
 24 and then subsequent permits will build towards setting
 25 stormwater effluent limits for their non-construction-

1 related stormwater discharges.
 2 Q. And this iterative process involves permits
 3 that last for five years. How many permit cycles do
 4 you anticipate it will take to impose effluent limits
 5 that are sufficient to achieve compliance with water
 6 quality standards?
 7 A. Well, I believe our standards actually allow
 8 us to put a facility on a 12-year compliance schedule.
 9 I'm hoping that we're able to do it in less time than
 10 that.
 11 Q. And that's 12 years starting when?
 12 A. That would be 12 years starting when we put
 13 on what we know to be final stormwater effluent limits.
 14 Q. So it could be as much as 12 years from a
 15 date that hasn't even happened yet?
 16 A. That's my understanding, yes.
 17 Q. What's your understanding of the limit on how
 18 much time Ecology has to impose effluent limits?
 19 A. For stormwater?
 20 Q. Yes.
 21 A. The only thing that we're required to do for
 22 stormwater right now, at least from EPA, the only thing
 23 we're required to do for stormwater right now is to put
 24 BMPs on those. So we're I think considerably ahead of
 25 the game here in that for at least moving towards

1 putting water quality-based limits, through the
 2 information that we're gathering, we're at least moving
 3 towards putting water quality-based limits into effect
 4 for this facility.
 5 Q. Let me see if I understand you. Despite
 6 known exceedances of state water quality criteria for
 7 copper that are identified in the fact sheet, your
 8 understanding is that Ecology is under no obligation to
 9 impose any effluent limits on copper stormwater runoff
 10 and that requiring BMPs is good enough?
 11 A. No, I'm saying that EPA says it's good enough
 12 to require BMPs. Ecology is actually moving ahead to
 13 say, we think it takes more than BMPs to truly address
 14 the impacts, the water quality impacts of stormwater
 15 discharges. That's why we're trying to logically and
 16 intelligently move ahead to put stormwater effluent
 17 limits, stormwater water quality-based effluent limits
 18 into effect for this facility as well as a number of
 19 other industrial facilities where stormwater's a
 20 problem.
 21 Q. What happened to Ecology's obligation to set
 22 permit limitations and conditions as necessary to avoid
 23 violations of water quality standards now, not 12 years
 24 from now or 12 years from some future date?
 25 A. Well, we're fulfilling that obligation by

1 putting in the type of requirements that moves us
2 towards that level of compliance. One cannot simply
3 turn a switch or say, okay, here are the effluent
4 limits, make it happen, and just by doing that have it
5 be so. I mean, that is not dealing in reality.

6 The reality is is that you have a facility
7 that discharges large amounts of stormwater, large
8 amounts of stormwater that are receiving some
9 treatment, but we're finding that in some cases it's
10 not receiving all the necessary treatment. And so what
11 we have to do, if we're going to do anything at all and
12 not simply fold our tents up and go away, is build a
13 system that further expands our knowledge of what is
14 the characteristics and what are the impacts of these
15 stormwater discharges, and then further, how we can put
16 the sort of source control changes into effect, how we
17 can maximize all our treatment BMPs at this facility,
18 and then to see if we even need to go further in
19 developing some innovative best management practices
20 treatment BMPs to really solve the water quality
21 problem that we're confronted with.

22 MR. POULIN: I'd like to introduce a new
23 exhibit, but before we do that, let's take a break.

24 (Recess taken.)

25 Q. (BY MR. POULIN) Let's go back on the record,

1 And the trend that I've seen, and I'm going
2 to put the caveat on this that this is not any formal
3 type of analysis that I've done but this is a very
4 thumbnail type of trend analysis, that the trend that
5 have seen is that from the Port's Annual Stormwater
6 Monitoring Reports is that over the years, the trend
7 that I'm seeing is an improvement in the water quality
8 of their stormwater discharges. And again, I want that
9 understood that there's a fair number of qualifiers on
10 that.

11 Q. You've just said that the monitoring you
12 require the Port to do tells you something, but it
13 doesn't tell you the information necessary to determine
14 compliance, isn't that true?

15 A. Compliance with what?

16 Q. With the state water quality standards for
17 dissolved metals.

18 A. It helps us look at part of that picture.
19 And I will grant you that by not having the hardness
20 data on the receiving water submitted along with the
21 stormwater sampling that they're doing, that it leaves
22 that picture incomplete. But nevertheless, it does
23 tell us something as to what the characteristics of
24 that stormwater are and through the reporting that they
25 do in their Annual Stormwater Monitoring Reports, we

1 it's 2:35.

2 Mr. Fitzpatrick, you've testified that you
3 were satisfied that the source control efforts and
4 other actions that the Port has taken -- well, you're
5 satisfied with their approach.

6 I'd like to ask, if you don't know whether
7 the Port's discharges or the conditions in the
8 receiving waters comply with water quality standards
9 and you're not presently requiring the sampling and
10 monitoring necessary to determine such compliance, how
11 can you know whether things are getting better or will
12 get better?

13 A. I think part of your question, which was a
14 multi-part question, you said that we don't require
15 monitoring to determine if things are getting better,
16 and I would disagree with that. We do require
17 monitoring.

18 Q. My question is intended to refer to the kinds
19 of monitoring we discussed earlier, monitoring of
20 hardness, monitoring of instream quality.

21 A. Well, the types of monitoring we do require
22 does tell us something about the characteristics of
23 their stormwater discharges, and we can tell from that
24 monitoring whether that water quality is getting better
25 or if it's getting worse.

1 can tell if things are getting better or things are
2 getting worse. Now, there's a lot more that we need to
3 learn.

4 Q. Before we look at one of those Annual
5 Stormwater Monitoring Reports, let's look at the permit
6 requirement that requires the Port to generate an
7 Annual Stormwater Monitoring Report. It appears to me
8 that that's addressed in Permit condition S2.E. Please
9 tell me if you agree. That would be Page 17 of 52 in
10 Exhibit 3.

11 A. Yes, I'd agree.

12 Q. Let me ask your understanding as the former
13 permit manager and current section head for water
14 quality, under the first sentence of Permit Condition
15 S2.E, is the Port supposed to report a summary of the
16 results of both construction and non-construction
17 stormwater?

18 A. (Witness reading document). Are you talking
19 in the Annual Stormwater Monitoring Summary Report?

20 Q. Yes.

21 A. What they're supposed to report there is
22 monitoring that was done under S2.B which is -- S2.
23 monitoring requirements for non-construction
24 stormwater, or S3.E -- and it needs to include I
25 believe S3.E.

1 Q. And isn't it true that Permit Condition S3.E
2 requires the recording of results for each measurement
3 or sample taken, a requirement that embraces both
4 construction and non-construction stormwater?

5 A. Well, S3.E applies to all samples taken by
6 the Port, yeah.

7 Q. So then shouldn't their Annual Stormwater
8 Monitoring Summary include a summary of all stormwater
9 samples taken, not just the non-construction?

10 A. I would take it that they, at least in that
11 summary, be providing everything that's included there
12 under S3.E.

13 Q. Would you agree that that includes
14 construction stormwater samples?

15 A. Yeah, I'd agree. Yes, I'd agree.

16 Q. So the annual summary report generated to
17 satisfy Permit Condition S2.E should include all
18 stormwater sampling whether construction or
19 non-construction?

20 A. Now that I read this over again, I would have
21 to -- (Witness reading document.) Yeah, because it
22 says "stormwater monitoring conducted pursuant to
23 Special Condition S2.B or S3.E," and S3.E does apply to
24 all measurements taken. So I would think that would
25 include stormwater monitoring done at construction

1 indicating that this report would have been submitted
2 on October 1, 1999?

3 A. Yeah, it has to be submitted by October 1st.
4 That's probably why it's dated September '99.

5 Q. That was right about the time when you took
6 over as the permit manager?

7 A. Just right about then, yeah.

8 Q. At the outset, would you agree that this
9 Annual Stormwater Summary Report only summarizes
10 non-construction stormwater sampling?

11 A. No, I don't think I'd agree with that,
12 because they have another section in here, 4.7, Other
13 Results, which includes WET samples, non-representative
14 composites, field quality control samples, and then
15 also there's a section on outfall constructions.

16 So without having opportunity to review this
17 again in detail, you know, I wouldn't know whether I
18 could agree or disagree with you as to whether or not
19 there's results from construction activity included in
20 here.

21 Q. Looking briefly at Pages 29, 30, 31, do you
22 see any indication that these other results include
23 sampling of construction discharges?

24 A. (Witness reviewing document). Well, just
25 with my quick review of those pages that you point out

1 sites as well.

2 Q. Now, what happens to these reports when
3 they're submitted? First off, who are they submitted
4 to?

5 A. They're submitted to the permit manager for
6 review, and I believe they also copy -- these Annual
7 Stormwater Monitoring Reports, they put a copy of those
8 into the Burien Public Library for ease of public
9 access.

10 Q. Is this the kind of report that Ecology has
11 to approve or sign off on?

12 A. No, there's no approval required on this
13 report.

14 (Deposition Exhibit No. 139 was marked for
15 identification.)

16 Q. (BY MR. POWLIN) Exhibit 139 is a copy of the
17 Annual Stormwater Monitoring Report for Seattle-Tacoma
18 International Airport for the period July 1, 1998
19 through June 30, 1999, has a date of September 1999 on
20 it.

21 Have you previously reviewed this 1999 Annual
22 Stormwater Monitoring Report?

23 A. I believe I reviewed it soon after I came in.
24 That would be over, what is it now, two years ago.

25 Q. Am I correct to read Page 6 of the permit as

1 to me, I don't see under that Section 4.7, which is
2 entitled Other Results, anything referring to samples
3 from construction-related stormwater.

4 Q. Let's turn to Page 29 where there's a
5 discussion of WET testing, whole effluent toxicity.

6 A. Okay.

7 Q. It says in the second paragraph there under
8 4.7.1 that "WET testing bioassays used the two required
9 aquatic test species: Daphnia pulex" -- well,
10 paraphrasing, a waterflea, and the fathead minnow.

11 Who or what requires the use of those two
12 species, do you know?

13 A. I think you'd have to turn back to the NPDES
14 permit and the whole effluent toxicity testing, S10.

15 Q. Yes.

16 A. And it says there --

17 Q. I see here, Page 35 apparently answers the
18 questions on provision -- seems to kind of revert from
19 S10 to S9.

20 A. That's a typo in there.

21 Q. Appears to be a pagination error --

22 A. Yeah.

23 Q. -- of some sort.

24 A. Yeah, it's a heading error. It should
25 actually read S10, Acute Toxicity - Stormwater

1 (Continued). But you look under there, it says, "Acute
2 toxicity tests shall be conducted with the following
3 species and protocols," so.

4 Q. The reason I ask, in yesterday's deposition,
5 the King County water quality specialist stated that
6 she thought it somewhat curious that the fathead minnow
7 was used rather than a salmonid. Do you know why that
8 fathead minnow was selected?

9 A. I don't, I don't.

10 Q. Now, in this report, back to Page 29 in the
11 1999 report, it states, "Results from outfall SDN1
12 exhibited toxicity that appears to be attributable to
13 metals leaching from uncoated galvanized metal
14 rooftops. The Port is currently verifying the source
15 of toxicity so that this problem can be rectified in a
16 timely manner."

17 Now, isn't it true that SDN1 is a code that
18 designates a known outfall with a known drainage basin?

19 A. Yes. I believe it refers to stormwater
20 outfall, north stormwater -- or drainage basin on the
21 north part of the airport.

22 Q. And this report is over two years old, isn't
23 that right?

24 A. Yes.

25 Q. Let's introduce or take a look at a

1 MR. REAVIS: Did that last question say "as
2 of the year 2000"?

3 A. Actually, this is more of the year 2001,
4 wouldn't it be?

5 Q. (BY MR. POULIN) Well, my reference is to the
6 two reports mentioned in the parenthetical POS 2000b
7 and Tobiason and Logan 2000.

8 Do you know if either of those reports was
9 previously submitted to the Department?

10 A. I don't know. The references -- I don't know
11 because it's unclear to me what these references are.
12 If I had a better idea of what the references are, I
13 might be able to tell you.

14 Q. Now, the discussion in the next three
15 paragraphs refers in a couple of places to the
16 apparently high costs of reroofing or painting,
17 paraphrasing.

18 A. Could I have it established, this is the
19 first time I've seen this report. This report was
20 submitted to Ecology in September 2001. At that time I
21 was no longer the facility manager for the Port of
22 Seattle, so you're catching me at a cold start here.

23 Q. The question I wanted to ask is, given the
24 discussion here of the cost effectiveness of various
25 options, I wanted to have you explain your

1 previously introduced exhibit that's Exhibit No. 6.
2 I haven't given you a copy yet. If you look to Page
3 37 -- back that up. If you look to the bottom of Page
4 36 in this 2001 Annual Stormwater Monitoring Report
5 from Sea-Tac, the discussion two years later states
6 that, "Zinc associated with runoff from galvanized" --

7 A. I'm sorry. I'm just trying to establish the
8 times here. Okay, go ahead.

9 Q. Yeah, the Exhibit 139 is the 1999 report and
10 Exhibit 6 is the similar report two years later,
11 September 2001, which states on Page 36, "Zinc
12 associated with runoff from galvanized roofing
13 materials appears to affect only outfall SDN1. Unlike
14 SDE4, where several metal-roofed cargo buildings make
15 up a few percent of the total impervious area in the
16 subbasin, three similar cargo buildings comprise nearly
17 30 percent of the total impervious area drained by SDN1
18 (at the sampling station)." And skipping a sentence
19 then states, "Source-tracing indicated that the SDN1
20 toxicity was attributable to zinc."

21 So it sounds like the source of that zinc
22 problem has been identified as of last September or as
23 of the date of the year 2000 reports identified there,
24 would you agree?

25 A. Correct.

1 understanding of the extent to which cost is a factor
2 when Ecology decides what proposals are acceptable to
3 address known pollution problems.

4 A. Well, our standard under RCW 9048 is all
5 known available and reasonable treatment. And
6 "reasonable" does consider cost, it does factor in.

7 Q. And could you please explain to me how
8 that AKART, that so-called AKART of standard applies,
9 how it's used?

10 A. Well, this would be something that is done by
11 the facility manager, that the facility manager would
12 do what we call an AKART analysis. And they would look
13 at the available -- you know, the literature that's
14 available out there to see what type of remedies have
15 been brought to bear in the past for these types of
16 pollution control issues.

17 And, for example, if they were to find
18 through a review of the literature that reroofing or
19 recoating the rooftop is a generally accepted practice,
20 they would most likely require the Port to put that
21 remedy in place, unless the Port could demonstrate that
22 their alternative here of putting a treatment media
23 place effects the same level of control.

24 Q. Let's look at this 1999 annual reports
25 discussion of the metals in stormwater. If you look at

1 the discussion beginning on Page 22, first paragraph
2 states that, "All data reported below are for total
3 recoverable metals." And the first sentence of the
4 second paragraph explains that "The Washington water
5 quality standards for copper, lead and zinc are based
6 on the dissolved fraction of the metal."

7 A. Yes.

8 Q. Now, isn't it true that the same laboratories
9 that evaluate samples to determine total recoverable
10 metals could determine the dissolved fraction?

11 A. Yes. In most cases, yes.

12 Q. And all that would require would be a change
13 in their instructions to do so?

14 A. Well, it would require a change in the way
15 the sampling is done.

16 Q. How so?

17 A. Because in testing for dissolved metals, you
18 have to filter the sample to do a test for dissolved
19 metals. You're filtering through only the dissolved
20 species of the metal.

21 Q. Would that involve a change in the way the
22 sample is taken or a change in the way the sample is
23 processed?

24 A. It's a change in the way the sample's taken.
25 At least that's my understanding. The sampling

1 A. I'm not sure I understand your question.

2 Q. Well, this Section S2.G that you've
3 identified seems to suggest that there are several
4 sources of standards that could be used. I'm wondering
5 if you know which one is used. Is it the CFR
6 guidelines, is it the APHA guidelines, is it something
7 else?

8 A. I don't know and I wouldn't want to guess.
9 I'd have to go back and ask the current facility
10 manager to research that. In most cases, though,
11 people are following the sampling and analytical
12 methods prescribed in standard methods.

13 Q. We talked about whole effluent toxicity
14 testing. Is that something that the Port is required
15 to do on an annual basis under this permit?

16 A. Well, there's both acute and chronic whole
17 effluent toxicity testing that they do both on their
18 industrial wastewater discharge and on their stormwater
19 discharges. And if you're -- is your question
20 referring to stormwater?

21 Q. Yes, with reference to stormwater.

22 A. With reference to stormwater, in this permit
23 they were required to do the effluent characterization
24 for acute toxicity. And I believe for this permit that
25 effluent characterization was required once based on

1 procedure for dissolved metals is different from the
2 sampling procedures for total recoverable.

3 Q. If I remember correctly, you were uncertain
4 earlier as to where the permit dictates the required
5 procedures for sampling; is that right? Or do you know
6 where they are specified?

7 A. I think they're specified in the monitoring
8 portion of the permit. In S2, there's Sampling and
9 Analytical Procedures.

10 Q. That's on Page 18?

11 A. Page 18, right. If you look at the second
12 paragraph there, "Sampling and analytical methods used
13 to meet the water and wastewater monitoring
14 requirements specified in this permit shall conform to
15 the latest revision of the Guidelines Establishing Test
16 Procedures for the Analysis of Pollutants contained in
17 the 40 CFR Part 136."

18 Q. Do you know whether -- to finish that
19 sentence, it says, "or to the latest version of
20 Standard Methods for Examination of Water and
21 Wastewater," skipping a bit, "unless otherwise
22 specified in this permit or approved in writing by the
23 Department."

24 Do you know which procedures are approved at
25 present?

1 two acute toxicity tests. And it was toxicity tests
2 done on composite stormwater samples from outfalls 002,
3 005, 006, and 011.

4 Q. Now, I note those four outfalls do not
5 include -- do not appear to include SDN1, the outfall
6 with the zinc problem; is that right?

7 A. I wouldn't know whether subbasin SDN1 is
8 tributary to those outfalls.

9 Q. If you'll look to page -- for example, if
10 you'll look to Page 119 of Exhibit 139, it's a
11 spreadsheet very near to the end of the exhibit, you
12 will see that in the last full column to the right of
13 this spreadsheet, which is identified as SDE4 Source
14 Tracing in Multiple Upstream Manholes, the Port is
15 actually reporting here hardness data.

16 A. Yes.

17 Q. And if you turn to the page back to SDE4 --
18 I'm sorry, if you turn the page back to the previous
19 page, 118, you'll see that there towards the center
20 there's some hardness information reported in the
21 column to the left of PH.

22 A. Yes.

23 Q. Turning to, for example, Pages 113, 115, 117
24 as you like, you will see these spreadsheets, which
25 towards the right report sampling results for copper,

1 leads and zinc do not include hardness, in contrast
2 with that first page we looked at, 119, which includes
3 hardness data but no results for copper, lead and zinc.
4 In that respect 119 is the same as 118.

5 I'd like to know if you're aware that
6 following Citizens Against Sea-Tac Expansion's use of
7 the 1999 Annual Stormwater Monitoring Report, Exhibit
8 139, to correlate copper, lead and zinc data with the
9 hardness reported in the annual report, the Port of
10 Seattle stopped including hardness data in its annual
11 report?

12 A. I'm not aware of that.

13 Q. In your understanding of the permit
14 requirements that obligate the Port to generate an
15 annual report summarizing the results of its stormwater
16 sampling including as stated in Permit Condition S3.E,
17 the results of all analyses, are you aware of any
18 authority that would allow the Port to withhold
19 hardness data from the annual report?

20 A. They could not withhold hardness data from
21 that. If they were doing the sampling, if they were
22 taking the samples for hardness, it's my understanding
23 that they would have to include it as part of their
24 annual report.

25 Q. So if we assume that the Port is complying

1 A. What pages are you referring to?

2 Q. Well, as an example, I would refer you to
3 Page 14 of the 1999 report that's Exhibit 139.

4 A. Page 14?

5 Q. Yes.

6 A. Well, to make the comparison between the
7 water quality of their stormwater runoff to that from
8 other stormwater studies I think is a comparison that
9 they are welcome to make. I mean, it's advancing
10 information, advancing knowledge of what you see in
11 other stormwater sources, other stormwater sources from
12 City of Bellevue in this case, from studies done by
13 Metro in the Seattle area, and then also what's come
14 out of national studies like under the column of NURP.

15 Q. Well, perhaps these questions should be
16 directed to the Port and perhaps they will be, but
17 looking at Table 4, that table doesn't even include
18 Sea-Tac's discharges, does it?

19 A. No.

20 Q. Doesn't this compare everybody but Sea-Tac?

21 A. That's correct. I'm taking it for what
22 they're calling it, stormwater quality comparators.

23 And I take it as it was authored is, here's some
24 information for Ecology to consider on what other
25 stormwater studies have shown. I guess what I'm saying

1 with its obligations, does its failure to report any
2 hardness data suggest that it has stopped monitoring or
3 sampling hardness data?

4 A. If they're complying with their obligations,
5 if they're meeting the obligations of their NPDES
6 permit, I would draw the conclusion that they have
7 stopped taking hardness samples and running analysis
8 for hardness.

9 Q. And would you agree that they're able to do
10 so without violating the permit because the permit does
11 not require them to sample or report hardness?

12 A. The permit does not require them to sample or
13 report hardness.

14 MR. POULIN: It's 3:32. I'd like to take a
15 brief break, if we could.

16 (recess taken.)

17 Q. (BY MR. POULIN) It's 3:37.

18 Before we move on from the Annual Stormwater
19 Monitoring Report, the Port's discussion of metals
20 focuses heavily on comparisons of the water quality in
21 the Port's discharges from Sea-Tac Airport with other
22 places rather than comparing its own water quality with
23 state water quality standards.

24 Is that approach acceptable to the
25 Department?

1 is I'm taking it at its face value. I'm not trying to
2 read anything into it, any intent into it.

3 Q. What do you make of this footnote (f) on
4 Table 4?

5 A. What page again, please?

6 Q. This is Page 14, Table 4. In discussing the
7 Washington state standard and the far right-hand
8 column, the table actually generates a state standard
9 for copper, lead and zinc but attaches a footnote (f)
10 which says, "Total recoverable metals. Washington
11 state acute standards expressed as total recoverable,
12 calculated at 28 micrograms per liter of hardness using
13 Ecology's 'TSDCALC6.XLW' spreadsheet."

14 A. Uh-huh.

15 Q. Does Ecology have a program that identifies
16 the applicable water quality standard at different
17 hardness values?

18 A. Yes. And I believe at the time that they did
19 this report in 1999, the version of that program was a
20 TSDCALC6.XLW spreadsheet.

21 Q. Now, it just strikes me as odd when the Port
22 has a demonstrated ability to create a nice summary
23 table including easy-to-compare information and
24 juxtaposes that with the Washington state standard,
25 they omit the relevant information from Sea-Tac from

1 that table, and any effort to derive that information
2 from this report requires a great deal of scratching
3 and digging through the text of the discussion in all
4 manner of different parts of the report.

5 MR. YOUNG: I object to the form of the
6 question. It's not even a question.

7 Q. (BY MR. POULIN) That's not very helpful, is
8 it?

9 A. I don't know what I'm being asked, Rich.

10 Q. Well, you stated earlier that you're
11 satisfied that what the Port's doing is making things
12 better. And looking at these reports, I have to ask,
13 how can you possibly know? How can you easily compare
14 what's being packaged in this format with the previous
15 year's report?

16 A. Well, again, I'll go back to what I
17 previously said. As you go year to year and look at
18 the actual quality of the stormwater effluent, it's my
19 evaluation, and again with the qualifier that I haven't
20 done a formal analysis on this, but my thumbnail sketch
21 evaluation is that there is a trend of improving
22 stormwater quality at the outfalls that they're
23 monitoring.

24 And I'll go further and say that I believe a
25 reason for that improvement are the source control

1 efforts going on by Port of Seattle staff at the
2 airport. And I believe they've done a very credible
3 job at when they found that they were having fecal
4 coliform problems in one particular subdrainage, of
5 tracking down the source of that fecal coliform to a
6 Dumpster that was being improperly managed, and putting
7 controls on that.

8 Another instance I recall is they've found --
9 and this refers to fecal coliform again -- where waste
10 from the aircraft, where that was being managed or
11 disposed of didn't have tight enough stormwater
12 controls on that, they got on top of that.

13 In the case of deicing controls, they've in
14 my opinion successfully tracked down where the real
15 problem subdrainages are for aircraft deicing runoff.
16 And they're taking steps, in some cases I believe
17 they've already completed, in one particular case of
18 rerouting those problem drainages into the industrial
19 wastewater system.

20 So I guess perhaps I choose to look on these
21 reports as the glass being half full rather than half
22 empty.

23 Q. We've talked considerably about copper today,
24 but looking at the discussion of copper here, the first
25 thing they say on Page 33 of Exhibit 6 is, "Overall, in

1 312 samples in the past six years, the median copper
2 value for all outfalls sampled is," paraphrasing, blah,
3 blah, blah.

4 Now, they're taking a composite of samples
5 from over six years, but more than that, they're
6 conglomerating all outfalls sampled, some of which may
7 not have any copper at all. Where's the discussion
8 that focuses on the places where copper is actually a
9 problem?

10 A. I don't know where that is in this particular
11 report. As I told you before, I have not had
12 opportunity to review the 2001 report. Is that the one
13 that you're quoting from? Which report are we on?

14 Q. That most recent quote was indeed from the
15 2001 report.

16 A. Exhibit 6, okay.

17 Q. The next thing they say there, and this very
18 closely tracks the discussion in the 1999 annual report
19 on Page 23 --

20 A. Are we on Page 23 of the 2001 report?

21 Q. Let's look at Page 23 of the 1999 report.

22 A. Okay.

23 Q. There they discuss 225 samples in the past
24 five years, but in the next sentence in both, they
25 discuss airfield and landside outfall data in this case

1 are similar.

2 Well, perhaps we should move on. We haven't
3 talked about fecal coliform. Isn't it true that fecal
4 coliform has been a problem area for some of the Port's
5 discharges?

6 A. Yes. On occasion, yes.

7 Q. And isn't it true that some of the Port's
8 discharges have violated the water quality criteria for
9 fecal coliform?

10 A. Yes.

11 Q. Isn't it also true that the receiving waters,
12 one of the receiving waters is on the 303D list --

13 A. Yes.

14 Q. -- for fecal coliform?

15 A. Yes. I believe that's Des Moines Creek.

16 Q. Does Ecology have any evidence that the BMPs
17 the Port has proposed to address stormwater runoff are
18 effective to reduce concentrations of dissolved metals?

19 A. There is some evidence to support that for
20 some of the treatment BMPs that the Port has proposed,
21 for example, compost media filters and other types of
22 filter media treatment BMPs, that there is treatment
23 for -- that they can successfully treat and remove
24 dissolved metals.

25 Q. Do you know what the relative degree of that

1 success is, what portion of dissolved metals you might
 2 expect to be removed?
 3 A. I can't recall what the specifics of
 4 performance of these treatments are other than that in
 5 the suite of different treatment BMPs that the Port is
 6 considering or has into effect, that they do have --
 7 some of those treatment BMPs do have the capability of
 8 treating for dissolved metals, and further, that they
 9 also have the ability to treat for particulates, metals
 10 in the particulate form.
 11 Q. During your term as the acting permit or
 12 facility manager for the NPDES permit at Sea-Tac
 13 International Airport, did you take any enforcement
 14 actions against the Port of Seattle?
 15 A. I don't know if it was during my term as the
 16 facility manager or whether I was the -- in my capacity
 17 as a unit supervisor, but I do recall a couple of
 18 occasions when we took enforcement actions against the
 19 Port of Seattle; one for their construction operation
 20 at the north employees parking lot, and the other for
 21 their operation of a cement batch plant.
 22 Q. Have you ever imposed a fine on the Port?
 23 A. Yes.
 24 Q. For violations?
 25 A. On two occasions that I can recall.

1 vaults.
 2 Q. How long does concrete have to cure before
 3 the pH issue is no longer a problem?
 4 A. I do not know. That's something that's -- as
 5 your source from King County tells you, it's something
 6 they've recently become aware of. Like a lot of stuff
 7 in stormwater, there's always some new problem popping
 8 up.
 9 Q. Does Ecology know institutionally or is it an
 10 unresolved issue?
 11 A. I don't know, when you say does Ecology know
 12 institutionally.
 13 Q. When you say you don't know, do you mean you
 14 personally don't know, or are there other people in
 15 Ecology that probably do, or do you think no one knows?
 16 A. What I'm aware of is that our stormwater
 17 inspector, Ron Devitt, through the course of his duties
 18 became aware of this as recently as -- I'm talking
 19 about in March of 2001. And he is working very
 20 diligently, as a number of people in Ecology do, to
 21 raise attention on this matter, that this is a water
 22 quality concern.
 23 But again, this points out that everyone is
 24 in the learning process on stormwater. Anyone that
 25 says that they know everything there is to know about

1 Q. Do you recall the violation and/or the
 2 amount?
 3 A. I think for the violation at the cement batch
 4 plant, I believe that was a 6- or \$8,000 fine, and I
 5 think for the north employees parking lot violations,
 6 that was somewhere between 16- and \$20,000. I'm sorry,
 7 I'd have to go back and actually review the enforcement
 8 fines.
 9 Q. Your mention of concrete reminds me that the
 10 King County water quality specialist noted that King
 11 County has recently become aware of pH problems that
 12 can result from improper curing of stormwater vaults.
 13 Are you aware of that issue?
 14 A. Yes. Actually, we're working along with King
 15 County on that problem. It was one of our water
 16 quality inspectors who first brought that to a number
 17 of people's attention, Ron Devitt, D-e-v-i-t-t.
 18 Q. The comprehensive stormwater management plan
 19 associated with the third runway and master plan update
 20 projects proposes the construction of a number of new
 21 stormwater detention vaults; is that right?
 22 A. Uh-huh.
 23 Q. Will they be concrete vaults?
 24 A. Some I believe will be concrete. I believe
 25 the wet vault facilities proposed will be concrete

1 stormwater is dead wrong or a fool.
 2 Q. I want to briefly address the recent permit
 3 modification relating to construction-related
 4 stormwater discharges in the Walker Creek and Gilliam
 5 Creek basins. I believe you agreed earlier that the
 6 provisions of --
 7 A. Can I take a quick head break?
 8 MR. POULIN: Sure, yes.
 9 (Recess taken.)
 10 MR. POULIN: Perhaps we should discuss
 11 timing. I'm happy to continue today as late as you all
 12 would like. I'm fairly convinced that unless you're
 13 interested in going quite late, I'm not going to make
 14 it through all the subject matter that I have. But
 15 again, I'm happy to press on.
 16 MR. YOUNG: I'm inclined to say that at 5 the
 17 deposition as far as we're concerned is concluded. And
 18 if you want to add more time, you'll have to ask the
 19 Board for more time.
 20 MR. POULIN: Well, I believe under the civil
 21 rules, the deposition is open-ended until its purposes
 22 have been satisfied. And your obligation will be to
 23 move for protective order if you believe that something
 24 about the conduct of the deposition has been
 25 unacceptable or in conflict with the rules.

1 MR. YOUNG: Well, first of all, you all said
2 you needed one day, which is what you will have at
3 5:00. Second of all, we have a tremendous number of
4 depositions that need to be conducted in this case
5 before the discovery cutoff in two weeks, and so I
6 don't believe that it makes sense to have him come back
7 for another day.

8 I also would note that your clients, the ACC,
9 have taken a position that it's unreasonable for their
10 experts to come back for two days, so I think that it's
11 unreasonable for your experts to come for two days,
12 it's unreasonable for our experts to come in two days,
13 particularly when you indicated you would only need one
14 day in the first place. So I'm willing to go till 5 or
15 5:30 or even 6:00, but we're not coming back for a
16 second day.

17 MR. POULIN: Well, I am not personally aware
18 of the discussions in which you say ACC indicated that
19 it only needed one day. I'd be surprised if they
20 closed the door on going longer. It certainly is not
21 what happened with the Kenny deposition or the Kelly
22 Whiting deposition, both of which have been continued.

23 MR. YOUNG: Kelly Whiting is coming back
24 solely for the purpose of questioning with regards to
25 his review of the December 2001 stream flow plan,

1 was the time that you needed, so this is what we
2 scheduled.

3 MR. POULIN: Well, I guess we'll have to go
4 back to the deposition notice and see what it says. I
5 would note that with respect to Kelly Whiting, of
6 course he's not represented by the Attorney General's
7 office, and I would note that he has yet to be cross-
8 examined by either the Port or by Citizens Against
9 Sea-Tac Expansion. So I don't believe that his
10 deposition has been concluded or will be limited to the
11 issues that you've described.

12 MR. YOUNG: Oh, yes, it's quite clear, it's
13 on the record. You can review the record.

14 MR. POULIN: Oh, I understand you stated
15 that; I was in the room.

16 MR. YOUNG: And Rachel agreed to that. She
17 subsequently, in fact, wrote me a letter saying that
18 yes, that's what we agreed to, and she had a couple
19 additional subjects she wanted to talk about which we
20 can discuss. But that is what the agreement was. Now,
21 all of this is just wasting time.

22 MR. POULIN: Sure. Let's not waste
23 additional time.

24 Q. (BY MR. POULIN) When we spoke previously
25 earlier today, I believe you agreed that the

1 otherwise that deposition is concluded.

2 We can conclude Kelly Whiting in one day, we
3 can conclude Ray Hellwig in one day, we can certainly
4 conclude Kevin Fitzpatrick in one day. The Ann Kenny
5 deposition was carried over for another day because Ann
6 Kenny is the author of the 401.

7 MR. REAVIS: Let me say that no one really
8 agreed to that continuance. It was not finished.
9 Mr. Stock said he would like to do another day, but
10 there was no agreement among counsel to that effect,
11 that that was acceptable.

12 MR. YOUNG: We're not coming back for another
13 day, it's as simple as that.

14 MR. POULIN: Is either of you aware of any
15 agreement that depositions would not take more than one
16 day?

17 MR. YOUNG: You all said you needed one day.
18 I mean, that's what you said at the beginning, and so
19 we gave you a day.

20 MR. POULIN: My guess would be that that was
21 an estimate of how much time the deposition would
22 likely take in a context where the question was, should
23 we schedule this for a half a day or do you think it's
24 going to take longer.

25 MR. YOUNG: Well, it was identified that this

1 conditions, Permit Condition S2.C.2.a, was added to the
2 permit with a recent major modification and does not
3 apply to any construction-related stormwater discharges
4 except for those in the Miller and Gilliam Creek
5 drainages; is that right?

6 A. Correct, other than those, in reading S2.2,
7 Monitoring Schedule for Construction Stormwater
8 Discharges to Walker Creek and tributaries and Gilliam
9 Creek and tributaries. So S2.A (sic), it would follow
10 applies to those watersheds.

11 Q. So in order to find out the monitoring
12 requirements applicable to all of the other previously
13 authorized construction-related stormwater discharges,
14 we would look to S2.C.1; is that correct?

15 A. (Witness reading document). Yes.

16 Q. Would you agree that the requirements of
17 S2.C.1 apply only to those construction projects
18 required to have a Stormwater Pollution Prevention Plan
19 under Special Condition S13 of the permit?

20 A. (Witness reading document). Yes.

21 Q. Turning to Condition S13 on Page 39 of the
22 permit, could you please explain your understanding of
23 this phrase, "five or more acres of total land area (or
24 other minimum land area to be determined by federal
25 regulation)"?

1 A. Certainly. The five or more acres is the
2 current threshold for the required general stormwater
3 permit for construction activity. Any construction
4 project which disturbs five or more acres is required
5 to have coverage under that general permit if they
6 don't have coverage under an individual permit.

7 And then five or more acres of total land
8 area or other minimum land area, that is to make sure
9 -- that was put in there to provide language to keep
10 current with any newly promulgated federal regulation
11 which might decrease that five or more acre threshold.

12 Q. Is it your understanding that, then, five
13 acres is the applicable minimum at present?

14 A. For the required --

15 Q. For this permit.

16 A. It's the applicable -- for the requirement
17 for the Stormwater Pollution Prevention Plan for
18 construction activities, that's the threshold. Any
19 construction project at the Port of Seattle that will
20 disturb five or more acres would then trigger this
21 requirement S13.

22 Q. And what about construction projects
23 disturbing less than five acres?

24 A. If it's a project that disturbs less than
25 five acres, it wouldn't trigger this requirement.

1 Ecology is aware of that and interprets it to reduce
2 this minimum below five acres.

3 A. Well, our interpretation, the reason why we
4 created the S13 condition was to make sure that this
5 individual permit was in compliance with the stormwater
6 regulations, EPA's stormwater regulations. EPA's
7 stormwater regulations require a construction activity
8 permit which follows that they have to have sediment
9 erosion control plans for projects that disturb five
10 acres or more.

11 We cover the Port's industrial activities
12 under other portions of this permit, and so if there's
13 construction activity occurring of five acres or less
14 in an area where the Port's conducting construction
15 activity, that activity is being monitored -- or, I'm
16 sorry, that portion of the facility is being regulated
17 under the industrial activities section of this permit.

18 That is why we call out certain outfalls for
19 monitoring, because those are outfalls that are
20 characteristics of portions of the facility where we
21 have industrial activities taking place at the airport.
22 And by "industrial activities" I mean subbasin areas of
23 the airport where there's fueling of aircraft taking
24 place or deicing of aircraft taking place or where
25 those aircraft may be -- the deicing aircraft may be

1 Q. And so because of the related nature of the
2 provisions, not only would there be no Stormwater
3 Pollution Prevention Plan under S13 but, likewise, no
4 monitoring at all under S2.C.1; is that right?

5 A. Correct, unless the construction project -- I
6 wouldn't want to say no monitoring at all because the
7 construction project might indeed lead into stormwater
8 drainages that are monitored under other sections of
9 the permit.

10 Q. Isn't it true that the permit does not
11 require monitoring of discharges from construction
12 projects that result in disturbance of less than five
13 acres?

14 A. If a construction project is less than five
15 acres, it would not -- this Condition S13 would not
16 kick in, correct.

17 Q. Is it your understanding -- I don't mean to
18 be obtuse; I perhaps should explain. My reading of the
19 federal regulation is that the five acre minimum should
20 not apply at Sea-Tac because the construction is all
21 related to the activities at an industrial site which
22 is subject to the permit.

23 And I wanted to find out -- I don't have the
24 citation of the specific federal regulation with that
25 provision buried in its terms, but I wanted to know if

1 taking off.

2 Q. Do you know if Ecology intends to apply the
3 requirements of new Condition S2.C.2 to all
4 construction stormwater discharges in the new permit
5 instead of just the Walker and Gilliam Creek basin
6 projects?

7 A. Are you referring on the reissuance of the
8 permit?

9 Q. Yes.

10 A. That is something that we have discussed and
11 are considering for the reissuance of the permit, yes.

12 Q. Do I recall your stating earlier that Ed
13 Abbasi will be reviewing the Port's application for the
14 renewal program?

15 A. Yes.

16 Q. Will you be involved in that review process?

17 A. No. Ed's the facility manager; I'm trusting
18 on his professional capabilities as an environmental
19 engineer and professional engineer to do that. That's
20 his baby.

21 Q. Ann Kenny testified in her deposition that
22 the 401 certification can be changed and could be
23 modified by future changes in the Port's NPDES permit
24 Do you agree with that view?

25 A. Ann is the expert on the 401 water quality

1 certification, and so if she stated that, I would have
2 to defer to her expertise on that.

3 Q. Have you reviewed the water quality
4 components in the low flow plan submitted by the Port
5 in support of the 401 certification request?

6 A. I think I may have glanced at them, but
7 that's not a part of the water quality certification
8 that I was really reviewing.

9 MR. POULIN: I'd like to introduce a new
10 exhibit.

11 (Deposition Exhibit No. 140 was marked for
12 identification.)

13 Q. (BY MR. POULIN) I'd like to explain, this is
14 a portion of the most recent version of the Low
15 Streamflow Analysis and Summer Low Flow Impact Offset
16 Facility Proposal submitted by the Port in December of
17 2001. In compiling this exhibit, I included the title
18 page, the table of contents, and two sections of
19 Volume 1, the water quality design aspect of the
20 mitigation proposal that's captured in Section 3.4, and
21 also the monitoring plan that's described in Section 5.

22 Would you agree that the Summer Low Flow
23 Impact Offset Facility Proposal is to capture rainwater
24 or stormwater during the rainy season, store it, and
25 subsequently release it when needed for mitigation

1 Kelly Whiting, Department of Ecology has contracted
2 Kelly Whiting to review and comment on the proposal.
3 And I believe John Drabek also was -- I guess to best
4 describe it is assisting Ann in understanding the
5 comments and concerns coming back from Kelly Whiting on
6 the proposal.

7 Q. Just as background on my further questioning,
8 I'd like you to understand that this proposal states
9 that, "Ecology has defined standards for water quality
10 related to stormwater release, including periods of low
11 flow. Ecology has jurisdiction to monitor and enforce
12 these standards through their National Pollution
13 Discharge Elimination System (NPDES) Permit. These
14 standards include" -- ellipses, dot, dot, dot, I'm
15 adding -- "dissolved metals."

16 It states further down that "the water
17 quality standards discussed in this report are those
18 listed for Class AA water bodies, which are the most
19 stringent standards. Water quality standards for
20 metals are based on toxicity" -- again ellipses -- "and
21 are listed in WAC 173-201A-040 (Toxic Substances)," the
22 section we've been discussing for much of the day.

23 It next states, "Ecology has started the
24 process to potentially revise state water quality
25 standards."

1 purposes during the summer dry season?

2 A. I understand that that's a proposal to
3 mitigate for the base flow impacts from the project,
4 yes.

5 Q. So do you understand that this proposal will
6 result in direct discharges to the creeks?

7 MR. REAVIS: Objection; vague.

8 Q. (BY MR. POULIN) I'd like to clarify. Do you
9 understand that this proposal will result in direct
10 discharges of stored stormwater to the creeks?

11 A. I don't know the details of how they will
12 deliver up that stored water. There's been, as far as
13 I know, a number of proposals of how that water would
14 be delivered back into the stream, and that's as far as
15 my knowledge goes. I mean, one of the proposals I
16 heard that was put forth was actually to infiltrate
17 some of that water and allow it to enter back into the
18 stream through groundwater base flow.

19 Q. Do you personally not have any role in the
20 review of this proposal?

21 A. I do not have any role in the review of that
22 proposal, no.

23 Q. Do you know who does?

24 A. The two people that I'm aware of who are
25 involved in review of the proposal, we've contracted

1 Are you aware of that effort?

2 A. Certainly that's part of the state's
3 triennial review process. I read that statement as
4 reflecting that the state's triennial review process is
5 underway of our state water quality standards.

6 Q. You'll see on Page 3-8 a discussion of metals
7 of concern including copper, lead and zinc. The Port
8 explains that, "Washington State water quality
9 standards for these metals are based on the dissolved
10 fraction, are dependent on the hardness of the water,
11 and, as with all water quality standards, are
12 applicable to the receiving waters."

13 A. Yes.

14 Q. I'd like you to join me in reviewing the
15 proposed monitoring plan for this facility to see if
16 the Port intends to do the kind of monitoring that's
17 necessary to determine whether their discharges can be
18 expected to result in violations of state water quality
19 criteria in the receiving waters.

~~20 If you turn to Page 5 3, this proposal states
21 under the heading 5.1.3.6, Metals, "Samples will be
22 analyzed for copper, lead and zinc. The samples will
23 be obtained from discharge points in receiving waters
24 (approximately 100 feet downstream from where
25 discharges enter the streams). The metals sampling and~~

~~1 analysis will occur upon opening of Flow Impact Offset
2 Facility outlets and a minimum of monthly throughout
3 operation of the facility."
4 It doesn't appear that the Port intends to
5 sample for hardness, does it?
6 MR. YOUNG: I object. Lack of foundation.
7 This is only a portion of this document. This witness
8 has not seen this document before, I don't believe,
9 and --
10 MR. POULIN: A simple concise objection will
11 be sufficient.
12 MR. YOUNG: I'm making my objection.
13 MR. POULIN: You're making a speech.
14 MR. YOUNG: And he has not -- it's only a
15 partial exhibit. He's never seen it before and he's
16 testified that he's not going to review it.
17 Q. (BY MR. POULIN) Please answer the question.
18 A. I can't answer the question because I don't
19 believe all the information on how they're doing
20 sampling has been presented to me. Again, I have not
21 seen this document before, and in the line of my
22 duties, I will not be reviewing this document.
23 Q. Would you agree that there's no indication in
24 the language we just looked at to suggest that the Port
25 intends to monitor for hardness in the receiving waters~~

1 Q. Could I ask where you're reading that?
2 A. At the top of 5.1.3, Operational Monitoring.
3 Now, what I would hope would be pointed out to them by
4 whoever is providing comment back to them, and this is
5 submitted to Ecology in December of 2001, my hope is
6 that they would point out to them the need to do
7 hardness sampling.
8 Q. Should that be a requirement?
9 A. This document's currently under review by
10 Ecology.
11 Q. Shouldn't that be a requirement imposed by
12 Ecology rather than a suggestion?
13 A. In order -- this has to be approved by
14 Ecology, and certainly it would be a requirement for
15 approvals of such a plan, of such a monitoring plan.
16 This document to my understanding as to the
17 way that we approve monitoring plans, we only approve
18 those monitoring plans if they're monitoring for all
19 necessary parameters, and one of those necessary
20 parameters, as you've pointed out, is hardness. And
21 that appears to me as if that has been overlooked here.
22 But again, this is a document that my understanding of
23 it, gosh, we just got this -- we're currently reviewing
24 this right now.
25 Q. None of the other monitoring plans that

~~1 of discharges from their proposed facility?
2 MR. YOUNG: I object. The document speaks
3 for itself.
4 A. Without seeing the entire document, I don't
5 know what type of receiving water monitoring they'll be
6 doing. If somewhere in this document there's receiving
7 water monitoring going on as part of the low flow
8 analysis, I'm assuming that any type of receiving water
9 monitoring that they would be doing would include
10 analysis for hardness.
11 Q. (BY MR. POULIN) I'll direct your attention
12 to Page 5-2 and Paragraph 5.1.3 where the proposal
13 states that, "The monitoring proposal for the Flow
14 Impact Offset Facility includes the following
15 monitoring components: Water levels within the
16 stormwater vaults, flow, turbidity, DO, temperature,
17 and metals."
18 A. Right. And I would point to before that,
19 "The Port is proposing to monitor the operation of Flow
20 Impact Offset Facility to provide assurance that the
21 facility is achieving its performance goals and not
22 causing any water quality violations in the receiving
23 waters. This will be accomplished by periodic
24 monitoring of both the discharge and receiving waters
25 during the annual operation" --~~

1 Ecology has approved have required monitoring for
2 hardness, have they?
3 A. What other monitoring plans Ecology's
4 approved? I don't understand.
5 Q. For instance, stormwater monitoring plans,
6 SWPPPs submitted to Ecology pursuant to the NPDES
7 permit.
8 A. If you're talking about the stormwater
9 monitoring plans for construction activity, our main
10 concern on construction activity is turbidity, and what
11 we're looking for there is where they're going to be
12 monitoring their facilities for those construction
13 projects for turbidity.
14 Q. Let's shift gears.
~~15 How did it come to be that the King County
16 Surface Water Design Manual basic menu became the
17 standard for the Comprehensive Stormwater Management
18 Plan for the Port's proposal?
19 MR. YOUNG: I object. Lack of foundation.
20 THE WITNESS: What am I supposed to do?
21 MR. YOUNG: You can go ahead and answer, I'm
22 sorry. If you can answer, go ahead and answer. If y
23 understand his question, you can answer it.
24 Q. (BY MR. POULIN) Would you agree that the
25 Port has invested considerable effort to demonstrate~~

1 that its proposal complies with the requirements of the
2 King County Stormwater Design Manual?

3 A. Correct. And one of the reasons for that is
4 the Port's stated intention for its stormwater
5 management plan is that it would meet necessary
6 requirements of the King County Design Manual as well
7 as the -- what was at the time Department of Ecology's
8 stormwater manual, I believe, which is the stormwater
9 manual for Puget Sound.

10 Q. And do you know why that is?

11 A. Why what is?

12 Q. I thought you said that that was the Port's
13 stated objective or intention. Do you know why they
14 sought to meet those standards?

15 A. I would have to assume that the Port was
16 intending to demonstrate that they're meeting not only
17 state standards but applicable local standards, local
18 standards that the surrounding communities to the Port
19 are subject to.

20 Q. Aren't the most relevant standards for
21 Section 401 certification purposes the state water
22 quality standards?

23 A. There's the state water quality standards,
24 but you also have the design requirements that are --
25 were in the Puget Sound Stormwater Manual and in King

1 County's Stormwater Design Manual.

2 Q. Compliance with those manuals does not assure
3 compliance with state water quality standards, does it?

4 A. Compliance with those manuals -- well, I
5 don't believe that King County makes the -- or
6 Department of Ecology, for that matter, has ever made
7 the type of categorical statement that you comply with
8 these manuals and you're entirely in compliance with
9 the state water quality standards. I don't think they
10 would make that type of leap, nor could they make that
11 type of leap.

12 Q. So you'd agree that they're independent
13 standards?

14 A. Well, it's apples and oranges, isn't it? I
15 mean --

16 Q. That's the question.

17 A. Well --

18 MR. POULIN: Could we go off record for a bit
19 (Recess taken.)

20 MR. POULIN: Back on the record at 4:54.
21 I guess we'll reserve any further discussion of the
22 time limits applicable to these depositions, and I'll
23 continue questioning.

24 MR. YOUNG: Yeah, but at 6:00 we're leaving.

25 MR. POULIN: At 6:00?

1 MR. YOUNG: At 6:00.

2 MR. POULIN: You previously said 5.

3 MR. YOUNG: Well, I said I was willing to go
4 to 5:30 or even 6, and I'm willing to do that. But at
5 that point we're done.

6 MR. POULIN: Well, you're welcome to leave,
7 but I reserve the right to indicate that I haven't
8 finished my questioning. And I'm happy to go until 6.

9 (Discussion off the record.)

10 (Recess taken.)

11 Q. (BY MR. POULIN) Let's go back on. It's

12 4:59.

13 Kevin, did I understand you to state that you
14 were not involved in reviewing the water quality
15 implications of this Low Streamflow Analysis and Summer
16 Low Flow Impact Offset Facility Proposal?

17 A. Correct.

18 Q. Could you refresh my memory as to who you
19 said was in charge of reviewing the water quality
20 impacts of this low flow plan and facility?

21 A. I believe that this is being reviewed by John
22 Drabek and it may also be under review by Ed Abbasi.

23 Q. And how will their --

24 A. Let me also state that because this is an
25 analysis on this low flow impact offset facility

1 required by the water quality certification, I believe
2 that Ann Kenny would be in that review loop as well.

3 Q. Can you please turn to Exhibit 1 which I
4 handed out earlier, and tell me, if you can, where the
5 provision pertaining to this report and Ecology's
6 review and approval authority is?

7 A. (Witness reviewing document).

8 MR. REAVIS: Page 22.

9 A. Thank you.

10 Q. (BY MR. POULIN) Yeah, to save time, I just
11 came across that as well.

12 A. I believe this comes out of right there in
13 Paragraph 1. "In order to ensure clarity, within 45
14 days of receipt of this Order the Port shall submit a
15 revised plan integrating the Low Streamflow Analysis
16 and Summer Low Flow Impact." And I believe that's what
17 this is.

18 Q. And doesn't this Section I.1 of the water
19 quality certification on Page 22 state that Ecology has
20 already -- and that's my term -- Ecology has reviewed
21 and approved the December 2000 version of that report,
22 the Low Streamflow Analysis?

23 A. Well, it says it's reviewed and approved the
24 December 2000 Low Streamflow Analysis, and then there
25 was also a Summer Low Flow Impact Offset Facility

1 Proposal dated July 23, 2001.

2 Q. Now, do you see --

3 A. So I understand both of those documents have
4 been reviewed and approved.

5 Q. Do you see any provision of this Section 1
6 that requires subsequent review and approval of this
7 December 2000 plan?

8 MR. REAVIS: 2001?

9 Q. (BY MR. POULIN) Thank you. December 2001
10 plan?

11 A. Well, I'd have to go through -- this is a
12 lengthy condition here of what this revised plan must
13 have.

14 Q. Right. Well, I understood you to state
15 earlier that this -- that whatever this plan that I
16 have partially excerpted in Exhibit 140 does or states
17 is subject to further review and approval, and so I
18 thought you might know where that requirement of
19 further review and approval is. And, frankly, I'm not
20 seeing it here.

21 A. Well, what's here is everything that this
22 revised document must have in it, including monitoring
23 and reporting requirements, what a minimum -- addresses
24 the following elements. And if you'll look in there
25 under (e)(v), and again, this is what this recently

1 submitted plan must include, it must include
2 "Contingency if water quality in vaults does not meet
3 water quality criteria."

4 So what that says to me is that they'd have
5 to have a means in the plan to determine if that
6 collected and stored stormwater is indeed meeting water
7 quality criteria. And it would follow that what they
8 would have to do is monitor instream receiving water
9 hardness.

10 Q. Well, you'd think so.

11 Did I understand you to state you have not
12 reviewed the previously submitted Low Flow Analysis or
13 Low Flow Impact Offset Facility Proposal?

14 A. No.

15 Q. You weren't in on that loop?

16 A. No.

17 Q. Did anyone report to you about their review
18 of the water quality aspects of those plans?

19 A. No.

20 Q. So it may be that John Drabek or Ed Abbasi or
21 Kelly Whiting has looked into it but they didn't --

22 A. They wouldn't report to me, they would have
23 reported to Ann. Ann relied upon them to do the
24 reviews of these plans since Ann was the project person
25 for the water quality certification.

1 Q. Did you review the water quality implications
2 of the MSE wall as part of the 401 certification?

3 A. I guess reviewed as part of -- as it was
4 addressed in their stormwater management plan.

5 Q. To what extent was it addressed in that plan?

6 A. What I recall is given the proposed structure
7 and slope of the wall, the types of stormwater
8 facilities that would have to be constructed in order
9 to accommodate the design of the wall.

10 Q. Do you know what the date of that monitoring
11 plan was?

12 A. I didn't say it was a monitoring -- it was a
13 stormwater management plan.

14 Q. Management plan, I'm sorry. Thank you.
15 Do you know the date of that plan that you reviewed?

16 A. That review, along with a number of other
17 people in the water quality section -- well, when I say
18 "number of other people," I had part in that review
19 along with John Drabek and also Kelly Whiting was our
20 main review authority, if you will, on the stormwater
21 management plan. But I recall reviewing aspects of
22 that plan, their most recent plan that was submitted I
23 think just prior to issuance of the 401 certification.

24 Q. So to paraphrase, then, the management plan
25 that you reviewed was issued in August or September of

1 2001; is that right?

2 A. I'd have to look back at the records as to
3 when their final stormwater management plan was
4 submitted, but that sounds about right. I think it may
5 have been July of 2001.

6 Q. But you're sure it was before the issuance of
7 the certification, the 401 certification?

8 A. I believe it was.

9 Q. Have you reviewed a Hart Crowser report
10 relating to the design of the MSE wall that was
11 submitted to Ecology in November?

12 A. No.

13 Q. Are you aware that that report proposes
14 significant changes to the design of the MSE wall?

15 A. I'm not aware of the report so I don't know.

16 Q. You haven't heard any mention of the
17 substance of that report or any design change?

18 A. No.

19 Q. So you haven't reviewed any water quality
20 implications that might result from such a change?

21 A. No, but -- no.

22 Q. Is it true that the Port has proposed an
23 expansion of its industrial wastewater system?

24 A. Yes.

25 Q. Is it true that that expansion project is not

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1 considered part of the master plan update project?

2 A. Yes. The expansion and improvements of their
3 industrial wastewater system were driven primarily by
4 the NPDES permit.

5 Q. Is it true that not all of the metals-
6 generating surfaces at Sea-Tac International Airport
7 are being routed to the IWS for treatment?

8 A. That's correct, that they do have some metal-
9 generating surfaces, some roofs and downspouts that are
10 not going into the industrial wastewater system.

11 Q. And isn't it also true that a part of the
12 stormwater runoff from the runways themselves is not
13 routed to the IWS system for treatment?

14 A. Yeah, there's large portions of the runways
15 that go into the stormwater system and not into the
16 industrial wastewater system.

17 Q. And the Port is not proposing to route
18 stormwater runoff resulting from the third runway to
19 the IWS, is it?

20 A. No, I don't believe that that's -- I believe
21 there's a contingency that if they find -- well, I
22 won't speculate on that. But, yes, I believe most of
23 the stormwater runoff from the third runway go into a
24 stormwater system and not into the industrial
25 wastewater system.

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1 Q. Let's turn to your work on the clean fill
2 criteria aspect of the 401 certification.

3 A. Okay.

4 Q. Who selected the final clean fill criteria
5 incorporated in the final 401 certification, by which I
6 mean the amended --

7 A. The acceptable fill criteria?

8 Q. Yes, thank you. I am referring to the
9 September 21st water quality certification.

10 A. Section E?

11 Q. Yes, Section E, beginning on Page 14.

12 A. The conditions under Section E, those final
13 draft conditions were proposed by myself, and this was
14 after working in some consultation with Chung Yee in
15 our cleanup program.

16 Q. Are you referring to the values in the second
17 column of the table on Page 17, the --

18 A. Actually, I'm referring to all the
19 conditions.

20 Q. All the conditions, okay. Including the fill
21 criteria specified in that table?

22 A. Including what's entitled the fill criteria
23 limitations for hazardous substances.

24 Q. How did Chung Yee come to be involved in the
25 project? Could you please tell us who he is?

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1 A. Yes. Chung Yee was actually -- for a short
2 time he was a facility manager, I believe, for a period
3 of about six months of the Sea-Tac Airport permit.
4 And Chung Yee's background both in water quality and in
5 the toxics cleanup program made him a good resource to
6 tap into as we started to think about acceptable fill
7 criteria for the 401 water quality certification. So
8 he did some initial work on these acceptable fill
9 criteria while he was the facility manager for Sea-Tac
10 Airport. This would be in about August/September 2000.

11 And then he switched positions within
12 Department of Ecology to take a toxics cleanup program
13 position down in our headquarters office in Lacey.
14 And when our water quality certification -- as we
15 appeared to be moving toward drafting up a water
16 quality certification, we called upon the toxics
17 cleanup program to see if he could involve himself, you
18 know, lend his technical expertise to the 401 water
19 quality certification team.

20 And so I guess to characterize Chung Yee, he
21 was sort of our consultant from the toxics cleanup
22 program developing these criteria. And then I worked
23 along with him.

24 Q. Why didn't the toxic cleanup program itself
25 develop these fill criteria?

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1 A. Well, I don't know what you mean by that.
2 Chung Yee works for the toxics cleanup program. He's
3 an environmental engineer and a professional engineer
4 in the toxics cleanup program. And they made his
5 services available to us in helping to develop these
6 acceptable fill criteria.

7 Q. Did you also rely on the expertise of Pete
8 Kmet in developing these criteria?

9 A. Yes. I believe Pete Kmet was -- we sought
10 review and advice from Pete Kmet on those, as I recall.

11 Q. Isn't Pete Kmet Ecology's resident expert on
12 hazardous substances?

13 MR. REAVIS: Objection; lack of foundation.

14 A. We have a number of experts on hazardous
15 substances in the toxics cleanup program. I would say
16 he's one of those, yes.

17 Q. (BY MR. POULIN) Would you agree that he has
18 considerably more expertise than Chung Yee?

19 A. I don't have a way of agreeing or disagreeing
20 with that.

21 Q. Were any of Pete Kmet's recommendations
22 concerning fill criteria adopted in the final 401
23 criteria for fill?

24 A. We heard loud and clear from Pete Kmet and
25 agreed with him that there should be no fill material

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1 coming from a contaminated site or even fill material
2 that's been remediated from a contaminated site. And
3 so we put that as a condition in here on Prohibited
4 Fill Sources, on E(d), I think it is, Prohibited Fill
5 Sources.

6 "The following fill sources are prohibited
7 for use on Port 404 projects: Fill which consists in
8 whole or in part of soils or materials that are
9 determined to be contaminated following a Phase I or
10 Phase II site assessment." And even further, "Fill
11 which consists in whole or in part of soils or
12 materials that were previously determined to be
13 contaminated by a Phase I or Phase II site assessment
14 and have been treated in some manner so to be
15 considered remediated soils or fill material."

16 Q. Did Mr. Kmet submit any written comments to
17 you or to Chung Yee concerning the proposed fill
18 criteria?

19 A. I believe that there were -- there was an
20 e-mail transmission, one or two of those.

21 Q. And do you recall whether Mr. Kmet suggested
22 a minimum sampling frequency for fill?

23 A. I don't recall -- I'm sorry, I don't recall a
24 minimum sampling.

25 MR. POULIN: I'd like to help refresh your

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1 MR. POULIN: It's entirely possible that --

2 MR. REAVIS: Because my Page 2 has a number
3 on it that says 2. That's the second page of the
4 e-mail.

5 MR. POULIN: I was concerned that you might
6 be missing the conclusion of the e-mail. And if we
7 could very briefly revise the exhibit, I'd like to get
8 a quick copy of this. And we'll go off record for just
9 a moment and I'll do that. Thanks, Mr. Reavis.

10 (Discussion off the record.)

11 Q. (BY MR. POULIN) Back on the record.

12 Thanks to Mr. Reavis, a copy of the original
13 exhibit, we can now see that this should be a six-page
14 exhibit, and we in fact were missing the second and
15 third pages.

16 Now that you see those pages which should be
17 inserted in Exhibit 15 after the first page, does that
18 look more familiar to you?

19 A. Yes, it does.

20 Q. Now, on the unnumbered fifth page of this
21 exhibit which has a couple of two-column tables towards
22 the bottom, would you agree that Mr. Kmet -- do you
23 recall now in reviewing this that Mr. Kmet recommended
24 a higher minimum number of samples than were proposed
25 in the fill criteria that he reviewed?

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1 memory with an exhibit.

2 (Discussion off the record.)

3 (Recess taken.)

4 Q. (BY MR. POULIN) Back on the record.

5 I'd like to have you review this previously
6 introduced Exhibit 15. Would you agree that this
7 exhibit appears to be Ann Kenny's copy of an e-mail
8 that Peter Kmet sent to you?

9 A. Well, what I see what was sent to me is a
10 word document that says, "Here are my comments. Make
11 sure you open the attachment." Then, but what follows
12 is a copy of an e-mail sent from me to Pete. Is this
13 the opened attachment then?

14 Q. My understanding is that the referenced
15 attachment is the second, third and fourth pages of the
16 exhibit.

17 A. Okay.

18 Q. Do you recognize these as the comments that
19 Pete Kmet sent to your attention?

20 A. You mean the underlined material?

21 Q. Well, I mean the entirety of Pages 2, 3 and
22 4, unnumbered Pages 2, 3 and 4 of this exhibit.

23 MR. REAVIS: I think it starts with Page 3,
24 actually, because isn't Page 2 the second page of the
25 e-mail?

1 A. Yes.

2 Q. Would you agree that Mr. Kmet recommended a
3 higher minimum number of samples than were adopted in
4 the final 401 criteria?

5 A. Yes.

6 Q. What was your basis for rejecting his
7 recommendation?

8 A. I didn't reject his recommendation. I took
9 the recommendation that came to me from Chung Yee, and
10 the recommendation that came to me from Chung Yee is
11 what appears in the water quality certification as the
12 minimum number of samples.

13 Q. Why did you select as the fill criteria the
14 minimum number of samples provided to you by Chung Yee
15 instead of those forwarded to you by Peter Kmet?

16 A. Because Chung Yee was the one who was working
17 on the final set of conditions that were established in
18 the water quality certification. This recommendation
19 from Pete I believe came in September, came by us
20 September 11, 2000, and then the final draft of these
21 recommendations went through or came to me from Chung
22 Yee, gosh, I believe in July of 2001.

23 Q. Did you have any basis to believe that Chung
24 Yee's work product was superior to Peter Kmet's?

25 A. What I was relying upon was Chung Yee's

1 expertise, and as the person, the staff person from the
2 toxics cleanup program who was selected to assist us in
3 this process. And so what I was relying on is that he
4 had reviewed Pete Kmet's recommendation and that he
5 considered that recommendation and decided to go with
6 what he originally had.

7 Q. So is it your testimony, then, that you did
8 not select the final criteria; rather, Chung Yee did?

9 A. It's my testimony that I relied on the final
10 set of draft conditions that Chung Yee came up with,
11 but I did select his final draft recommendations.

12 Q. Do you know whether Chung Yee had any basis
13 to reject Pete Kmet's recommendations?

14 A. I do not know.

15 Q. So do you know whether Chung Yee's
16 recommendations are superior to those of Mr. Kmet?

17 A. I don't know. Again, what I was relying upon
18 is what Chung Yee provided us in June/July of 2001.

19 Q. Independent of Chung Yee's recommendation,
20 what basis do you have for concluding that the fill
21 criteria he recommended to you is adequate to protect
22 water quality?

23 A. If your question is -- when you say the fill
24 criteria recommended, are you referring to the minimum
25 number of samples that he recommended?

1 that Chung Yee's recommendations were sufficient?

2 A. Yes.

3 Q. Did you ever respond to Mr. Kmet's comments?

4 A. No. I held on to these comments because I
5 knew that we were going to be revisiting this issue
6 eventually when we got around to issuing the 401
7 certification. And I made sure to forward these
8 comments on to Chung Yee.

9 Q. Let's look at the fill criteria themselves,
10 and by that I mean the numeric criteria identified in
11 the second column of the table on Page 17 of the water
12 quality certification, Exhibit 1.

13 MR. REAVIS: Let me just say, I've got just a
14 few more minutes here and then I have to head out, I've
15 got another commitment. So I don't think that we're
16 going to agree on whether or not that's in compliance
17 with the completion of this deposition, but I suggest
18 we take that up later. And I don't know how much time
19 you think it's going to take to go through this subject
20 area, but my guess is it's going to take awhile. So my
21 suggestion would be to go ahead and stop here.

22 MR. POULIN: Well, are you available until 6?

23 MR. REAVIS: Yeah. If you think you can get
24 through this, I can wait until 6.

25 MR. POULIN: Well, I don't think I can get

1 Q. Yes. Yes, I am.

2 A. Okay, that's very different from the
3 acceptable fill criteria. This is for characterization
4 of the fill.

5 And my sense of it is that in light of the
6 fact that we were requiring the Port not to use any
7 fill sources that were contaminated or even fill
8 sources that had in part or whole even remediated soils
9 from contaminated sources, my sense of it is that this
10 testing of this uncontaminated soils would give us a
11 sort of -- a confirmation that indeed we were dealing
12 with uncontaminated sources.

13 Q. Isn't it true that Mr. Kmet commented that
14 the sampling frequency proposed by Chung Yee is, quote,
15 insufficient to determine compliance with the
16 monitoring standards, and further, that the sampling
17 schedule is not likely to find contamination?

18 A. I don't see where it says "not likely to find
19 contamination."

20 Q. You'll find in the underlined text in the
21 third full paragraph on that unnumbered fifth page of
22 Exhibit 15 the full sentence being, "Also, your
23 sampling schedule is not likely to find contamination."

24 A. Okay. I'm now aware of that.

25 Q. So notwithstanding his advice, you thought

1 through it, but in the off chance that we don't have a
2 chance to reconvene this deposition, I'd like to use
3 the time available.

4 MR. REAVIS: Okay, certainly.

5 Q. (BY MR. POULIN) Did you select these fill
6 criteria?

7 A. What I chose to do is include these criteria
8 among the conditions for acceptable fill in the water
9 quality certification, and that's because these were
10 presented to me by Chung Yee as acceptable criteria.

11 Q. Do you have any independent basis for --

12 A. But there's more to -- I mean, you're talking
13 about an entire -- not just this table. I mean, these
14 are all part and parcel of that entire fill criteria
15 condition. I mean, the fill criteria is not just this
16 table alone. You know, it also includes special
17 criteria that come into effect when -- well, you'll
18 notice there's a footnote 3 there of -- you know, a
19 different set of criteria that come in to play for
20 metals like chromium when the fill is placed within six
21 feet of the ground surface.

22 Q. Sure. But let's look at another exhibit.

23 (Deposition Exhibit No. 141 was marked for
24 identification.)

25 Q. (BY MR. POULIN) To my surprise, the Board's

1 Order Granting Motion to Stay the Effectiveness of 401
2 Certification has not previously been used as an
3 exhibit. I'd like you to turn to Page 16 of the
4 Board's Order Granting the Motion to Stay.

5 You'll see that the second column of the --
6 let me back up. You'll see that the first two columns
7 apart from the heading correspond to the information
8 presented in Page 17, the table in Page 17 of the 401
9 certification, listing the substance or contaminant in
10 the first column and the fill criteria from the 401
11 certification in the second column.

12 First off, let me ask, do you have any reason
13 to disagree with any of the information here in the
14 third and fourth columns of the table in the Order?

15 A. Far be it from me to ever disagree with a
16 Board decision, but I believe that those are accurate
17 representations in those third and fourth columns there
18 for those contaminants of what Puget Sound background
19 is, where it's known, and then the practical
20 quantification limits for detection of those
21 contaminants.

~~22 Q. Would you agree that in several instances the
23 fill criteria selected in the 401 certification is
24 substantially higher than the Puget Sound background
25 and the practical quantification limits?~~

1 will not be in contact with an active groundwater
2 component and, therefore, you know, I believe -- and
3 this is relying somewhat on Chung Yee's expertise, t
4 because of that, that fill material which was even a
5 these levels for chromium or nickel or lead, because
6 you'll notice that for certain metals we match the
7 Puget Sound background, in particular for copper. But
8 that given the characteristics of those particular
9 metals, that as long as they are not in contact with an
10 active groundwater component, as they would not be in
11 the proposed fill profile for the third runway, that
12 that would be sufficiently protective of state ground
13 waters and surface waters.

14 Q. Well, I'd like to ask, if I might use a
15 colloquialism, where does the buck stop? You state
16 that you relied on Chung Yee, I believe Ann Kenny would
17 state that she relied on you, and probably Mr. White
18 would state that he relied on Ann Kenny.

19 Who has the responsibility for selecting
20 standards that are known to be sufficiently protective?

21 A. I told you I selected these.

22 Q. You selected these based on --

23 A. Chung Yee's expertise.

24 Q. For which you have no independent basis to
25 confirm or deny or reject?

~~1 MR. R... let me just object to this
2 question because it's a compound question and covers a
3 number of different constituents and issues. That's my
4 objection.~~

5 Q. (BY MR. POULIN) Fair enough. Let's look at
6 arsenic where the 401 fill criteria is 20, Puget Sound
7 background is 7, and the practical quantification limit
8 is 1.5, presumably milligrams per kilogram.

9 Doesn't this indicate that the 401
10 certification accepts fill that is more than double the
11 background of arsenic?

12 A. Of what the Puget Sound background is?

13 Q. Yes.

14 A. Yes.

15 Q. And so with lead where the quantification
16 limit is just .5 and the background is 24, the lead
17 value is nearly ten times that, 220, or in some cases
18 250?

19 A. Yes.

20 Q. Now, in light of this, I'd like to ask why
21 you believe that the levels selected in the 401
22 certification are sufficiently protective of water
23 quality.

24 A. Well, I believe they're sufficiently
25 protective of water quality because this fill material

1 A. I don't understand his question.

2 Q. You don't know -- you don't have any reason
3 to know whether Chung Yee's recommendation is valid or
4 invalid, adequate or inadequate?

5 A. I rely on the fact that of his years of
6 experience in the toxics cleanup program, his education
7 and background as an environmental engineer and as a
8 professional engineer, and his expertise in how
9 contaminants may or may not become mobile from the
10 soils in a fill profile.

11 And if you want to know where the buck
12 stopped on selecting these criterias, I told you, it
13 stopped with me. And the reason I accepted these is
14 because of the expertise, experience and background
15 that Chung Yee had, and that also that he took Pete
16 Kmet's comments into consideration as well. But why he
17 made the recommendation that he made to me in the end
18 is something that you'll have to ask him.

~~19 MR. POULIN: In respect of your request to
20 stop at 6:00, I'll note that it's 5:59 and a half.~~

~~21 I would like to continue the deposition and would
22 request that Ecology provide me with a future date
23 Mr. Fitzpatrick will be available for future
24 questioning.~~

~~25 THE WITNESS: If that's to be done over the~~

1 next two weeks, that is going to be difficult indeed,
2 because my schedule has filled up for the remainder of
3 the month.

4 MR. YOUNG: Yeah, and our position is at this
5 point in time that we've made him available for the
6 time that you asked him to be available, and we've got
7 tons of other depositions that we've got to do in those
8 two weeks.

9 MR. POULIN: Well, I believe there are many
10 days on which no deposition is scheduled, but at
11 present I will simply close with a request that this
12 deposition be continued.

13 MR. YOUNG: And we are objecting to that
14 request.

15 MR. REALIS: As are we, on behalf of the
16 Port.

17 MR. POULIN: Thank you. And let's go off
18 record. It's 6:00.

19 (Deposition adjourned/concluded at 6:00 p.m.)
20 (Signature reserved.)
21
22
23
24
25

1 REPORTER'S CERTIFICATE

2
3 I, DIANE MILLS, the undersigned Certified Court
4 Reporter and Notary Public, do hereby certify:

5 That the testimony and/or proceedings, a transcript
6 of which is attached, was given before me at the time
7 and place stated therein; that any and/or all
8 witness(es) were by me duly sworn to tell the truth;
9 that the sworn testimony and/or proceedings were by me
10 stenographically recorded and transcribed under my
11 supervision, to the best of my ability; that the
12 foregoing transcript contains a full, true, and
13 accurate record of all the sworn testimony and/or
14 proceedings given and occurring at the time and place
15 stated in the transcript; that I am in no way related
16 to any party to the matter, nor to any counsel, nor do
17 I have any financial interest in the event of the
18 cause.

19 WITNESS MY HAND AND SEAL this 30th day of
20 January 2002.

21
22 DIANE MILLS, CSR# MI-LL-SD-M380N3
23 Notary Public in and for the State
24 of Washington, residing in King
25 County. Commission expires 10/10/02.

1 CORRECTION & SIGNATURE PAGE

2 RE: AIRPORT COMMUNITIES COALITION VS. STATE OF
3 WASHINGTON, et al.
4 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
5 DEPOSITION OF: KEVIN FITZPATRICK; 1/16/2002

6 I, KEVIN FITZPATRICK, have read the
7 within transcript taken JANUARY 16, 2002, and the same
8 is true and accurate except for any changes and/or
9 corrections, if any, as follows:

10 PAGE LINE CORRECTION
11
12
13
14
15
16
17
18
19
20
21

22 Signed at _____, Washington,
23 on the ____ day of _____, 2002.

24 _____
25 KEVIN FITZPATRICK

AR 001586

<p>\$</p> <p>\$20,000 [1] 130:6</p> <p>\$8,000 [1] 130:4</p>	<p>114 [1] 120:23</p> <p>115 [1] 120:23</p> <p>118 [2] 120:19 121:4</p> <p>119 [3] 120:10 121:2,4</p> <p>1191 [1] 2:22</p> <p>11:21 [1] 53:19</p> <p>11:29 [1] 53:22</p> <p>12 [5] 103:11-12,14 104:23-24</p> <p>12-year [1] 103:8</p> <p>12:15 [2] 72:20-21</p> <p>1325 [1] 1:19</p> <p>136 [7] 3:12 60:17,20,22 84:8 100:23 118:17</p> <p>137 [4] 3:13 65:3 87:2 97:3</p> <p>138 [6] 3:14 89:14,16 91:1 96:8 98:15</p> <p>139 [7] 3:15 110:14,16 114:9 120:10 121:8 123:3</p> <p>14 [7] 19:12 51:25 60:10 123:3-4 124:6 158:11</p> <p>140 [3] 3:17 141:11 153:16</p> <p>141 [3] 3:17-18 168:23</p> <p>15 [7] 30:14 31:1 38:18 82:4 162:6 163:17 166:22</p> <p>1500 [1] 1:19</p> <p>16 [6] 1:18 4:1 48:24 130:6 169:3 174:5</p> <p>168 [1] 3:18</p> <p>17 [8] 47:22 48:16,18 108:9 158:17 167:11 169:8</p> <p>173-040 [1] 25:7</p> <p>173-200 [1] 21:12</p> <p>173-201A [6] 21:11,14 32:21 46:21 48:3 58:23</p> <p>173-201A-030 [2] 21:24 33:25</p> <p>173-201A-030(1) (c) (vi [1] 35:13</p> <p>173-201A-040 [11] 36:24 41:11 54:24 57:18 59:5, 20 64:21 84:16 85:2 99:9 143:21</p> <p>173-201A-050 [1] 3:13</p> <p>18 [2] 118:10-11</p> <p>180 [1] 89:10</p> <p>18th [1] 13:2</p> <p>1975 [1] 9:25</p> <p>1980 [1] 9:19</p> <p>1981 [1] 10:1</p> <p>1983 [3] 69:7-8,12</p> <p>1986 [1] 12:4</p> <p>1990 [1] 12:12</p> <p>1997 [2] 54:3 101:7</p> <p>1998 [2] 101:3 110:18</p> <p>1999</p>	<p>[18] 3:16 13:12 17:5 91:3 98:22 110:19,21 111:2 113:11 114:9 116:24 121:7 123:3 124:19 127:18,21</p> <p>1:00 [2] 72:22 73:2</p> <p>1:06 [1] 73:7</p> <p>1:28 [1] 82:2</p> <p>1st [1] 111:3</p>	<p>[2] 72:4 112:17</p> <p>36 [2] 114:4,11</p> <p>37 [1] 114:3</p> <p>39 [1] 136:21</p> <p>3:32 [1] 122:14</p> <p>3:37 [1] 122:17</p>
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<p>2431 Unique Words</p>	<p>(206) 622-6875</p>	<p>* dmills@yomreporting.com</p>	<p>From \$20,000 to 89</p>

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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)

Appellant,)

vs.)

PCHB No. 01-160

STATE OF WASHINGTON,)

DEPARTMENT OF ECOLOGY; and)

THE PORT OF SEATTLE,)

Respondents.)

DEPOSITION UPON ORAL EXAMINATION
OF
THOMAS FITZSIMMONS

10:04 A.M.

JANUARY 18, 2002

2425 BRISTOL COURT SW

SECOND FLOOR

OLYMPIA, WASHINGTON

CARLA R. WALLAT, CRR, RPR, CCR #WALLACR346BE

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1 APPEARANCES
 2
 3 FOR THE AIRPORT COMMUNITIES COALITION:
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 25 ALSO PRESENT: NONE

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1 Requests for Production Nos. 1-6 to
 2 Department of Ecology and Responses
 3 Thereto
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 8 Subject: RE: Sea-tac Third Runway
 9 166 E-mail dated 5/11/2000, 4:48 PM from 29
 10 Hellwig to Luster, Ehlers, White, Hart,
 11 Groves, Pastore, Alkire; Subject: Meeting
 12 with Mic Dinsmore, POS, Wes Ulman, (PSRC?)
 13 and the Governor re SeaTac
 14 167 E-mail dated 5/19/2000, 1:10 PM from 39
 15 Hellwig to Fitzsimmons;
 16 Subject: SeaTac 3rd Runway
 17 168 Letter dated 9/28/2000 to Dinsmore 77
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 19 169 E-mail dated 10/3/2000, 7:29 AM from 79
 20 Hellwig to Fitzsimmons, Luster and Oliva;
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 22 170 E-mail dated 11/20/2000, 4:35 PM from 81
 23 Marchioro to Fitzsimmons;
 24 Subject: October 23, 2000 e-mail
 25 171 ACC's Interrogatories Nos. 1-18 and 84

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1 OLYMPIA, WASHINGTON; JANUARY 18, 2002
 2 10:04 A.M.
 3 --oOo--
 4
 5 THOMAS FITZSIMMONS,
 6 sworn as a witness by the Notary
 7 Public, testified as follows:
 8
 9 EXAMINATION
 10
 11 BY MR. EGLICK:
 12 Q. Good morning, Mr. Fitzsimmons, I'm Peter
 13 Eglick and I'm one of the attorneys for the Airport
 14 Communities Coalition. Could you state and spell your
 15 full name for the record, please.
 16 A. Thomas, T-H-O-M-A-S, Craig, C-R-A-I-G,
 17 Fitzsimmons, F-I-T-Z-S-I-M-M-O-N-S.
 18 Q. And what's your address?
 19 A. In Tumwater, 5917 Prospector,
 20 P-R-O-S-P-E-C-T-O-R, Place Southwest.
 21 ~~Q. When was the last time you spoke with Jay~~
 22 ~~Manning about the airport project; do you know what I~~
 23 ~~mean by the airport project?~~
 24 A. No, I don't. So why don't you describe it to
 25 me. If you're going to use that term, then we can

1 define. Go ahead.
 2 Q. Port of Seattle Third Runway Project.
 3 A. Anything related to it, is that embodied in
 4 that term?
 5 Q. Yes.
 6 A. I don't recall exactly.
 7 Q. No recollection of a conversation with Jay
 8 Manning about the Port of Seattle Third Runway Project?
 9 A. That's not what I said. You asked when is
 10 the last time I spoke to him. I answered I don't
 11 recall exactly, so.
 12 Q. Do you recall approximately?
 13 A. I'm having a hard time. I've had a number of
 14 conversations or been involved in a number of
 15 conversations with Jay over several years. So -- I'm
 16 not understanding. The last time I spoke to Jay
 17 Manning was yesterday. I spoke with Jay Manning weeks
 18 ago on shoreland management guidelines. I've spoken
 19 with Jay on other issues that he represents related to
 20 the Department. So I'm having a hard time thinking
 21 exactly the last time I had a conversation with Jay
 22 about the Third Runway Project. I'm sorry, I'm just
 23 answering truthfully.
 24 Q. Have you ever spoken with Jay Manning about
 25 the Port of Seattle Third Runway Project?

1 director?
 2 A. I served as the governor's transition
 3 director between his position as King County executive
 4 and governor, which was about a three-month tour of
 5 duty.
 6 Q. And what did you do prior to that?
 7 A. I was the county administrator for Thurston
 8 County for a period of about 11 years.
 9 Q. And prior to that?
 10 A. I was the -- an assistant to the King County
 11 executive for a period of about six years.
 12 Q. And prior to that?
 13 A. I was the -- I worked at a residential
 14 treatment center for emotionally disturbed children and
 15 I was in private consulting.
 16 Q. Private consulting in what field?
 17 A. Government affairs, federal government Native
 18 American affairs.
 19 Q. Native American affairs in any particular
 20 aspect?
 21 A. Yeah, we had a contract with the federal
 22 government to provide training and technical assistance
 23 services to 32 tribes in Washington, Oregon, Idaho and
 24 Alaska.
 25 Q. What kind of services?

1 A. Of course I have.
 2 Q. Okay. And who is Jay Manning?
 3 A. He is an attorney who is in private practice
 4 and I believe one of his clients is the Port of
 5 Seattle.
 6 Q. You believe it or you know it?
 7 I know it.
 8 Q. Okay. Have you ever had your deposition
 9 taken before?
 10 A. Yes, I have.
 11 Q. About how many times?
 12 A. Ten or twelve.
 13 Q. Okay. So you understand the procedure is
 14 that I ask you questions, you answer them under oath?
 15 A. I do understand that.
 16 Q. And you understand that if you don't
 17 understand the question, you let me know and I'll try
 18 to make it clearer to you.
 19 A. Yes, I do.
 20 Q. What's your position now in the Department of
 21 Ecology?
 22 A. I'm the director of the agency.
 23 Q. How long have you been director?
 24 A. As of yesterday, five years.
 25 Q. And what did you do prior to becoming

1 A. A whole range of services, anything from
 2 legal to staff training, to accounting, to
 3 infrastructure development, to the development, as a
 4 specific example, the museum at Neah Bay on the
 5 cultural historical museum at Neah Bay was one of our
 6 projects.
 7 Q. That was one of your development projects?
 8 A. Uh-huh.
 9 Q. Now, what's your educational background?
 10 A. I have a college degree and I have a master's
 11 degree in public affairs.
 12 Q. And your college degree is in public affairs
 13 as well?
 14 A. No. My college degree is in biological
 15 sciences, you know, basic bachelor of arts degree -- or
 16 bachelor of science, excuse me.
 17 Q. And when did you get your bachelor's degree?
 18 A. 1972, I think.
 19 Q. And when did you get your master's degree?
 20 A. I'm not exactly sure. '73 -- three years
 21 later. So '75, '76, I'm not exactly sure of the date.
 22 Q. Now, did you say before you talked with Jay
 23 Manning several times about the Port of Seattle Third
 24 Runway Project?
 25 A. I think you to explain the question here.

1 Okay? I'm not trying to be resistant in answering the
 2 question. You're asking me did I talk to Jay Manning?
 3 Q. About the Port of Seattle Third Runway
 4 Project?
 5 A. I said on several occasions; in group
 6 settings, in problem solving issues. So again the
 7 inference here is that -- I'm having a hard time
 8 understanding. Do you mean a one-on-one conversation?
 9 Do you mean -- what does talk to Jay Manning mean?
 10 Q. Well, either one, in fact, but let's break it
 11 down if that's easier for you. Have you had any
 12 conversations with Jay Manning about the Port of
 13 Seattle Third Runway Project in which there were no
 14 other participants?
 15 A. I don't recall one. No, I don't.
 16 Q. Have you had any conversations with Jay
 17 Manning about the Port of Seattle Third Runway Project
 18 in which there was only one other participant other
 19 than you and Mr. Manning?
 20 A. Yes, to the best of my recollection, I
 21 believe one or maybe others, but I do recall one.
 22 Q. Now, did that conversation occur before or
 23 after Mr. Manning left the state's employ?
 24 A. The conversation I'm recollecting occurred
 25 afterwards.

1 meetings. And I just am uncertain. He may have been.
 2 That is a possibility.
 3 Q. When did you first become aware that Jay
 4 Manning was representing the Port of Seattle concerning
 5 the third runway?
 6 A. I think about a year and a half ago.
 7 Q. And when you became aware of that, did you
 8 perform an investigation to determine whether or not he
 9 had participated in any meetings with you, for example,
 10 concerning the Port of Seattle Third Runway?
 11 A. No, I did not.
 12 Q. Did you ask anyone else to?
 13 A. No, I did not.
 14 Q. Were you surprised in any way to see that the
 15 former head of Ecology's attorney general division was
 16 now in front of you representing a party that had been
 17 before the Department for several years?
 18 A. No, I was not.
 19 Q. You thought that was routine?
 20 A. I thought it -- for it to occur, I trusted
 21 that Mr. Manning, our attorneys, the attorney general's
 22 office, and the ethics involved in practicing law would
 23 have all been considered and that it would have been
 24 perfectly appropriate for Jay to take on the
 25 responsibility that he did. And I made those

1 Q. Okay. Have you had any conversations with
 2 Mr. Manning with a group, individually, one
 3 participant, 100 participants, doesn't matter, have you
 4 had any conversations with Mr. Manning about the Port
 5 of Seattle Third Runway Project while he was in the
 6 state's employ? Do you know what I mean by "in the
 7 state's employ" by the way?
 8 A. Of course I do.
 9 Q. I'm referring to the fact he was the
 10 assistant attorney general responsible for the Ecology
 11 division, wasn't he?
 12 A. Yes.
 13 Q. Then go ahead if you would, please, and
 14 answer the question.
 15 A. I can't answer the question with the kind of
 16 specificity I would like to. And please understand,
 17 I've been in this position five years. On a weekly
 18 basis I interact with attorney generals on numerous
 19 occasions, certainly on every Tuesday and Friday when
 20 we have meetings on issues and on legal cases, et
 21 cetera. So what you're asking me to do is think back
 22 five years ago and recall in my own mind without any
 23 opportunity to refresh my memory here if Jay was -- if
 24 we were dealing with the third runway during those
 25 meetings and if Jay was the representative during those

1 assumptions based on several other experiences in my
 2 career where the same kinds of shifts have occurred and
 3 the same sorts of ethics have presented, if there was a
 4 conflict to be a conflict.
 5 Q. You say you made some assumptions; is that
 6 correct?
 7 A. Yes, I used that term.
 8 Q. Did you make any investigation to determine
 9 whether those assumptions were in fact warranted?
 10 A. I answered that. No, I did not.
 11 Q. Okay. It's true, isn't it, that the Port of
 12 Seattle has been seeking approval from Ecology for its
 13 Third Runway Project for a period of time that extends
 14 back into Mr. Manning's tenure as head of the Ecology
 15 division of the attorney general's office, isn't it?
 16 A. Not to nitpick, but just to sort of, in the
 17 beginning of our conversation here, let you know that
 18 I'm, if you haven't already experienced, wanting to
 19 understand your question here, not to resist and not to
 20 answer it, but I'm not willing to answer questions that
 21 have triple or quadruple meaning, okay? So let's just
 22 sort of walk our way through so I understand the
 23 question.
 24 It is true that the Department of Ecology has
 25 been reviewing a permit by the Port of Seattle for the

~~third runway. I don't consider that trying to get approval out of the Department of Ecology. That may have been their intention, that's not how I saw it. I saw an objective review of a proposal. It is true that the life of that project dipped back into before Jay left the attorney general's office. I actually I think that's probably very true. Beyond the facts, I'm not sure I understand your question.~~

~~Q. Well, I think you just answered it.~~

~~Now, how long, to your knowledge, has the issue of water rights been involved in the Port of Seattle Third Runway application?~~

~~A. It probably dates back about a year, a year and a half at the most.~~

~~Q. There were no issues concerning water rights earlier than a year or a year and a half ago?~~

~~A. If there were, I was not aware of them.~~

~~Q. Well, maybe we can share something with you that will shed light on that in a moment.~~

~~I know what I wanted to ask you. Have you ever had any conversations with a Mr. Isaki concerning the Port of Seattle Third Runway application?~~

~~A. Yes, I have.~~

~~Q. And who is Mr. Isaki?~~

~~A. He is currently a special assistant to the~~

~~special expertise, no.~~

~~Q. Does he have an environmental background?~~

~~A. Joe Dear has a regulatory agency background.~~

~~He was the director of L&I for the State of Washington and then he was a deputy to the federal OSHA, whatever that agency, before he became chief of staff.~~

~~Q. And L&I is what?~~

~~A. Labor & Industries.~~

~~Q. Okay. So it sounds like his background is in regulations having to do with labor and workplace conditions?~~

~~A. Yes. Regulation in general in workplace and worker safety I guess in particular.~~

~~Q. And are there a lot of nexuses that you know of between OSHA regulations and the Federal Clean Water Act regulations?~~

~~A. No, not that I'm aware of, but I'm -- again, you asked me if he has any special expertise and my thought -- my answer was no, but he has some related experience.~~

~~Q. Well, I guess in the Kevin Bacon sense perhaps. Do you understand what I mean by that?~~

~~A. No, but --~~

~~Q. Okay. We'll explain it on a break.~~

~~A. If it's a question~~

~~governor for business and -- business relations and regulatory reform or some such title. I'm not exactly sure of the title. When I had the conversations I just answered yes to, he was the chief of staff to the governor.~~

~~Q. And does he have some special expertise in the Ecology administration of the 401 program?~~

~~A. No, I wouldn't suggest that he does.~~

~~Q. What's his first name?~~

~~A. Paul.~~

~~Q. Okay. And you say he was chief of staff for the governor?~~

~~A. Yes.~~

~~Q. Now, I thought that was someone else named Joe Dear?~~

~~A. Joe Dear left at about a year and a half ago, January or so of the year 2001, I think. And Paul Isaki was appointed chief of staff subsequent to that.~~

~~Q. So Paul Isaki is Joe Dear's successor of chief of staff for the governor?~~

~~A. Yes.~~

~~Q. Now, Joe Dear, I have the same question for you, does he have some special expertise in Ecology's administration of the 401 program?~~

~~A. I wouldn't characterize it as him having~~

~~Q. Now, have you met recently with Gordon White concerning the 401 Certification for the Port of Seattle?~~

~~A. What do you mean by "recently"? Within the last week; within the last month?~~

~~Q. Within the last week.~~

~~A. No, I have not.~~

~~Q. Okay. Have you met with him within the last month, same question, concerning the 401 Certification?~~

~~A. Yes, I have. I had a discussion with him about the status of the project.~~

~~Q. When was that?~~

~~A. Sometime within the last month. Maybe two and a half weeks ago, three weeks ago, something like that.~~

~~Q. Around the holidays?~~

~~A. Yeah, that's about right.~~

~~Q. And who else was involved in that discussion?~~

~~A. I think, to recalling, I think -- I think it would be December 18th, I think is when I had the discussion. And the reason I recall was that that's the day I believe that the PCHB stay ruling came out.~~

~~And as he and I talked, I think Ron Schultz from the governor's office may have been in the conversation because it was about connecting the governor with~~

1 understanding the decision and of course having us
 2 understand the decision as well. So the conversation
 3 was around the announcement.
 4 Q. What's Ron Schultz's position in the
 5 governor's office?
 6 A. He's a policy analyst for the governor.
 7 Q. Was it by phone or in person?
 8 A. I think -- well, I know Gordon was in person,
 9 Ron was in person. And now that I recall, the person
 10 on the phone was the governor's press secretary, Pierce
 11 something. I can't remember. I don't know his last
 12 name.
 13 Q. Is Pierce the first name?
 14 A. Yeah, I think so.
 15 Q. What was the substance of the discussion?
 16 A. Did you hear the announcement? My legal
 17 counsel had left me a voice mail, so Gordon and I and
 18 Ron and then turned to phone by Pierce, so it was a
 19 substance around what the PCHB ruling was. I believe
 20 it was the 18th. I may be wrong, but I think it was
 21 the 18th of December. It was on the day the decision
 22 came out.
 23 Q. and were there any discussions about what
 24 Ecology would do in response to the decision?
 25 A. Yes. We said we needed to meet with legal

1 Runway Project; is that right?
 2 A. Again, are you asking -- help me understand
 3 your question. Not to pursue the Third Runway Project.
 4 Are you meaning not to move dirt, not to proceed
 5 relative to the construction of the project, or are you
 6 meaning --
 7 Q. Those things.
 8 A. -- to drop the project and not to pursue it
 9 as a proposed project?
 10 Q. No, I think your clarification was very
 11 appropriate. And the first two things that you
 12 mentioned would be good examples of what I'm asking
 13 about: Dirt and construction.
 14 A. Yeah, I understand. I do not know if or if
 15 not communications to that effect have occurred. I am
 16 not aware of them. I assume not being aware of them
 17 would suggest we have not because it would be typical
 18 for me in this sort of a situation to be aware of that
 19 kind of communique.
 20 Q. And are you also aware of a decision which
 21 the Pollution Control Hearing Board issued a bit more
 22 recently concerning the major modification of the Part
 23 of Seattle's NPDES permit?
 24 A. I am aware of that.
 25 Q. And do you know what the decision essentially

1 counsel and decide what to do.
 2 Q. Has anyone from Ecology, to your knowledge,
 3 communicated with the Port about what actions would or
 4 would not be taken in response to the Board's stay
 5 decision?
 6 A. I believe our attorney has had conversations,
 7 if that falls within the anybody from Ecology question.
 8 I have not, and to the best of my knowledge, none of
 9 our staff have.
 10 Q. Has Ecology, to your knowledge, communicated
 11 to the Port that it should take no action in
 12 furtherance of the Third Runway Project in light of the
 13 Board's entry of a stay on the '01 Certification?
 14 A. I have no knowledge about what -- about that.
 15 If Ecology has, I'm not aware of it.
 16 Q. Well, as the director --
 17 A. Well, the director has not.
 18 Q. As the director on this high profile project,
 19 that's something you would likely have knowledge of,
 20 isn't it?
 21 A. Yes, I think so. Yeah. I mean, I should
 22 have knowledge of it, yes.
 23 Q. And as far as you know, Ecology has done
 24 nothing in response to the Port's stay with regard to
 25 telling the Port of Seattle not to pursue the Third

1 did?
 2 A. I believe I have an understanding of what the
 3 decision did, yes.
 4 Q. Why don't you explain that to me, if you
 5 would, please, your understanding?
 6 A. My understanding is that with the exception
 7 of the technical identification of the location of
 8 outfalls, the PCHB determined that Ecology's granting
 9 of a major modification was appropriate. That's my
 10 shorthand of it.
 11 Q. Well, is it your understanding that the PCHB
 12 said that the identification of outfalls was an
 13 inconsequential matter?
 14 A. Yeah, that's my impression of the decision,
 15 yes.
 16 Q. Have you read it?
 17 A. No, I have not.
 18 Q. Who told you that the identification of
 19 outfalls was inconsequential in terms of the PCHB's
 20 decision?
 21 MS. MARCHIORO: Objection, mischaracterizing
 22 the testimony of the witness.
 23 Q. (BY MR. EGLICK) Who gave you your impression
 24 of whether or not the identification of outfalls was
 25 consequential?

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1 A. I had a briefing of the results and
 2 interpretation of what the Board's decision was and I
 3 drew the conclusion from that information.
 4 MR. EGLICK: Could you read back the
 5 question, please.
 6 (Reporter read back as requested.)
 7 A. I did, that's what I just answered. I gave
 8 myself my own impression based on the information that
 9 I had gotten in terms of the report of the decision.
 10 Q. (BY MR. EGLICK) Did you brief yourself,
 11 Mr. Fitzsimmons?
 12 A. I drew my own conclusion that the decision by
 13 the PCHB, based on what I understand to be their
 14 decision, briefed by my counsel, I drew my own
 15 conclusion that the issue that we were found to err in
 16 was not a substantive issue, and on the whole the major
 17 modification that we granted was supported by the PCHB.
 18 Q. So you were briefed by your counsel; is that
 19 correct?
 20 A. Yes, I was.
 21 Q. And you have not read the decision; is that
 22 correct?
 23 A. I stated that. No, I have not.
 24 Q. Do you know whether or not the permit that
 25 was the subject of the appeal and the Board's decision

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1 was remanded or not?
 2 A. I believe it was remanded for the purposes
 3 that I've described my understanding here, that
 4 technical information had to be supplied in order for
 5 the permit to ultimately go forward.
 6 Q. Okay. Now, when you say identification of
 7 outfalls, what does that mean, to you?
 8 A. To me it means the specific location of where
 9 the stormwater effluent would be emitted into the
 10 environment, the outfall.
 11 Q. Discharged into a stream, for example?
 12 A. Precisely.
 13 Q. Now, as the director of the Department of
 14 Ecology, can you conceive of circumstances where
 15 knowledge of the location of an outfall would be
 16 important in terms of assessing compliance with water
 17 quality standards?
 18 A. Knowledge of where outfalls are to be located
 19 is important, but the precise specificity within feet,
 20 yards, oftentimes varies when it comes down to actually
 21 constructing it and varies in terms of the end result
 22 for whatever reason. And that range of specificity, I
 23 don't believe makes a significant -- it could
 24 potentially, but I believe, my understanding of our
 25 certain plan here and the major modification permit,

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1 that the specific location of the outfalls in question
 2 are not significant to our choices around the effect of
 3 water quality.
 4 Q. And how were the outfalls in question
 5 identified by location in the permit and fact sheet
 6 that the Board has now remanded?
 7 A. I'm not -- I don't know for sure. I don't --
 8 can't answer the question because I don't -- other than
 9 I don't know.
 10 Q. Well, I got the impression you were saying
 11 that -- that from the permit that the Board has now
 12 remanded you could know within a few feet where an
 13 outfall was going to be located. Is that what you're
 14 saying?
 15 A. I don't believe that's what I said, and if I
 16 did, I mean -- if I left you with that impression I
 17 apologize. I was answering a question about, is the
 18 exact location of permits -- of outfalls in a permit,
 19 and I didn't know we were talking specifically about
 20 this permit. We were talking in general in terms of
 21 outfalls and their effect on water quality. And I said
 22 they can vary, they do vary, and that variation
 23 potential is taken into consideration as I've come to
 24 understand how our program people do work. That's the
 25 answer.

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1 Now, in terms of where exactly these were and
 2 what the -- your second question here, I don't know
 3 what variation there was, et cetera.
 4 Q. And have you, before deciding what position
 5 the Department is going to take as to whether the
 6 Board's decision on location of outfalls was technical
 7 is the word you used, have you set aside some time when
 8 you're going to actually look at the major modification
 9 that the Board has remanded and look at the Board's
 10 decision?
 11 A. No, I have not. I have been -- it has been
 12 suggested to me by our staff who I have great
 13 confidence in that this exact location of the outfalls
 14 is, in their view, not a significant issue and it's --
 15 that's -- on this particular permit, that's who I'm
 16 trusting to draw my conclusions from.
 17 Q. So you have no independent analysis, you're
 18 not planning on performing any yourself?
 19 A. I'm not, no.
 20 Q. Okay. And have you been given any -- strike
 21 that.
 22 Are you aware of any action the Department
 23 has taken to advise the Port of Seattle that in light
 24 of the remand of the NPDES major modification, the Port
 25 may not proceed once again with moving dirt,

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1 construction activities -- you're nodding yes, but I
 2 should finish or otherwise the question won't be
 3 recorded for the reporter -- or any activities that
 4 were taken in reliance on that NPDES major
 5 modification?
 6 A. I'm not aware of any instructions provided to
 7 the Port on what to do relative to this most recent
 8 decision by the PCHB. I am aware that our staff are
 9 thinking about it, I've been informed that there's some
 10 consideration in terms of what this means, what it
 11 means for the project, what it means for the
 12 Department, and I'm aware that that consideration is
 13 going on right now.
 14 Q. And who has informed you of that?
 15 A. Ray Hellwig, my regional director.
 16 Q. Who else?
 17 A. Nobody else.
 18 Q. Well, is it typical that when a permit is
 19 remanded, the Department doesn't take some action to
 20 halt activity proceeding on the strength of the
 21 remanded permit?
 22 A. You're taking some time here. Do you want me
 23 to reword the question or --
 24 A. No, I'm reflecting on the -- on my answer.
 25 The first step on any PCHB decision that the

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1 401 or 402 permits?
 2 A. No, it's not practice.
 3 Q. That doesn't happen?
 4 A. It has happened. There's a difference
 5 between it happening and it being practice.
 6 Q. What's the difference?
 7 A. One of regularity versus one of having been
 8 contacted or having already been informed about the
 9 significance of a 401 or a major modification permit,
 10 et cetera. So sometimes it happens, sometimes it
 11 doesn't, given the circumstances of the particular
 12 project.
 13 Q. So it's not regular practice, as you put it,
 14 for the governor's office to contact Ecology concerning
 15 the time frame for a 401 or 402 action; is that
 16 correct?
 17 A. That's correct. It is not regular practice.
 18 Q. Okay. I'd like to share with you some
 19 documents here. Start with this one.
 20 (Deposition Exhibit No. 165 was marked for
 21 identification.)
 22 (Mr. Stock left the proceedings.)
 23 (BY MR. EGLICK) Showing you when's been
 24 marked as Exhibit 165, who that was a minute to
 25 look at

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1 Department does is to stop back and say, What should we
 2 do? The second step is then at usually a staff level
 3 to inform the project applicant what it is we are doing
 4 and what it is we expect them to do. So it is typical
 5 that after a PCHB decision or a Shoreline Hearings
 6 Board decision or a court decision that we do what
 7 we're doing right now on the major modification, and
 8 then it is typical to have some interaction with the
 9 project proponent, yes.
 10 Q. What do you understand Ecology is doing right
 11 now on the major modification?
 12 A. We are thinking about what to do.
 13 Q. And is there some time frame in which Ecology
 14 is going to come to a conclusion about what to do?
 15 A. There is no definite time frame that I'm
 16 aware of, no.
 17 Q. Has anyone from the governor's office called
 18 and said, We want you to set a definite time frame in
 19 which you will decide what to do about the major
 20 modification?
 21 A. Called whom?
 22 Q. You.
 23 A. Me. No.
 24 Q. Isn't it practice for the governor's office
 25 to make such requests with regard to issues concerning

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1 A. (Witness reviewing document.)
 2 Q. Let me know when you're good to go.
 3 A. Okay.
 4 Q. Can I see that for a minute?
 5 First, I guess could you tell me who Carol
 6 Jolly is?
 7 A. In this context, she was a policy staff for
 8 the governor in the governor's policy office, and she
 9 is the deputy director of the governor's policy shop
 10 now.
 11 Q. And what about Mic Dinsmore, do you see him
 12 mentioned here?
 13 A. Yes, I do.
 14 Q. Who's he?
 15 A. He's the executive director of the Port of
 16 Seattle.
 17 (Deposition Exhibit No. 166 was marked for
 18 identification.)
 19 A. Okay. Do you have questions?
 20 Q. (BY MR. EGLICK) First, this is an e-mail you
 21 can see from Ray Hellwig to you dated May 11, 2000,
 22 4:48 p.m.; is that right?
 23 A. Uh-huh.
 24 Q. Pardon me?
 25 A. Yes, I'm sorry.

1 Q. And do you recall this e-mail?
 2 A. I do now that I see it in front of me. I do
 3 recall it.
 4 Q. By the way, who's Nancy Groves?
 5 A. I think that's Ray's assistant in his office
 6 up in Seattle -- or in Bellevue.
 7 Q. Ray Hellwig?
 8 A. Ray Hellwig.
 9 Q. What about Diane Pastore?
 10 A. That's my assistant.
 11 Q. And Bill Alkire?
 12 A. Alkire. He is the legislative liaison for
 13 the Department of Ecology.
 14 Q. Okay. Who's Martha Choe?
 15 A. She is the director of the Office of Trade
 16 and Economic Development for the State of Washington.
 17 Q. So she's another department director?
 18 A. Precisely.
 19 Q. What role does that department have in 401
 20 Certifications?
 21 A. I could say none, other than being the agency
 22 represented or interested in economic development.
 23 They are a -- they have an interest and a role in
 24 assisting business and economic development activities
 25 in a general sense in a regulatory proceedings. So

1 A. The water quality standards of the state are
 2 about protecting the water quality of the state.
 3 Q. Are there any regulations, standards or
 4 anything else that Ecology is supposed to consider on a
 5 Federal Clean Water Act 401 Certification that speak at
 6 all to the question of fostering economic development?
 7 MR. MANNING: Objection, calls for a legal
 8 conclusion.
 9 Q. (BY MR. EGLICK) To your knowledge as
 10 director of the state agency that administers the 401
 11 Certification program?
 12 A. My answer is that the water quality laws of
 13 the state, to my knowledge, are nested in a set of
 14 intentions and goals that also address consideration of
 15 the economy and the economic impact of those standards.
 16 And so in my view they do connect, not as a mission,
 17 not as a standard, but they do connect and are nested
 18 in a statutory framework that does contain intentions
 19 and considerations associated with economics of the
 20 state.
 21 Q. So is there some particular water quality
 22 standard, for example, that you can point to that would
 23 bear out, in your view, the response you just gave?
 24 A. No, I don't believe there is a water quality
 25 standard, but I'm suggesting in answer to your previous

1 I would say that's the role they have. Watchful,
 2 supportive. Their mission is to support economic
 3 development. But in terms of authority or in terms of
 4 project review or technical assistance, they have no
 5 role.
 6 Q. Well, they had enough of a role, didn't they,
 7 according to this e-mail, to arrange a meeting between
 8 the head of the Port and the governor?
 9 A. And that's precisely a very appropriate role
 10 in the sense of their mission to assist in economic
 11 development, to assist business development and other
 12 related activities to the general economy of the state.
 13 In this case, obviously, it's appropriate for the
 14 agencies to be involved in a runway project that would
 15 have a lot to do with the capacity of the state to
 16 provide trade and to meet economic development
 17 objectives.
 18 Q. Which one of the state water quality
 19 standards that 401 Certifications are about is
 20 concerned with the factors you just mentioned?
 21 MR. MANNING: Objection, calls for a legal
 22 conclusion.
 23 Q. (BY MR. EGLICK) To your knowledge and
 24 understanding as director of the department that
 25 administers the state water quality standards

1 question that those -- you asked the water quality laws
 2 of the state, unless I misunderstood your question, and
 3 the water quality laws of the state are nested in a
 4 whole series of laws, environmental and economic, and
 5 so they do contain consideration of economic concerns.
 6 Q. And was it your direction, then, to
 7 department personnel in reviewing the 401 Certification
 8 that it take into account "economic concerns" as you
 9 put it?
 10 A. No, it was not my direction.
 11 Q. So this is something that you have kept to
 12 yourself but not imparted to your staff, or your
 13 department personnel?
 14 A. I don't understand your question because the
 15 previous question was, do the laws of the state
 16 consider economic development, and my answer to that
 17 was yes. So please, help me understand now this
 18 question.
 19 Q. Actually, I think my question was whether
 20 there are any provisions that are of concern under a
 21 Clean Water Act Section 401 Certification that take
 22 into account at all economic development, as you
 23 referred to it, concerns.
 24 MR. MANNING: Objection, calls for a legal
 25 conclusion and asked and answered.

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1 I am not aware of specific provisions in the
 2 standards that guide the statutes that relate -- not
 3 relate -- specifically on a 401 Certification that
 4 statutorily require the agency to consider economic
 5 development in the -- in the review of a 401
 6 Certification.
 7 Q. (BY MR. EGLICK) So what --
 8 A. May I finish, though?
 9 Q. Oh, sure, go ahead.
 10 A. There are rules that the agency has adopted
 11 associated with that, and in many of those rule-making
 12 activities, they require a business impact assessment.
 13 And in that business impact assessment, we have to
 14 consider economic development. So it's not as clean a
 15 yes and no answer as, you know, I sense you're wanting
 16 me to provide to you by suggesting the answer in your
 17 question.
 18 Q. I'm actually asking for a clear answer,
 19 rather than a yes or no answer, Mr. Fitzsimmons. So
 20 I'll try again.
 21 The question is if -- and I think you've kind
 22 of said there are no water quality standards or other
 23 laws that are administered under the 401 program that
 24 have to do with economic development. But the question
 25 is, if you're saying there are some other

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Department of Trade and Economic Development clearly
 has expertise related to small business impact.
 Q. So is it your testimony then that in making
 the 401 Certification decision for the Port of Seattle
 Third Runway Project, it was appropriate for the
 Department of Ecology to take into account economic
 development issues such as, I think you've just
 mentioned, business impact?
 A. The Department --
 Q. Would you like me to have the question read
 back?
 A. Please, go ahead.
 (Reporter read back as requested.)
 A. That's not my testimony.
 Q. (BY MR. EGLICK) Okay. Did Martha Choe or
 CTED have any -- or did Martha Choe or CTED have any
 expertise to offer in any topic area other than ones
 related to economic development with regard to a Port
 of Seattle 401 Certification?
 A. I don't believe so, no, she did not.
~~Deposition Exhibit No. 166 was marked for
 identification.~~
 Q. (BY MR. EGLICK) Now, Exhibit 166 is about a
 proposed meeting, is it not, among Mic Dinsmore, the
 director of the Port, Martha Choe, the governor, that

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regulations or laws that bring economic development
 factors to bear on a 401 Certification, were they
 brought to bear in this case?
 MR. MANNING: Objection, mischaracterizes the
 witness's prior testimony.
 Q. (BY MR. EGLICK) Go ahead and answer.
 A. This has lost its trail to me. So I don't
 know what the question is. I'd ask that you repeat a
 specific question and I will truly try and answer it.
 Q. Well, let's go back and ask another one.
 Is there anything that CTED, that's Martha
 Choe's agency --
 A. Yes.
 Q. -- has jurisdiction over or expertise in --
 are you with me so far?
 A. I am tracking you.
 Q. That has any bearing under the laws and
 regulations that govern a 401 Certification by the
 Department of Ecology?
 A. Yes, there is. And the answer is, the laws
 that govern 401 Certification require us to set and
 establish standards through rule-making processes.
 When we engage in a rule-making process, we are
 required by law to consider economic impact, especially
 small business impact, and I would suggest that the

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would be Governor Locke?
 A. Yes.
 Q. Wes Ulman, is that the former mayor of
 Seattle?
 A. By name, yes.
 Q. And works for a number of groups now; is that
 right?
 A. I believe that's the case. I don't have a
 lot of knowledge about it, but that's my impression.
 Q. Now, did the meeting referred to in this
 exhibit take place?
 A. I believe it did, but I'm not absolutely
 certain.
 Q. Did you attend it?
 A. No, I did not.
 Q. You weren't invited?
 A. To the best of my recollection, I wasn't
 invited, yes.
 Q. Do you see where Mr. Hellwig -- Mr. Hellwig
 is your regional director in the Northwest Regional
 Office?
 A. Yes.
 Q. Do you see where Mr. Hellwig in the second
 paragraph says he had conversations with Jerry O'Keefe?
 A. Yes.

1 Q. Who is that?
 2 A. He is a staff member in our budget and policy
 3 shop at Department of Ecology.
 4 Q. Okay. By the way, do you see where it
 5 mentions the meeting is campaign related? Do you see
 6 that?
 7 A. Take me to where it says that, please.
 8 Q. First line, second paragraph.
 9 A. No, I don't see that. It says it's very
 10 likely the meeting is campaign related.
 11 Q. Do you have any reason to believe it wasn't?
 12 A. I think that was the question that's embodied
 13 in this memo, or at least the issue around this memo.
 14 It may have been, it may not have been. As I recall,
 15 part of this was whether it was or whether it wasn't,
 16 yes.
 17 Q. Whether it was or wasn't what?
 18 A. Campaign related.
 19 Q. And what campaign is that a reference to?
 20 A. The governor's reelection campaign.
 21 Q. Okay. And then Mr. Hellwig says that. But
 22 according to conversations, quote, the meeting agenda
 23 will probably include, quote, and then he goes on to
 24 describe some things the Port wants to tell the
 25 governor about the Third Runway Project.

1 Q. And you'll agree with me that it is, what,
 2 eight days after Exhibit 166?
 3 A. Yes, I would.
 4 Q. Okay. And Mr. Hellwig, if you could read --
 5 Mr. Fitzsimmons, if you could read Mr. Hellwig's first
 6 sentence into the record, I'd appreciate it, please.
 7 A. It reads, "Tom, the July '00 decisionmaking
 8 time frame is going to be tight for us, but we'll give
 9 it our best shot. It appears that the KC" -- I believe
 10 that means King County -- "review of the Port's
 11 stormwater management plan may require up to ten more
 12 weeks."
 13 Q. Now, Mr. Hellwig has sent you an e-mail in
 14 which he's commenting on, quote, the July 2000
 15 decisionmaking time frame, quote. Do you see that,
 16 what you just read?
 17 A. Yes, I do.
 18 Q. What's that a reference to? He seems to
 19 think you'll know because he doesn't explain it.
 20 A. Well, to the best of my recollection, he's
 21 referring to previous discussions, briefings that I had
 22 been in around time frames for making the decisions
 23 related to the third runway proposal.
 24 Q. Now, was this the July 2000 decisionmaking
 25 time frame something that was imposed as a result of a

1 Do you see that?
 2 A. I do.
 3 Q. You're saying you didn't go to that meeting?
 4 A. No, to the best of my recollection, I didn't
 5 attend the meeting. I'm pretty certain I didn't.
 6 Q. So is it typical for the governor to conduct
 7 meetings about pending applications before the
 8 Department of Ecology without someone from the
 9 Department of Ecology being in attendance?
 10 A. No, I wouldn't say it's typical.
 11 (Deposition Exhibit No. 167 was marked for
 12 identification.)
 13 Q. (BY MR. EGLICK) Showing you what's been
 14 marked as Exhibit 167 to your deposition. Can you
 15 identify it?
 16 A. Yes. It's a memo from Mr. Hellwig to me
 17 dated May 19, 2000 at 1:10. And I would characterize
 18 it as an informational memo on time frames and issues
 19 related to the decisionmaking process of the SeaTac
 20 third runway.
 21 Q. Okay. It's actually an e-mail, isn't it?
 22 A. I'm sorry, it is an e-mail memo, yeah.
 23 Q. It's not cc'd to anyone else, is it; in other
 24 words, it's just from Ray Hellwig to you?
 25 A. Yes.

1 meeting that had taken place eight days earlier?
 2 A. I do not believe it was, no.
 3 Q. Well, is there a reason then on May 19th,
 4 that you know of, Mr. Hellwig has decided to write you
 5 an e-mail and say, The July time frame is going to be
 6 tight for us?
 7 A. Well, the July -- the May 11th memo says, "We
 8 are meeting with the Port of Seattle to discuss the
 9 status of several key issues and identify steps we need
 10 to make to resolve outstanding ones."
 11 My recollection is that that's about both
 12 substantive and time frames, and time frames during
 13 this and any project in decisionmaking are very
 14 critical to the applicant. The practice of Ecology is
 15 to try and commit to a series of time frames, realistic
 16 but also sensitive to applicants' need to know with
 17 time frame certainty.
 18 So I would not at all presume that some new
 19 commitment came out of the May 11th or the, whatever
 20 date the governor's meeting was, and if they did, I am
 21 not aware of them and had no conversations with the
 22 governor or anybody else about some new time frame. So
 23 I would suggest that it is a coincidence of words, not
 24 of fact.
 25 Q. Okay. Well, did you write back to

1 Mr. Fitzsimmons -- excuse me, to Mr. Hellwig when you
2 got this e-mail and said, What July time frame are you
3 talking about?

4 A. I don't recall doing so, no.

5 Q. So you knew what July time frame he was
6 talking about?

7 A. I believed -- yes, I most likely did. And
8 the July time frame was the time frame that we had on
9 the table going into the -- likely going into whatever
10 communications that occurred around the May 11th
11 meeting -- or the Tuesday, May 16th meeting, I'm sorry.
12 I'm looking at the date of the e-mail as opposed to,
13 "the meeting will happen at 4 p.m. on Tuesday the
14 16th."

15 Q. By the way, have you talked with Mr. Hellwig
16 about your deposition?

17 A. I had -- no, I have not specifically talked
18 to him about my deposition, the content of my
19 deposition or the fact that it is occurring. He did
20 ask me when it was occurring, and I've informed -- I
21 informed him when it was occurring.

22 Q. You had a meeting with him, didn't you?

23 A. I had a meeting with him about, what, my
24 deposition?

25 Q. And his

1 Q. (BY MR. EGLICK) So Mr. Fitzsimmons, let me
2 ask you again, did you meet with Ray Hellwig before
3 Christmas or at any time concerning your deposition or
4 his?

5 A. I met with Ray Hellwig concerning -- the
6 purpose of the meeting was not solely about his
7 deposition. The fact and issues related to his
8 deposition did come up during the meeting. I believe
9 the previous question you asked me was did I meet with
10 Ray Hellwig about my deposition, and I did not meet
11 with Ray about my deposition. That's what I believe
12 your previous question was.

13 Q. I think actually the record will reflect what
14 my previous question was.

15 A. So maybe you could refresh me through the
16 record then.

17 Q. And I think I actually asked whether you met
18 about your deposition or his. But be that as it may,
19 we're very glad to have the facts out now.

20 When did this meeting take place?

21 A. Roughly sometime before Christmas, I think
22 between Thanksgiving and Christmas if I recall
23 correctly.

24 Q. And was that in your office?

25 A. Yes.

1 A. I wouldn't characterize the meeting in those
2 terms, no.

3 Q. I'll just read you something, and if I need
4 to, I can certainly put it in the record. This is from
5 Mr. Hellwig's deposition. He's talking about a meeting
6 with you shortly before Christmas, and I asked him what
7 was the agenda for the meeting and he answered, quote,
8 The agenda for the meeting with him -- that's you,
9 Mr. Fitzsimmons -- was to briefly go over key areas of
10 concern related to the runway decision to clarify for
11 myself my own memory of events in part for purposes of
12 this deposition, end quote.

13 And that's Page 15, Lines 3 through 7.

14 Do you want to take a look at that? I'll
15 give you a copy of it if you want.

16 A. No, you can provide it to me, but what you've
17 read -- looking across the table, seeing you read a
18 quote from a document, so if you want to hand it to me,
19 that's fine.

20 Q. Sure. It's Page 15 here, lines -- let's see
21 3 through --

22 MS. MARCHIORO: Why don't we take a break.
23 We've already been going about an hour. Give the court
24 reporter a rest.

25 (Recess taken.)

1 Q. And was anyone else there?

2 A. No.

3 Q. Did you take any notes?

4 A. I don't recall doing so. I may have, but I
5 don't recall doing so.

6 Q. Well, we've made disclosure requests, so I
7 would expect that if there are some, we would be
8 getting them, and I hope you will look into that or your
9 counsel will.

10 A. Well, I suspect if I did make notes you have
11 them, and -- because we pretty much always, if not
12 every single time, disclose anything appropriate with
13 disclosure requests. So I'm confident that if I took
14 notes you would have them. I don't recall taking
15 notes.

16 Q. Now, who initiated the meeting?

17 A. I think Ray may have initiated it, yes.

18 Q. And he came down here from Bellevue for the
19 meeting?

20 A. No. I think he came down here for other
21 meetings as well and we stole a few moments to talk
22 about a range of issues. So -- he's usually down in
23 Olympia at least once a week, if not more frequently.

24 Q. So he came from Bellevue down here and in the
25 course of the day that he spent down here he met with

1 you privately, is that correct?
 2 A. Yes.
 3 Q. How long was the meeting?
 4 A. Half hour perhaps, as I recall.
 5 Q. And what were the topics discussed in the
 6 meeting?
 7 A. The status of the overall sort of progress of
 8 the case, the timing, when he expected his deposition,
 9 I don't recall at that point that I had mine scheduled
 10 yet. How staff were doing in terms of all the
 11 depositions, either pending or already having been
 12 taken, how it's affecting other workload and other
 13 permit activities.
 14 Let's see. I think there were a couple of
 15 other issues. There's -- that frankly I'm -- I think
 16 it's a personnel matter that I'm not able to share
 17 here, during the course of the conversation.
 18 Q. Now, I read you before and I'll just read you
 19 again, Mr. Hellwig said that the agenda for the
 20 meeting, quote, was to briefly go over key areas of
 21 concern related to the runway decision to clarify for
 22 myself my own memory of events, in part for purposes of
 23 this deposition, end quote.
 24 Do you disagree with that characterization?
 25 MS. MARCHIORO: I'm going to object from the

1 to Page 15, Line 7. I'd like you to read that into the
 2 record, please.
 3 A. "Q: Well, how did you happen to end up with
 4 a meeting with the director in his office?
 5 A: I asked for it.
 6 "Q: And what was the agenda for the meeting?
 7 "A: The agenda for the meeting with him was
 8 to briefly go over key areas of concern related to the
 9 runway decision to clarify for myself my own memory of
 10 events, in part for the purposes of his" -- "of this
 11 deposition."
 12 Q. Thank you.
 13 Now, is that accurate?
 14 A. That's what the paper says.
 15 Q. Is Mr. Hellwig's characterization that you
 16 just read accurate?
 17 MR. MANNING: Objection. I don't know how
 18 this witness can testify as to what Ray Hellwig thought
 19 the purpose of the meeting was. Ray Hellwig explained
 20 to us what he thought the purpose of the meeting was.
 21 MR. EGLICK: Mr. Manning, you've been around
 22 long enough to know that that objection is wholly
 23 improper. You're smiling as if that's kind of a funny
 24 thing to do, but in fact it's a very unprofessional
 25 thing to do.

1 endpoint I think the witness should be allowed to
 2 read the transcript and get the context in which
 3 Mr. Hellwig made those comments because my recollection
 4 of that is not the same, and I was at that deposition.
 5 MR. EGLICK: You're saying, Counsel, that
 6 that's not an accurate quote?
 7 MS. MARCHIORO: I'm not saying you're not
 8 quoting accurately. I'm saying that in the context
 9 that Mr. Hellwig also stated that he had a range of
 10 issues --
 11 MR. EGLICK: Counsel, don't testify.
 12 MS. MARCHIORO: You asked me a question.
 13 MR. EGLICK: No, I asked you whether it was
 14 an accurate quote. That's usually a yes or no
 15 question.
 16 MS. MARCHIORO: Not when you answer them.
 17 MR. EGLICK: I'm not answering questions
 18 here, Counsel, and you shouldn't be testifying here,
 19 Counsel.
 20 Q. (BY MR. EGLICK) Sure, let's do it your way,
 21 Mr. Fitzsimmons. Why don't you read into the record,
 22 if you would, this is from the deposition of Ray
 23 Hellwig, Page -- well, let's see. Start with Page 14,
 24 Line 25, and then read into the record through Page 15,
 25 Line 7 -- there's 14, Line 25, then it goes over here

1 MR. MANNING: What I find funny is that
 2 you're asking a witness to explain the purpose of a
 3 meeting from another person's perspective who has
 4 testified as to what he thought the purpose of the
 5 meeting was.
 6 MR. EGLICK: And the appropriate objection is
 7 about three words, not three paragraphs.
 8 MR. MANNING: I guess I'm not as skillful as
 9 you.
 10 A. I think the record --
 11 Q. (BY MR. EGLICK) Well, excuse me a minute,
 12 Mr. Fitzsimmons, because I think what I'll do is ask a
 13 question that perhaps will deal with the concern that
 14 your counsel -- or I guess it's your former counsel,
 15 has expressed, and that is, is Mr. Hellwig's
 16 description of the agenda an accurate description of
 17 what the agenda for the meeting actually was?
 18 A. From my perspective, no. And I testified
 19 what was covered in the meeting. A range of issues,
 20 one of which was his deposition. But other things were
 21 covered in the meeting and there wasn't a written
 22 agenda for the meeting. So if that's Ray's belief of
 23 the agenda, I can only testify to my belief of the --
 24 my understanding of the agenda, and it was other things
 25 than just the deposition.

1 Q. Were the subjects that he described that you
2 read into the record subjects that were addressed in
3 the meeting?

4 A. Yes, they were.

5 Q. Okay. So you've told us about lots of things
6 that went on in addition to your recollection, but
7 let's focus for a minute on what was said within the
8 area that Mr. Hellwig described. What facts did you
9 and he talk about relating to preparing for his
10 deposition?

11 A. My recollection -- the best of my
12 recollection is that we talked about sequencing issues,
13 when -- he wanted to recall, and it was helpful to me
14 as well, to know when we met or when we talked about
15 something or when -- timings of meetings and so forth.
16 So we talked about timing as one topic.

17 Q. Timing of what?

18 A. Well, just timing of events, the sequence of
19 events, when they occurred. We talked about his -- he
20 shared with me his understanding of, and his reasoning
21 of the decisions around the requirement, whether or not
22 the stormwater mitigation plan required a water right,
23 because that was an area that was in -- that evolved
24 over time.

25 He assured me again that he was very sorry.

1 Mr. Hellwig that he requested, did Tom Luster get
2 mentioned?

3 A. Yes. Ray shared with me his knowledge of the
4 fact that Tom Luster is a, apparently a witness for the
5 plaintiff's case and he shared with me his frustration.
6 Again, I'm just sharing with you the conversation and
7 the topic of the meeting, how, to his knowledge in the
8 case, Tom Luster's -- Ray's opinion of how Tom Luster's
9 so-called expert testimony is just mischaracterized
10 from his perspective.

11 Q. And you said "so-called expert testimony."
12 Are you saying that you don't consider Tom Luster an
13 expert with regard to 401 Certifications? We're
14 referring to Tom Luster who worked for the Department
15 of Ecology for over a decade; isn't that right?

16 A. Yes, we are.

17 Q. And who was the Department's senior 401
18 coordinator, isn't that right?

19 A. Yes.

20 Q. So when you used the term "so-called expert
21 testimony" --

22 A. I was referring to the characterization that
23 Ray put on it.

24 Q. Let me ask you what your characterization is
25 then, now that we've kind of gotten that clarified.

1 that the attorney-client privilege document that he
2 made a note in got out publicly and assured me that the
3 opponents in this case were absolutely twisting the
4 truth of that document and the truth of the event, and
5 that he expressed quite a bit of frustration over that,
6 how his integrity and meeting notes were being
7 manipulated. That was a topic that we talked about.

8 Q. In preparation for his deposition?

9 A. It was a topic of the meeting. I don't know
10 whether you could -- if you wish to characterize it as
11 preparation. I wouldn't characterize it as that. I
12 would talk about -- you know, the whole general topic,
13 as I said, was we talked about other things than just
14 his deposition, and that was one of the topics that
15 came up.

16 Q. Have you talked to him since his deposition
17 was taken?

18 A. No, I don't believe I have. I -- well, I
19 take that back. I talked to him as recently as
20 yesterday -- when was his deposition taken?

21 Q. January 8th.

22 A. Yes, I have. On several occasions --

23 Q. Anything come up about this case?

24 A. No.

25 Q. Now, when you had the meeting with

1 Would you call Tom Luster an expert on 401
2 Certifications?

3 A. I would say that Tom's expert -- I mean, Tom
4 Luster, I would characterize it as that he has some
5 expertise related to Clean Water Act Certifications. I
6 would not characterize him in any stretch of the
7 imagination as having all the expertise needed to make
8 a 401 decision.

9 Q. Well, he was the Department's expert on 401
10 Certification, wasn't he?

11 A. I wouldn't call him that, no. He was the
12 Department's coordinator on the 401 decisionmaking
13 process. Big difference. Significantly big
14 difference.

15 Q. He was the Department's senior 401
16 coordinator; is that correct?

17 A. That's correct.

18 Q. And he held the trainings for others in how
19 to make 401 decisions; is that correct?

20 A. He coordinated training related to the 401
21 decisionmaking process. He did not, to the best of my
22 knowledge, conduct training on the substantive and
23 technical decisions because there are far many more
24 people in the agency who we rely on to make those
25 technical decisions within their expertise that Tom

1 Luster does not -- perhaps now he does -- did not then
 2 have.
 3 Q. Okay. And what was Tom Luster's expertise,
 4 to your knowledge? Are you familiar with his resume?
 5 A. I think -- I'm not familiar with his
 6 resume -- that's the answer to your second question --
 7 in any specificity. I'm familiar with his job, the
 8 assignment according to his job.
 9 Q. Well, who has more expertise, Tom Luster or
 10 Ray Hellwig on 401 Certifications?
 11 A. That's a value judgment I can't make.
 12 Q. Well, you just made a value judgment
 13 concerning Tom Luster's expertise vis-a-vis others who
 14 you couldn't even name. I'm now asking you to make a
 15 judgment naming another person and I'm asking you to
 16 apply that judgment you just made in a specific
 17 circumstance.
 18 A. In answer to your question, I would say that
 19 Ray has a number of expertise related to 401
 20 decisionmaking in terms of processes, in terms of the
 21 legal aspects of public information and public
 22 participation, and Tom Luster has a number of expertise
 23 related to the processes, et cetera. So it's hard for
 24 me to say one has more expertise than another.
 25 Q. What are Ray Hellwig's qualifications for

1 with Ray's expertise.
 2 Q. Okay. So can you tell me what his higher
 3 education degrees are in?
 4 A. Off the top of my head, I can't. I mean -- I
 5 don't recall what they are.
 6 Q. And you're aware, aren't you, that for years
 7 after achieving his degree, he was involved in
 8 budgetary matters as his occupation? Are you aware of
 9 that?
 10 A. I'm fully aware of that, of course.
 11 Q. And in fact, Ray Hellwig has no scientific
 12 expertise in any environmental science, does he?
 13 A. Are you asking my opinion of whether Ray has
 14 science expertise or are you asking me to answer and
 15 affirm the opinion you just provided in the question?
 16 Q. Well, I'm asking you whether, in your
 17 opinion, Ray Hellwig has any scientific expertise in
 18 any area of environmental science. And my next
 19 question after that will be for you to give me the
 20 basis for that.
 21 A. In my opinion, Ray does have scientific
 22 expertise, expertise gained through his positions in
 23 the Department of Ecology, and possibly, although I
 24 don't recall explicitly, in his undergraduate course
 25 work and his previous job experience.

1 making a 401 Certification decision to your knowledge,
 2 other than that he is director of the Northwest
 3 Regional Office of the Department of Ecology?
 4 A. Well, he also worked in the environmental
 5 programs for a number of years and was involved in a
 6 number of permitting activities. So he clearly has
 7 expertise in environmental regulatory decisionmaking,
 8 regulatory enforcement. He clearly has experience and
 9 knowledge in science and data, in analysis, all of
 10 which bear on making 401 decisions as well as other
 11 decisions.
 12 Q. What's Ray Hellwig's experience in science
 13 and data and analysis?
 14 A. I don't recall exactly how many years Ray has
 15 worked for the Department, but it's been a number of
 16 years, and in and out of a number of programs,
 17 including shoreland program, riparian zone issues,
 18 streamside management issues, exposure to those issues
 19 and involvement in those issues.
 20 Q. Have you ever actually reviewed what
 21 positions he held and what tasks he performed prior to
 22 becoming director of the Northwest Regional Office?
 23 A. I hired Ray Hellwig. I made the choice of
 24 appointing Ray Hellwig based on a very competitive
 25 process, and in that process I became very familiar

1 Q. Has he ever had any training since he's come
 2 to the Department of Ecology in any area of scientific
 3 or environmental review or analysis?
 4 A. I don't know. I don't know.
 5 Q. Would it surprise you to know that he
 6 testified in his deposition that he had less than a day
 7 of training in anything of that sort?
 8 A. If that's what he testified, that's what he
 9 testified. I'm not surprised or unsurprised by it.
 10 I think -- you asked me my opinion, I gave you my
 11 opinion. I believe Ray Hellwig has scientific
 12 expertise in environmental decisionmaking, in
 13 permitting. Does he have expertise compared to others?
 14 Probably not. I simply asked a question to the best of
 15 my ability.
 16 Q. And you did say earlier that you hired him as
 17 director of the Northwest Regional Office and were very
 18 familiar with his qualifications, didn't you?
 19 A. During the hiring process I became very
 20 familiar with his qualifications, yes. Yes, I did.
 21 Q. But you're just not recalling them now; is
 22 that it?
 23 A. That's it, yes.
 24 Q. Okay.
 25 A. You asked me what his degree is in and I -- I

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1 mean, I don't recall exactly what his degree is in, but
 2 I, at one point a number of years ago, got very
 3 familiar with Ray and his background and his expertise
 4 and hired him based on that background and knowledge.
 5 Q. Now, back to this meeting with Mr. Hellwig,
 6 did you talk about -- you talked about date sequencing
 7 I think you said; is that right?
 8 A. Yes, I think so. Yeah, event sequencing.
 9 Q. Event sequencing. So did any discussion at
 10 that meeting have to do with the sequence of events
 11 surrounding Tom Luster's removal from the 401
 12 Certification application by the Port of Seattle?
 13 A. It's not possible to have had that discussion
 14 as you characterize it because Tom Luster was not
 15 "removed," as you've characterized it.
 16 Q. So your testimony is that Tom Luster was not
 17 removed from the 401 Certification application for the
 18 Port of Seattle?
 19 A. That is my testimony.
 20 Q. Would you prefer "transferred" as the verb in
 21 that question?
 22 A. That is more akin to the fact that at one day
 23 he was working on the project and whatever time went on
 24 he moved on to other work. And the reason it's more
 25 characteristic of it is because it is a neutral term

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1 and relative to what happened to him, and his
 2 reassignment of duties was a neutral activity related
 3 to the 401 and the Port project, et cetera.
 4 Q. Was he reassigned?
 5 A. Are you asking a yes or no question to the
 6 term "reassigned"?
 7 Q. Yes.
 8 A. No. I would say no, he was not "reassigned."
 9 Q. So if there are Department documents not
 10 generated by Mr. Luster but by others in the Department
 11 that used the term "reassigned," then you're taking
 12 issue with the use of that term?
 13 A. Your use of the term -- perhaps I need some
 14 explanation of your use of the term.
 15 Q. Why don't you tell me what you think
 16 "reassigned" means.
 17 A. It denotes to me that with some purpose of
 18 intent, he was taken off of one activity and reassigned
 19 to another activity. His assignments changed and in
 20 the context of anticipated changing assignments, so if
 21 that's what is meant by the term, he took on new
 22 assignments, he was assigned or -- from one to another
 23 set of activities.
 24 Q. And the set of activities that he was
 25 assigned from was the Port of Seattle 401 application;

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1 is that correct?
 2 A. From -- yes, that's correct.
 3 Q. Now, back to what my original question was
 4 before we had to clarify whether he was removed,
 5 transferred, reassigned or just assigned from one thing
 6 to another, and that question was, was that topic, in
 7 any form, using any of those verbs, discussed in your
 8 meeting with Mr. Hellwig?
 9 A. Yes, it was.
 10 Q. And why would Ray Hellwig discuss that with
 11 you?
 12 A. Well, I think it's a very logical issue
 13 because during the permitting process, I had had
 14 several contacts by legislators, I had had a contact by
 15 Tom Luster himself via a phone mail -- voice mail
 16 rather -- about his assignments and his duties, and so
 17 I had personal involvement in the series of events over
 18 the course of time that related to Tom Luster.
 19 Q. Related to Tom Luster in general or related
 20 to Tom Luster's ultimate assignment from, as you put
 21 it, the SeaTac third runway application to, as you put
 22 it, other duties?
 23 A. I'm sorry, I got lost in the question. I was
 24 paying more attention to how much fun you were having
 25 asking it, to tell you the truth, by the smirk on your

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1 face. I really don't know the question, Peter. Would
 2 you ask it again?
 3 Q. I'm not aware that I'm smirking, I'm actually
 4 kind of sitting here trying to suppress a cough which I
 5 have --
 6 MR. EGLICK: But go ahead, court reporter, if
 7 you would, please, read back the question.
 8 (Reporter read back as requested.)
 9 A. I'd say related to Tom -- my answer is
 10 related to Tom Luster in general.
 11 Q. (BY MR. EGLICK) Now, what did you discuss
 12 about Tom Luster in general with Mr. Hellwig?
 13 A. I recall him telling me where Tom Luster now
 14 is employed. I recall him talking about the status of
 15 his knowledge of Tom Luster as, as we had talked about
 16 in this deposition previously, an expert witness for
 17 the plaintiffs. I recall Ray making remarks that, The
 18 plaintiffs are trying to make this out to sound like we
 19 removed Tom Luster from his job.
 20 I, of course, was familiar with those charges
 21 because legislators had made them and others had made
 22 them and I said -- you know, This is not true. They
 23 can say what they want to, they can spin it out to be
 24 what they want to, but it's just not true that Tom --
 25 and so we talked about those issues

1 We talked about --

2 Q. Well, let me interrupt you for a minute. You

3 said, We talked about those issues. You mean about the

4 issues of whether Tom was removed from his job?

5 A. Yes.

6 Q. Okay. Now, were you aware before Tom's --

7 and you're now used the term "removal," but I'll use

8 yours, "reassignment." Were you aware of Tom's

9 reassignment before it occurred?

10 A. Yes, I was. Yes, I was.

11 Q. And were you aware of it from Ray Hellwig?

12 A. I believe I had conversations both with Ray

13 Hellwig and with Gordon White on the subject. And

14 Gordon White, in case you're going to ask it --

15 Q. I wasn't going to ask anything, I'm just

16 taking a cough drop.

17 A. So from Ray Hellwig as one, and in addition,

18 Gordon White.

19 Q. Had you received complaints from Mic Dinsmore

20 concerning Tom Luster's performance on the 401

21 Certification application review? Mic Dinsmore is the

22 guy you said is the executive director of the Port of

23 Seattle, right?

24 A. Yes. And the answer from Mic Dinsmore, no.

25 Q. From anyone affiliated with the Port of

1 Q. Now, you said having regular meetings with

2 Gina Marie Lindsey did you say?

3 A. Yeah. I wouldn't call them regular, but I

4 would call them frequently enough to be not any date

5 certain, but four or five meetings during the course of

6 a year and then in the last year of the project review,

7 probably once a month or so. Either meetings or

8 telephone calls. I'm sorry, I don't mean to imply that

9 they were all in person, but contacts is probably a

10 better way to say it.

11 Q. And who attended those meetings?

12 A. Sometimes her staff, Elizabeth Leavitt.

13 Michael Cheyne, I think is his name. And Port staff --

14 Q. These are two Port persons, Elizabeth Leavitt

15 and Michael Cheyne, C-H-E-Y-N-E?

16 A. Is that how you spell it?

17 Q. And Leavitt is L-E-A-V-I-T-T?

18 A. And then Ray Hellwig. On occasion, one of

19 our staff related perhaps to a particular issue. John

20 Glenn, for example, I recall one meeting where the

21 issue was the major modification and the time frames

22 and processes around that --

23 Q. Did the Port -- anyone affiliated with the

24 Port in any way request, suggest that Mr. Luster be, to

25 use your term, "reassigned"?

1 Seattle?

2 A. Yes. I had been in conversations where

3 people raised concerns about the objectivity of Tom

4 Luster in carrying out his job.

5 Q. Now, how would you happen to be in a

6 conversation with the Port of Seattle where Tom

7 Luster's activities at all would come up? What

8 circumstances did you have those conversations?

9 A. Periodic meetings that I had with the Port of

10 Seattle airport manager.

11 Q. Who's that?

12 A. I'm trying to think of her name.

13 Q. Gina Marie Lindsey?

14 A. Gina Marie Lindsey, thank you. Over the

15 course of the year or two that -- in the latter year or

16 two of the activities related to the review of their

17 proposed project, and in the course of those meetings

18 which we would periodically hold to talk about issues,

19 progress, concerns, or in some cases that I would

20 engage in as support to a decision or a recommendation

21 we were making to the Port, periodically during those

22 meetings the subjects -- lots of subjects obviously

23 came up, but the subject of their concern for the

24 objectivity of our staff in general and Tom Luster in

25 particular.

1 A. Request, no. Suggest, no.

2 Q. Did they make suggestions that would have

3 resulted in Mr. Luster, if they had been followed, no

4 longer reviewing their project?

5 A. They expressed their concerns about the

6 objectivity of Tom Luster over a period of time.

7 Similarly, at the same level as the -- as a group of

8 several opponents of the project expressed their

9 adamancy that Tom Luster is the only person in the

10 Department of Ecology that has any objectivity on this

11 project. And in that context, I -- that's the context

12 in which these issues were coming to my attention.

13 Q. And that was in the same time frame, is your

14 recollection, as the Port was asking for, or suggesting

15 Tom's -- Tom Luster's removal --

16 A. I just answered the question. The Port did

17 not suggest his removal. The Port expressed their

18 concerns about his objectivity.

19 Q. Okay.

20 A. And my best recollection is that never went

21 to the level of them saying, Remove him from the

22 project. But, yes, it was at the same time opponents

23 to the project were in writing and in telephone calls

24 orally, legislators and citizens and elected officials

25 in the local communities, expressing very strongly that

1 Tom Luster is the only person in the Department of
 2 Ecology with objectivity.
 3 Q. And those letters then would be part of the
 4 record of such letters were sent prior to Mr. Luster's
 5 reassignment; is that correct?
 6 A. Yes, they should be.
 7 Q. Okay. So if they're in the record, they're
 8 there, and if they're not, then perhaps you've gotten
 9 your sequencing wrong, would that be possible?
 10 A. If they're in the record, they're there. I
 11 don't understand the sequencing comment.
 12 Q. Well, I guess it comes from the fact that my
 13 review of the record I guess reflects that the concern
 14 about Mr. Luster was something that came up from the
 15 public after he was reassigned and that you're kind of
 16 putting two things together that didn't happen at the
 17 same time. But that's fine, this is your deposition,
 18 not mine.
 19 A. It's mine, and I also recall that there were
 20 telephone calls prior to his change in assignment.
 21 Q. Now, you're smiling and kind of laughing as
 22 you say that. Is there a reason for that?
 23 A. Yes. The same reason you were, because you
 24 have continually used the term "reassigned," "removed,"
 25 and I'm trying to communicate that he was not removed.

1 Q. And Mr. Dinmore was there?
 2 A. Yes.
 3 Q. He flew in from Europe for that meeting?
 4 A. I'm not sure that that's the meeting he flew
 5 in from Europe. It may be.
 6 Q. You had more than one meeting with him down
 7 at the pier?
 8 A. Yes. Yeah, there were, I think, two meetings
 9 with him down at the pier --
 10 Q. Okay.
 11 A. -- if I recall.
 12 Q. And at those two meetings -- now, these are
 13 meetings that took place just prior to the withdrawal
 14 of the Port 401 application?
 15 A. Yes.
 16 Q. At those two meetings, were there any
 17 requests, suggestions from the Port concerning
 18 reassignment of Mr. Luster -- change in assignment of
 19 Mr. Luster, excuse me?
 20 A. There were expressions of -- the similar
 21 expressions of concern as in past about Mr. Luster's
 22 objectivity.
 23 Q. And you were at the same time, weren't you
 24 negotiating whether or not the Port would withdraw its
 25 401 application or whether you would have to issue a

1 he was not reassigned, he had a change in assignment.
 2 And the smile you saw on my face is that in my own head
 3 I've just arrived at a term that better represents the
 4 terms you're suggesting and more accurately reflects my
 5 understanding of the situation.
 6 Q. I'm not suggesting any terms. I'm happy to
 7 use your change in assignment --
 8 A. Yes, he had a change in assignment.
 9 Q. -- and with all the meanings that you want to
 10 assign to it.
 11 Now, let me ask you a question then. You're
 12 saying that you had these regular meetings with Gina
 13 Marie Lindsey and Tom Luster's objectivity was
 14 questioned, but he wasn't removed -- excuse me, his
 15 assignment wasn't changed, was it until after the Port
 16 withdrew its 401 application in the fall of 2000; isn't
 17 that correct?
 18 A. That is correct. Yes, that is correct.
 19 Q. Now, before -- or right around the time that
 20 withdrawal occurred, you had another meeting with the
 21 Port, didn't you?
 22 A. Yes.
 23 Q. And that was down at the Port's offices on
 24 the pier, wasn't it?
 25 A. Yes, that's correct.

1 ... isn't that correct?
 2 I wouldn't use the term "negotiating." I
 3 would say that we were -- we informed the Port -- I
 4 informed the Port that it was the agency's decision to
 5 deny the 401 Certification. And that they had options.
 6 And one option was to withdraw and resubmit, another
 7 option was to take the denial and appeal or take the
 8 denial and stop the project. I wouldn't characterize
 9 that we were negotiating over anything.
 10 Q. You were laying out options; is that correct?
 11 A. That's correct.
 12 Q. And the Port was responding to your laying
 13 out of options; is that correct?
 14 A. That's correct.
 15 Q. And then you responded to the Port's
 16 response; is that correct?
 17 A. Yes.
 18 Q. And then they responded back to you; is that
 19 correct?
 20 A. Yes.
 21 Q. Okay. And there were a few rounds of that;
 22 isn't that right?
 23 A. Yes.
 24 Q. And there were some drafts of documents
 25 exchanged, weren't there?

1 A. Yes, there were. Yes.

2 Q. And at any time in the course of this process

3 that we just described or in any conversations or

4 exchanges or communications related to it, did the

5 subject come up in any way of reassignment of

6 Mr. Luster's change in assignment of Mr. Luster,

7 excuse me again?

8 A. Yes, it did. It came up in the context of a

9 discussion, as I recall the timing of it, the Port made

10 the decision to withdraw their application. And then

11 we subsequently, whether it was a subsequent meeting,

12 we talked about given that then what is the next step,

13 and they wanted to resubmit the application. And we

14 talked about how hard staff had worked, how staff

15 assignments had been devoted almost in the last year

16 exclusively to the Third Runway Project. We talked

17 about changing the composition of the staffing patterns

18 so that we could free backup thinking about, you know,

19 sort of get out of the tension and recommit in a very

20 positive way and renew it.

21 A. At that point in time I was -- it was either

22 there or shortly thereafter, but I think it was there,

23 I was aware that there was a whole series of activities

24 that Tom Luster was not doing, that he had been

25 scheduled to get to do a long time ago. And I don't

1 Q. So thr

2 these discu

3 particular

4 assignm

5 A.

6 Q.

7 discussion

8 people, by elect

9 means, exchanged tho

10 change of assignment for 10.

11 A. No.

12 Q. Then, I guess I'm going to have

13 and ask you the question I asked that y

14 "Yes, it did," so and ask that again.

15 A. Please, go back and do that.

16 (Reporter read back as requeste

17 Q. (BY MR. EGLICK) Now, that

18 that related to --

19 A. Something different than what

20 me.

21 Q. No, I don't think so --

22 A. Well, then why don't we let the

23 back and ask the question and then I'll

24 Q. Why don't we clarify it by aski

25 question and --

1 believe I made any disclosure about or commitment to

2 change Tom Luster. My recollection was I said we

3 would, at Ecology, go back and make determinations

4 about staff assignments and reconstitute a team to go

5 to the next step on this.

6 MR. EGLICK: Now, Mr. Fitzsimmons, I know

7 you're concerned about time and I'm going to ask the

8 reporter to read back the question again. If you

9 would, please, Reporter.

10 (Reporter read back as requested.)

11 (Discussion off the record.)

12 Q. (BY MR. EGLICK) We'll go on from there. But

13 what I wanted to point out to you, Mr. Fitzsimmons, is

14 I asked a question, you answered it with, "Yes, it

15 did," and then you went on to 22 lines of things I

16 hadn't asked about, but I might ask about in some way,

17 but if you're concerned about time, and you've said you

18 are, it's really your choice how you want to proceed.

19 I'll go to the next question.

20 A. All of the discussions and whatever you just

21 described took place where?

22 A. A variety of places.

23 Q. And were any of those places in locations

24 where Port of Seattle representatives were present?

25 A. Yes.

1 A. Then what question am I

2 Q. Excuse me, Mr. Fitzsimmons.

3 better if we talk one at a time and I as

4 and your attorney makes the objection

5 sense in getting hot under the collar.

6 MS. MARCHIRO: Well, and

7 that you asked -- at the beginning of t

8 you instructed Mr. Fitzsimmons to let

9 didn't understand the question. I thin!

10 up some questions on him and he's try

11 explained. So if you would please do

12 appreciate it.

13 MR. EGLICK: Sure. I'd be ha

14 did invite him to let me know if he di

15 the question. It didn't mean to invite t

16 angry.

17 MS. MARCHIRO: Objectio

18 mischaracterizes Mr. Fitzsimmons' st

19 MR. EGLICK: Well, I'm not t

20 his state of mind. I'm wondering wh

21 Q. (BY MR. EGLICK) In any e

22 move on here, folks.

23 The question is, you were desc

24 of interaction with the Port and what

25 and maybe the question wasn't clear,

AR 001606

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1 interaction, that process that you described of the
 2 Port and you exchanging thoughts and drafts of
 3 documents and so on, did the change in assignment for
 4 Tom Luster come up?
 5 No, does that work for you as a clear
 6 question?
 7 A. No, it does not.
 8 Q. Can you pinpoint for me which part's unclear
 9 and I will do my damndest to fix it?
 10 A. When you ask, did the change of assignment --
 11 in assignment to -- of Tom Luster come up, I am really
 12 trying to answer the question. I've been in many
 13 depositions. I am an honest person, but I'm also
 14 sensitive when words can be used differently than what
 15 I mean them to use. So that's what this is really
 16 about.
 17 Q. Well, tell me which words you're concerned
 18 about and we'll fix it.
 19 A. The "change of assignment." We talked about,
 20 to the best of my recollection, the team of people on
 21 both sides. That was my previous answer.
 22 Q. And we is who?
 23 A. The Port of Seattle staff, Ray and I were in
 24 a meeting where, as I tried to describe earlier, we
 25 talked about, okay, if they're going to resubmit, then

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1 let's talk about constitution of the teams of people
 2 and the processes associated with that, et cetera.
 3 Q. So you talked with the Port of Seattle -- the
 4 way you would like to phrase it to make it clearer is
 5 that you talked -- you had discussions that involved
 6 the Port of Seattle concerning the composition of the
 7 review team if the Port were to submit -- withdraw and
 8 submit a new application?
 9 A. Thank you, that is characterizing it. We did
 10 not specifically talk about whether Tom Luster would
 11 be -- what his assignment would be on that review team.
 12 They expressed their concerns about Tom Luster. We
 13 expressed our concerns about some of their staff and
 14 how the staff were working together and how the staff
 15 had, for the past year been under an incredible amount
 16 of tension. And we said we would take their concerns
 17 into heart, under consideration.
 18 And then what I tried to describe previously,
 19 separate from this meeting with the Port, which you I
 20 understood previously, suggested it was with the
 21 meeting with the Port, my staff and I talked about,
 22 among other things related to the staff team, the
 23 assignments of Tom Luster.
 24 Q. And the question that you talked about was
 25 whether Tom would be on this new review team if the

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1 Port is submitted or whether he would have a change in
 2 assignment?
 3 A. And if Tom were, what other duties of Tom's
 4 were not happening and what are the pros and cons of
 5 constituting -- reconstituting the team differently.
 6 That whole range of issues, yes, we did talk about
 7 that.
 8 Q. Okay. And then after those discussions were
 9 concluded, at some point you and the Port reached
 10 agreement on the Port's withdrawal of its 401
 11 application and resubmission of a new one; is that
 12 correct?
 13 A. I think they had reached a decision to
 14 withdraw, so the agreement wasn't whether or not they
 15 were withdrawing. Maybe I misunderstood your question.
 16 Reached agreement on the withdrawal implies to me that
 17 they hadn't decided to withdraw until after these
 18 discussions. They had decided to withdraw before the
 19 discussions I just described.
 20 Q. They hadn't formalized the withdrawal,
 21 though, had they?
 22 A. No, they had not, that's correct.
 23 Q. Okay. Well, that's helpful. And I really do
 24 apologize, because we could have saved a lot of time --
 25 and that's my responsibility as well as yours, if you

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1 had wanted to enter the word "composition," I would
 2 have been happy to accept it. So just let me know as
 3 soon as you have what works better for you as a synonym
 4 and maybe we can run with it.
 5 MS. MARCHIORO: Off the record.
 6 (Discussion off the record.)
 7 MR. EGLICK: Back on.
 8 (Deposition Exhibit No. 168 was marked for
 9 identification.)
 10 Q. (BY MR. EGLICK) Showing you what's been
 11 marked as Exhibit 168 to your deposition, can you
 12 identify it?
 13 A. (Witness reviewing document.)
 14 Are you asking me to characterize it or --
 15 Q. Well, have you ever seen it before?
 16 A. Yes.
 17 Q. What is it?
 18 A. It is a letter -- it's a document that is in
 19 a letter form dated September 28th, 2000 from me to Mic
 20 Dinsmore, executive director of the Port, with a cc to
 21 Governor Locke. And it is in regards to the Port of
 22 Seattle's withdrawal of its 401 Water Quality
 23 Certification.
 24 Q. And was this one of the letters whose
 25 contents was negotiated with the Port at those two

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1 meetings at the Port's offices in September 2000 that
 2 you attended and Mic Dinsmore attended?
 3 A. This letter isn't signed, so I'm wondering if
 4 this -- actually we ever sent this letter. I'm not
 5 absolutely certain that we did.
 6 Q. That wasn't my question, though.
 7 A. Well, I'm asking you a question, because --
 8 Q. This is a document we got from Ecology. But
 9 my question is, I think, without having the reporter
 10 read it back, which I can do, was whether --
 11 A. I'm sorry. I'll stick with your questioning,
 12 I apologize.
 13 Q. Was this one of the documents that was --
 14 whose contents was negotiated with the Port at those
 15 meetings at the Port's offices in September 2000 that
 16 you and Mic Dinsmore attended?
 17 A. No.
 18 Q. Was it negotiated, the contents negotiated
 19 after those meetings?
 20 A. No.
 21 Q. Well, how did this letter come about, this
 22 document?
 23 A. The contents of this letter, as I recall --
 24 this letter was not negotiated. This letter reflects
 25 commitments, agreements and understanding coming out of

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1 sorry.
 2 Q. Well, I'll ask you another one since -- in
 3 the interest of time.
 4 Do you see where this document says, "I'm
 5 assuming that as we're in the midst of working toward a
 6 final 401 decision, all relevant internal documents
 7 should be considered deliberative and do not need to be
 8 disclosed at this time."?
 9 Do you see that?
 10 A. I do see that. So your previous question as
 11 I recall it was, was there a time when Ecology decided
 12 that public records would not be disclosed, and my
 13 answer was no. There was never a time, and public
 14 records are never withheld. This memo suggests, as my
 15 recollection exactly in answering your previous
 16 question, is that there are some internal documents,
 17 working deliberative documents that are -- do not --
 18 are not by the law required to be disclosed at a
 19 certain time frame of deliberation. And it's a fine
 20 point, but I think it's a very important point.
 21 Q. Was my previous question about public
 22 records? Do you want me to have it read back?
 23 A. Please.
 24 MR. EGLICK: I think it started, "Was there a
 25 time when..."

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1 a series of meetings with the Port.
 2 Q. And that included the two meetings at the
 3 Port of Seattle's offices in September 2000 that you
 4 and Mic Dinsmore attended?
 5 A. Yes.
 6 Q. Now, was there a time when Ecology decided
 7 that it should not share with the public anymore the
 8 benefit of staff review and comments on Port proposals
 9 and documents?
 10 A. No.
 11 (Deposition Exhibit No. 169 was marked for
 12 identification.)
 13 Q. (BY MR. EGLICK) Showing you what's been
 14 marked as Exhibit 169, can you identify it?
 15 A. It's an e-mail from Ray to myself, Tom Luster
 16 and other staff members -- if you're interested, I'll
 17 read all of their names into the record -- as well as
 18 Joan Marchioro.
 19 Q. Now, this e-mail suggests that certain
 20 documents be withheld from disclosure from that point
 21 forward, doesn't it, "that point" being October 3rd,
 22 2000?
 23 A. No. This document doesn't, and I'd like to
 24 if I might -- I don't know if this is appropriate, but
 25 go back to your previous discussion -- question, I'm

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1 (Reporter read back as requested.)
 2 MR. EGLICK: And what was the witness's
 3 answer?
 4 THE WITNESS: No, I believe.
 5 Q. (BY MR. EGLICK) Okay, let's move on.
 6 Now, you would agree, Mr. Fitzsimmons, that
 7 my previous question actually didn't say "public
 8 records," it referred to the benefit of staff analysis
 9 of Port proposals; is that right, now that you've had
 10 it read back?
 11 A. It also said "documents."
 12 Q. Okay.
 13 (Deposition Exhibit No. 170 was marked for
 14 identification.)
 15 Q. (BY MR. EGLICK) Now showing you what's been
 16 marked as Exhibit 170 to your deposition, can you
 17 identify it?
 18 A. Yes. This is an e-mail from Joan Marchioro
 19 to me dated October 23rd, 2000. Attached to it was a
 20 final draft of the third runway 401 -- actually two
 21 documents titled that, Word documents, and I need a
 22 minute to see if they're here. I think I've described
 23 it. It is a -- now that I track through it all better,
 24 it's a series of e-mails, a string of e-mails starting
 25 back Monday, October 23rd at 11 a.m. from Rachel McCre

1 to Ray Hellywig and a group of other people, attaching a
2 draft, notes, and then that original e-mail appears to
3 be passed on from Tom Luster to others.

4 And then that Tom Luster e-mail is passed on
5 by e-mail from Joan to me.

6 Q. Okay. And the Tom Luster memo was one that
7 you ultimately ordered the Department to release,
8 didn't you, after the public protested that it was
9 being withheld?

10 A. Let me refresh -- may I think just a moment
11 to just sort of refresh my memory around this?

12 Q. Sure. Do you recall you were actually called
13 by some legislators who wanted to know why the
14 memorandum was being withheld?

15 A. I do recall that.

16 I do not specifically recall if this is one
17 of the memos that they were talking about. It would
18 take me a few more minutes to get this recollection
19 back in my mind.

20 Q. Well, I pulled the next document. If you
21 want to keep on looking, that's fine.

22 MR. MANNING: I'm going to take this
23 opportunity to leave the room for just a second. Back
24 in a moment. Go ahead.

25 A. (Witness reviewing document.)

1 other things, discussions with the Dept concerning its
2 401 application?

3 A. Yes, it does.

4 (Deposition Exhibit No. 171 was marked for
5 identification.)

6 Q. (BY MR. EGLICK) Showing you what's been
7 marked as Exhibit 171 to your deposition, can you
8 identify it?

9 A. It is a legal document. I'm not an attorney,
10 so I'm not sure what the name of this is, but --

11 Q. Why don't you read the title?

12 A. Pollution Control Hearing Board for the State
13 of Washington --

14 Q. Now, look at the bottom, the right there --
15 there you go.

16 A. There we go, ACC's Interrogatories. So it is
17 I guess ACC's interrogatories to the Department of
18 Ecology in this ACC versus the State on the Port of
19 Seattle permit.

20 Q. And it's DOE's response as well, isn't it?

21 A. Yes, it is.

22 Q. Take a look at Page 9, if you would, second
23 line from the bottom. Do you see your name there?

24 A. I do.

25 Q. And you're listed as someone, quote, who

1 Yes, I think this is -- now that I look at

2 it, I think this is the document, if there weren't more
3 than one, but I think this is one of the documents that
4 were -- that the legislators called me about suggesting
5 that there was a document that we are withholding that
6 would, under this deliberative review choice, so we
7 were withholding it from immediate review -- I mean,
8 immediate disclosure. And they, as I recall, wanted --
9 claimed that it had something in it that proved that
10 Tom was removed from the project or that the project is
11 already inappropriately decided upon or something like
12 that, as I recall.

13 And in response to that request, I just
14 simply said, Fine, if you don't trust us, as I recall
15 I, on the phone, I said, We'll just release the
16 document. And they had it released.

17 Q. (BY MR. EGLICK) Okay. And who had ordered
18 it withheld?

19 A. I think it was one of a number of documents
20 that were held back in timing from public release under
21 this need for an opportunity for our staff to be
22 deliberative in -- and not have to have their written
23 documents reviewed by the public before we had an
24 opportunity to deliberate them -- on them.

25 Q. The document concerns decisions, among

1 supplied information in answer to these
2 interrogatories, quote.

3 Do you see that?

4 A. I do see that.

5 Q. Is that correct?

6 A. Yes, I believe I -- well, I was -- I recall
7 being a party to the preparation of these -- of this
8 interrogatory.

9 Q. And how were you a party to the preparation
10 of the responses?

11 A. My attorneys and staff interacted with me,
12 either in supplying records or -- let me see, if you
13 might, if there's actually a correct statement from me
14 in the interrogatories here.

15 Q. Well, let me help you out. Look at
16 Interrogatory 17, Page 34, please. And could you read
17 that interrogatory into the record, please.

18 A. Uh-huh. I'm sorry, Page 34?

19 Q. Interrogatory 17, Page 34. Do you have it
20 there?

21 A. I'm hoping.

22 Describe in detail the contents of any
23 meeting or communication in which Joan Marchioro, Tom
24 Fitzsimmons and/or Port Counsel Jay Manning (or others)
25 participated addressing in whole or in part the need or

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1 potential use of a water right for implementation of
 2 flow mitigation for the Third Runway Project, which
 3 took place on April 2nd, 2001."
 4 Q. Now, were you asked to provide information in
 5 response to that interrogatory?
 6 A. Yes, I was.
 7 Q. Okay. And what information did you provide?
 8 A. If I recall, I was asked about my
 9 recollection of the conversation, and I provided that
 10 recollection.
 11 Q. And what did you provide as a recollection?
 12 A. The interrogatory says my answer -- on 17, is
 13 that what we're --
 14 Q. Right, but I'm asking what information you
 15 provided, not what this piece of paper says.
 16 A. Oh, I'm sorry.
 17 Well, I provided my recollection of the
 18 conversation which was a three-party conversation,
 19 Joan, myself and Jay Manning, and an opportunity for
 20 Mr. Manning, representing the project applicant, to
 21 share the project applicant's view of whether or not
 22 the water -- whether or not the stormwater facility as
 23 part of the project needed a water right.
 24 Q. Okay. And what was the means by which -- was
 25 this a telephone call?

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1 Manning wants to talk to the director; is that correct?
 2 A. I imagine it is, yes. I'm not absolutely
 3 certain of the facts.
 4 Q. And so you were at, you said, someplace in
 5 Eastern Washington?
 6 A. Yes.
 7 Q. They made the arrangements to get on the
 8 phone with Jay Manning and Joan Marchioro; is that
 9 right?
 10 A. Yes, that's right.
 11 Q. And when you got on the phone did you know
 12 what the topic was?
 13 A. I recall, yes, that Diane told me -- let me
 14 just see if I'm -- may I, I'm sorry to interrupt. My
 15 pager is going off like crazy here --
 16 (Interruption.)
 17 A. Back to the question. My recall is that my
 18 secretary told me that the topic of the conversation
 19 was the Port's water right.
 20 Q. (BY MR. EGLICK) And which members of the
 21 401 -- or do you call it a "team" now, the folks who
 22 were reviewing the Port's 401, is that what you call
 23 it, a "team"?
 24 A. Yeah, I've used that term. It's in my head
 25 in terms of a team of people.

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1 A. Yes, it was.
 2 Q. Okay. And did Jay Manning just happen to
 3 call you up and catch you on the phone with Joan in
 4 your office, Joan Marchioro?
 5 A. No, I was at an airport in Eastern
 6 Washington, Joan was someplace else and Jay was
 7 someplace else, and my secretary arranged -- it's not
 8 too extraordinary -- an opportunity while I was waiting
 9 for a plane to make a phone call. Or I can't remember
 10 whether he called me or I called him.
 11 Q. So for some reason on April 2nd you decided
 12 you wanted to talk with Jay Manning about whether the
 13 Port needed a water right?
 14 A. As I said, I can't remember whether I called
 15 him or he called me. I do recall that my secretary
 16 said that the Port wanted to talk to me, and I can't
 17 recall whether I dialed the phone or he dialed the
 18 phone to me. That's what I meant by whether I called
 19 him or he called me.
 20 Q. So had the meeting -- excuse me, had the
 21 telephone call been arranged a day in advance or a week
 22 or anytime in advance?
 23 A. I think that morning, if I'm not mistaken.
 24 Q. In other words, that morning someone called
 25 your secretary from Jay Manning's office and said, Jay

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1 Q. Which members of the 401 team were on the
 2 call?
 3 A. Well, if you want to consider Joan on the
 4 team, I could suggest that, but Joan and Jay and I were
 5 on the call. That's the fact.
 6 Q. Is Joan on the team or is Joan the attorney
 7 general who advises the team?
 8 A. Is the answer to that really that important?
 9 I mean, is it really that important, because we could
 10 get into this, okay? My consideration of what the team
 11 is versus your point. I mean, is it really that
 12 important? If it is, I'll answer it as I understand
 13 it.
 14 Q. Why don't you answer it, Mr. Fitzsimmons.
 15 A. I consider Joan Marchioro part of the team,
 16 yes.
 17 Q. So she's not just the attorney general
 18 advising Ecology, she's part of the 401 decisionmaking
 19 team; is that correct?
 20 A. Yes. In my view, yes.
 21 Q. Okay, thank you.
 22 Now, how long did the phone call last?
 23 A. Rough recollection, ten minutes maybe, at the
 24 most.
 25 Q. Okay. And what did Mr. Manning say?

1 A. As I recall, he laid out the Port's and his
 2 views about the issue at hand, and the issue was
 3 whether the -- a water right permit was required for
 4 the stormwater aspects of the Water Quality
 5 Certification.
 6 Q. And are you particularly expert in water
 7 rights law?
 8 A. I know a lot about it. I don't claim to be
 9 an expert.
 10 Q. Okay. Are there people on the 401 team who
 11 know a lot about it?
 12 A. Yes.
 13 Q. Okay. Why not have them on the call?
 14 A. One of them was.
 15 Q. Oh, okay. Joan Marchioro, again?
 16 A. Yes.
 17 Q. Why not have somebody from your department on
 18 the call, other than you? I understand you are from
 19 your department, but you're the director.
 20 A. Well, because a project proponent wanted
 21 access to the director to share their views over a
 22 critical matter, and that's a very frequent occurrence.
 23 Q. So in those circumstances you don't include
 24 staff --
 25 A. Sometimes I do --

1 team meeting that was scheduled for two days later to
 2 discuss this very issue?
 3 A. Yes, there was. So one of the issues is the
 4 timing of it, as I suggested previously.
 5 Q. And didn't Mr. Manning want you to weigh in
 6 on the issue before the senior management team meeting?
 7 A. I don't understand your question. Didn't --
 8 didn't --
 9 Q. Let me ask a different question.
 10 A. Are you asking me a question or putting a
 11 statement in my mouth?
 12 Q. Well, did Mr. Manning ask you to weigh in on
 13 the issue with your staff before the senior management
 14 team meeting?
 15 A. To the best of my recollection, the
 16 conversation was Mr. Manning expressed his views about
 17 what decision the Department of Ecology should make
 18 relative to the water right.
 19 Q. And what did you do with regard to that topic
 20 after you spoke with Mr. Manning at any time?
 21 MR. EGLICK: I'm sorry, no notes passed to
 22 the witness.
 23 MS. MARCHIORO: I'm not passing it to the
 24 witness.
 25 MR. MANNING: This note was just clipped

1 Q. I'm sorry, you have to let me finish the
 2 question.
 3 A. I'm sorry.
 4 Q. You don't include staff who's actually
 5 working on the application?
 6 A. In those circumstances, sometimes staff are
 7 included, sometimes they're not. It depends on the
 8 issue, it depends on my accessibility. It depends on
 9 my knowledge of the issue at hand.
 10 Q. Now, what did Mr. Manning want out of you in
 11 this call; in other words, maybe to explain my
 12 question, he's calling you, you're in an airport in
 13 Eastern Washington. What did he expect you to do as a
 14 result of that call?
 15 A. I think Mr. Manning's only expectations were
 16 for me to listen and to take his views into
 17 consideration.
 18 Q. And why was it necessary to conduct a call
 19 from an airport in Eastern Washington as opposed to
 20 say, Well, you know, at some point we'll get together,
 21 we'll have a meeting and we'll talk about it?
 22 A. It could be I was unavailable for meetings
 23 for days or for the week before. It could be the issue
 24 just came up.
 25 Q. In fact, wasn't there a senior management

1 ~~and that was the meeting~~
 2 A. That probably relates to my discussion with you.
 3 ~~my again, please~~
 4 Q. (BY MR. EGLICK) What did you do with
 5 relation in any way to the topic of the phone call you
 6 had with Mr. Manning after the phone call?
 7 A. I pondered his view, I took that view into
 8 the conversation and decisionmaking that occurred at
 9 the senior management team meeting several days later,
 10 and I weighed and balanced his suggestions against
 11 other, both legal and political and what to do,
 12 opinions on this matter. That's it.
 13 Q. So you were actually an attendee at the
 14 senior management team meeting?
 15 A. Yes, I was.
 16 Q. And you participated in the deliberations
 17 there?
 18 A. Yes, I did.
 19 Q. And that's where the decision was made then,
 20 two days later after your call with Mr. Manning, to not
 21 require a water right for the Port; is that correct?
 22 A. Actually, that's not exactly correct. It is
 23 the place where the decision on whether or not a
 24 stormwater facility requires a water right, and then
 25 second to that is the application of that water right

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1 decision to the Port project.
 2 I guess the difference I'm trying to say is
 3 that it was a decision on both the policy and a legal
 4 question about whether or not stormwater facilities
 5 relative to 401 Certifications needed a water right.
 6 Q. Okay. Could you look at the interrogatories
 7 exhibit which is Exhibit 171, Page 35, Interrogatory
 8 No. 18, second sentence of the answer.
 9 A. Here it is.
 10 Q. Page 35, Interrogatory 18, second sentence of
 11 the answer. Could you read that second sentence into
 12 the record, please.
 13 A. "Ecology's senior management team decided on
 14 April 4, 2001 that a water right was not required for
 15 the low flow mitigation portion of the Third Runway
 16 Project."
 17 Q. Okay. Is that an accurate statement?
 18 A. Yes.
 19 Q. Now, at some point -- and by the way, you're
 20 aware that the Pollution Control Hearing Board in its
 21 stay decision has addressed that topic, aren't you?
 22 A. Yes.
 23 Q. And what action is Ecology taking in
 24 response -- if any, in response to the Pollution
 25 Control Hearing Board's stay decision?

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1 A. We are appealing that decision.
 2 Q. Any other action being considered or taken?
 3 A. It's such a broad -- we've had discussions
 4 about whether that should be the legal framework for
 5 other projects.
 6 Q. Any other actions or decisions being
 7 considered with regard to the Third Runway Project?
 8 A. I have considered through conversations with
 9 others about the possibility of having the legislature
 10 clarify whether this should or should not be the policy
 11 of the state. I think we talked previously about
 12 actions related to instructions to the Port, et cetera.
 13 That's my answer.
 14 Q. Has the Ecology department advised the Port
 15 to go get a water right?
 16 A. No.
 17 Q. To your knowledge, is the Port taking any
 18 steps to obtain a water right?
 19 A. No, because I don't believe they need one.
 20 Q. Okay. And do you know whether anyone on the
 21 401 team has ever suggested that the Port does need
 22 one?
 23 A. No, I'm not aware that someone has ever
 24 suggested that they do need a water right.
 25 Q. Has anyone on the 401 team ever suggested

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1 that it's a possibility that the Port needs a water
 2 right?
 3 A. Yes. Yes.
 4 Q. Who has suggested that?
 5 A. By my descriptions our legal counsel as part
 6 of the team and as part of the deliberations, we talked
 7 about the law and how to interpret the law. And one
 8 interpretation of the law is that they might need one.
 9 Another interpretation of the law is that they might
 10 not. The law is very unclear on it.
 11 Q. Please focus on my question,
 12 Mr. Fitzsimmons --
 13 A. I'm answering --
 14 Q. For your sake, I had asked for --
 15 A. The last sentence is where I varied. Beyond
 16 that I think I'm within clearly the scope of your
 17 question.
 18 Q. I asked you who had suggested that they might
 19 need a water right. And I'm really happy to hear the
 20 rest of your answer, it's just I know you're on a tight
 21 time frame, so I'm trying to accommodate you.
 22 MS. MARCHIORO: And when we conclude this,
 23 can we take a break, please, so I can give him this
 24 phone message?
 25 MR. EGLICK: Sure.

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1 A. Well, I don't know that I need to answer the
 2 question. And the reason for it is because I don't
 3 know whether I am violating attorney-client privilege
 4 by answering your question or not.
 5 Q. (BY MR. EGLICK) Well, I think you've already
 6 given me that answer, but what I'm asking is anyone
 7 else other than legal counsel because you've already
 8 answered that.
 9 A. Well, that's -- to the best of my knowledge,
 10 that's the extent of -- no, I take it back. There
 11 are -- well, I don't know.
 12 Q. What about Bob Barwin, do you know him?
 13 A. I was going to just say, there are people in
 14 the program in the course of the discussion about
 15 whether a water right is needed or not, who -- that
 16 argued on behalf of a water right needing to be
 17 required and there are others who argued that it's not
 18 required.
 19 Q. So Bob Barwin is one who argued that it was?
 20 A. I vaguely recollect that, yes.
 21 Q. Who else? I'm asking this because we may
 22 want to do discovery with these folks, but I'm entitled
 23 to know who they are first.
 24 A. Well, I think Bob -- I don't know who else,
 25 and the reason being is because at the program level,

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1 his -- I wasn't involved in the program water
 2 manager/staff discussion on this. So there may be
 3 others, but I don't know.
 4 It was characterized to me that there are
 5 some staff who, on balance, believe that it's best to
 6 require a right. There were other staff who, on
 7 balance, believed it was not required. And
 8 specifically who, I don't know. I do recall Bob
 9 Barwin's name on the side of they're not requiring a
 10 water right.
 11 Q. They're not or they do require it?
 12 A. That in his judgment we should require a
 13 water right.
 14 MR. EGLICK: Okay. Thanks.
 15 (Recess taken.)
 16 MR. EGLICK: Back on the record.
 17 Q. (BY MR. EGLICK) Mr. Fitzsimmons, who was the
 18 lead -- well, strike that.
 19 Did you have someone who was team leader for
 20 the 401 team?
 21 A. Ray Hellwig, I would characterize as the team
 22 leader.
 23 Q. So what -- and once again, because you seem
 24 to be very sensitive about words, if there's a better
 25 term for it, pick it, but what I'm trying to find out,

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1 what Ray Hellwig's role was if he was team leader.
 2 A. To oversee that the project elements were
 3 on -- that were, you know, activities that were
 4 occurring were done in a timely manner to ensure that
 5 there was an opportunity and coordination between all
 6 of the parties internal to the agency to voice
 7 concerns, play their role to sort of manage some staff
 8 resources which is not a unique role to him -- not to
 9 digress, but all of the regional managers in big
 10 projects are -- have the role of helping to manage the
 11 resource allocation in the form of staff, in the form
 12 of meeting time and those sorts of issues.
 13 I believe he managed the contract or at least
 14 oversaw a contract related to outside consultants. He
 15 interacted with the Port of Seattle at his level in
 16 terms of team management and issue dealings and
 17 schedulings. So those are the things I would say
 18 characterize his role.
 19 Q. Was he also lead in interacting with you as
 20 the director?
 21 A. Yes.
 22 Q. Was he also lead in assisting you in
 23 interacting with the Port of Seattle?
 24 A. Yes.
 25 Q. And what about lead in assisting you in

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1 interacting with the governor's office?
 2 A. Actually I think I was interacting with the
 3 governor's office without him being a lead assistant.
 4 I was doing that directly myself.
 5 Q. Okay. Now, was he supposed to have a
 6 substantive role also in terms of deciding which way in
 7 particular an environmental issue would be resolved?
 8 A. He did have a substantive role in the form of
 9 him -- his opinion being an opinion. The ultimate
 10 decision on 401 permits as well as others is -- was
 11 actually in the hands of Gordon White.
 12 Q. Now, was the 401 -- to your knowledge, was
 13 the 401 decision drafted under Gordon White's
 14 supervision?
 15 A. Gordon White had a role in the drafting, to
 16 the best of my knowledge, and Gordon White is the
 17 direct supervisor of several of the staff that are
 18 involved in the -- on the team.
 19 Q. My question, though, was, and I'm not trying
 20 to interrupt you, but I just -- it will save time.
 21 A. I'm thinking out loud which obviously is not
 22 something of value to you or what you want out of me.
 23 Q. No, it's neither of that. It's just that
 24 it's your -- I've been told several times your time is
 25 short and I think my question was more concise perhaps

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1 than the answer you're giving.
 2 And the question was, was the 401 decision
 3 drafted under Gordon White's supervision?
 4 A. Yes.
 5 Q. Well, you're gesturing. Do you want to
 6 reconsider your answer or -- let me ask you another
 7 question.
 8 A. Yes, it was --
 9 Q. Go ahead.
 10 A. -- but not in total.
 11 Q. Okay. Well, who else supervised drafting of
 12 the 401 decision?
 13 A. Ray Hellwig.
 14 Q. Who had the more direct role in supervising
 15 drafting of the 401 decision?
 16 A. Ray Hellwig.
 17 Q. And who did the actual drafting, if you know?
 18 A. I don't know. In fact, actually I do know,
 19 Ann Kenny.
 20 Q. And she works in the Northwest Regional
 21 Office?
 22 A. Yes, she does.
 23 Q. Okay. Now, did you review the 401 decision
 24 that was issued in August 2001 before it was issued?
 25 A. Yes.

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1 Q. And how did it look to you?
 2 A. It looked like a 401 decision.
 3 Q. Did it look pretty solid?
 4 MS. MARCHIORO: Objection, vague.
 5 Q. (BY MR. EGLICK) Did it look like a competent
 6 401 decision to you, Mr. Fitzsimmons?
 7 A. Are you referring to the decision as
 8 finalized or are you just referring to a draft
 9 decision?
 10 Q. Well, I guess what I was assuming, and I
 11 appreciate your pointing this out, that you actually
 12 saw the final decision when it was in final draft form
 13 and before it was issued.
 14 A. That's an incorrect assumption.
 15 Q. Okay. Then let me ask --
 16 A. I reviewed the 401 decision in draft and in
 17 final.
 18 Q. Okay.
 19 A. When I reviewed it in final -- to get to your
 20 question --
 21 Q. Go ahead.
 22 A. -- I unequivocally think it's a competent 401
 23 decision.
 24 Q. And you're talking about the August 2001
 25 decision?

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1 A. Yes.
 2 Q. And you felt that way when you reviewed it in
 3 a draft?
 4 A. In a draft, there were changes made, I added
 5 value in my review of that draft, and it was improved
 6 as a decision in clarity, in other aspects. And then
 7 the final was perfectly -- I'm perfectly satisfied with
 8 -- I was perfectly satisfied with the final.
 9 Q. Okay. And you expected the Port to be as
 10 well, didn't you?
 11 A. No, I did not.
 12 Q. You did not?
 13 A. No.
 14 Q. So you anticipated when the August 401
 15 decision was issued that the Port would not be
 16 satisfied with it?
 17 A. Yes, I did.
 18 Q. And nonetheless, in your judgment as director
 19 of the Department, it was the appropriate decision to
 20 issue; is that correct?
 21 A. Yes.
 22 Q. When did you change your mind about that?
 23 A. So you presume I changed my mind about that?
 24 Q. Well, are you aware that the Department
 25 withdrew that August 401 decision and issued a new one?

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1 A. Yes.
 2 Q. So if the 401 decision that was issued in
 3 August was, you thought -- you used the word
 4 "perfectly" in there somewhere, didn't you?
 5 A. Uh-huh.
 6 Q. When did it become imperfect in some way?
 7 A. When information about the project became
 8 known that was not known to our staff in reviewing the
 9 project.
 10 Q. Now, let me ask you this, if you can recall.
 11 How many years has the Department of Ecology been
 12 reviewing the Port's project?
 13 A. Probably this review has taken place over
 14 about a five-year period of time, I think.
 15 Q. And would you agree there are literally tens
 16 of thousands of pages of documents relating to that
 17 review?
 18 A. I would accept that, yes.
 19 Q. And thousands of hours of staff time?
 20 A. Definitely.
 21 Q. And your testimony is that in August you
 22 issued a decision that you thought was a perfectly
 23 acceptable 401 decision --
 24 A. Yes.
 25 Q. -- and then at some point between August 10th

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1 and -- wasn't the second decision September 21, I
 2 think?
 3 A. September 21 of 2000.
 4 Q. 2001?
 5 A. Yeah, of 2001. Okay.
 6 Q. Your staff became aware of new information
 7 about the project that had not been known before that
 8 justified revoking the August decision and issuing a
 9 new one; is that your testimony? And I'll have it read
 10 back if you like.
 11 A. Perhaps I'm confused here. So I'm not sure
 12 what my testimony is.
 13 Q. All right. Well, let's go through it again
 14 because maybe you're not aware of this chronology.
 15 Let me show you what's been marked in all the
 16 depositions we've been taking as Exhibit 2, and can you
 17 identify that?
 18 A. (Witness reviewing document.)
 19 I now know where my own confusion lies.
 20 Q. Okay.
 21 A. You were using -- you in several of your
 22 questions, or at least I heard you to say, in August of
 23 2000.
 24 Q. Oh, I apologize for that if I did.
 25 A. If I might explain, where I was confused was,

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1 I think about August of 2000, some time frame in there,
 2 we issued a 401, the Port -- maybe it was 1999, maybe
 3 I'm confused, but my recollection is we issued a 401,
 4 the Port withdrew from the 401, and that 401 had to do
 5 with an assumption about the acreage of wetland. And
 6 we found out later that there was additional wetlands
 7 that had not been considered and so we started the 401
 8 process over again with a resubmittal.
 9 So I was thinking you were referring to that
 10 series of 401 submissions and withdrawals.
 11 Q. And I understand what you're talking about,
 12 and I apologize if I used the wrong year. Let's start
 13 over.
 14 You've got in your hand now what's Exhibit 2
 15 to all of the depositions we've been taking here which
 16 is, I'll represent to you, and I'd like you to confirm
 17 if I'm right, the August 10, 2001 401 decision.
 18 A. Right. I did review this, this 401 as well
 19 in draft, as it was brought to fruition in terms of
 20 close to being final. And then I reviewed it in
 21 final. And on the August 2001 401, I believed at the
 22 time and still do believe that it is a very
 23 appropriate, I used the term "perfectly acceptable" and
 24 I'll stick with that term, 401 decision.
 25 Q. Okay. And then you know what the questions

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1 are going to be now.
 2 A. I do.
 3 Q. Then what happened?
 4 A. What occurred, which is, in my experience,
 5 something that occurs on other projects as well, is --
 6 one question you asked, I'll just ask it and answer it,
 7 is, did I anticipate the Port to be perfectly happy and
 8 my answer was no, something to that effect.
 9 Q. Right. And I said --
 10 A. There are conditions in here that I thought
 11 the Port would have concerns about.
 12 Q. And you were prepared to state that that was
 13 a perfectly acceptable 401 decision?
 14 A. That's correct.
 15 Q. Despite concerns the Port would raise?
 16 A. Correct.
 17 Q. And was there any provision in there, in that
 18 August 2001, 401 decision that you looked at and said,
 19 Well, you know, it's, to use that old -- and I don't
 20 particularly agree with it, perjorative -- it's good
 21 enough for government work, I'm just sending it out the
 22 door?
 23 A. Absolutely not.
 24 Q. So you were proud of that?
 25 A. Absolutely proud of this decision.

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1 Q. All right. So you put it out the door and
 2 you knew the Port -- there might be things the Port
 3 would quibble about, but you were going to stand by it;
 4 is that right?
 5 A. And I still to this day stand by it.
 6 Q. But your Department did, a little over a
 7 month later, withdraw it and issue a modified decision?
 8 A. They certainly did.
 9 Q. Now, between --
 10 A. We certainly did.
 11 Q. Right. And between August and September when
 12 you did that, how many times were you contacted by the
 13 governor's chief of staff?
 14 MS. MARCHIORO: Objection, vague.
 15 Q. (BY MR. EGLICK) Well, what's vague about it,
 16 Mr. Fitzsimmons, to you? Do you know who the
 17 governor's chief of staff is?
 18 A. I do.
 19 Q. Do you know what the word "contact" means?
 20 A. I do.
 21 Q. Do you know what "how many times" means?
 22 A. I do.
 23 Q. Is there something that I can clarify for
 24 you?
 25 A. No.

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1 Q. Okay.
 2 A. I would say I -- he contacted me --
 3 Q. "Contact" means any form of communication.
 4 So we don't quibble about that. E-mail, pony express,
 5 carrier pigeon, in person, meeting, whatever.
 6 A. Fine. Then I'd say it was probably five
 7 or -- between five and seven times.
 8 Q. And that's between August 10th when the 401
 9 was originally issued, and September 21 when you issued
 10 the revised 401?
 11 A. Yes.
 12 Q. And the governor's chief of staff is Paul
 13 Isaki?
 14 A. Yes.
 15 Q. And he was contacting you, among other
 16 things, wasn't he, to let you know that the Port was
 17 not happy with the August decision; is that correct?
 18 A. Actually, no, because I already knew that,
 19 because the Port contacted me directly.
 20 Q. Okay. But he was contacting you to tell you
 21 that as well, wasn't he?
 22 A. He was contacting me to say, How do we deal
 23 with this, Tom? The Port's dissatisfied, they're
 24 raising concerns about clarity, they're raising
 25 concerns about conditions. Are we willing to -- what

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1 is the appropriate thing to do here? What have we done
 2 in the past? And then over a series of subsequent
 3 contacts and meetings, as you well know by the record,
 4 we engaged in a series of meetings.
 5 Q. I don't well know that, by the way. There's
 6 very little record of it, oddly enough.
 7 A. Okay. Well, we, in sticking with this
 8 contact theme here, at times Paul Isaki was involved,
 9 at other times he was not. As we understood, worked
 10 through the Port's concerns about the 401 decision and
 11 we clarified elements of those concerns.
 12 Q. Now, you said the Port had already told you
 13 or you already knew the Port was unhappy with it. So
 14 the Port had told you that after August 10 when the
 15 first 401 was issued?
 16 A. Yeah. Actually I think the, if I'm not -- I
 17 think I have this correct, we issued the August 10th
 18 401 decision publicly and the Port got it at exactly
 19 the same time. That afternoon or the next day Ray told
 20 me they had got it, reviewed it, expressed some
 21 concerns about it.
 22 Q. Now, the Port had already gone to the
 23 director of the Department, which is over the head of
 24 the team, isn't it, the 401 team?
 25 A. If you want to quibble, I consider the

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1 Department director to be part of the team, too.
 2 Q. Okay.
 3 A. We can play those word games.
 4 Q. But you're the director?
 5 A. Sure.
 6 Q. The Port had already let you know they were
 7 unhappy; is that right?
 8 A. Yes.
 9 Q. They already let Ray Hellwig know they were
 10 unhappy; is that right?
 11 A. Yes.
 12 Q. Was Paul Isaki called by you to say, I've
 13 heard from the Port they're unhappy?
 14 A. Actually I think Paul Isaki heard from the
 15 governor who had -- somebody associated with the Port
 16 mentioned to the governor that, and this is maybe
 17 several days after this, that they have got it and
 18 there are conditions in it that they're concerned
 19 about. So it kind of went through that process.
 20 Q. From the Port to the governor to Paul Isaki
 21 and then to you?
 22 A. Yes.
 23 Q. And then from there the chronology flowed, as
 24 you've described it, resulting in the issuance of a
 25 September modification; is that right?

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1 A. Correct.
 2 Q. Now, did you carefully examine for yourself
 3 the changes that were made between the August 401 and
 4 the September modification, and what we're talking
 5 about --
 6 A. Yes.
 7 Q. -- for the deposition, Exhibit 1 is the
 8 September 21, and the August one I think is Exhibit 2.
 9 A. Right.
 10 Q. I'm not going to give the reporter new copies
 11 of it, but we're all agreed on that.
 12 A. Yes, I did. I was involved in understanding
 13 a list of issues that the Port was raising. I was
 14 involved in giving guidance and interpreting our
 15 choices back to the governor's office. I was involved
 16 in a meeting with the Port at the Mic Dinsmore, Gina
 17 Marie Lindsey, Mike Leavitt level, at which I and Paul
 18 Isaki and Ray Hellwig met with them.
 19 Q. Who's Mike Leavitt? I know Elizabeth
 20 Leavitt.
 21 A. Michael Cheyne. It's Michael -- Michael
 22 Cheyne. I'm sorry.
 23 Q. And he's the person from the Port you
 24 mentioned earlier?
 25 A. Yes. That meeting listed out their concerns.

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1 We had our staff at the staff level first understand
 2 what the differences -- what their concerns are and --
 3 around words, around possible interpretation of words
 4 and all of those issues. I believe they -- at legal
 5 and staff levels, there were discussions, resolutions
 6 to those issues.
 7 Then came the question of, is the 401
 8 substantially changed. I believed it was not in terms
 9 of its environmental outcome and in terms of the
 10 requirements placed on the Port through it. Was it
 11 improved? Yes, because it was clarified, people
 12 understood it better. And it is that month or so of
 13 activity that led to the withdrawal of the 401 by the
 14 Department and the resubmission of the 401 by the
 15 Department.
 16 Q. Okay. Let me ask you a few questions about
 17 that, and I'm going to try to ask you focused questions
 18 because this is really my last line of questioning.
 19 A. Great.
 20 Q. So the light's at the end of the tunnel,
 21 maybe.
 22 First of all, did you give any consideration
 23 in providing an opportunity for public notice and
 24 comment on the change in the 401 Certification?
 25 A. I recall that question being asked, and we

1 determined that legally it was not required and that
 2 the public had ample opportunity through the PCHB
 3 processes, et cetera. I believe that the -- then it
 4 was answered and I can't remember whether it was by the
 5 PCHB or our own conclusions, that it --
 6 Q. Are you answering my question now or are you
 7 going on to bigger things?
 8 A. Okay. I'll go back. I'm sorry.
 9 Q. Well, let me ask you another question.
 10 A. I'm apparently trying to be more helpful than
 11 you're wanting me to be.
 12 Q. It's not the helpfulness that I --
 13 A. The answer is yes, we did consider whether or
 14 not public needed an opportunity to be -- give comment
 15 on the changed 401.
 16 Q. And by the way, I'm happy to have your help,
 17 but then I'm concerned that you're going to complain
 18 about the time. So it's kind of a, you know, a
 19 conundrum. Let's move ahead.
 20 Ultimately no public notice and opportunity
 21 for comment was given before the September 21 amended
 22 401 was issued, was it?
 23 A. I recall that to be the case.
 24 Q. And in fact, you were saying a minute ago,
 25 well, it was determined that legally there was no

1 401; is that correct?
 2 A. Perhaps -- I'd like to withdraw that
 3 statement, okay? Because I'm not sure that's what I
 4 meant. So I withdraw that statement.
 5 Q. Okay. Now, you said something about the
 6 amended 401 September one is clearer than the August
 7 one. Am I right on that?
 8 A. You are -- that's one characterization I
 9 placed on it, yes.
 10 Q. And is the amended 401 clearer in terms of
 11 the scope of projects that are covered by its -- by the
 12 scope of the projects that are covered by its
 13 conditions?
 14 A. That was, as I recall, one of the issues on
 15 this list of six or eight issues. And so thus I recall
 16 that the question of what was the Department's intent
 17 in a series of items in the August 10th 401 relative to
 18 the scope, and that was clarified in the September 21st
 19 version, yes.
 20 Q. Well, wasn't it in fact clarified in this
 21 way, that is, that the original 401 said all of the
 22 Port's master plan update projects are covered, whereas
 23 the amended 401 said, some are covered, some are not,
 24 and we'll decide later which ones are in and which ones
 25 are out? Isn't that correct?

1 requirement in the Department's view to give public
 2 notice an opportunity for comment. Didn't you say
 3 that?
 4 A. That's -- my recollection was that the
 5 balance of the law said we are not required to do it.
 6 Q. Was there anything in the law that said you
 7 were required to amend the 401?
 8 A. No.
 9 Q. So the Port asked for something that Ecology
 10 did not have to do, that is, amend the 401 that had
 11 already been issued, and Ecology went ahead, going
 12 through a process to consider doing that; is that
 13 correct?
 14 A. Correct.
 15 Q. And ultimately did do that?
 16 A. Correct.
 17 Q. But at the same time, Ecology, because there
 18 was no legal requirement to do so, did not give public
 19 notice and comment of that process that Ecology had
 20 allowed the Port; is that correct?
 21 A. Yes, that is correct.
 22 Q. Now, I believe you said something about the
 23 determination was in part that the public had ample
 24 opportunity for review in the PCHB. Presumably you
 25 were saying it didn't like what came out of the amended

1 A. I'd have to do more review to be able to
 2 answer one way or the other. I gave you my
 3 recollection of the higher level understanding of this,
 4 and you've taken me to a level of detail that I'd have
 5 to either refresh my memory or get more understanding
 6 of.
 7 Q. Well, who would be someone you would rely on
 8 to explain the difference? Would Ray Hellwig?
 9 A. Ray Hellwig, Gordon White.
 10 Q. So that's something to ask Ray Hellwig about?
 11 A. If you wish to, whatever, yes.
 12 Q. Okay. Did you understand that any changes
 13 were made between the August 401 and the September 401
 14 in terms of the conditions for monitoring of wetland
 15 hydrology?
 16 A. Yes, I do. Again, that -- I recall that that
 17 was one of the issues on this issues list, and I
 18 engaged in staff discussions with me, with our
 19 attorneys on that topic.
 20 Q. And is it your understanding that the
 21 monitoring condition for wetland hydrology was
 22 clarified, as you put it, in the September 401?
 23 A. That's an issue where my understanding is
 24 that it was improved to the better of the -- in terms
 25 of the certainty and the methodology. So I would say

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1 that was an improvement to the August 10th 401.
 2 Q. Well, would you agree that it is important to
 3 have preconstruction monitoring of wetland hydrology?
 4 A. It's all dependent on a -- on the facts of
 5 the case, et cetera. So as a global statement I
 6 wouldn't necessarily approve -- agree with that.
 7 Q. Okay.
 8 A. And I'm not thinking of exactly what it is we
 9 did here. I'm just reacting to a general statement.
 10 Q. Well, what did the August 401 do with regard
 11 to monitoring of wetland hydrology, do you recall?
 12 A. Roughly, I recall it requiring -- the intent
 13 of it was to get data prior to construction. It
 14 presumed that there was no data available, and it was
 15 unclear as to whether or not monitoring had to happen
 16 during and up to a specific season or period of time.
 17 Q. And did the August 401 require monitoring for
 18 wetland hydrology before construction?
 19 A. My recollection is that it required it over a
 20 period of time.
 21 Q. Why don't you take a look at --
 22 A. And I don't know when construction was
 23 related to that period of time.
 24 Q. Why don't you take a look at Exhibit 2,
 25 Page 6, Section G. Do you have the August one there?

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1 A. I do. Exhibit 2. (Witness reviewing
 2 document.)
 3 Okay. I've read it.
 4 Q. Okay. Now, the September one takes out
 5 before construction, doesn't it?
 6 A. If I can look at the September one.
 7 Q. Sure.
 8 A. Do you know where that is?
 9 Q. I think it's actually Page -- what page is
 10 this one on? Page 6? It's on Page 7 probably in the
 11 September one. I think the pagination changed a bit.
 12 A. (Witness reviewing document.)
 13 It does take the term "before construction"
 14 out. I don't see this -- it says, "The Port shall
 15 conduct bimonthly hydrologic monitoring during the wet
 16 season, November through May, before construction."
 17 That's the August. And this one says, "The
 18 Port shall immediately begin conducting twice-monthly
 19 hydrologic monitoring during the wet season, November
 20 through May, and shall continue such monitoring for at
 21 least three years after completion."
 22 Q. Why the change? Do you know?
 23 A. I don't know why, other than our staff in --
 24 I guess suggesting or accepting, recommending to this
 25 change, believed that the monitoring was adequate and

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1 that they didn't originally intend to preclude November
 2 through May, meaning that some construction couldn't
 3 happen. I think that's the substance of the change
 4 here.
 5 Q. In other words, the way the condition was
 6 originally written might inhibit commencement of
 7 construction?
 8 A. And if they changed it, they must not have
 9 meant that in the original 401.
 10 Q. The one that you said was -- how did you put
 11 it, "perfectly" what?
 12 A. You have my words. You can use them as you
 13 wish.
 14 MR. EGLICK: Okay. Thanks. I have no other
 15 questions.
 16 (Deposition concluded at 1:20 P.M.)
 17 (Signature reserved.)
 18
 19
 20
 21
 22
 23
 24
 25

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1 CORRECTION & SIGNATURE PAGE
 2
 3 RE: ACC V. STATE OF WASHINGTON
 4 PCHB NO. 01-160
 5 DEPOSITION OF: THOMAS FITZSIMMONS,
 6 JANUARY 18, 2002
 7 I, THOMAS FITZSIMMONS, have read the
 8 within transcript taken JANUARY 18, 2002, and the same
 9 is true and accurate except for any changes and/or
 10 corrections, if any, as follows:
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PAGE	LINE	CORRECTION
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22	Signed at	
23	on the day	, 2002.
24		
25		THOMAS FITZSIMMONS

1 REPORTER'S CERTIFICATE

2
3 I, CARLA R. WALLAT, the undersigned Certified Court
4 Reporter and Notary Public, do hereby certify:

5 That the testimony and/or proceedings, a transcript
6 of which is attached, was given before me at the time
7 and place stated therein; that any and/or all
8 witness(es) were by me duly sworn to tell the truth;
9 that the sworn testimony and/or proceedings were by me
10 stenographically recorded and transcribed under my
11 supervision, to the best of my ability; that the
12 foregoing transcript contains a full, true, and
13 accurate record of all the sworn testimony and/or
14 proceedings given and occurring at the time and place
15 stated in the transcript; that I am in no way related
16 to any party to the matter, nor to any counsel, nor do
17 I have any financial interest in the event of the
18 cause.

19 WITNESS MY HAND AND SEAL this 24th day of
20 January 2002.

21
22 CARLA R. WALLAT, RPR, CRR, CCR #WALLCR046BE
23 Notary Public in and for the State
24 of Washington, residing in King
25 County. Commission expires 1/1/06

Ray Hellwig

January 8, 2002

ACC v. DOE

01-160

CONDENSED TRANSCRIPT AND CONCORDANCE
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COPY

JAN 11 2002

AR 001620

1 POLLUTION CONTROL HEARINGS BOARD

2

3 AIRPORT COMMUNITIES COALITION,)

4 Plaintiff,)

5 vs.) NO. 01-160

6 DEPARTMENT OF ECOLOGY and THE)

7 PORT OF SEATTLE,)

8 Defendants.)

9 DEPOSITION UPON ORAL EXAMINATION

10 OF

11 RAY HELLWIG

12 10:00 A.M.

13 JANUARY 8, 2002

14 1325 FOURTH AVENUE, SUITE 1500

15 SEATTLE, WASHINGTON

16

17

18

19

20

21

22

23

24 MARY L. GREEN, CCR, RPR

25 NO. GREENML497RZ

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21 ELIZABETH LEAVITT

22

23

24

25

JAN 11 2002

1 EXAMINATION BY: PAGE

2 Mr. Eglick 6

3

4

5 EXHIBITS FOR IDENTIFICATION PAGE

6

7 81. Memo to Joe Dear from Ray Hellwig dated 77

8 May 12, 2000, Subject: May 16 Meeting

9 with Port of Seattle (POS)-re the Third

10 Runway

11 82. E-mail to Raymond Hellwig from Steve 86

12 Alexander dated February 8, 2000, Re:

13 Fill Criteria for the Third Runway

14 83. E-mail to Tom Luster from Raymond Hellwig 92

15 dated May 15, 2000, Subject: May 16

16 Meeting with the Port of Seattle-the

17 Third Runway

18 84. E-mail to Thomas Fitzsimmons from Raymond 95

19 Hellwig dated May 19, 2000, Subject:

20 SeaTac 3rd Runway

21 85. E-mail to Tom Luster from Raymond Hellwig 118

22 dated September 6, 2000, Subject: Use of

23 Contaminated Fill for Sea-Tac Third

24 Runway Project

25 86. E-mail to Raymond Hellwig from Tom Luster 120

dated October 6, 2000, Subject: Lessons

Learned from Big Projects-the official

version

87. E-mail to Raymond Hellwig from Tom Luster 138

dated October 18, 2000, Subject: SeaTac

88. E-mail to Rachel McCrea from Ann Kenny 149

dated October 24, 2000, Subject: Third

Runway 401 Permit Negotiations

89. E-mail to Ann Kenny from Raymond Hellwig 162

dated October 26, 2000, Subject: 3rd

Runway Notes and Next Meetings

1 90. E-mail to Raymond Hellwig from Joan 166

2 Marchioro dated August 16, 2001, Subject:

3 New Method A Soil Cleanup Levels

4 91. Fax to Ann Kenny from Yvonne Oliva 166

5 dated 10/6/00; Letter to M. R. Dinsmore

6 from Tom Fitzsimmons dated September

7 28, 2000

8 92. Memo to Gary Zeller from Ray Hellwig 170

9 dated May 12, 2000

10 93. E-mail to Thomas Fitzsimmons from Raymond 175

11 Hellwig dated May 17, 2001, Subject:

12 Discussion Paper

13 94. E-mail to Raymond Hellwig from Ann Kenny 177

14 dated July 29, 2001, Subject: Deliberative

15 Do Not Disclose, Preliminary Draft 401

16 WQC for Third Runway

17 95. E-mail to Dianne Pastore from Thomas 184

18 Fitzsimmons dated August 1, 2001, Subject:

19 Seattle editorialist (by phone) about

20 the 3rd-runway decision & Tom's schedule

21 on August 9

22 96. E-mail to Raymond Hellwig from Dianne 191

23 Pastore dated August 2, 2001, Subject:

24 Briefing material for Governor

25 97. Draft memo to Tom Fitzsimmons from Ray 193

Hellwig dated 8/6/01, Subject: Briefing

Decision for the Port of Seattle Sea-Tac

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Proposal

98. News Release dated August 1, 2001 195

99. Overriding messages dated 8/6/2001 198

100. E-mail to Andrea Grad from Ann Kenny 209

dated October 13, 2001, Subject: SeaTac

101. E-mail to Tom Fitzsimmons from Raymond 218

Hellwig dated August 16, 2001, Subject:

Meeting in Seattle

1 102. E-mail to Raymond Hellwig from Curt Hart 219
 2 dated August 27, 2001, subject: Draft
 3 Talking Points: Third Runway Permit Appeal
 4 103. Phone message to Ray from Joan Marchione 231
 5 dated 8/28; handwritten notes
 6 104. E-mail to Thomas Fitzsimmons from Raymond 243
 7 Hellwig dated September 24, 2001, subject:
 8 NW Update
 9 105. E-mail to Kevin Fitzpatrick from Ann Kenny 251
 10 dated October 23, 2001, subject: Processed
 11 Materials
 12
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1 SEATTLE, WASHINGTON; TUESDAY, JANUARY 8, 2002
 2 10:00 A.M.
 3 --oOo--
 4 RAY HELLWIG
 5
 6 SWORN as a witness by the Notary Public,
 7 testified as follows:

8 EXAMINATION
 9
 10 BY MR. EGLICK:
 11 Q. Will you state your full name for the record,
 12 please.
 13 A. Raymond Kenneth Hellwig.
 14 Q. And your residential address?
 15 A. Is 1137 Southwest 320th Place in Federal Way,
 16 and that's 98023.
 17 Q. Have you ever had your deposition taken
 18 before?
 19 A. I have.
 20 Q. How many times?
 21 A. I believe it was two or three times.
 22 Q. And in what circumstances?
 23 A. It was related to some decisions that we made
 24 on applications for water rights. The decisions were
 25 made back in '95, I believe, and so the depositions

1 probably would have occurred in '96 or '97.
 2 Q. Were those depositions, the two or three
 3 depositions you referred to, in PCHB proceedings?
 4 A. Yes.
 5 Q. And what were the names of those proceedings?
 6 A. I'm not recollecting all of them. We made
 7 dozens of decisions, and several of them were appealed.
 8 Ones that come to mind, for instance, that went on to
 9 further appeal was Postema and King County Black
 10 Diamond. There were just numerous cases. I'm not
 11 recalling all the names.
 12 Q. There were numerous cases in which your
 13 deposition was taken?
 14 A. I believe that it was under a circumstance
 15 where the appellants formed together in a group, and so
 16 the depositions were taken such that I believe they
 17 applied to several cases.
 18 Q. Postema being one of the cases?
 19 A. One of the --
 20 Q. King County Black Diamond being another?
 21 A. I believe so.
 22 Q. And you said two or three times for your
 23 deposition.
 24 A. I don't remember the exact number.
 25 Q. Can you recall a third time your deposition

1 was taken?
 2 A. Not specifically.
 3 Q. You understand the procedure here. I ask
 4 questions. You answer unless your counsel instructs
 5 you not to answer. The court reporter takes down the
 6 proceedings. Do you understand that?
 7 A. Yes.
 8 Q. And you understand you're under oath?
 9 A. Yes.
 10 Q. And you understand that if you don't
 11 understand a question you should let me know so that I
 12 can make sure that the question is understandable
 13 before you proceed to answer it?
 14 A. Yes, I do.
 15 Q. Did you engage in any preparation for this
 16 deposition?
 17 A. Could you explain more what you mean by
 18 preparation?
 19 Q. Did you do anything in the course of your
 20 business that you would not have done but for the fact
 21 that you were going to be deposed?
 22 A. Yes.
 23 Q. What was that?
 24 A. Well, a few weeks ago when I was informed
 25 that a deposition would occur, I did go back through

1 some of my notes to refamiliarize myself with some of
2 the key areas of concern pertinent to the decision we
3 made.

4 Q. And are those notes that are kept in a file
5 in your office?

6 A. Yes.

7 Q. And are all of those notes notes that have
8 been produced to Airport Communities Coalition?

9 A. Yes.

10 Q. And are they in handwritten form?

11 A. Some handwritten. I believe most of what I
12 would have looked at then were typed documents; for
13 example, briefing documents.

14 Q. And who were the notes prepared by?

15 A. Most of those notes would have been prepared
16 by me.

17 Q. If they weren't prepared by you, who were
18 they prepared by?

19 A. Well, my files with my notes also include
20 e-mail documents initiated by other ecology employees
21 and perhaps external sources.

22 Q. In the course of preparation, did you review
23 any document that has not been produced to ACC?

24 A. No.

25 Q. Was that all that you did in preparation for

1 this deposition?

2 A. Well, I've had conversations in passing with
3 others who were also going to be deposed, but I
4 wouldn't characterize those conversations as deposition
5 preparation, but there have been other conversations
6 about the depositions with ecology employees, and I've
7 had conversations with my attorney.

8 Q. Which ecology employees have you had
9 conversations with about the deposition?

10 A. Well, I've had conversations with several
11 employees regarding the fact that we were going to be
12 deposed, but not in a manner to necessarily prepare for
13 the depositions. But individuals that I've talked to
14 about the depositions include Ann Kenny. I traded
15 voice messages with Gordon White, had a brief
16 conversation with Tom Fitzsimmons.

17 Let me think. Dan Swenson, maybe one or two
18 words with him, perhaps just a very few words with
19 Kevin Fitzpatrick, and of course my assistant, Nancy
20 Groves who helps me manage my schedule. There could
21 be others, but they're not coming to mind right now.

22 Q. What did you talk with Tom Fitzsimmons about?

23 A. I reviewed with him some of the key areas of
24 concern that we've dealt with over the last many months
25 for purposes of -- I think in part just trying to

1 recall events and to get my own memory clear on a few
2 key issues.

3 Q. Did any of those events include contacts with
4 the Post of Seattle?

5 A. The events that we discussed?

6 Q. Yes.

7 A. Not that I recall.

8 Q. What about contacts with the governor's
9 office?

10 A. There may have been reference to meetings
11 that we'd had at the governor's office. This was a
12 fairly brief conversation, sort of an overview.

13 Q. Was there any reference to Tom Luster?

14 A. I don't think so.

15 Q. Have you talked to anyone affiliated with the
16 port about anything concerning your deposition?

17 A. I'm thinking about the previous question
18 about Tom Luster, and I'm thinking about the
19 conversation, the brief conversation I had with Tom.
20 It's possible --

21 Q. You mean Tom Fitzsimmons?

22 A. Tom Fitzsimmons. It's possible -- I don't
23 recall specifically -- that we had discussions about
24 assignments made for the 401 coordination function, and
25 Tom Luster's name may have come up in that context, but

1 I'm not recalling specifically

2 Q. What do you mean by assignments made?

3 A. The ecology staff person assigned
4 responsibility for coordinating with program experts
5 for purposes of pulling information together and
6 writing a recommendation with respect to reasonable
7 assurance and a 401 water quality certification.

8 Q. Tom Luster was removed from the assignment on
9 the 401 for the Sea-Tac project, was he not, in October
10 2000?

11 A. I think that was the time frame.

12 Q. What was the reason that you talked with Tom
13 Fitzsimmons about it? Was this in the last few weeks
14 you talked to Tom Fitzsimmons?

15 A. It would have been the last few weeks.

16 Q. So in the last few weeks, you're testifying
17 that you talked with Tom Fitzsimmons, and you're saying
18 that reassignment of Tom Luster may have come up in the
19 conversation; is that correct?

20 A. Yes.

21 Q. Now, what does the reassignment of Tom Luster
22 have to do with your conversation with Tom Fitzsimmons?

23 A. Well, as I mentioned, the conversation was
24 brief. It was an overview of key areas of concern a.
25 issues that relate to the runway decision, and one of

1 the issues that could come up in a discussion about
 2 that decision would be the roles and responsibilities
 3 of different ecology staff, and there was a change made
 4 as you just mentioned in responsibility for the 401
 5 coordination function.

6 Q. Did you talk with Mr. Fitzsimmons about the
 7 reasons that that change was made in October 2000?

8 A. We may have.

9 Q. You may have?

10 A. I don't recall specifically.

11 Q. How long ago was this conversation with
 12 Mr. Fitzsimmons?

13 A. A few weeks ago.

14 Q. How often do you speak with the director of
 15 -- Mr. Fitzsimmons is director of the Department of
 16 Ecology, isn't he?

17 A. That's correct.

18 Q. How often do you speak to him?

19 A. Fairly routinely.

20 Q. Fairly routinely is how often?

21 A. Not every day. It depends on what is
 22 happening in the region, what issues are at hand.

23 Q. Let me ask you this. Today is January 8.
 24 When was the last time you talked to Mr. Fitzsimmons?

25 A. He was involved in a conference call, a

1 senior management team conference call, on Monday. I'm
 2 losing track of days here. So that's yesterday.

3 Q. And prior to that --

4 A. Along with several other members of senior
 5 management team, so I think our only direct
 6 communication in that conversation was, hi, how you
 7 doing?

8 Q. Now, was this conversation that you're
 9 describing when Tom Luster came up a conversation on a
 10 conference call with other people?

11 A. No. I was in Olympia or Lacey rather, and I
 12 had a brief meeting with Tom in his office.

13 Q. And when was this?

14 A. I would have to look at my calendar for the
 15 exact date.

16 Q. Do you have your calendar here?

17 A. No, I do not.

18 Q. Was it before or after Christmas?

19 A. Before.

20 Q. How did you happen to be in the director's
 21 office for a meeting?

22 A. Well, I was down there for more than one
 23 meeting, and I don't remember what the other meeting
 24 was. I would have to look at my calendar.

25 Q. Well, how did you happen to end up with a

1 meeting with the director in his office?

2 A. I asked for it.

3 Q. And what was on the agenda for the meeting?

4 A. The agenda for the meeting with him was to
 5 briefly go over key areas of concern related to the
 6 runway decision to clarify for myself my own memory of
 7 events in part for purposes of this deposition.

8 Q. So you asked for a meeting with the director
 9 so that you could augment your memory of things that
 10 you had been involved in with regard to the third
 11 runway decision?

12 A. In part.

13 Q. Was anyone else in the room for this meeting?

14 A. No.

15 Q. Did you take any notes at the meeting?

16 A. No.

17 Q. Did the director take any notes at the
 18 meeting?

19 A. I don't recall that he did. I don't believe
 20 he did.

21 Q. Now, with regard to Tom Luster, how would the
 22 director be able to augment your memory for your
 23 deposition of how Tom Luster happened to be replaced on
 24 the Sea-Tac project?

25 A. If there was discussion about Tom

1 specifically, it would have been brief, and as a matter
 2 of just running through a list of items or issues, it
 3 was just one of them.

4 MR. EGLICK: Let's stop for a minute, please.
 5 (Discussion off the record.)

6 MR. EGLICK: We took a break because there
 7 was a ringing cell phone, and I think we've gotten that
 8 taken care of now. Could you read back the last
 9 question, please.

10 (The reporter read back as requested.)

11 Q. (BY MR. EGLICK) Mr. Hellwig, I'd ask you to
 12 answer that question, please.

13 A. If we discussed it, then I would have
 14 probably summarized my recollection of the situation,
 15 and he may or may not have commented and nodded his
 16 head, and then we moved on to the next item.

17 Q. I'm going to ask the court reporter to read
 18 back the question again, and I'd ask you to answer my
 19 question.

20 MR. EGLICK: If you could read it back again,
 21 please.

22 (The reporter read back as requested.)

23 THE WITNESS: One more time, please.

24 (The reporter read back as requested.)

25 A. I think my response was -- and I'll say it

1 again and try to add to it. Is that if I summarize my
2 recollection of events, then he may or may not be able
3 to tell me if that was consistent with what he
4 recalled.

5 Q. Would Mr. Fitzsimmons to your knowledge have
6 any involvement in the replacement of Tom Luster?

7 A. He would have known about it, of course. He
8 did not make the decision. That decision was made by
9 Gordon White, program manager for the Shorelines and
10 Environmental Assistance Program.

11 Q. Did Mr. Fitzsimmons have any involvement in
12 the decision to replace Tom Luster to your knowledge?

13 A. No, he did not.

14 Q. And how do you know that?

15 A. I'm not aware of him having any involvement.
16 My understanding is the decision was made by Gordon
17 White, program manager of the shorelines and
18 environmental assistance program.

19 Q. How do you know that?

20 A. Because I work with Gordon and I talk to
21 Gordon.

22 Q. And did you have any involvement with the
23 decision to replace Tom Luster?

24 A. I talked to Gordon about it.

25 Q. Before the decision was made?

1 A. They could be categorized as complaints.

2 Q. Did you categorize them as complaints?

3 A. I'd categorize them as concerns.

4 Q. And what's the difference between a concern
5 and a complaint?

6 A. I'd say that a complaint would be one step
7 beyond concern; that you think there's a problem that
8 needs to be dealt with.

9 Q. So as far as you knew, the port didn't think
10 there was a problem with Tom Luster's performance; is
11 that correct?

12 A. I think the port had some concerns with Tom's
13 approach to the review of their application for the
14 401.

15 Q. But those concerns as far as you knew were
16 not so serious as to be problems with his approach,
17 were they?

18 A. No. Perhaps potential problems, but, again,
19 they were concerns that they had with his approach.

20 Q. So there were no problems that the port
21 identified with his approach; is that correct?

22 A. There may have been problems, but I would
23 have to go back and look and see if I have notes that
24 reflect that there was something that would be
25 categorized or classified as a problem. There could

1 have been.

2 Q. Now, you said you reviewed your notes in
3 preparation for this deposition; is that correct?

4 A. I went over notes or documents that I had
5 prepared before that you have copies of a few weeks
6 back when I became aware that I was going to be
7 deposed.

8 Q. And you talked with other people about your
9 deposition; is that correct?

10 A. I talked in passing with several people about
11 the fact that these depositions would occur.

12 Q. Well, the meeting with Tom Fitzsimmons wasn't
13 in passing.

14 A. And Tom Fitzsimmons, as I think I already
15 answered, we had a conversation about some of the key
16 areas of concerns, issues relating to the decision.

17 Q. And Tom Fitzsimmons' office is in Lacey or
18 Olympia; is that right?

19 A. That's correct.

20 Q. And your office is where?

21 A. Bellevue.

22 Q. So you didn't just pass Tom Fitzsimmons, did
23 you?

24 A. No. I went down there to meet with him, and
25 I had other meetings as well that day.

1 A. Yes.

2 Q. Did you talk to Tom Fitzsimmons about it
3 before the decision was made?

4 A. No.

5 Q. Do you know if anyone else talked to Tom
6 Fitzsimmons -- you have to wait until I finish my
7 question. Do you know if anyone else talked to Tom
8 Fitzsimmons about it before the decision was made?

9 A. I have no knowledge of anybody talking to Tom
10 Fitzsimmons about it before the decision was made.

11 Q. So you don't know either way?

12 A. My understanding of the circumstances and the
13 situation would be that nobody talked to Tom
14 Fitzsimmons before the decision was made.

15 Q. When you say nobody, you mean nobody in
16 ecology?

17 A. Nobody, period. Nobody at ecology and nobody
18 else.

19 Q. Nobody from or affiliated with the port?

20 A. No.

21 Q. Had you heard complaints from the port about
22 Tom Luster's performance?

23 A. I had heard concern expressed by the port
24 about Tom Luster.

25 Q. Were they complaints?

1 Q. So after all that preparation based on that
 2 preparation and your memory, do you have any
 3 recollection today of problems that the port had with
 4 Tom Luster's approach to the 401 decision?
 5 A. No. I wouldn't call it problems. I don't
 6 recall seeing in my notes -- and it wasn't -- I didn't
 7 spend a lot of time going over my notes in preparation
 8 for the deposition. I looked over briefing documents
 9 that had been prepared for previous meetings in the
 10 past because they summarize the key areas of concern,
 11 and I don't recall in looking at any of those materials
 12 any indication specifically of the port having a
 13 problem with Tom Luster.
 14 That doesn't mean the port didn't have a
 15 problem with Tom Luster. What was conveyed to me by
 16 the port throughout the decision-making process related
 17 to the runway would be -- I would categorize as
 18 concerns.
 19 Q. And you think there's a difference between
 20 concerns and problems; is that correct?
 21 A. Yes.
 22 Q. And you think there's a difference between
 23 concerns and complaints; is that correct?
 24 A. Yes.
 25 Q. Now, getting back to your meeting with

1 Mr. Fitzsimmons, when you described your recollection
 2 of how Tom Luster was replaced, isn't that something
 3 you told me you did with Mr. Fitzsimmons?
 4 A. I think it's possible that we did. I'm not
 5 remembering the specifics of the conversation, but it's
 6 very likely if I went over the key areas of concerns
 7 and issues it's possible that we had some discussion
 8 about the change in assignment for the 401 coordination
 9 work.
 10 Q. And did Mr. Fitzsimmons have any response to
 11 that?
 12 A. I don't remember.
 13 Q. How long did your meeting with
 14 Mr. Fitzsimmons last?
 15 A. Several minutes.
 16 Q. How many is several?
 17 A. Anywhere from 10 to 20.
 18 Q. Did you talk with Mr. Fitzsimmons about the
 19 governor or the governor's staff or office involvement
 20 in the 401 process?
 21 A. I think there was a brief mention of the
 22 meetings we had with the governor's chief of staff
 23 where Mic Dinsmore and Gina Marie Lindsey would have
 24 been present from the port and --
 25 Q. Go ahead.

~~1 there may have been reference to that~~
~~2 meeting and other meetings that we had with the~~
~~3 governor's chief of staff.~~
 4 Q. Now, who is the governor's chief of staff?
 5 A. At the time it was Paul Isaki.
 6 Q. Paul I-s-a-k-i?
 7 A. I believe that's it.
 8 Q. Isaki?
 9 A. Yes.
 10 Q. And Mic Dinsmore, who is he?
 11 A. He's the executive director of the Port of
 12 Seattle.
 13 Q. And who is Gina Marie Lindsey?
 14 A. She's the manager of Sea-Tac airport.
 15 Q. What's your educational background,
 16 Mr. Hellwig?
 17 A. I have a Bachelor's degree in political
 18 science and a Master's degree in business
 19 administration.
 20 Q. And where are those from and when did you get
 21 them?
 22 A. Graduated from Central Washington University
 23 in 1975, and my MBA from University of Puget Sound was
 24 '82, I believe.
 25 Q. Did you have a major other than political

1 science at CWU or was that it?
 2 A. CWU was a Bachelor's degree, and, yes, my
 3 major was political science, other courses in economics
 4 and history.
 5 Q. Now, you were in the Marines then, weren't
 6 you?
 7 A. Yes, I was.
 8 Q. When was that?
 9 A. From 1968 into 1970.
 10 Q. So that was prior to going to CWU?
 11 A. After I got out of the Marine Corps, I worked
 12 at a cement plant for about a year and a half. Then I
 13 started school at Shoreline Community College, received
 14 an AA degree there, transferred to Central Washington
 15 University, and started working for the state, I
 16 believe, in 1976.
 17 Q. So '76 after you got your BA, that was your
 18 first job out was with the state?
 19 A. No. I worked -- let me try and remember
 20 here. I worked at a 7-Eleven store. I worked at
 21 Aurora Rents. A friend of mine owns that business. He
 22 has a --
 23 Q. So '76 was your first job with the state,
 24 though?
 25 A. Yes.

1 Q. And where was that, what department?
 2 A. That was with Department of Licensing.
 3 Q. And what was your position there?
 4 A. My position there, I worked with the driver
 5 examining division. I was an examiner there for about
 6 a year and a half. Then I was promoted to a
 7 supervisor, then in another year promoted to a higher
 8 level supervisor. From that division I moved into the
 9 driver improvement division where I was a hearings
 10 examiner.
 11 Q. Now, approximately what year was that?
 12 A. Hearing officer, early '80s. Conducted
 13 hearings pursuant to the implied consent statutes,
 14 habitual traffic offender law, and conducted individual
 15 and group interviews for individuals who had
 16 accumulated too many traffic citations.
 17 Q. That was the early '80s, and then what after
 18 that?
 19 A. From there I went to work for the budget and
 20 planning division of Department of Licensing and was a
 21 management analyst and planner and then budget analyst,
 22 and from there in 1988 I moved over to the Department
 23 of Ecology.
 24 Q. What position did you take when you moved to
 25 DOE?

1 A. Environmental planner position.
 2 Q. And where was that?
 3 A. That was with the administration program in
 4 the financial services and budget office.
 5 Q. Now, when you say administration program in
 6 financial services and budget office, what does that
 7 office do or what did it do?
 8 A. Well, the budget office is responsible for in
 9 coordination with the governor's budget office
 10 developing the budget for Department of Ecology, which
 11 is then further scrutinized by the budget office and
 12 the legislature.
 13 Q. So is that what you worked on?
 14 A. Worked on budget doing cost estimates on
 15 proposed legislation and supported the water quality
 16 program, so worked closely with the water quality
 17 program, its managers, and learning its issues, its
 18 activities, and all the laws and regulations related to
 19 them to assist me in analyzing proposed legislation,
 20 costing it out, and then later to assist them with
 21 budget status reports and budget development work.
 22 Q. So this was all focused around budget and
 23 financial issues; is that correct?
 24 A. It was focused around budget and water
 25 quality program workload issues, workload planning and

1 budget issues.
 2 Q. So workload meaning manpower, person power,
 3 however you want to put it?
 4 A. Helping the program budget, for example, for
 5 its permitting functions.
 6 Q. What do you mean by helping the program
 7 budget for its permitting functions?
 8 A. Working with its managers to develop plans
 9 and then budgets for the resources it would need to
 10 implement a permitting program.
 11 Q. So, in other words, figuring out financially
 12 what it would take; is that correct?
 13 A. Figuring out staff and dollar resources,
 14 dollars for equipment and all the other resources
 15 needed for a part of the program, for the program and
 16 its various parts.
 17 Q. Now, how long were you in this administration
 18 program financial services and budget office?
 19 A. I was there for a couple years. Then I moved
 20 over to Department of Fisheries before it was combined
 21 with Department of Game, which it's now Fish and
 22 Wildlife, and I was the budget officer there for a
 23 little less than a year, and then an opening came up
 24 with the water quality program back at Department of
 25 Ecology for a section manager position for its -- the

1 section responsible for legislative review, planning,
 2 information management, personnel matters, so I
 3 competed for that job and took it over in -- boy, it
 4 was '91 or '92.
 5 Q. Was this a job that worked out of Lacey or
 6 that worked out of Bellevue?
 7 A. It was out of Lacey, and I was a member then
 8 of the water quality program program management team
 9 and worked regularly with the managers responsible for
 10 the permitting programs and regional managers.
 11 Q. Now, how long were you in that position as a
 12 section manager in the water quality program
 13 responsible for legislative review planning information
 14 management and personnel?
 15 A. That would have been probably only about a
 16 year and a half or two years.
 17 Q. Then what job did you move to, if any, after
 18 that?
 19 A. Do you mind if we take a break?
 20 Q. Not at all.
 21 MS. MARCHIORO: You have to answer that
 22 question first.
 23 THE WITNESS: I'd like to take a break and
 24 answer the question.
 25 MR. EGLICK: He can take a break and answer

1 when he gets back.
 2 MS. MARCHIORO: I just want to make sure it
 3 was okay.
 4 (Recess taken.)
 5 (The reporter read back as requested.)
 6 A. Well, I went from the section manager of the
 7 -- section manager with the water quality program to
 8 section manager for the shorelines program at the
 9 northwest regional office in Bellevue and managed the
 10 shorelines section there for about a year and a half.
 11 Q. (BY MR. EGLICK) And that would bring you to
 12 about what year?
 13 A. I went up there, I believe it was, in '94.
 14 After a year to a year and a half, the program merged
 15 with water resources program, so it became the
 16 shorelines and water resources program, so I became
 17 section manager of -- when it was shorelines, the
 18 section was 10 or 12 people, I believe, and when we
 19 merged with water resources, then I was manager of a
 20 section then of about from 25 up to 27 people at one
 21 point.
 22 Q. And that job was through when?
 23 A. That job was through -- some of the dates
 24 could be wrong here, the time frames, and I didn't
 25 bring my resume, which outlines it a little bit better,

1 but for two or three years section manager for
 2 shorelines and water resources. Then there was yet
 3 another reorganization.
 4 The water resources program was split off
 5 from the shorelines program, and then some of the
 6 functions of the shorelines program and what was
 7 referred to as central programs at headquarters were
 8 merged together and regionalized, and that's the time
 9 when the -- so I had a choice to go with the water
 10 resources program that was peeled away from the
 11 shorelines and then what became the shorelines and
 12 environmental assistance program.
 13 I went with shorelines and environmental
 14 assistance. The program shorelines was merged with
 15 some of the functions that had been carried out at
 16 headquarters, one of them being the 401 coordination
 17 work. That function was regionalized at that time. I
 18 don't have the exact date for you.
 19 Q. What year was that?
 20 A. I don't remember.
 21 Q. Approximately?
 22 A. Let me go back in time here. '97-'98 time
 23 frame.
 24 Q. Was your next job then as northwest regional
 25 director of Department of Ecology?

1 A. That's correct.
 2 Q. When did you assume that position?
 3 A. That would have been June of '99.
 4 Q. Have you ever taken any courses at the
 5 university level in hydrology?
 6 A. The closest would be a geology course and
 7 maybe parts of a physics course.
 8 Q. So is that a no?
 9 A. No course that was called hydrogeology.
 10 Q. Or hydrology?
 11 A. Hydrology, no.
 12 Q. Neither one?
 13 A. No.
 14 Q. What about toxicology?
 15 A. Nope.
 16 Q. Salmon ecology?
 17 A. No.
 18 Q. Are you a member of the professional
 19 association for wetland scientists? Do you know what
 20 that's called?
 21 A. Sure I do. I have people that I've hired and
 22 who work for me that belong to that organization.
 23 Q. Are you a member of it?
 24 A. No.
 25 Q. The Society of Wetland Scientists, is that

1 what it's called?
 2 A. I believe.
 3 Q. So what course work have you done in the
 4 environmental area since getting your MBA?
 5 A. Well, there's been some training put on by
 6 the shorelines and environmental assistance program
 7 technical experts on wetland delineation.
 8 Q. Let's talk about that for a minute. You've
 9 been to a training on wetland delineation?
 10 A. Well, we had -- I'm trying to remember. The
 11 program puts on training courses.
 12 Q. Right. But my question is have you been to a
 13 training on wetland delineation?
 14 A. Yes.
 15 Q. When?
 16 A. That would be a few years ago.
 17 Q. How long did the training last?
 18 A. Less than a day.
 19 Q. What other environmental substantive topics
 20 have you successfully completed a training course on?
 21 A. I don't remember. None come to mind.
 22 Q. When you first got involved with the airport
 23 401, what year was it?
 24 A. '98. I was aware of airport-related issues
 25 in '97, but my involvement -- formal involvement was

1 '98.

2 Q. And what position did you hold at the
3 Department of Ecology at the time?

4 A. Section manager of the shorelines and
5 environmental assistance program.

6 Q. So this was before you became regional
7 director?

8 A. That's correct.

9 Q. And in what capacity did you become involved
10 with the airport application? We're talking about the
11 third runway application, right?

12 A. Uh-huh.

13 Q. Was that a yes?

14 A. Yes.

15 Q. I'm sorry. It's not that I mind an uh-huh.
16 The problem is the court reporter doesn't know what to
17 write down.

18 A. I understand.

19 Q. What capacity did you become involved with
20 the airport application in 1998? What was your role?

21 A. Management lead.

22 Q. What does that mean?

23 A. It means I had responsibility for pulling
24 together the technical experts from the various
25 programs to work together to discuss areas of concerns

1 and issues and attempt to resolve them for purposes of
2 the decision-making process. I would in that role be a
3 contact for external parties too, including the port,
4 and would organize -- help organize meetings and trac
5 progress.

6 Q. Now, have you ever signed a 401 certification
7 for the airport?

8 A. Not for the airport.

9 Q. Now, there have been a few for the airport,
10 haven't there? Just in this third runway business
11 alone, haven't there been three at least?

12 A. The last 401 was signed by Gordon White.

13 Q. You're talking about the September one?

14 A. Right.

15 Q. By the way, why don't we get that out of the
16 way now.

17 MR. EGLICK: Did you folks bring your
18 Exhibits 1 and 2 with you?

19 MR. REAVIS: No. Sorry.

20 MR. EGLICK: That's like a bible. You didn't
21 bring it? I can sell you some extra copies.

22 MS. MARCHIORO: We can share and I'll give
23 them back.

24 MR. EGLICK: Check it and make sure it's the
25 right one. I think this one I'm giving you now is the

1 August 10, which I think is supposed to be Exhibit 1.
2 Am I right? No. August 10 is Exhibit 2. Does
3 everyone agree on that? Anyone disagree?

4 MR. REAVIS: I don't disagree. I will take
5 your word for it.

6 MR. EGLICK: What I'm handing out now is the
7 September 21, which I believe is Exhibit 1.

8 Q. (BY MR. EGLICK) Now, you might want to just
9 check those quickly, Mr. Hellwig, and make sure we're
10 all talking about the same thing. My understanding is
11 that what I've told you is Exhibit 2, the August 10
12 certification, is one of the two that was issued, you
13 know, that have been raised in this case. Does that
14 work for you?

15 A. Yes.

16 Q. Now, both of these were signed, weren't they
17 -- and I guess I better check, but that was my
18 impression they were signed by Gordon White. Is that
19 correct?

20 A. That's correct.

21 Q. So how come you get to do all the work and
22 then he signs?

23 A. In my role as section manager for shorelines
24 and environmental assistance program, I would sign --
25 did sign 401s for various projects, and when it came to

1 the 401 for the runway and associated projects, it was
2 decided that given the involvement of multiple programs
3 and headquarters as well as regional staff and given
4 the significance of the decision inasmuch as it was --
5 it is a major project proposal, a complicated and
6 complex one, that it would be appropriate for the
7 program manager of the shorelines and environmental
8 assistance program to sign the 401. That's one point.

9 The second point with respect to my role,
10 after becoming a regional director, regional directors
11 -- it is not the role of regional directors typically
12 to sign permit or certification documents. It is the
13 role of the program manager or the section heads in the
14 regions to sign permits or certification documents.

15 Q. Say that --

16 MR. EGLICK: Could you read back the last
17 sentence, please?

18 (The reporter read back as requested.)

19 Q. (BY MR. EGLICK) I think you said it's the
20 role of the program managers or section heads in the
21 regions to sign certification documents?

22 A. Yes.

23 Q. So in this case, who would the program
24 manager be who would have normally signed the Sea-
25 401 certifications?

1 A. The program manager is Gordon White.
 2 Q. And he as the program manager is based at
 3 headquarters; is that correct?
 4 A. That's correct.
 5 Q. And then the section head in the region, who
 6 would that be?
 7 A. There's four regions, and in the northwest
 8 region, the section head -- I was the section head up
 9 until '99 and had been signing 401 certifications for
 10 other projects up to that point, and following me into
 11 that position is Jeannie Summerhays. She's the current
 12 section manager for shorelines and environmental
 13 assistance program. She reports, as I did when I was
 14 in that position, to Gordon White, who is the program
 15 manager.
 16 Q. But because of the significance of this
 17 project, the signature authority was given to Gordon
 18 White; is that correct?
 19 A. I think I said that because of the
 20 involvement of multiple programs, the complexity --
 21 that it was a major project proposal, a complicated and
 22 complex one, and I think in part too because of the
 23 transition from me into my new job, although I'm not
 24 recollecting specifically, it was decided that the
 25 program manager would sign this 401. There could be

1 other reasons. I expect there are, but I don't
 2 remember them.
 3 (Mr. Stock joined the proceedings.)
 4 Q. Who made the decision as to who would sign?
 5 A. I believe that Gordon White made that
 6 decision.
 7 Q. So that was a decision that he could make
 8 authoritywise?
 9 A. Yes.
 10 Q. Gordon White is based -- I think we already
 11 said this. I want to be sure. He's based in Olympia?
 12 A. Actually, Lacey. Our office building is in
 13 Lacey.
 14 Q. Tell me if I'm wrong about this, but in all
 15 these facilitated meetings and all this that took
 16 place, which we're going to talk about later, did
 17 Gordon White come to any of those meetings that you
 18 recall?
 19 A. I don't recall that he did, no. I don't
 20 believe he did.
 21 Q. Let's go back to something we were talking
 22 about earlier. I just want to make sure that I have
 23 covered this, because we may have moved away from it.
 24 When you were talking about preparing for your
 25 deposition, I believe I asked you whether you talked

~~1 with anyone affiliated with the port about your
 2 deposition or anything related to it. What's the
 3 answer to that?
 4 A. No.
 5 Q. You said that you had talked and you gave me
 6 a list of people you had talked with. Did you have any
 7 contact other than conversation in preparation for your
 8 deposition; for example, an e-mail?
 9 A. No.
 10 Q. Did you attend the department --
 11 A. Well, pardon me. There were e-mails, of
 12 course, logistical e-mails that referred to the
 13 depositions, of course, for purposes of scheduling,
 14 setting them up.
 15 Q. Did you attend the Department of Ecology
 16 training session on depositions which was held to
 17 prepare people for this deposition?
 18 A. Yes.
 19 Q. You did. Okay. That slipped your mind?
 20 A. I had forgotten that Joan had come out to the
 21 -- our attorney had come out to the office and met with
 22 folks who were scheduled for depositions.
 23 Q. And when was that?
 24 A. That was before Christmas as well. I don't
 25 have the exact date.~~

~~1 Q. Was that before or after you met with the
 2 director about your deposition?
 3 A. I believe the brief conversation I had with
 4 the director happened before the meeting at the
 5 Bellevue office.
 6 Q. And the meeting at the Bellevue office you're
 7 referring to the training session that Joan Marchioro
 8 held?
 9 A. The overview, the training session that we
 10 had with our attorney.
 11 Q. Did anyone other than Department of Ecology
 12 personnel attend that session?
 13 A. No.
 14 Q. You're aware, are you not, Mr. Hellwig, that
 15 the board has issued a stay of the 401 certification in
 16 this case?
 17 A. Yes.
 18 Q. When did you become aware of that?
 19 A. I don't remember the exact date, but it would
 20 have been as soon as our attorneys found out and
 21 notified us.
 22 Q. And are you aware that the board has issued a
 23 partial summary judgment on the appeal brought by case
 24 on the MPDS permit major modification?
 25 A. No. That's not the way I understand the~~

1 situation.
 2 Q. What's your understanding?
 3 A. My understanding is that ecology prevailed on
 4 three or four of the issues that were under debate.
 5 Q. And what's your understanding of what
 6 happened on the issue or issues that ecology did not
 7 prevail on?
 8 A. I don't have a clear understanding.
 9 Q. Have you reviewed the decision --
 10 A. No.
 11 Q. -- on the MPDS major modification?
 12 A. No.
 13 Q. Have you reviewed the board's decision on the
 14 stay of the 401 certification?
 15 A. I looked through it.
 16 Q. And when did you do that?
 17 A. I don't have the exact date, but it would
 18 have been shortly after the document was delivered to
 19 the Bellevue office.
 20 Q. Before or after Christmas?
 21 A. That was before Christmas. Wait. I could be
 22 confusing -- I could be confusing documents here. The
 23 appeal document and the -- would you repeat the
 24 question?
 25 MR. EGLICK: Could you read the question

1 body, please?
 2 (The reporter read back as requested.)
 3 A. I think I confused that document with an
 4 earlier appeal-related document, but I did look thro
 5 the stay document. I don't remember the exact time.
 6 Q. (BY MR. EGLICK) What earlier appeal document
 7 did you confuse your review of the PCHB stay decision
 8 with?
 9 A. I don't remember specifically.
 10 Q. Were you aware before it was filed that the
 11 port was going to appeal the PCHB stay decision?
 12 A. I was aware it was being considered.
 13 Q. And how were you aware of that?
 14 A. I believe I was aware of that through our
 15 attorneys.
 16 Q. You mean -- when you say our attorneys, you
 17 mean the attorneys for the port?
 18 A. When I say our attorneys, I mean the
 19 assistant attorney generals that support Department of
 20 Ecology.
 21 Q. How would the assistant attorney general for
 22 the Department of Ecology know what the port was going
 23 to do?
 24 A. I don't know.
 25 Q. You have no idea?

1 A. I have no recollection.
 2 Q. Well, this is all events that have occurred
 3 in the past month; is that correct?
 4 A. That's correct.
 5 Q. But you have no recollection?
 6 A. I don't remember specifically.
 7 Q. Did you ever talk to anyone in ecology about
 8 the port possibly appealing the PCHB stay decision?
 9 A. I don't remember.
 10 Q. Can't recall at all?
 11 A. I don't remember a specific instance of doing
 12 that.
 13 Q. Did you ever talk to anyone affiliated in any
 14 way with the Port of Seattle about the possibility that
 15 it would appeal the PCHB stay decision?
 16 A. I don't remember that, no.
 17 Q. You don't remember either way or you don't
 18 remember doing that?
 19 A. I don't remember having -- no, I did not.
 20 Q. Have you had any meetings with persons
 21 affiliated with the port since December 15, 2001?
 22 A. No.
 23 Q. Have you had any contact with persons
 24 affiliated with the port since December 15, 2001?
 25 A. I believe I've had one or two -- I don't

1 remember the specific number. I've had conversation
 2 with Robin Kordik and Elizabeth Leavitt.
 3 Q. Now, who is Robin Kordik?
 4 A. Robin Kordik works for the port, is assisting
 5 with an interlocal agreement that is being developed
 6 between ecology and the port that would make resources
 7 available to ecology to assist in overseeing compliance
 8 with the terms and conditions of the 401 certification
 9 for the runway and associated projects.
 10 Q. What's Ms. Kordik's position with the port if
 11 you know?
 12 A. I don't know the title.
 13 Q. Do you know what her area of responsibility
 14 is?
 15 A. Well, the area of responsibility includes
 16 support relating to the runway work and that project.
 17 Q. When was the conversation -- was it one
 18 conversation with Ms. Kordik?
 19 A. No. I've had a few conversations with her
 20 about the interlocal agreement that we are attempting
 21 to develop between our agencies.
 22 Q. And this is a few conversations since
 23 December 15, 2001; is that correct?
 24 A. The conversations I'm thinking of may have
 25 happened some of them before that date, some of them

1 after, but in the neighborhood of early December, late
2 November, early December.

3 Q. Now, you also mentioned that you'd had
4 conversations with Elizabeth Leavitt since December 15,
5 2001; is that correct?

6 A. I believe that I have.

7 Q. Elizabeth Leavitt is the person sitting right
8 here in the room across the table?

9 A. That's correct.

10 Q. And what's her position?

11 A. She's manager of the Port of Seattle or
12 director of the Port of Seattle aviation environmental
13 division. That's not an exact title.

14 Q. And what has been the substance -- well,
15 let's back up a minute. How many conversations have
16 you had since December 15, 2001, with Elizabeth
17 Leavitt?

18 A. I don't remember the exact number.

19 Q. Less than five?

20 A. Yes.

21 Q. And who's initiated them?

22 A. I believe that -- I'm not remembering who
23 initiated each conversation, but my best recollection
24 is that I may have initiated at least one of them and I
25 believe she initiated at least one of them.

1 Q. What was the purpose of the call that you
2 initiated?

3 A. My best recollection is that it involved
4 touching base on the interlocal agreement, the status
5 of that.

6 Q. Any other topics discussed in the
7 conversation?

8 A. There may have been reference in the
9 conversation to submittals due to ecology from the port
10 pursuant to the 201.

11 Q. And what was the nature of the reference to
12 those submittals?

13 A. I believe that there was a reference to the
14 timing or the status of the submittal of an updated low
15 flow technical analysis document.

16 Q. And what was discussed with regard to the
17 timing or status of that document?

18 A. Nothing beyond the timing or status.

19 Q. What was said about the timing or status of
20 that document?

21 A. I don't remember the specific conversation.

22 Q. Was any reference made to the PCHB stay
23 order?

24 A. I don't remember that.

25 Q. Does that mean there was no reference or you

1 just don't recall?

2 A. I don't recall that there was a reference to
3 the PCHB stay.

4 Q. Now, you say the other conversations since
5 December 15, 2001, with the port have been initiated by
6 did you say Ms. Leavitt?

7 A. I don't remember a specific contact, but I
8 seem to recall that on my voice mail when Ms. Leavitt
9 returned from vacation she left a message just checking
10 in wanting to touch base with me on things.

11 Q. And did you return the call?

12 A. Yes.

13 Q. And what did you discuss?

14 A. I believe that all the conversations dealt
15 with essentially the same matters, the interlocal
16 agreement and status of submittals.

17 Q. When you say status of submittals, does
18 status include the substance of the submittals in any
19 way?

20 A. No.

21 Q. What actions to your knowledge has ecology
22 taken in response to the PCHB stay order?

23 A. I have a status or voice message from our
24 assistant attorney general relating to that.

25 MR. EGLICK: Could you read back the

1 question, please?

2 (The reporter read back as requested.)

3 Q. (BY MR. EGLICK) Could you answer that
4 question, please?

5 A. My understanding is that we filed a document
6 -- that the attorneys on behalf of the agency have
7 filed a document. I'm not familiar with the substance
8 of that document. I haven't seen it and don't know the
9 details of it.

10 Q. What do you know about it?

11 A. We're supporting the port's appeal of the
12 stay. I don't know the specifics around what support
13 constitutes.

14 Q. When was the decision made to support the
15 port's appeal of the stay by ecology?

16 A. Voice messages were exchanged between myself
17 and the assistant attorney general's office, myself and
18 the director, and my guess would be there were other
19 messages exchanged, but I don't have knowledge of them.

20 Q. What was the substance of the voice messages
21 that you're aware of? Take them one at a time and go
22 through them.

23 A. The substance dealt with whether or not
24 ecology should support the port's stay of the decision
25 whether or not ecology should support the port's

1 ~~appeal of the stay and what form that support should~~
 2 ~~take and the level of -- the idea that the level of~~
 3 ~~effort associated with that support could be variable.~~
 4 Q. Now, you say there was one voice message
 5 exchanged between yourself and the assistant attorney
 6 general, is that correct?
 7 A. There may have been more than one. I don't
 8 remember.
 9 Q. And there was one or more voice messages
 10 exchanged between you and the director on this topic?
 11 A. I don't believe that the director -- wait. I
 12 believe there were two messages traded back and forth.
 13 I believe the director only responded to one of my
 14 messages. The gist of the messages was to coordinate
 15 on the type of or level of support that we would be
 16 connecting to the port's appeal of the stay.
 17 Q. Now, is it your testimony, then, that ecology
 18 has already made a decision to support the PCHB's --
 19 excuse me -- to support the port's appeal of the PCHB
 20 stay decision?
 21 A. It's my understanding that we've done that.
 22 Q. And do you know when that decision occurred?
 23 A. Well, the decision leading up to the action
 24 evolved over a period of several days as I understand
 25 it.

1 Q. Well, why don't you start at the beginning
 2 and tell me how it evolved. Give me dates and times
 3 and people's names.
 4 A. I don't remember specific dates and times,
 5 but the names -- it would be the names of our
 6 attorneys, Tom Young and Joan Marchioro, and the
 7 messages, I believe one from Tom Young, would have gone
 8 to Tom Fitzsimmons and I, and I recall responding back
 9 to Tom Young and to Tom Fitzsimmons --
 10 Q. When was this?
 11 A. In a voice message.
 12 Q. But when was it?
 13 A. A few days back.
 14 Q. A few days back from today, you mean?
 15 A. Yes.
 16 Q. So today is January 8, so that's a few days
 17 back?
 18 A. I don't remember the exact date. I've worked
 19 several days straight now, and it's literally mixed up
 20 in my mind.
 21 Q. Was it January 1?
 22 A. No.
 23 Q. Was it January 2?
 24 A. May have been.
 25 Q. Could it have been as late as January 3?

1 A. I don't remember.
 2 Q. Could it have been as late as yesterday?
 3 A. It was before yesterday.
 4 Q. Yesterday was Monday; is that right?
 5 A. It would have been last week.
 6 Q. So last week, Thursday or Friday of last
 7 week?
 8 A. Possibly.
 9 Q. Which would be the 3rd or the 4th, is that
 10 correct, of January?
 11 A. I think so, yes.
 12 Q. So we know it's between January 2 and January
 13 4; is that correct?
 14 A. That's my best recollection.
 15 Q. Now, were all the interchange on this
 16 conducted by voice mail and telephone?
 17 A. Voice messaging, yes.
 18 Q. Any electronic or documentary media employed?
 19 A. There may have been -- I believe there was
 20 one attorney/client privilege message from Tom Young
 21 just --
 22 MS. MARCHIORO: I'm going to object to the
 23 content you're asking about the substance of that if
 24 we're getting --
 25 MR. EGLICK: Are you objecting to the

1 question I just asked or the one I haven't asked yet:
 2 Why don't we read back the question and see if you want
 3 to object.
 4 (The reporter read back as requested.)
 5 MS. MARCHIORO: I'm sorry. I misunderstood
 6 the question.
 7 MR. EGLICK: Could you read back the answer,
 8 please?
 9 (The reporter read back as requested.)
 10 MS. MARCHIORO: I misunderstood your
 11 question.
 12 Q. (BY MR. EGLICK) To your knowledge, was there
 13 a request from the port in any way that DOE join and
 14 support -- join in support of its appeal of the PCHB
 15 stay?
 16 A. No. Not that I'm aware of.
 17 Q. You said you were aware of one what you're
 18 terming an attorney/client privilege message from Tom
 19 Young. Did that message include any information
 20 obtained from the port?
 21 A. My best recollection is it was just an
 22 indication of legal actions occurring.
 23 Q. And your reference to a message came in the
 24 response to my question as to whether there were any
 25 documentary or electronic media that were used in the

1 communications concerning the DOE decision to join or
 2 support the port's appeal of the PCHB stay decision.
 3 You mentioned this one document. Are there any others,
 4 documents, electronic media, or anything of that sort?
 5 A. Not that I'm recalling.
 6 Q. Did you send any messages yourself other than
 7 by telephone or voice mail or make any communications
 8 other than by telephone or voice mail?
 9 A. No.
 10 Q. Have you reviewed the document that you say
 11 has been filed concerning DOE's support?
 12 A. No.
 13 Q. Have you seen it?
 14 A. No.
 15 Q. Do you know who made the decision for ecology
 16 to support the port's appeal of the stay?
 17 A. I'm only aware of the conversations or the
 18 messages, rather, traded back and forth between myself
 19 and the attorneys and a couple of messages I recall
 20 sending or copying the director on, Tom Fitzsimmons,
 21 and one response I got back from him, and as far as a
 22 final decision, I'm not aware of a final decision
 23 point. I am aware that Mr. Fitzsimmons and I were in
 24 agreement on supporting the appeal of the stay, but we
 25 did not have a conversation about what form that

1 support should take.
 2 Q. Supporting the stay?
 3 A. My understanding is there's -- we had more
 4 than one alternative in front of us with respect to how
 5 we would join in or support the port's appeal of the
 6 stay, and so I was not involved with real time
 7 conversations with our attorneys or Mr. Fitzsimmons on
 8 what form that support should take.
 9 MR. EGLICK: Maybe I can ask Ms. Marchioro
 10 this. He's testifying that something's been filed.
 11 Now, I can testify for the record here that if
 12 something's been filed, we haven't received it. Do you
 13 have a copy with you today, Ms. Marchioro, that we
 14 might refer to?
 15 MS. MARCHIORO: No.
 16 MR. EGLICK: Could you maybe have one over
 17 the lunch break faced by your office so that we could
 18 ask Mr. Hellwig some questions about it?
 19 MS. MARCHIORO: Possibly.
 20 MR. EGLICK: Maybe you could check in the
 21 next break and let us know before the lunch break,
 22 because I think we may want to ask him some questions,
 23 and, of course, we won't know that. If it's been
 24 filed, I assume that you would agree we're entitled to
 25 have it when it's filed.

1 MS. MARCHIORO: I didn't say you weren't
 2 entitled to have it.
 3 MR. EGLICK: Do you agree we're entitled to
 4 have it when it's filed?
 5 MS. MARCHIORO: I didn't say you weren't
 6 entitled to have it. It's in the mail.
 7 MR. EGLICK: Do you know when it was mailed?
 8 MS. MARCHIORO: Yesterday afternoon.
 9 MR. EGLICK: In other words, it was filed
 10 with the court or was it mailed to the court?
 11 MS. MARCHIORO: It was filed to the court.
 12 MR. EGLICK: And then mailed to us from
 13 Olympia?
 14 MS. MARCHIORO: Yes. If you don't have it in
 15 your mail, I'll be happy to give my office a call.
 16 MR. EGLICK: I think Mr. Stock will go check,
 17 but as far as I know we don't have it.
 18 (Mr. Stock left the room.)
 19 Q. (BY MR. EGLICK) Is ecology taking any other
 20 action, then, in the port court proceeding? What
 21 you're telling me, Mr. Hellwig, is that ecology is
 22 going to join in the port appeal of the stay, so we
 23 know about that, but is ecology taking any other action
 24 in response to the stay that you're aware of?
 25 A. No. I'm not aware of any other

1 Q. Is ecology considering taking any other
 2 action in response to the stay?
 3 A. Not that I'm aware of.
 4 Q. Has ecology considered taking any other
 5 action in connection with or in any way in response to
 6 the stay?
 7 A. Not that I'm aware of.
 8 Q. Has ecology considered not proceeding with
 9 implementation of the 401 in response to the stay?
 10 A. I believe that we're in need of having some
 11 conversations about that issue.
 12 Q. Didn't you just tell me a few minutes ago
 13 that you were having conversations with the port
 14 concerning various matters that really are
 15 implementation of various aspects of the 401
 16 certification, aren't you?
 17 A. I referred to conversations that we had about
 18 the interlocal agreement, yes.
 19 Q. And that is part of implementation of the 401
 20 conditions, isn't it?
 21 A. Yes.
 22 Q. And is ecology continuing to move ahead on
 23 401 implementation despite the stay?
 24 A. Ecology is in a position where I think we
 25 need to have additional conversations about the

1 applicability of the action to what our work should be.
 2 MR. EGLICK: Could you read back the
 3 question, please?
 4 (The reporter read back as requested.)
 5 Q. (BY MR. EGLICK) Could you answer that
 6 question, please?
 7 A. It's not clear to me that any work we're
 8 doing now related to the 401 would be considered
 9 implementation or not. In the last two or three days
 10 or in the last week, I have done no work on the
 11 interlocal agreement, and I'm not aware of any other
 12 work that staff might be doing related to the 401.
 13 Q. Has ecology made a decision not to proceed
 14 with implementation of the stay in response to the PC
 15 -- with implementation of the 401 in response to the
 16 PCHB decision?
 17 A. Please ask that again.
 18 Q. I'll ask another question. Has ecology made
 19 a decision not to proceed with implementation of the
 20 401 in response to the PCHB stay decision?
 21 A. We have not made a specific decision one way
 22 or another.
 23 Q. So is there any impediment that you know of
 24 to ecology proceeding with implementation of the 401?
 25 A. It's a matter that I need to discuss with our

1 attorneys and with staff.
 2 Q. When did the stay decision come out,
 3 Mr. Hellwig?
 4 A. I don't recall the exact date.
 5 Q. It was mid December; is that correct?
 6 A. If that's the date.
 7 Q. It's now January 8. Can we agree on that?
 8 A. Yes, we can.
 9 Q. So has a meeting been scheduled where ecology
 10 will decide whether or not it will proceed with
 11 implementation of the 401 in light of the stay?
 12 A. No.
 13 Q. You would know about it, wouldn't you, if
 14 such a meeting had been scheduled?
 15 A. Most likely.
 16 Q. In fact, you would be the person most likely
 17 to schedule it, wouldn't you?
 18 A. Most likely, yes.
 19 Q. And have you or to your knowledge anyone in
 20 ecology advised the port that implementation of the 401
 21 will not proceed in light of the stay?
 22 A. I'm not aware of that.
 23 Q. Has ecology been considering at any time
 24 since issuance of the -- what's the date on the latest
 25 401? Is that September 21, Exhibit 1? Do we agree on

1 that?
 2 A. September 21.
 3 Q. Has ecology been considering since September
 4 21 at any time to your knowledge amendments to its 401
 5 certification? By amendments I mean changes,
 6 modifications, clarifications, whatever rubric is
 7 placed on a change.
 8 A. Not that I'm aware of.
 9 Q. Have there been any discussion about changes
 10 to the 401 in light of the PCHB decision granting a
 11 stay?
 12 A. I believe that we need to have more
 13 conversation about that within the agency.
 14 MR. EGLICK: Could you read back the
 15 question, please?
 16 (The reporter read back as requested.)
 17 Q. (BY MR. EGLICK) Could you please answer that
 18 question?
 19 A. I'm not aware of any changes being considered
 20 to the 401 in light of that stay decision.
 21 Q. Are you aware of any changes being considered
 22 to the 401 in light of anything else?
 23 A. The port will be submitting additional
 24 information to ecology pursuant to the 401, and ecology
 25 will review that information. I'm not exactly sure

1 what's in front of us right now, but I'm not aware of
 2 any specific changes that are being considered at this
 3 time.
 4 Q. Well, will the -- how do you know that the
 5 port will be submitting additional information?
 6 A. My understanding without looking at the
 7 document or talking to staff in the last couple of days
 8 is that the port would be, I believe has, submitted
 9 additional technical information -- part of this is
 10 coming back to me. The port has submitted additional
 11 technical information related to low flow that ecology
 12 will have its consultant experts at King County review
 13 pursuant to a contract we have with the county.
 14 Q. And when was this additional information
 15 submitted?
 16 A. I don't have the exact time.
 17 Q. Was it in 2002?
 18 A. I don't know.
 19 Q. Is there any suggestion in any way that
 20 you're aware of that the port will change its proposal
 21 as a result of this submission of additional
 22 information?
 23 A. Not that I'm aware of.
 24 Q. Any suggestion for a change in the -- or any
 25 possibility based on this additional information

1 let's ask it that way -- any possibility based on this
 2 additional information of a change in the 401
 3 certification?
 4 A. Well, depending on how the legal process
 5 sorts itself out, I would suppose it's fair to say that
 6 there's a possibility, yes.
 7 Q. Other than based on how the legal process
 8 sorts it out, the legal process might not happen at
 9 least tomorrow. Any other possibility?
 10 A. I'm not sure I understand the question
 11 anymore.
 12 Q. Ecology doesn't have to wait for the legal
 13 process to sort itself out, does it, to try to make a
 14 change in the 401?
 15 A. It's not clear to me right now the way -- how
 16 the pending stay and the related appeals affect what
 17 ecology should or should not be considering with
 18 respect to a change to the 401, and I need to consult
 19 with our attorneys and our staff on that.
 20 Q. Well, is ecology considering making a change
 21 to the 401?
 22 A. Not that I'm aware of.
 23 Q. Has the port asked for a change to the 401 in
 24 any way?
 25 A. Not that I'm aware of.

1 Q. Have you talked with anyone affiliated with
 2 the Army Corps of Engineers concerning the PCHB stay?
 3 A. No.
 4 Q. Do you know whether anyone else in ecology
 5 has?
 6 A. No.
 7 Q. Didn't you at one time ask one of your staff
 8 persons to determine what would be the effect on the
 9 corps 404 decision-making process if a stay were
 10 granted by the PCHB?
 11 A. I believe I may have asked that question, but
 12 I'm not remembering who I asked, if it was an attorney
 13 or a staff.
 14 Q. Why would you ask that?
 15 A. Trying to understand the overall
 16 decision-making processes for ecology and the corps and
 17 how they fit together.
 18 Q. Does ecology have an interest in whether or
 19 not the corps does or does not issue a 404 permit under
 20 the Clean Water Act for the port's project?
 21 A. My general understanding is that the corps
 22 would not be able to issue a 404 if the 401 is stayed
 23 or not approved, and I believe I was asking for
 24 information around to either confirm that or to help me
 25 understand better what the corps processes were with

1 respect to the state process.
 2 MR. EGLICK: Could you read back the
 3 question, please?
 4 (The reporter read back as requested.)
 5 A. What do you mean do we have an interest?
 6 Q. (BY MR. EGLICK) Does ecology have a position
 7 either way on whether the army corps should issue a
 8 Clean Water Act section 404 permit approval for the
 9 port's project?
 10 A. Well, we think we made a good decision, and
 11 we think that we'll prevail, and based on that, we have
 12 an interest in the corps accepting our decision. The
 13 corps, its business is its own, but inasmuch as it can
 14 make a decision only after we've made our decision as I
 15 understand it, then we have an interest in how it fits
 16 together.
 17 Q. And the interest is as I understand it in
 18 having the army corps issue a 404 permit based on
 19 ecology's 401 decision?
 20 A. My understanding is that's part of the base
 21 of their decision, but if they issue the 404, in part
 22 our interest then in the project moving forward is
 23 being able to monitor what happens and ensure the
 24 port's compliance with the terms and conditions of the
 25 401.

1 Q. Does ecology have an interest in having the
 2 port's project move forward?
 3 A. Ecology has an interest in defending its
 4 decision, but ecology is not a project proponent.
 5 Q. So is the answer to my question, then, that
 6 ecology does not have an interest in whether the port's
 7 project moves forward?
 8 A. I'm not sure I understand the question with
 9 respect to interest in the port's project moving
 10 forward. We have an interest in making a solid
 11 decision that ensures that the project conforms with
 12 pertinent environmental laws and regulations and that
 13 the environment is protected.
 14 Q. Does ecology have a position on whether or
 15 not the port's project should move forward?
 16 A. Ecology's position is that what the port
 17 submitted ultimately gave us reasonable assurance that
 18 water quality would be protected and therefore that the
 19 certification should be granted.
 20 Q. That's the certification, but my question is
 21 -- and we'll read it back if you like, but I believe
 22 my question is whether ecology has a position of
 23 whether the port's project should move forward.
 24 A. And I apologize if I'm not understanding the
 25 question clearly, but our interest is in making a

1 sound defensible decision.

2 Q. Let me ask it this way. Is it your

3 testimony, then, that once ecology issued the 401

4 certification, it became a proponent for implementation

5 of the port's project as a whole?

6 A. We're not a proponent for implementation. We

7 have responsibility for overseeing the implementation.

8 It's not our responsibility to implement the project.

9 Our responsibility is to oversee and ensure it conforms

10 with the terms and conditions of the 401.

11 Q. So ecology, then, does not have a position

12 that says we are in favor of the port project

13 proceeding; is that correct?

14 A. Not that I'm aware of.

15 Q. And the 401 certification in your view does

16 not commit ecology to advocate for the port project

17 moving ahead; is that correct?

18 A. That's my understanding at this point.

19 Q. And in fact, other than perhaps some

20 professional pride, if the PCHB happened to disagree

21 with the 401 certification, that would not contravene

22 any particular policy position that ecology has with

23 respect to the third runway, would it?

24 A. Ask that again, please.

25 MR. EGLICK: Could you read it back, please?

1 (The reporter read back as requested.)

2 I'm not sure what you mean by professional

3 pride, and I'm not sure I understand the question.

4 Q. (BY MR. EGLICK) Would you like me to explain

5 it?

6 A. Would you please?

7 Q. Professional pride, I'm assuming that you and

8 the folks you work with have some pride in your work;

9 is that correct?

10 A. Yeah. We think we do good work.

11 Q. So professional pride means at least as I

12 expressed it that if you issue a decision you hope that

13 it's upheld because you worked on it.

14 A. Certainly.

15 Q. So we're clear on that part of the question

16 now?

17 A. Yes.

18 Q. Was there another part that you --

19 the rest of it.

20 Q. The rest of the question -- and I'll have it

21 read back in a minute -- was asking whether or not

22 other than obviously taking pride in your work and

23 being invested in your work for that reason, other than

24 that, did ecology have a position in favor of the third

25 runway that would be contravened by a PCHB decision

1 that reversed the 401 certification?

2 A. Not that I'm aware of.

3 Q. So other than professional pride, ecology

4 doesn't care whether the 401 is upheld, correct?

5 A. I'm reflecting upon your definition of

6 professional pride. Other than the fact that we think

7 that we made a solid, defensible decision, no, we don't

8 have an opinion on the project. We're not a proponent.

9 Q. And there's no public interest that ecology

10 is responsible for administering, is there, that says

11 there should be a third runway?

12 A. That's not our role.

13 Q. So what's the answer to my question?

14 A. No.

15 MR. EGLICK: What's your pleasure, folks? We

16 can take a slightly early lunch break or I can go on to

17 another line of questioning which will probably take me

18 maybe 15 minutes. Off the record.

19 (Discussion off the record.)

20 (Recess taken.)

21 Q. (BY MR. EGLICK) Did you just talk with

22 Mr. Reavis?

23 A. Briefly.

24 Q. What did you talk about?

25 A. I believe he asked me if this was similar to

1 previous depositions. I said it feels about the same,

2 although I don't recall a lot of specifics from the

3 previous depositions, and then was informed that he's

4 been on the other side before and had a deposition

5 himself. That was about it.

6 Q. On the other side of what?

7 A. The table. After conducting several of them

8 has been on the other side.

9 Q. Really?

10 A. Uh-huh.

11 Q. Do you know anyone who works at the

12 California Coastal Commission?

13 A. I do.

14 Q. And who would that be?

15 A. Jamie Kooser.

16 Q. How do you spell that?

17 A. K-o-o-s-e-e-r.

18 Q. And what's the first name, J-a --

19 A. Jamie. J-a-m-i-e, I believe is how she

20 spells it.

21 Q. Have you ever spoken to that person about Tom

22 Luster?

23 A. Boy, not that I recall. It's possible in

24 briefly four or five years ago, but I don't recall

25 specifically. We were part of the same program, worked

1 together.

2 Q. Do you recall telling someone at the army

3 corps hearing that you spoke regularly with a person at

4 the California Coastal Commission who was Tom Luster's

5 supervisor?

6 A. No.

7 Q. Do you speak with someone regularly at the

8 California Coastal Commission?

9 A. I haven't talked with Jamie Kooser in a

10 couple of years or more.

11 Q. Have you talked with anyone else at the

12 California Coastal Commission in the last two years?

13 A. No.

14 Q. And have you contacted in any way the

15 California Coastal Commission with anything with regard

16 to Tom Luster?

17 A. No.

18 Q. Have you had any discussions at the

19 Department of Ecology concerning ACC expert witnesses

20 or commentators and how they would be treated on

21 projects they're involved in other than the third

22 runway?

23 A. Not that I recall.

24 Q. Well, you took a minute for that one,

25 Mr. Hellwig. I want to make sure. Is there something

1 that you think you might recall but don't or do?

2 A. I was trying to recall after you asked the

3 question who some of the experts were who support ACC.

4 Q. Well, would you like me to give you the names

5 of the experts who have submitted comments that ACC has

6 sponsored?

7 A. Sure.

8 Q. Amanda Abuse, wetlands, does that ring a

9 bell? You've met her, haven't you?

10 A. Sure I have.

11 Q. Any discussion at ecology that you're aware

12 of in any way, shape, or form about how she would be

13 treated?

14 A. How she would be treated with respect to

15 what?

16 Q. Her activities on behalf of clients other

17 than ACC.

18 A. No.

19 Q. What about Northwest Hydraulic Consultants?

20 A. The names of the individuals?

21 Q. Bill Rozeboom and Dr. Malcolm Leytham.

22 A. No.

23 Q. Not aware of any discussions or any

24 conversation or e-mail having to do with treatment of

25 ACC experts in other arenas other than the third

1 runway:

2 A. I'm not recalling that, no.

3 Q. You're not recalling them or you don't know?

4 A. Well, we've talked about those consultants

5 before. We've had conversations about the ACC's

6 consultants generally.

7 Q. Who is we?

8 A. Staff.

9 Q. Who is staff?

10 A. Ching-Pi Wang and I believe Dave Garland and

11 Ann Kenny.

12 Q. And when was the last such conversation?

13 A. Don't remember.

14 Q. Was it in 2002?

15 A. No.

16 Q. Was it in 2001?

17 A. Possibly.

18 Q. Did you keep any notes of those

19 conversations?

20 A. Not that I recall.

21 Q. Any e-mails?

22 A. Not that I recall.

23 Q. Have you ever been on the Sea-Tac site?

24 A. Yes.

25 Q. More than once?

1 A. Yes.

2 Q. How many times?

3 A. When you say Sea-Tac site, are you talking

4 about office facilities, the area where the runway --

5 proposed runway would be built? What do you mean?

6 Q. Project area, not existing office facilities.

7 A. I've been to the project area two or three

8 times.

9 Q. And over the course of what period of time?

10 A. Two or three years.

11 Q. And how have you happened to be there? Did

12 you just lose your way getting ready to take a flight?

13 A. On trips with technical experts from the

14 operating programs on whom I rely substantially and

15 trust in their judgment. Eric Stockdale and Kevin

16 Fitzpatrick may have been at one, and I believe --

17 well, I don't know if Tom Luster was at one or not

18 earlier as the 401 coordinator. He may have been.

19 The primary purpose, though, was to see the

20 site, see where the embankment would be built, and get

21 an understanding of where some of the environmental

22 impacts would occur to assist in understanding

23 mitigation requirements.

24 Q. Now, I made a joke there, how did you happen

25 to be there, did you miss a flight, and I think you

1 ~~launched right into why you were there, so I assume~~
 2 ~~this was something that you arranged with the port?~~
 3 ~~A. Yes.~~
 4 ~~Q. And did they put a lot of restrictions on~~
 5 ~~your access to the site or did they let you see what~~
 6 ~~you wanted to see?~~
 7 ~~A. We saw what we wanted to see.~~
 8 ~~Q. Well where you wanted to go to assess these~~
 9 ~~things you just described to me; is that right?~~
 10 ~~A. Yes.~~
 11 ~~Q. And did you have to sign a lot of paperwork~~
 12 ~~to do this?~~
 13 ~~A. No.~~
 14 ~~Q. And how long on average did these site visits~~
 15 ~~last?~~
 16 ~~A. A couple hours.~~
 17 ~~Q. Each?~~
 18 ~~A. Approximately.~~
 19 ~~Q. Was some of this by vehicle and some walking?~~
 20 ~~A. Yes.~~
 21 ~~Q. Anyone with a camera?~~
 22 ~~A. I don't remember.~~
 23 ~~Q. Do you recall anybody telling you you can't~~
 24 ~~bring a camera?~~
 25 ~~A. No.~~

1 ~~Q. And did you take notes?~~
 2 ~~A. I don't remember taking notes.~~
 3 ~~Q. Now, I think when I asked you about the site~~
 4 ~~visits to start with you were describing things that~~
 5 ~~you wanted to see, and you said something about assist~~
 6 ~~in understanding. That was a phrase you used. Do you~~
 7 ~~recall that?~~
 8 ~~A. Yes.~~
 9 ~~Q. So why does the site visit assist you in~~
 10 ~~understanding?~~
 11 ~~A. In working with the technical experts in the~~
 12 ~~program, the 401 coordinator works closely with the~~
 13 ~~technical experts, should work with them, and knowing~~
 14 ~~that I would be having conversations with the technical~~
 15 ~~people and the 401 coordinator, having seen the site, I~~
 16 ~~knew it would add context to or around my understanding~~
 17 ~~of mitigation requirements, what type of wetland was~~
 18 ~~being impacted, for example, what Miller Creek looked~~
 19 ~~like, how the residences backed up to Miller Creek.~~
 20 ~~Q. So as far as you were concerned, that was~~
 21 ~~something that you thought would be useful to your~~
 22 ~~understanding of the project and the request for~~
 23 ~~certification; is that correct?~~
 24 ~~A. Yes.~~
 25 ~~Q. When was the last time you were on the site?~~

1 ~~A. It's been many months since I've been on the~~
 2 ~~project site, I believe. I'm not recalling -- let me~~
 3 ~~think. Well, we had -- sometime in 2001 I believe I~~
 4 ~~was on the project site. I'm not remembering the exact~~
 5 ~~date. It was from a -- that trip, I believe, was all~~
 6 ~~in a vehicle.~~
 7 ~~Q. And previous trips were multimodal as we~~
 8 ~~said?~~
 9 ~~A. In the vehicle and then walking onto~~
 10 ~~properties to look at aquatic resources.~~
 11 ~~Q. Aquatic resources. For someone who reads~~
 12 ~~this who isn't a member of our little club here, you're~~
 13 ~~talking about streams and wetlands and that sort of~~
 14 ~~thing?~~
 15 ~~A. Wetlands, streams, related habitat.~~
 16 ~~Q. Looking at the September 21 certification,~~
 17 ~~did ecology notify the Environmental Protection Agency~~
 18 ~~before it issued the modified certification?~~
 19 ~~A. I don't recall that.~~
 20 ~~Q. So did ecology get approval from the~~
 21 ~~Environmental Protection Agency for the modifications~~
 22 ~~in the September 21 certification?~~
 23 ~~A. Not that I'm aware of.~~
 24 ~~Q. So to your knowledge, has ecology ever~~
 25 ~~notified EPA that the original August certification was~~

1 ~~modified?~~
 2 ~~A. Please repeat that question.~~
 3 ~~MR. EGLICK: Could you read it back?~~
 4 ~~(The reporter read back as requested.)~~
 5 ~~A. I'm not aware of any notification to that~~
 6 ~~effect.~~
 7 ~~Q. (BY MR. EGLICK) And that's something you~~
 8 ~~would know, wouldn't you?~~
 9 ~~A. As I'm thinking about it, while there may not~~
 10 ~~have been formal notification, it's likely that the~~
 11 ~~manager for this subregion of EPA in the field who~~
 12 ~~works out of our Lacey office most likely would have~~
 13 ~~known about this, but I would expect that would be~~
 14 ~~informally, and I'm not aware of any formal~~
 15 ~~notification.~~
 16 ~~Q. For example, formal notification meaning to~~
 17 ~~the regional administrator of EPA; is that correct?~~
 18 ~~A. Yes.~~

19 ~~MR. EGLICK: Why don't we break here for~~
 20 ~~lunch. Does that work for everyone?~~
 21 ~~MR. REAVIS: Fine.~~
 22 ~~(Lunch recess taken 12:06 to 1:00 p.m.)~~
 23
 24
 25

AFTERNOON SESSION

1:00 P.M.

--oOo--

CONTINUING EXAMINATION

BY MR. EGLICK:

Q. Mr. Hellwig, did ecology place -- or did the port place ecology under substantial pressure with regard to the 401 application?

A. I'm not sure what you mean by substantial. The port was very interested in the decision-making process, the status of that.

Q. Well, would you use the phrase "substantial pressure" to describe what the port applied to ecology at times in the course of the 401 review?

A. No. I'd call it continuous interest or pressure if you want to call it that.

Q. But you wouldn't call it substantial?

A. No.

(Deposition Exhibit No. 81 was marked for identification.)

Q. (BY MR. EGLICK) Showing you what's been marked as Exhibit 81 to your deposition, Mr. Hellwig. Why don't you take a minute and see if you can identify it.

A. I remember the document.

Q. Did you write it?

A. Yes.

Q. Could you just read the heading on the document, the date, the to, the from, and the subject?

A. The date is May 12, 2000. It is to Joe Dear, Chief of Staff, Office of the Governor, from myself, Ray Hellwig, Regional Director, and the subject May 16 Meeting with Port of Seattle re the Third Runway.

Q. Could you look down -- do you see on the first page of this memo at the bottom it's got a line on it that says "Breif (very brief) History"?

A. I see that.

Q. Could you read into the record for me the first sentence after that heading of brief history?

A. "Nearly two years ago, in response to substantial pressure from the Port of Seattle, Ecology issued a heavily conditioned 401 Water Quality Certification for the third runway."

Q. And you wrote this memo again, right?

A. I did.

Q. Now, let's go back up and look at some other aspects of this memo. You start off by saying, quote, following is our assumption regarding the origin of the May 16 meeting along with background information for

likely agenda items, end quote. Do you see that?

A. Yes.

Q. So I take it, then, there was a May 16 meeting about the port's application for a 401 certification, May 16, 2000?

A. I was reading that paragraph. You asked me if -- please repeat that question.

Q. I said I take it that there was a May 16 meeting of some sort, 2000 concerning the port's application for 401 certification?

A. That was my assumption and my understanding.

Q. And then you have a heading, don't you, that says The Meeting?

A. Yes.

Q. And could you read what's underneath that?

A. "M. A. (Mic) Dinsmore, Executive Director for the POS, Port of Seattle, "apparently asked Martha Choe, Community Trade and Economic Development, "to arrange for a meeting between himself, the Governor, and Wes Ulman(?) The meeting has been scheduled for 4:00 p.m. on Tuesday the 15th, somewhere in Seattle (most likely the Seattle CTED offices)."

Q. Martha Choe was director of CTED, wasn't she?

A. That's correct.

Q. And what was her position in the ecology

review of the third runway project? Did she have a particular task that you had assigned her?

A. No.

Q. What about Wes Ulman? Was he working for ecology on review?

A. No.

Q. Do you know who he was working for?

A. No.

Q. So you wrote this memo to Joe Dear. It's dated May 12, right, 2000?

A. That's correct.

Q. Now, did you just wake up one morning and decide you wanted to write a memo to Joe Dear or how did this come about?

A. I'm going to take a moment to read this.

Q. Absolutely. Have you had a chance in the last few minutes to go through this document to your satisfaction, Mr. Hellwig?

A. Yes. For now. I didn't read every word on the second and third pages, but I went over it. So you'll need to remind me what the last question was.

Q. My question was, how did the meeting come about?

A. The May 16 meeting?

Q. I'm sorry. How did the memo come about? If

I said meeting, I misspoke

A. Memo came about through to my best recollection inquiries made from the governor's office regarding the status of the decision-making process, and now that I've seen this memo, I do remember having at least one phone conversation with John Savage, who was an AD reporting to Martha --

Q. And an AD is what?

A. Assistant director. -- and informed him essentially about what was happening with the decision-making process consistent with what is in the memo here, but I was asked to go ahead and put together a document for Mr. Dear based on my understanding or assumption that there was going to be this meeting, and this is what I produced.

Q. And you said you had -- in this memo it says you had, quote, conversations we have had with senior Port of Seattle staff and John Savage, an AD reporting to Martha Choe, end quote. Now, does that statement mean that you had conversations with senior Port of Seattle staff and John Savage about this meeting that was upcoming on May 16?

A. My recollection is I did some investigating into whether or not there would be a meeting and what the purpose would be. I'm not recalling specifically

who I talked to at the port. It very well may have been Elizabeth Leavitt, but I don't remember that for sure. Again, as I mentioned, I talked to John Savage trying to understand from his end what he knew about the meeting that was to happen.

Q. Your first phrase under the heading Likely Agenda Items could you read the first phrase before the word however, please, into the record? It starts "we are."

A. "We are assuming that the meeting is campaign related, however, according to conversations we have had with senior Port of Seattle staff and John Savage, an AD reporting to Martha Choe, we expect the agenda will probably include."

Q. And then you list a number of topics that has to do with the third runway and ecology's timetable for decision making, is that correct?

A. That's correct.

Q. And ecology wanting to convey to the -- excuse me. The port wanting to convey to ecology, quote, the importance of the third runway project to this region, end quote, and so on, right?

A. That's correct.

Q. Now, when you were referring to campaign related, was that to some Clean Water Act campaign that

The governor was involved in that the port was meeting with him about?

A. No. My assumption was that it was then connected to -- I don't remember which campaign.

Q. It was a political campaign, wasn't it?

A. Political campaign. I'm trying to remember the dates. It could have been the governor's.

Q. The governor's reelection campaign, wasn't it?

A. May have been.

Q. Now, this memo, there is about a campaign-related meeting to be held in as you understood it a government office, the CTED office; is that correct?

A. That was my assumption.

Q. And in addition to talking about the governor's reelection campaign, the port, you understood, was going to talk to the governor about moving the third runway along. Isn't that what this memo is about?

A. The memo speaks for itself. I don't know if those words apply necessarily or not.

Q. Well, the port wasn't going to ask the governor to slow down the third runway 401 certification, was it?

A. I doubt it.

Q. And you wrote this memo understanding that they were going to go in in a campaign meeting and complain to the governor -- a campaign meeting in a government office and complain to the governor about how ecology was dragging its feet on the 401 certification; isn't that correct?

A. It's not the way I would characterize it. I don't think it is the way I characterized it.

Q. Could you read -- let me read to you. Quote, there may be allegations that ecology has expanded issues in an unreasonable manner, end quote. Who did you think those allegations were going to be coming from at this campaign meeting in a government office? Did you think they were going to come from ecology?

A. No. They're coming from the port.

Q. Now, to your knowledge -- well, did you get to attend this meeting?

A. No.

Q. Do you know if anyone from ecology attended?

A. I don't know who attended the meeting.

Q. Does ecology to your knowledge hold campaign meetings in ecology offices?

MS. MARCHIORO: Objection; relevance.

Q. (BY MR. EGGLECK) Unless she instructs you not

1 to answer, Mr. Hellwig, please answer.
 2 A. Not that I'm aware of.
 3 Q. Could you take a look on the second page of
 4 this Exhibit 81? Do you see the heading that says
 5 Current Status of Ecology's Project Review Process?
 6 A. Yes.
 7 Q. Could you read the -- it's a parenthetical
 8 sentence. Could you read the last sentence into the
 9 record of that paragraph?
 10 A. Yes. "We have advised the Port of Seattle,
 11 provided our requirements are met, that this project
 12 can be permitted -- we have said that the technical
 13 issues are not as complex as those associated with the
 14 Battle Mountain Gold project."
 15 Q. Now, you use the term "we" in that sentence.
 16 By the way, when this memo was written, Tom Luster was
 17 still the ecology 401 permit coordinator, wasn't he?
 18 A. Yes.
 19 Q. Did you check that with Tom Luster before you
 20 wrote that sentence in a memo to the governor's chief
 21 of staff, Joe Dear, about this upcoming campaign
 22 meeting?
 23 A. That we in that sentence would have applied
 24 to the technical experts in the program and then also
 25 to the 401 coordinator.

1 Q. My question was did you check that statement
 2 with Tom Luster before you put it in this memo to the
 3 governor's chief of staff?
 4 A. I don't recall doing that.
 5 Q. I mean, there's no indication on here that
 6 this memo was cc'd to Tom Luster, is there?
 7 A. No.
 8 Q. One thing I was curious about with this memo
 9 is there's also no indication on it that it was to be
 10 held confidentially and not given to the port, is
 11 there?
 12 A. No.
 13 (Deposition Exhibit No. 82 was marked for
 14 identification.)
 15 Q. (BY MR. EGLICK) Showing you what's been
 16 marked as Exhibit 82 to your deposition. Would you
 17 take a look at it and then tell me if you can identify
 18 it?
 19 A. Yes.
 20 Q. What is it?
 21 A. It's an e-mail from Steve Alexander to me,
 22 John Wietfeld, and Dan Cargill regarding fill criteria
 23 for the third runway.
 24 Q. And is it what you would call an e-mail
 25 thread; that is, a back and forth among various people,

1 one of them being you all the way?
 2 A. Yes.
 3 Q. And this is something that you were involved
 4 in in the course of your work on the 401 certification,
 5 I guess the work on the 401 certification in the year
 6 2000?
 7 A. Yes.
 8 Q. And who is Roger Nye?
 9 A. Roger Nye is -- he's a technical staff person
 10 with the toxics clean-up program. I believe he's a
 11 hydrogeologist.
 12 Q. So is he an expert in your view?
 13 A. Yes.
 14 Q. And who is Steve Alexander?
 15 A. Steve Alexander is the section manager for
 16 the toxics clean-up program at the northwest regional
 17 office. Roger works out of the northwest region as
 18 well.
 19 Q. Now, looking down at this -- the first e-mail
 20 in the thread, which is from Mr. Nye to you. Do you
 21 see that one, February 8, 2000, 2:56 p.m.?
 22 A. Yes.
 23 Q. Do you see the sentence in the second
 24 paragraph that says, quote, furthermore, the Port of
 25 Seattle is asking me for guidance regarding whether

1 asphalt as construction debris is acceptable as fill as
 2 per the policy, end quote?
 3 A. Yes.
 4 Q. So what was the answer to that?
 5 A. The answer to that in this memo?
 6 Q. Yeah. Well, no, not in this memo. Do you
 7 know what ecology -- you've been the person involved in
 8 this.
 9 A. I don't remember the answer.
 10 Q. So you don't know as you're sitting here
 11 today whether ecology allowed asphalt to be placed as
 12 fill in the third runway project area; is that correct?
 13 A. My best recollection is that it would not
 14 have been allowed.
 15 Q. Is that a recollection or a hopeful guess,
 16 Mr. Hellwig?
 17 A. It's my recollection based on conversations,
 18 previous conversations with staff about acceptable fill
 19 criteria.
 20 Q. Is there any documentation for this
 21 recollection that you've now offered?
 22 A. I don't know.
 23 Q. What I was wondering about is when I look at
 24 this e-mail thread, your response to Mr. Nye comes at
 25 5:32 p.m. Do you see that?

1 A. Yes.

2 Q. And what I expected to see in this was
3 something that said absolutely not, no asphalt in the
4 fill. It's a no brainer. You didn't say anything like
5 that in your response, did you?

6 A. I was reading it. I'm sorry. Would you say
7 that again, please?

8 MR. EGLICK: Would you read back my question,
9 please?

10 (The reporter read back as requested.)

11 A. The response had to do with the broader
12 context of the whole situation; that is, how do we come
13 up with adequate resources to develop acceptable fill
14 criteria and monitor it in a way that we protect water
15 quality? The response is to context that isn't
16 necessarily provided in the lower message about how do
17 we deal with this capacitywise, resourcewise?

18 Q. (BY MR. EGLICK) It was a management issue
19 response worrying about management issues but not a
20 response that dealt with the environmental issue; isn't
21 that correct?

22 A. No.

23 Q. Can you point to a portion of your February 8
24 response, which is I think all of three sentences, that
25 addresses the environmental question raised by use of

1 asphalt construction debris as fill?

2 A. We were looking at a way to have capacity to
3 develop criteria and prevent fill that would
4 contaminate water, and if you look at Steve Alexander
5 response back to myself and John and Dan, it's coherent
6 that way inasmuch as he's asking them to discuss
7 possible mechanisms with me for setting up a position
8 for the office, something along the lines of a prepaid
9 position set up as a project or developmental position
10 reporting to the RD.

11 Q. Absolutely I see where you're pointing to,
12 Mr. Hellwig, in terms of the management response, but
13 my question is where is the environmental response in
14 your e-mail?

15 A. The environmental response isn't in my
16 e-mail.

17 Q. Now, you were pointing, I think, to
18 Mr. Alexander, who is the top part of the thread, in
19 terms of setting up a position in the office that would
20 report to the RD. Is that you, regional director?

21 A. That's correct.

22 Q. And would address these questions of fill
23 posed by the port; is that correct?

24 A. The position as envisioned here as I
25 understand it would belong to the toxics clean-up

1 program and be available to let me know what was going
2 on with respect to the development of fill criteria and
3 overseeing and making sure and assuring that the
4 environmental issue would be addressed by the staff
5 that would be supported by this arrangement.

6 Q. Now, during the time, for example, that this
7 e-mail was exchanged, it's true, isn't it, that the
8 port was bringing fill onto the site under the rubric I
9 think they called it stockpiling; isn't that correct?

10 A. Fill was coming onto the site, and there was
11 an arrangement or agreement for screening the fill
12 established by the clean-up program prior to my coming
13 onto the scene as the management lead for the runway
14 decision.

15 Q. So the questions weren't just academic,
16 because there was actually fill coming in even as this
17 e-mail thread was being exchanged; is that correct?

18 A. That's my understanding.

19 Q. And, in fact, it's continued up until the
20 present, hasn't it, this stockpiling so-called?

21 A. That's my understanding.

22 Q. Now, did you ever provide the budget out of
23 the RD or the office that you had responsibility for to
24 set up a prepaid position such as was described in this
25 e-mail thread?

1 A. No.

2 Q. And tell me something, because you're
3 obviously an expert on the management and
4 administration at ecology. What is the toxics clean-up
5 program? What does that do?

6 A. The clean-up program is responsible for
7 overseeing the administration of the Model Toxics
8 Control Act.

9 Q. And that's the act that concerns itself with
10 contaminated soils; is that not correct?

11 A. Contaminated sites, yes.

12 Q. And the sites have what on them? They're
13 contaminated sites. What's on the site that's
14 contaminated? Isn't it the soils?

15 A. The soils primarily.

16 Q. So those are the folks in ecology who are the
17 experts on those issues of contaminated soils, aren't
18 they?

19 A. Well, I wouldn't say that's the only program
20 within the agency where we have experts on contaminated
21 soils, but that's where we have experts located to deal
22 with those issues.

23 Q. And that is their primary focus, isn't it?

24 A. For some of them, yes.

25 (Deposition Exhibit No. 83 was marked for

1 identification.)
 2 Q. (BY MR. EGLICK) Showing you what's been
 3 marked as Exhibit 83 to your deposition. Would you
 4 take a look at it and tell me if you can identify it?
 5 A. I'll take a moment to look at it.
 6 Q. Sure.
 7 A. Okay.
 8 Q. Have you had a chance to look at it?
 9 A. (Nodding head).
 10 Q. Can you identify this?
 11 A. Well, it's an e-mail from myself to Tom
 12 Luster and several other agency staff, managers,
 13 technical staff, and it's regarding or it's a string of
 14 e-mail where I forwarded on to these folks messages
 15 with attachments I've sent to Joe Dear regarding the
 16 meeting that was being set up for May 16 in which Joe
 17 was to attend.
 18 There's a -- it indicates that I sent a
 19 message to Joe with the attachment, then I sent him a
 20 follow-up message with an addendum or some other
 21 information about assumptions we were making, and then
 22 I passed all of this along to staff within the agency I
 23 assumed to be interested in.
 24 Q. So I kind of helped you out here. You did
 25 actually share this with these other folks, didn't you,

1 the memo that we talked about before?
 2 A. Yes.
 3 Q. Now, in doing that, in this transmittal, you
 4 said something interesting at least to me. If you look
 5 at the paragraph that starts, "This is an
 6 administrative problem." Do you see that paragraph?
 7 A. Yes, I do.
 8 Q. And then you see the sentence that goes,
 9 quote, we can't certify CZM consistency without the 401
 10 and vice versa? Do you see that?
 11 A. Yes.
 12 Q. What does that mean?
 13 A. Well, it means that we can't agree with the
 14 determination of coastal zone management consistency
 15 made by a project proponent if part of that consistency
 16 is contingent upon a decision on a 401 certification,
 17 and it's a situation wherein in the regulations the
 18 time frame for the CZM is six months and expires before
 19 the time frame does for making a 401 decision, which is
 20 one year, and so if we have not made a decision on the
 21 401 within the six-month time frame before the CZM
 22 expires, then it's necessary for a proponent to
 23 withdraw and then resubmit the CZM consistency
 24 determination paperwork.
 25 Q. Can you have a CZM consistency determination

1 for the Port of Seattle third runway project in the
 2 absence of a 401 certification?
 3 A. If we issue a 401 certification, that's one
 4 of the things that -- that's one of the instruments
 5 required for the consistency determination.
 6 Q. So if there is no legal effective 401
 7 certification, what's your understanding of whether
 8 there can be a CZM consistency determination?
 9 MS. MARCHICRO: Objection; calls for a legal
 10 conclusion.
 11 Q. (BY MR. EGLICK) Go ahead. You can answer,
 12 Mr. Hellwig, your understanding based on your position
 13 as --
 14 A. My understanding would be that if a 401 were
 15 overturned that that would create an issue with the CZM
 16 consistency determination.
 17 Q. And that's because you have to have an
 18 effective 401 certification to support a CZM
 19 consistency determination?
 20 A. That's my understanding.
 21 (Deposition Exhibit No. 84 was marked for
 22 identification.)
 23 Q. (BY MR. EGLICK) Looking at what's been marked
 24 as Exhibit 84 to your deposition. Can you identify it?
 25 A. I'll take a moment, please.

1 Q. Sure.
 2 A. Yes. I'm familiar with this.
 3 Q. Why don't you tell us -- this is an e-mail
 4 you sent to Tom Fitzsimmons, right?
 5 A. Yes, it is.
 6 Q. Dated?
 7 A. May 19, 2000. It's regarding the third
 8 runway.
 9 Q. And it's a follow-up, isn't it, to that
 10 previous memo you sent on the governor's meeting, isn't
 11 it, with the port?
 12 A. I don't know if it's a direct follow-up or
 13 not. I expect there were -- let's see. This is May
 14 19. There may have been another message in between.
 15 Let me see. But --
 16 Q. Let's look at --
 17 A. Let me read it.
 18 Q. Go ahead. I thought you had.
 19 A. I skimmed it. I'm familiar with the
 20 document. It gives him more information on the status
 21 of the decision-making process and how I'm going to go
 22 about keeping him informed with regard to key issues.
 23 Q. Looking at the first paragraph. It says,
 24 quote, Tom, the July '00 -- I guess that's 2000. Is
 25 that what that would be?

1 A. That's correct.
 2 Q. -- decision making timeframe is going to be
 3 tight for us, but we'll give it our best shot, end
 4 quote. What July decision-making time frame are you
 5 referring to?
 6 A. Well, that would have been for the 401 and
 7 for CZM consistency.
 8 Q. In other words, someone had established a
 9 time frame that you were going to make a decision in
 10 July 2000?
 11 A. The way it worked was I would pull staff
 12 together, ask what would be needed in order for us to
 13 make a decision. I would ask them to estimate how much
 14 time that would take and then based on those
 15 discussions and those estimates would project out
 16 possible time lines for a decision but always make it
 17 clear that decisions would be contingent upon us
 18 receiving adequate information from the port and having
 19 time to review it.
 20 Q. So was this July time frame communicated to
 21 the governor?
 22 A. I don't know. It's possible. It's my
 23 assumption that it was.
 24 Q. The governor in turn, your assumption is
 25 communicated it to the port?

1 A. Let me clarify. My assumption is that it
 2 would have been communicated to the governor's chief of
 3 staff.
 4 Q. Now, I notice a heading on this e-mail that
 5 says "making a commitment to place-hold time through
 6 July '00 for regularly scheduled internal meetings and
 7 meetings with Port of Seattle staff." That means put
 8 it on your calendar? Is that what that means?
 9 A. Well, it would mean either put it on their
 10 calendar or be prepared to arrange time to get it on a
 11 calendar; in other words, make it a high priority.
 12 Q. And then I'm looking under "developing a
 13 definitive list of issues for the proposed runway." Do
 14 you see that?
 15 A. Yes.
 16 Q. There's a commitment in there, isn't it, to
 17 make weekly reports to the director on the status of
 18 the third runway application? See that?
 19 A. Yes.
 20 Q. And then you say you'll use the list, quote,
 21 as a tool to help manage staff time. Do you see that
 22 quote?
 23 A. Yes.
 24 Q. And then, quote, for issues that are
 25 resolved, staff will be directed to begin drafting 401

1 language, end quote.
 2 A. Yes.
 3 Q. What does that mean?
 4 A. My best recollection is that we assumed it
 5 would be helpful to develop draft language for a 401
 6 that would help us discuss and debate pertinent issues.
 7 Q. Well, in other words, if an issue was
 8 resolved, you would draft language to discuss and
 9 debate whether it was resolved? Is that what you're
 10 testifying to?
 11 A. No. I think I can be clearer than that. I
 12 think that we were developing draft language that we
 13 would then go back and look at, and based on additional
 14 information we might receive based on discussions,
 15 continuing discussions we would have, that language may
 16 or may not be useful. My recollection is that shortly
 17 after discussing this approach we abandoned it. We did
 18 not stay with it.
 19 Q. So you didn't go with in the future or in the
 20 future past May 19, 2000, a system in which you
 21 designated some issues as resolved and some issues as
 22 unresolved?
 23 A. No. We attempted to do that, but what we did
 24 not do is draft 401 language.
 25 Q. But there were some issues that were

1 designated as resolved, weren't there?
 2 A. We had a table, and I can't remember if it
 3 was getting indicated resolved or not, but I think it
 4 may have, and it meant resolved for purposes of our
 5 internal discussions and being able to move on to
 6 additional issues. It did not mean resolved in the
 7 sense that we had reasonable assurance for a 401. It
 8 meant that we could move forward to the next issue.
 9 Q. So resolved and moving forward are not the
 10 same as resolved for purposes of 401. Is that your
 11 testimony?
 12 A. Yes.
 13 Q. So if it's not resolved for purposes of 401
 14 and it's not resolved for purposes of moving forward,
 15 was it resolved for purposes of discussion with the
 16 port?
 17 A. Maybe I misunderstood you. It was resolved
 18 for purposes of moving forward -- maybe I misunderstood
 19 you -- in working through the issues internally and
 20 externally with the port but not necessarily resolved
 21 for purposes of the 401.
 22 Q. So the Port of Seattle, it's your testimony,
 23 knew that when you told them an issue was resolved,
 24 that didn't necessarily mean that you wouldn't go
 25 later and say it wasn't resolved for purposes of the

1 401; is that correct?

2 A. I can't speak for the port, but I think we
3 tried to make it clear that it was possible as we
4 worked through issues that additional issues could
5 emerge or that through public comment or input issues
6 might come to our attention that would need to be
7 addressed.

8 Q. Wasn't one of the concerns as you put it
9 earlier -- you used that term earlier -- that the port
10 had that issues that it had thought were resolved
11 ecology did not agree were resolved?

12 A. My recollection is that the port would become
13 concerned about issues that would arise or result from
14 our continuing analysis because they were complex and
15 difficult.

16 Q. And wasn't this suggested way of proceeding
17 that we're talking about here an effort to mollify that
18 concern by stating that some issues would be labeled as
19 resolved in the course of the process?

20 A. It was an effort to manage the process,
21 document the process in a way that would help us move
22 forward.

23 Q. So it was a management tool for the 401
24 decision; is that correct?

25 A. Essentially.

1 Q. And that's what your expertise really is in,
2 isn't it, is in management?

3 A. My expertise is in managing the process,
4 pulling the people together, ensuring adequate
5 resources are devoted to the process so that we could
6 work through issues and ultimately reach a decision.

7 Q. Now, did it come about at some point that the
8 port had to withdraw the 401 certification request that
9 it had had pending over, for example, the summer of
10 2000?

11 A. Yes.

12 Q. And that withdrawal came about because
13 ecology -- please correct me if I'm wrong -- told the
14 port if you don't withdraw it, we're going to have to
15 deny it?

16 A. Yes.

17 Q. And was there a climactic meeting at which
18 that was -- you're smiling, so I must be on the right
19 track. Either that or I'm way off. Was there a
20 climactic meeting at which that came to a head with the
21 Port of Seattle?

22 A. I don't know if I'd describe it as a
23 climactic meeting, but we had a meeting because the
24 time frame -- the legal time frame that we had or
25 amount of time we had to make a decision was going to

1 end, and I think that there needed to be some clear
2 communication around what the status of the
3 decision-making process was with regard to whether or
4 not we had reasonable assurance and we could approve
5 the 401.

6 Q. When was the meeting?

7 A. I don't have exact dates for you, but I'm
8 sure you can produce a document that will have an exact
9 date on it.

10 Q. It was September 2000, wasn't it, just a day
11 or two before the deadline?

12 A. It was in September of 2000, that's correct.

13 Q. Where was the meeting?

14 A. Port of Seattle.

15 Q. Now, is it true for this that Mic Dinsmore
16 actually had to fly in from was it Hawaii or Scotland
17 or Ireland or outer Hebrides or something like that?

18 A. It's my understanding he was on a trip in
19 Europe and he needed to come back for this among other
20 things.

~~21 Q. And as ecology folks were summoned to
22 Dinsmore's office at the Port of Seattle?~~

~~23 A. I wouldn't say we were summoned~~

24 Q. Well, how did you happen to end up there
25 rather than Lacey or your office out in Bellevue? How

1 did you happen to end up down at the applicant's
2 office? Wasn't it down on -- is that on Western or
3 Alaska or something like that?

4 A. Down at Pier 69 or 63.

5 Q. Here in Seattle?

6 A. Yes.

7 Q. So how did you happen to end up there?

8 A. Centralized location.

9 Q. Central to what?

10 A. To the port staff, ecology. It's not real
11 central for the director, but he came up.

12 Q. The director actually came to the meeting
13 from Lacey?

14 A. That's my recollection.

15 Q. Now, were you there?

16 A. I was at a meeting in September where we
17 informed the port. I was there. The director was
18 there.

19 Q. And was anyone else from ecology there?

20 A. I believe Kevin Fitzpatrick was there.

21 Q. Anyone else from ecology?

22 A. Eric Stockdale may have been, but I don't
23 recall specifically.

24 Q. And who was there for the port?

25 A. Mic Dinsmore, Gina Marie Lindsey. I believe

1 Elizabeth Leavitt was there and Michael Cheyne. There
2 were other individuals there. I'm not recalling.

3 Q. Was Tom Luster there?

4 A. I don't believe he was.

5 Q. Now, he's the 401 coordinator, isn't he?

6 A. That's correct.

~~7 Q. And until he was removed from this thing, he
8 was at all the critical meetings, wasn't he?~~

~~9 A. There had been other meetings with the port
10 where he wasn't present.~~

11 Q. Well, I think what I asked you was he was at
12 all the critical meetings, wasn't he?

13 A. No.

14 Q. Can you name another meeting that took place
15 with the level of importance of a meeting where you're
16 going to tell the port they don't have reasonable
17 assurance where the 401 coordinator from ecology didn't
18 attend?

19 A. My understanding was you asked if there were
20 other critical meetings, and I had referred to other
21 meetings with the port executive management -- I didn't
22 say executive management, but other high level meetings
23 at the port headquarters offices where he was not
24 present that I considered to be critical.

~~25 Q. Okay. So you're telling me there were other~~

~~meetings at the port office that Tom was excluded from?~~

~~2 A. There were other meetings with the port where
3 a lot of ecology staff didn't attend. It was --~~

4 Q. How many 401 coordinators does the statewide
5 Department of Ecology have?

6 A. I don't have the exact number. We have -- we
7 regionalized the function, so we had a 401 coordinator
8 in the region, and before we regionalized the function,
9 the runway project was being dealt with by Tom Luster
10 out of Lacey, out of headquarters. When we
11 regionalized the function, we didn't regionalize that
12 specific permit, so I believe we had two, three, four,
13 or five coordinators statewide.

14 Q. Statewide 401 coordinators?

15 A. I believe we had one at the time covering
16 eastern Washington, one at the southwest region, one at
17 the northwest region, and one or two at headquarters.

18 Q. Tom Luster's writ, though, ran to the whole
19 state, didn't he?

20 A. Yeah. Tom was the senior 401 staff person,
21 and he had --

22 Q. In the whole state; isn't that correct?

23 A. Yes.

24 Q. And he was also the person assigned to be the
25 coordinator on the runway application; is that correct?

1 A. Yes. At that time he was.

2 Q. So how did it happen that Tom didn't get to
3 go to this meeting but, for example, Kevin Fitzpatrick
4 did?

5 A. Tom had done his job, and at that point, what
6 was driving our position was the technical substantive
7 concerns that Kevin Fitzpatrick, section manager for
8 the water quality program, where it was more
9 appropriate for him to represent those concerns, the
10 stormwater management plan.

11 Q. Who made the decision not to bring Tom Luster
12 to the meeting?

13 MS. MARCHIORO: Objection; lack of
14 foundation.

15 A. I'm not recalling it was an overt decision to
16 exclude anybody. My recollection is we talked about
17 who should come, and we --

18 Q. (BY MR. EGLICK) Who is we?

19 A. Tom Fitzsimmons and I.

20 Q. The director?

21 A. The director.

22 Q. Did Tom Luster's name come up in the
23 conversation as to who should come or did no one think
24 that the senior 401 coordinator in the whole state
25 should go to such a meeting?

1 A. His name may have come up.

2 Q. And what result?

3 A. Well, obviously we decided who should come.
4 It was Tom Fitzsimmons, myself, Kevin Fitzpatrick. I
5 think Eric Stockdale was there. I can't remember for
6 sure. We decided that's who we needed to be at that
7 meeting. Tom had been at previous meetings and helped
8 us arrive at the position we were at. He did his job.

9 Q. Was there any conversation about Tom Luster
10 at the meeting with the port in September?

11 A. Not that I recall.

12 Q. Were there any agreements made with the port,
13 commitments, undertakings with the port at that meeting
14 in September?

15 A. Yes.

16 Q. And were they all reduced to writing?

17 A. I believe that we did come up with a document
18 summarizing various commitments.

19 Q. I asked whether all of the agreements,
20 undertakings, commitments were reduced to writing, so
21 that's the question I'd like you to focus on, please.

22 A. I don't remember.

23 Q. So you can't recall whether there were some
24 agreements, undertakings, commitments that were made
25 but were not put in the document you say you came up

1 with?
 2 A. For example, I don't recall if the document
 3 that is vague in my mind referred to the commitment we
 4 made to adding structure to the permit review process
 5 to help us make our decision. I don't recall as an
 6 example whether or not that was in that document.

7 Q. Now, did the governor or the governor's
 8 office have any involvement in anything having to do
 9 with that meeting at the port's office?

10 A. Joe Dear was at that meeting. To my best
 11 recollection, he was there.

12 Q. And he was there because of his technical
 13 expertise on what aspect of the 401 application?

14 A. He was there because there was interest at
 15 his level in the status of the decision-making process.

16 Q. What level is Joe Dear at?

17 A. Chief of Staff to the governor at the time.

18 Q. Have you ever been involved in a 401 decision
 19 before where the governor's chief of staff has attended
 20 a meeting with an applicant?

21 A. No.

22 Q. In fact, in this case, the governor's chief
 23 of staff attended more than one meeting with the
 24 applicant; isn't that right?

25 A. That's correct.

1 Q. Now, is Mr. Dear -- let's take a look here at
 2 Tom Luster's credentials. This is from his
 3 declaration. Tom Luster has, would you agree, a
 4 Master's of Science degree in resource geography from
 5 Oregon State University?
 6 A. I looked through that, and I seem to recall
 7 seeing that.
 8 Q. Now, what's Mr. Dear's credentials along
 9 those lines? Does he have any?
 10 A. I don't know.
 11 Q. Does he have a Bachelor of Science in
 12 anything that you know of?
 13 A. I don't know.
 14 Q. Is he a member of the Society of Wetland
 15 Scientists like Tom Luster is?
 16 A. I don't think so.
 17 Q. So what did he contribute to this meeting
 18 where you say you really needed your technical experts
 19 there?
 20 A. I seem to recall that I said we needed our
 21 technical experts there to talk about the water quality
 22 issues, the stormwater issues.
 23 Q. What did you need Joe Dear there for?
 24 A. Joe Dear is my boss's boss. He wanted to be
 25 there.

1 Q. How do you know he wanted to be there?

2 A. It's my understanding.

3 Q. In other words, someone told you Joe Dear is
 4 going to this meeting?

5 A. That's my understanding.

6 Q. Or was it that Joe Dear told you guys, you're
 7 going to this meeting at the Port of Seattle?

8 A. I don't recall what interactions drove that
 9 meeting, who talked to whom to drive the meeting. I
 10 don't recall that.

11 Q. Well, do you recall ever calling up the port
 12 and saying, We'd sure like to come over to your office
 13 down at the World Trade Center and have a meeting with
 14 you and bring Joe Dear along?

15 A. I don't understand the question.

16 Q. Did you request the meeting at the Port of
 17 Seattle offices with Joe Dear in attendance?

18 A. I don't recall if it was Joe Dear who asked
 19 to have it organized, Tom Fitzsimmons, or if I made the
 20 recommendation. It may have come from Tom Fitzsimmons.
 21 It may have come from Joe Dear.

22 Q. When is the first time you met Joe Dear?

23 A. In person? I talked with him on the phone,
 24 traded messages with him previously. I first met him
 25 in person at Port of Seattle offices.

1 (Recess taken.)
 2 Q. (BY MR. EGLICK) Mr. Hellwig, do you recall
 3 whether any other written -- unwritten commitments
 4 other than the one you mentioned were made at that
 5 September 2000 I guess what I called the climactic
 6 meeting at the Port of Seattle? You're smiling again.
 7 A. Just at your characterization.
 8 Q. Was it an anticlimax for you?
 9 A. Pardon me?
 10 Q. Was it an anticlimax for you?
 11 A. No. I just knew the process was going to
 12 continue. No. Without seeing the document and not
 13 recalling what was in it and what wasn't -- and
 14 obviously I'm not remembering everything I put into
 15 documents or I would have remembered that I said there
 16 was substantial pressure at one point on this project.
 17 Q. Now, when you say put in the document, you're
 18 talking about what document?
 19 A. I'm talking about -- I'm recalling a document
 20 -- and I'm recalling that we disclosed it as well at
 21 some point -- where we summarized from that meeting we
 22 had in September 2000 some of our respective
 23 commitments relating to making a 401 decision, and I
 24 seem to recall, for example, in that document a
 25 commitment to if the port could provide us adequate

1 information with enough time for us to review it that a
2 decision was possible within a six-month time frame.

3 I remember us being uncomfortable doing that,
4 but I remember us saying that if we received the
5 information on time and it was adequate and it met our
6 requirements that we might be able to make a decision.
7 We tried to be clear in that memo with regard to --
8 actually, one of our commitments was to be as clear as
9 possible what would be required for an approval.

10 Q. Did you ever tell the Port of Seattle that it
11 wouldn't need to get a water right in connection with
12 addressing in-stream flow needs for the project?

13 A. Yes.

14 Q. Tell me about water rights in the northwest
15 regional office. Who is that handled by?

16 A. The section manager is Dan Swenson.

17 Q. And that's a section you never worked in; is
18 that right?

19 A. I managed that section for a while, for a
20 time.

21 Q. The question I'm asking is did you work in
22 the section?

23 A. I don't understand the difference.

24 Q. Well, were you ever someone who reviewed
25 water right applications?

1 A. I didn't review water right applications for
2 purposes of writing a report of exam, which would be a
3 recommendation as to an approval or a denial for a
4 supervisor to sign off on. I would have been the
5 manager who would see that information, see the
6 application, see the report of exam after a staff
7 person would have done the work around making a
8 recommendation for a decision.

9 Q. And are you based on some particular training
10 that you've had an expert in water rights?

11 A. I had continuous daily training from the
12 technical experts in that program, the hydrogeologists,
13 over and over again on hydrology and hydrogeology and
14 how under certain circumstances base flows could be
15 affected by withdrawal of groundwater, for example, so
16 I had extensive ongoing training from technical experts
17 with lots of training and education.

~~18 Q. So, in other words, you're saying that you
19 learned how to be a hydrogeologist by watching other
20 people do it?~~

~~21 MS. MARCHIORO: Objection; mischaracterizes
22 the testimony of the witness.~~

~~23 A. I'm not saying that.~~

24 Q. (BY MR. EGLICK) You're not a hydrogeologist,
25 are you?

1 A. No.

2 Q. And you're not a lawyer either, are you?

3 A. No.

4 (Mr. Witek joined the proceedings.)

5 Q. So other than this description that you've
6 given of information or expertise acquisition that
7 you've offered, is there some formal training you've
8 had in water rights?

9 A. No.

~~10 Q. Do you know who Rachael Paschal Coburn is?~~

~~11 A. Yes.~~

~~12 Q. Is she an expert in water rights?~~

~~13 A. My understanding is that she's a legal expert
14 on water rights.~~

~~15 Q. What about your counsel, Joan Marchioro?~~

~~16 A. She's a legal expert on everything we do.~~

~~17 Q. I guess from Joan's point of view that was
18 the right answer, right?~~

~~19 MS. MARCHIORO: No. Completely wrong from my
20 point of view.~~

~~21 MR. EGLICK: I guess we'll give you, Joan, a
22 chance to answer it yourself later.~~

~~23 MS. MARCHIORO: You may; you may not.~~

24 Q. (BY MR. EGLICK) Do you know who Pete Kmet is?

25 A. Yes.

1 Q. And can you tell me who he is?

2 A. He's a staff person with the toxics clean-up
3 program working out of the Lacey office.

4 Q. Is he an expert with regard to soils
5 contamination?

6 A. I don't know with any specificity what his
7 expertise is. He is an expert within that program, and
8 I would assume that he has expertise related to
9 contaminated soils.

10 Q. If you were managing a program and you had
11 somebody in there working in it as an expert in that
12 capacity, you wouldn't let them work there unless they
13 were an expert, would you?

14 A. No.

15 Q. So you have no reason to believe he's not an
16 expert, do you?

17 A. No.

18 Q. Do you know who Chung Yee is?

19 A. Yes.

20 Q. Now, where does he work?

21 A. Presently with toxics clean-up program in
22 Lacey, prior to that with the water quality program, as
23 an engineer with the water quality program in Belle

24 Q. And Kevin Fitzpatrick, why don't you just
25 remind us for the record who he is and where he works.

1 A. He is section manager for the water quality
2 program in the Bellevue -- out of Bellevue, northwest
3 region.

4 Q. Now, when you were putting together this 401
5 certification, both the August one and September one,
6 you were trying to figure out what to do about fill
7 criteria. You know what I mean when I refer to fill
8 criteria?

9 A. Acceptable fill criteria. Yes.

10 Q. Were you aware that the criteria that were
11 being proposed for adoption by ecology were ones that
12 Pete Kmet had cautioned would not do the job in some
13 respects in terms of protection of the environment?

14 MR. REAVIS: Objection to the
15 characterization of the evidence.

16 Q. (BY MR. EGLICK) Go ahead and answer.

17 A. My understanding was that within that program
18 there were some mixed views with respect to the
19 appropriateness of applying the criteria to this
20 project, and my understanding was some of the concern
21 had to do with MTCA itself and whether or not we were
22 improperly invoking MTCA, which we were not, and that
23 some of the concern related to the criteria went away
24 when we clarified that for purposes of this project we
25 were not invoking MTCA.

1 Q. Well, weren't some of the concerns about
2 regardless of whether the criteria were based on MTCA
3 or not that the criteria did not provide protection
4 necessary to meet water quality standards?

5 A. I'm not familiar with the concerns that
6 you're referring to.

7 (Deposition Exhibit No. 85 was marked for
8 identification.)

9 Q. (BY MR. EGLICK) Looking at what's been marked
10 as Exhibit 85 to your deposition. Can you identify it?

11 A. Well, this is an e-mail from me to Tom Luster
12 and Joan Marchioro. Attached to it is an e-mail from
13 Chung Yee to me, and below the string has an e-mail
14 from me to Kevin Fitzpatrick and Chung Yee, and that's
15 attached to one from Andrea Grad --

16 Q. Of my office; is that right?

17 A. Yes.

18 Q. I won't make you identify her.

19 A. Referring to -- oh, it was from Andrea to me.
20 The subject was use of contaminated fill, and it refers
21 to an attachment from Peter Eglick, yourself, on behalf
22 of the ACC.

23 Q. Now, can you look at the top of this e-mail
24 thread? You've got a message from Chung Yee to you
25 dated September 6, 2000. Do you see that?

1 A. Yes.

2 Q. He says, quote, in any case, the Method A
3 soil cleanup levels are, quote, based on protection of
4 ground water for drinking water use, end quote.

5 A. I see that.

6 Q. What does that mean to you?

7 A. I'm looking at it. Well, that the soil would
8 have to be clean enough to protect water to high enough
9 standards that it could be used for drinking purposes.

10 Q. Okay. Now, do you see the next sentence in
11 Chung Yee's e-mail, quote, for many but not all of the
12 contaminants in Method A table, the National Primary
13 Drinking Water Standards are lower than the water
14 quality standards for surface waters, end quote? Do
15 you see that?

16 A. Yes.

17 Q. What does that mean to you?

18 A. That's not clear to me. That's not clear to
19 me if lower means more protective or less protective.

20 Q. Well, did you send Chung Yee back an e-mail
21 saying I've got a question about that?

22 A. I remember having live conversations with
23 him, but I don't remember or see, at least not attached
24 here, an e-mail back to him. I see an e-mail from me
25 to Tom Luster and Joan Marchioro.

1 Q. Well, you can have chlorinated drinking
2 water, can't you?

3 A. Yes.

4 Q. But state water quality standards aren't
5 going to allow you to have a whole bunch of chlorine in
6 class double A waters, are they?

7 A. I'm not an expert. I'd go talk to the water
8 quality program about that.

9 Q. So you don't know?

10 A. It's my understanding there can be a concern
11 with chlorination.

12 (Deposition Exhibit No. 86 was marked for
13 identification.)

14 Q. (BY MR. EGLICK) Looking at what's been marked
15 as Exhibit 86 to your deposition. Can you identify it?

16 A. It's an e-mail from Tom Luster to me printed
17 off of his machine, it looks like. Attached to it is
18 an e-mail from Andy McMillan to the shorelines and
19 environmental assistance program in the regions and at
20 headquarters and Padilla Bay, it looks like, Lessons
21 Learned From Big Projects - the official version, High.

22 Q. And then what's attached and do you recognize
23 it?

24 A. Attached to it is a document, Lessons Learned
25 From Big Projects, Recommendations for the SEA Program.

1 This is something that staff were asked to put together
2 with respect to how ecology approaches big projects and
3 what are some of the lessons we've learned over time.

4 Q. And this was put together in the aftermath,
5 wasn't it, of Battle Mountain Gold?

6 A. I believe so.

7 Q. And what happened in Battle Mountain Gold,
8 wasn't it, is that ecology went ahead and approved the
9 401 and then was reversed by the PCHB; isn't that
10 correct?

11 A. That's what I recall.

12 Q. And Tom Luster had opposed approval of the
13 401, hadn't he?

14 A. That's also my recollection.

15 Q. And in the aftermath of Battle Mountain Gold,
16 the question that this memo was addressing is how do we
17 make sure that we don't make the same mistakes again;
18 is that correct?

19 A. Well, it's recommendations on things that we
20 should think about when we're approaching a major
21 project so we can end up making a defensible decision
22 that protects the environment.

23 Q. What's your understanding of the expression
24 "end run" Mr. Hellwig? If I'm making an end run
25 around staff, what am I doing?

1 A. Well, my interpretation would be that you
2 have a process set up where individuals are keeping
3 each other informed up and down a hierarchical chain
4 and within perhaps a group of technical peers and
5 somebody would decide that they would go around and
6 establish a process -- they would step outside of a
7 process that has been established and agreed to for
8 solving a problem, reaching a decision, or whatever,
9 goes around it to try to influence an outcome without
10 the benefit or the use of that process that's been set
11 up.

12 Q. So it's kind of an end around, I guess you'd
13 call it, maybe not an end run but an end around?

14 A. That's my interpretation.

15 Q. Is that correct?

16 A. That's my interpretation, yes.

17 Q. And it can mean going up the ladder of
18 command out of line so to speak and trying to fix
19 things at a higher level, can't it?

20 A. It can mean that or it can mean -- it can be
21 done at a staff level as well to try to influence other
22 staff --

23 Q. So we've got --

24 A. -- to ultimately get to a higher level.

25 Q. Higher management?

1 A. Uh-huh.

2 Q. So the people that are supposed to be making
3 the decisions are essentially put under pressure from
4 above or cut out of the process by those above; is that
5 correct?

6 A. That can happen, yes.

7 Q. And that's part of what you understand an end
8 around or an end run to be?

9 A. Yes.

10 Q. Would you take a look at, I guess, the second
11 page of this Exhibit 86? I wonder if you could look at
12 that bold heading number 2 and read that into the
13 record if you would.

14 A. I have number 2 on the first page. You mean
15 the second page after the --

16 Q. Yeah.

17 A. I got it. Okay. I see it.

18 Q. Can you read that into the record, please?

19 A. "Managers should not reward project
20 applicants' attempts to get early assurances or do an
21 end-around project staff."

22 Q. And then it goes on to say, quote, doesn't
23 it, many project applicants will try to get ecology
24 managers to assure them that a project is permissible
25 or will go to managers to get relief when project staff

1 are making requests or demands that applicants find
2 unreasonable, end quote. Do you see that?

3 A. Yes.

4 Q. Then it goes on to suggest there are several
5 ways, quote, that ecology management can support staff
6 and prevent applicant, quote, end-arounds, quote. Do
7 you see that?

8 A. Which bullet is that in?

9 Q. It's in the same one.

10 A. Uh-huh. Yes.

11 Q. Could you read the first bulleted item there
12 into the record, "management should not"?

13 A. "Management should not make any commitments
14 or give assurances to project applicants regarding
15 permit approval timelines or decisions without buy-in
16 from appropriate project staff."

17 Q. And then can you read the second one into the
18 record as well, please?

19 A. "When senior managers meet with project
20 applicants they should include lead project staff or
21 lower level managers in the meetings. All managers
22 need to keep project staff informed of meetings that
23 have occurred with applicants and what was communic-
24 -- heads-ups." "Heads-ups" in quotes it says, "work
25 both ways."

1 Q. And could you read the third bullet?
 2 A. "Managers need to talk to staff before they
 3 respond to complaints (especially personal attacks) and
 4 give staff the benefit of the doubt. Most attempts by
 5 applicants to circumvent staff are really attempts to
 6 circumvent requirements for additional information or
 7 mitigation."

8 ~~Q. Now, are you aware that Ann Kenny testified
 9 in her deposition that one of the problems with Tom
 10 Luster that she heard about was that consensus would be
 11 reached on issues except Tom wouldn't agree with the
 12 consensus that had been reached with the port?~~

13 ~~A. I'm not aware of her testimony, her specific
 14 testimony.~~

15 ~~Q. You haven't talked with anyone about it or
 16 reviewed it?~~

17 ~~A. I've heard just a couple of comments about
 18 how the deposition went and a couple of references to
 19 topics discussed in the deposition but none of the
 20 specifics from the deposition.~~

21 ~~Q. Well, would you agree with that
 22 characterization that I'm describing to you of Tom
 23 Luster?~~

24 ~~A. Would you read the characterization again,
 25 please?~~

~~Q. Well, I wasn't reading. I was actually
 2 paraphrasing. What she intimated or what she said was
 3 that Tom was not -- what Ann Kenny said was that Tom
 4 Luster was not going along with the consensus reached
 5 by ecology staff and the port and that that was
 6 creating problems.
 7 MS. MARCHIORO: Objection. I think that
 8 mischaracterizes the witness's testimony in the prior
 9 deposition that you're referring to. If you could show
 10 Mr. Hellwig the particular excerpt, I would appreciate
 11 that.~~

12 Q. (BY MR. EGLICK) Well, let's assume
 13 hypothetically that Ann Kenny testified to that, and
 14 let me ask you if that was what she testified to, would
 15 you agree with that characterization?

16 A. That's not the way I would characterize Tom
 17 Luster's participation in our meetings or our
 18 decision-making processes.

19 Q. And what would you disagree with about that
 20 characterization?

21 A. I would disagree that our decision-making
 22 processes were a function of a need for consensus
 23 necessarily. When we would have our meetings, I would
 24 ask lots of hard questions to make sure that issues
 25 would be thoroughly discussed.

1 Tom Luster is a very thorough person himself,
 2 and what I would say is that I would have concerns that
 3 Mr. Luster would not always understand his appropriate
 4 role with respect to consulting with and accepting
 5 conclusions of technical experts in the programs who he
 6 would in his role as 401 coordinator be expected to
 7 rely upon. That's how I would characterize it. There
 8 would be situations where that would occur.

9 Q. In other words, where someone else involved
 10 in the DOE discussion would say I think it's this way
 11 and Mr. Luster would say, no, I don't think that's
 12 accurate or defensible, and what you're saying is that
 13 he should have acquiesced with what the other person
 14 had said; is that correct?

15 A. I'm saying that on frequent occasions I would
 16 support Mr. Luster's inquiry because I was very
 17 concerned about us reaching a decision that would be
 18 defensible. However, when it was clear to me and
 19 sometimes others I could tell or they would indicate it
 20 was clear to them that the technical experts who
 21 Mr. Luster was supposed to rely upon were being clear
 22 about conclusions with respect to an issue, that then
 23 it would be important for Tom to say, I understand, let
 24 me account for that in my decision or in my decision
 25 recommendation.

1 Q. And would you consider Mr. Luster himself a
 2 technical expert?

3 A. Not necessarily. It depends on with respect
 4 to what.

5 Q. Wetlands?

6 A. The technical expert with respect to wetlands
 7 for purposes of this decision and other 401 decisions,
 8 some of which which I signed off on, was Eric
 9 Stockdale.

10 Q. Well, that's not the question I asked,
 11 though. I asked you whether you would consider
 12 Mr. Luster a technical expert with respect to wetlands.

13 A. No.

14 Q. You're aware that he's a member of the
 15 Society of Wetland Scientists?

16 A. No.

17 Q. Do you know whether Mr. Stockdale is a member
 18 of the Society of Wetland Scientists?

19 A. Not remembering for sure the exact title of
 20 the organization but assuming that it's the one that
 21 you're referring to that I'm familiar with, yes, he is.

22 Q. And is that a credential that's meaningful?

23 A. It has some meaning.

24 Q. Do you know how you get to be a member of the
 25 Society of Wetland Scientists?

1 A. I don't know all the requirements.
 2 Q. Do you know any of them?
 3 A. I believe there's certain education and
 4 certain experience requirements, but I don't know them
 5 in detail.
 6 Q. What about with regard to analysis of issues
 7 having to do with hydrology? Do you know whether
 8 Mr. Luster is an expert in that area?
 9 A. I don't know if he's an expert or not in that
 10 area.
 11 Q. Let's talk for a minute about Ann Kenny. She
 12 was the person selected to replace Mr. Luster as the
 13 401 coordinator; is that correct?
 14 A. That's correct.
 15 Q. And who made that selection?
 16 A. Gordon White and Jeannie Summerhays, I
 17 believe. That would be the program manager and section
 18 manager for the shorelines and environmental assistance
 19 program. She was a 401 coordinator in the region with
 20 ample experience in complex and smaller projects,
 21 trained in part by Tom Luster. We had regionalized the
 22 function. In fact, I had hired her into that position
 23 earlier, the 401 coordination position in the region,
 24 and so she was more than qualified to assume the role.
 25 Q. And do you know what her undergraduate degree

1 is in?
 2 A. Let me start with her -- I believe she has a
 3 graduate degree in public administration. I'm not
 4 recalling right off the bat what her undergraduate
 5 degree is in.
 6 Q. Is she a member of the Society of Wetland
 7 Scientists?
 8 A. I don't believe she is.
 9 Q. And isn't it true that the main qualification
 10 that you rely on to consider her -- well, do you
 11 consider her an expert?
 12 A. Again, it depends on with respect to what.
 13 If it's with respect to being able to coordinate with
 14 technical experts in a program for purposes of putting
 15 together a 401 decision recommendation, I'd say she's
 16 an expert.
~~17 Q. So the difference if I can summarize it
 18 between Ann Kenny and Tom Luster, then, was that Ann
 19 Kenny was put in the position to coordinate but not to
 20 give particular technical opinions on technical issues;
 21 is that correct?
 22 MS. MARCHIORO: Objection. Your question
 23 asked for a difference, and you only gave one of the
 24 parts of the equation.
 25 MR. EGLICK: Well, the other part of the~~

~~1 equation I thought he understood, which is whereas Tom
 2 Luster at least thought he was supposed to offer his
 3 technical expertise as well.
 4 MS. MARCHIORO: Objection; lack of foundation
 5 as to what Mr. Luster thought.~~
 6 Q. (BY MR. EGLICK) Let me ask another question.
 7 That's fine. Let's strike that. The problem that
 8 you're describing, if problem it be, with Mr. Luster is
 9 that on some issues somebody thought that he should
 10 have acceded or receded to other people's opinions; is
 11 that correct?
 12 A. My understanding of the role that Tom should
 13 have assumed would be that of one consulting with the
 14 experts in the programs on the water quality and
 15 wetland-related issues; that it's good and appropriate
 16 for him to first have background in those technical
 17 areas so that he can ask questions of the experts to
 18 get the information he would need to be able to make a
 19 determination with respect to reasonable assurance, and
 20 given that he had that expertise, I would assume that
 21 should have worked to his benefit.
 22 However, it's also my understanding of the
 23 role of the 401 coordinator that if there's a debate on
 24 a technical issue that ultimately after asking
 25 questions and doing the inquiring and doing the

1 coordinating and consulting, the expert in the progr.
 2 -- the conclusion of the expert in the program should
 3 prevail and should be represented in the decision
 4 that's formulated.
 5 Q. So Mr. Luster, you understood, should have
 6 been making recommendations based ultimately on other
 7 experts' opinions and not on his opinion; is that
 8 correct?
 9 A. The way his job was defined as I remember it,
 10 the expertise he should have been exercising as a
 11 priority would be his expertise as one who puts
 12 together and writes the 401 document.
 13 Q. Well, he was supposed to make a
 14 recommendation, wasn't he?
 15 A. That's correct.
 16 Q. And you're testifying here, aren't you, that
 17 in the end if -- let's pick somebody -- Kevin
 18 Fitzpatrick had a different view of the evidence than
 19 Tom Luster did that Tom Luster's recommendation that he
 20 was supposed to make should have reflected Kevin
 21 Fitzpatrick's view, not Tom Luster's view; isn't that
 22 correct?
 23 A. Yes.
 24 Q. So if Tom Luster then sat down and looked at
 25 the public comments from experts outside of DOE and

1 looked at the port material and then looked at the
2 material from ecology analysis and decided that, for
3 example, the public comments had the better of the
4 argument but Kevin Fitzpatrick disagreed, then Tom
5 Luster was supposed to write his recommendation to
6 reflect Kevin Fitzpatrick's view; is that correct?

7 A. Not necessarily. I think that's an
8 oversimplification of the types of situations that
9 develop. I think that what would typically happen in a
10 situation like that for a major complex project is that
11 I would hear from the 401 coordinator of the concerns
12 if I were the management lead, for example, involved
13 with the project and would assist in making sure that
14 an appropriate debate was carried out to the point
15 where I was comfortable and that others would be
16 comfortable too that we would have reasonable
17 assurance.

18 So there could be situations where it would
19 be more complicated than just Tom Luster saying, okay,
20 I can't ask questions anymore because you're the
21 technical expert. If he had significant concerns, then
22 those would be discussed further. I can think of
23 occasions where that happened.

24 Q. And at the end of the day, if Tom Luster
25 wasn't satisfied that his concerns had been addressed,

1 it's your testimony that he wasn't free to write a
2 recommendation that reflected those concerns as opposed
3 to the view of some other person in the department who
4 you view as more expert; is that correct?

5 A. It would be difficult for me to support a
6 process where if I knew when we ended up in court if we
7 did that the technical experts from our water quality
8 program or the shorelines and environmental assistance
9 program could not support a decision written up by a
10 401 coordinator that didn't represent their expertise.

11 Q. Now, who was the final arbiter in ecology for
12 the recommended 401 that was presented to Gordon White
13 for signature? Who made the final decision as to what
14 would go into it in the final analysis?

15 A. Well, Ann Kenny wrote the 401, and prior to
16 calling it final, technical people reviewed it,
17 management people reviewed it, and a final version was
18 agreed upon.

19 Q. And who made the final decision to forward
20 that to Gordon White and say this is the one we want
21 you to sign?

22 A. I believe -- my recollection is that Ann
23 Kenny, in coordination with our consultants, our
24 experts at King County, and with Shannon & Wilson and
25 our internal experts wrote a 401 that when it was

1 complete, when she had input from all the appropriate
2 experts, then it was her job to provide that to the
3 decision maker, who was Gordon White.

4 Q. And that didn't go through you?

5 A. I had opportunities to review the draft 401.

6 Q. Didn't you make the final decision of what
7 went to Gordon White?

8 A. The process wasn't really that
9 straightforward.

10 Q. So Ann Kenny sent her draft 401 to Gordon
11 White without your reviewing it first?

12 A. I reviewed it. Our attorneys reviewed it.
13 Technical staff reviewed it. Once everyone had had the
14 review, if a concern didn't emerge that required a
15 revision, then it was time for Gordon White to see it.

16 Q. And who was Ann Kenny's boss?

17 A. Jeannie Summerhays.

18 Q. And who is her boss?

19 A. Gordon White.

20 Q. So you had no input into what went to Gordon
21 White?

22 A. Oh, I had input. I read it as did others.

23 Q. Did you ever make a comment at some point
24 that Tom Luster was not working for the Department of
25 Ecology while he was still working for ecology?

1 A. Well, if I did, it was a mistake.

2 Q. What do you mean it was a mistake? Did you
3 make such a comment?

4 A. I don't recall that. If he was working for
5 Department of Ecology, I can't think of a reason why I
6 would suggest he wasn't working for ecology.

7 Q. You can't think of any reason why you would
8 have said that?

9 A. I don't recall having any --

10 Q. Can you think of any reason why you might
11 have written that down?

12 A. No.

13 Q. Did you ever have any concern that Tom
14 Luster's concerns about the port application and how
15 ecology was handling it and what issues were being
16 raised was not towing the ecology line?

17 A. I wouldn't characterize it that way. For the
18 most part, I had a lot of confidence in Tom. At least
19 I did up until the point of -- I started having more
20 significant concerns about Tom in the fall of 2000, but
21 Tom had substantial influence on the decision-making
22 process up to the point where in September 2000 we made
23 it clear to the port that what they had in front of us
24 didn't give us reasonable assurance. Tom had
25 substantial influence over that in consulting and in

1 coordination with our technical people, and so -- I'm
2 forgetting the -- I'm losing track now of the specific
3 question.

4 Q. Well, why don't I ask another one. I think
5 you were getting way beyond the question actually. So
6 September 2000, a lot of confidence in Tom. October
7 2000, Tom taken off the project; is that correct?

8 A. While in September 2000 I had confidence in
9 Tom, it didn't mean I also wasn't having concerns from
10 time to time, but my concerns became significant in the
11 fall of 2000.

~~12 Q. Because he was not agreeing with the program
13 that had been laid out after the September meeting down
14 at the Port of Seattle; isn't that correct?~~

~~15 A. No. My concerns with Tom were cumulative,
16 including prior to September 2000 when I still did have
17 some confidence in his -- where he was coming from, but
18 that in working with technical staff to work through
19 issues, to resolve issues, he was not accepting what he
20 was hearing.~~

~~21 Q. And that was impeding progress on the
22 commitments that had been made to the port in September
23 2000, wasn't it?~~

~~24 A. It was impeding our ability to move forward,
25 period.~~

1 Q. And didn't there come a time when actually
2 Tom was excluded from --

3 A. Irrespective of the commitments we made to
4 the port in September, it was impeding our ability to
5 move forward.

~~6 Q. Didn't there come a time when Tom was
7 actually excluded from a meeting with the port?~~

~~8 A. Prior to the reassignment?~~

~~9 Q. Yes.~~

~~10 A. That may have happened. I'm not recalling
11 specifically.~~

~~12 Q. Didn't Mic Binemose complain about Tom at
13 your meeting in September 2000?~~

~~14 A. I don't know if he -- I don't recall him
15 complaining about Tom specifically. I seem to recall
16 him complaining about staff who I would have inferred
17 would have meant Tom, but I don't remember if he called
18 him out by name or not.~~

~~19 Q. It was pretty obvious, wasn't it?~~

~~20 A. Yes.~~

~~21 (Deposition Exhibit No. 87 was marked for
22 identification.)~~

~~23 Q. (BY MR. EGLICK) Looking at what's been marked
24 as Exhibit 87 to your deposition. Can you identify it?~~

~~25 A. This is an e-mail from Tom Luster to myself,~~

1 Paula Ehlers, his boss, Kevin Fitzpatrick, and Joan
2 Marchioro, and it's dealing with Sea-Tac, and he's
3 providing a copy of some what he calls somewhat drafty
4 notes used for a discussion the previous day on issues,
5 and he indicates he's realizing that -- did you want me
6 to read it?

7 Q. No. That's okay. So you've seen this
8 before, have you?

9 A. Yes.

10 Q. And this is an e-mail you received from Tom
11 in the course of business?

12 A. I'm sorry?

13 Q. This is an e-mail you received from Tom in
14 the course of business at ecology?

15 A. Yes.

16 Q. And he says in it, quote, I realize that mine
17 is apparently the minority opinion on what the port and
18 ecology need to do to meet 401 requirements, but I
19 think it would be helpful for you to have these for a
20 couple of reasons, end quote. Do you see that?

21 A. Yes.

22 Q. Then he goes on to caution that "while some
23 of them may be internally resolved through consensus
24 minus one" -- was the one a reference to him, I guess?

25 A. Yes.

1 Q. -- "we are likely to hear these or similar
2 issues raised during public review." Do you see that?

3 A. Yes.

4 Q. Now, there's some handwritten notes on the
5 copy I have. Do you see the handwritten notes?

6 A. Yes.

7 Q. That's your handwriting, isn't it?

8 A. Yes, it is.

9 Q. Now, look in the middle there. There's a
10 circle. Do you see that?

11 A. I see that.

12 Q. Is that your handwriting?

13 A. Yes, it is.

14 Q. Why don't you read that into the record.

15 A. It says, "Tom L is apparently not working for
16 ecology."

17 Q. Now, was there some confusion in your mind
18 about whether he had been fired?

19 A. My recollection of this particular document
20 is that it represents frustration I had with how Tom
21 was fulfilling his role as a 401 or not fulfilling his
22 role as a 401 coordinator.

23 Q. Well, when you're a 401 coordinator, aren't
24 you supposed to be working for clean water and the
25 water quality standards? Isn't that what you're

1 supposed to measure your performance against?
 2 A. Our goals are to make defensible decisions
 3 that protect the environment.
 4 ~~Q. And are you saying that based on Tom writing~~
 5 ~~this memo and saying, gee, I know I'm a minority but~~
 6 ~~you got to hear these things because you're going to be~~
 7 ~~hearing them later on, not working for ecology? Isn't~~
 8 ~~that what you're saying here?~~

9 ~~A. No.~~
 10 Q. Well, did I read the words wrong or did you
 11 read them wrong into the record? Are there other words
 12 there other than the ones you read?

13 A. I believe that I said these words represent
 14 my frustration with the way things were progressing or
 15 not progressing.

16 ~~Q. You were frustrated with Tom Luster because~~
 17 ~~he had the temerity to write a memo and say, hey,~~
 18 ~~there's some issues that haven't been resolved in my~~
 19 ~~view; is that correct?~~

20 A. My recollection of the situation is that the
 21 questions had been asked and answered and debated and
 22 discussed thoroughly. Tom had been given every
 23 opportunity to ask his questions and provide his input
 24 and to participate in the debate with my support and
 25 that in the end he would not accept what I believed to

1 be a reasonable approach put forth by the water quality
 2 program, the experts that in his role my understanding
 3 is he is supposed to defer to.

4 Q. Who is more qualified, Mr. Hellwig, with
 5 regard to resolution of 401 issues? Who is more
 6 expert, Tom Luster or you? If you want, I can give you
 7 his resume to go over and we can go over yours.

8 MS. MARCHIORO: Objection; argumentative.

9 A. Please ask the question again.

10 Q. (BY MR. EGLICK) Who is more qualified to
 11 resolve issues regarding a 401 water quality
 12 certification -- you understand that means compliance
 13 with the state water quality standards -- Tom Luster or
 14 you?

15 A. I'm thinking.

16 Q. Pardon me?

17 A. I'm thinking.

18 Q. Take as much time as you need.

19 A. I'll answer it this way. For this particular
 20 situation at this stage of the decision-making process,
 21 I had concerns that Tom Luster was able to do his job.

22 Q. Do you want me to repeat the question again,
 23 Mr. Hellwig?

24 A. Go ahead.

25 MR. EGLICK: Read back the question, please.

1 ~~(The reporter read back as requested.)~~
 2 A. Tom Luster is trained in writing 401s and
 3 making recommendations with respect to reasonable
 4 ~~alternatives. I am not.~~

5 Q. (BY MR. EGLICK) And he's educated in the
 6 science that's involved as well, isn't he?

7 A. I believe he has some education in the
 8 science.

9 Q. And you do not?

10 A. I do not.

11 MR. EGLICK: Let's take a break.

12 (Recess taken.)

13 Q. (BY MR. EGLICK) Looking, I guess, at Exhibit
 14 87 for a moment again, Mr. Hellwig. The date on that
 15 is October 18; is that correct?

16 A. Yes.

17 ~~Q. So within how many days of this exhibit was~~
 18 ~~Tom Luster removed from the port project?~~

19 A. I don't recall specifically. I don't
 20 remember if it was a couple of weeks or -- I don't
 21 remember.

22 Q. He was off by the end of October, wasn't he?

23 A. Somewhere around then.

24 Q. So it was less than two weeks, right?

25 A. Well, if that's when it was, it would be less

1 than two weeks, yes.

2 Q. Well, he wasn't on the project in November,
 3 was he, November 2000?

4 A. I don't believe he was.

5 Q. I'm sorry?

6 A. I don't believe he was, no.

7 ~~Q. Now, Tom Luster was removed, and meanwhile~~
 8 ~~ecology proceeded with the process of negotiating the~~
 9 ~~401 permit; isn't that correct?~~

10 A. I don't know if I'd characterize it as
 11 ~~negotiating the 401 permit.~~

12 Q. Well, you engaged in a regular series of
 13 negotiation meetings with the port, didn't you, to
 14 negotiate the terms of the 401 certification, didn't
 15 you?

16 A. We arranged for technical meetings with the
 17 port, facilitated technical meetings with the port to
 18 work through issues. The purposes of the meetings were
 19 to keep us focused on documents the port would need to
 20 submit and document the process towards attempting to
 21 reach a resolution on those issues.

22 Q. So these weren't permit negotiations?

23 A. I wouldn't characterize them as permit
 24 negotiations.

25 Q. Did anyone characterize them as permit

1 negotiations that you know of?
 2 A. Well, if they did, if I did looking back at
 3 what happened now --

4 Q. What do you mean what happened now?

5 A. Looking back at the situation a year or so
 6 later, I would not consider those meetings
 7 negotiations.

8 Q. Well --

9 A. I don't believe I ever considered them
 10 negotiations.

11 Q. And if anyone had presumed, for example, on
 12 the port payroll to call them negotiations, what would
 13 you have done?

14 MR. REAVIS: Objection; calls for
 15 speculation.

16 Q. (BY MR. EGLICK) So ahead and answer looking
 17 back now.

18 A. I would have described the process that we
 19 had underway and not in the context of negotiating the
 20 permit. Our job was to make it clear for the port what
 21 would be required if they wanted us to be able to
 22 approve the application, which is a reasonable thing to
 23 do.

24 It's reasonable for the port to expect from
 25 us clarity around what the requirements ought to be,

~~1. The purpose of the technical meetings, the
 2 facilitated technical meetings, was to make it clear
 3 what the port needed to submit, set up time frames
 4 around it, and then document progress made~~

5 Q. So no way were these permit negotiations; is
 6 that right?

7 A. No.

8 Q. That's not right?

9 A. They were not negotiations.

10 Q. Who is Rachel McCrea?

11 A. McCrea?

12 Q. McCrea. Sorry. M-c-C-r-e-a.

13 A. She worked for and probably still does for
 14 the firm of Floyd & Snider and reports to Kate Snider
 15 at that firm. Kate Snider was hired by the port after
 16 agreement with the port and ecology that there be
 17 facilitated meetings and having the resources to do so,
 18 to facilitate technical meetings, technical and
 19 management meetings with the port and ecology to work
 20 through stormwater management plan issues as well as
 21 low flow mitigation plan issues, and she as an
 22 assistant to Kate and a member of that firm would
 23 sometimes be the facilitator of those meetings. More
 24 frequently or more often than not, she was there with
 25 Kate to do the documentation.

1 Q. And who picked this firm Floyd & Snider?

2 A. The firm was suggested by the port, and I
 3 don't recall if there was familiarity on the part of
 4 ecology -- oh, yes, there was. The firm -- the port
 5 suggested Kate Snider. Kate had worked with ecology on
 6 other matters, the Everett landfill. I believe I met
 7 her when she was facilitating meetings related to some
 8 issues around the Everett landfill. We had some
 9 familiarity with her, and the port suggested her as a
 10 facilitator. We agreed. The port said they would pay.
 11 So we set up the facilitated meeting process.

12 Q. And did you ever review the contract with
 13 Floyd & Snider?

14 A. No.

15 Q. Do you know what the instructions were that
 16 the port gave to Floyd & Snider in their engagement
 17 contract?

18 A. No.

19 Q. Do you know how the port described the
 20 process to Floyd & Snider?

21 A. Well, we had discussions with Floyd & Snider
 22 with the port and ecology present at the same time
 23 about expectations from the or out of the facilitated
 24 meeting process, but I don't know the contents of any
 25 meetings that might have happened between Floyd &

1 Snider and the port without ecology.

2 Q. So if Floyd & Snider gained an understanding
 3 of what this process was about, they gained it not just
 4 from the port but from ecology as well?

5 A. Yes.

6 Q. So they were very clear from ecology as to
 7 what these meetings were about?

8 A. If we had questions about clarity, if there
 9 was a perception that there wasn't clarity about the
 10 process and the role of the facilitator, then we would
 11 discuss it.

12 Q. I mean, going into it, I mean, going into the
 13 process from the outset, ecology participated with the
 14 port in telling Floyd & Snider this is what this
 15 process is, correct?

16 A. Yes.

17 Q. And one of the reasons that you did that
 18 presumably was if you look back at Exhibit 86 -- that's
 19 that memo about lessons learned from big projects. Do
 20 you remember that one?

21 A. Yes.

22 Q. Ecology presumably had a concern to make sure
 23 that no one misunderstood what the process was going
 24 to be; is that correct? That's one of the lessons --

25 A. That's correct.

1 (Deposition Exhibit No. 88 was marked for
 2 identification.)
 3 Q. (BY MR. EGLICK) Showing you what's been
 4 marked as Exhibit 88. Can you identify it?
 5 A. There's two e-mails here. One is from -- the
 6 top is from Ann Kenny to Rachel McCrea. It's dated
 7 October 24. It has to do with third runway permit
 8 negotiations is how it's termed here by Ann.
 9 Q. Ann who?
 10 A. Ann Kenny.
 11 Q. And she works for ecology, right?
 12 A. Right.
 13 Q. She took Tom Luster's place; isn't that
 14 right?
 15 A. Right. Yes.
 16 Q. You've seen these e-mails before, haven't
 17 you?
 18 A. Yes.
 19 Q. And the description from Rachel McCrea to Ann
 20 Kenny and to you is also "Subject: Third Runway 401
 21 Permit Negotiations," isn't it?
 22 A. Yes.
 23 Q. And in the text of the McCrea to Kenny cc to
 24 Snider and Hellwig e-mail, it refers to this
 25 negotiation process and to, quote, each 401 permit

1 negotiation, quote. Do you see that?
 2 A. Yes.
 3 Q. I want you to take a look at -- by the way,
 4 let's hold on 88 for a minute. We're at October 24,
 5 2000, right, on this Exhibit 88?
 6 A. Correct.
 7 Q. And looking back at Exhibit 87, that was
 8 October 18, 2000; is that right?
 9 A. That's correct.
 10 Q. That's the one that has that statement on it
 11 from you, "Tom L is apparently not working for
 12 ecology," referring to Tom Luster?
 13 A. Right.
 14 Q. So by October 24, which by my count is six
 15 days later, Rachel McCrea is telling Ann Kenny, quote,
 16 I understand from Ray Hellwig that you will be
 17 replacing Tom Luster in the 401 permit negotiations
 18 with the Port of Seattle, end quote.
 19 A. That's right.
 20 Q. So you were the one who on October 24
 21 informed Floyd & Snider that Tom Luster was being
 22 replaced by Ann Kenny?
 23 A. I did after that decision was made by Gordon
 24 White.
 25 Q. So that was six days after your October 18 --

1 that October 18 memo, which is Exhibit 87?
 2 A. It's within that time frame you and I
 3 discussed just a little while ago.
 4 Q. Now, when you sent that notice -- and I
 5 assume somehow between the 18th and the 24th you sent
 6 notice to Ms. McCrea, right, that Tom was being
 7 replaced by Ann? Do you know who I mean by Tom, Tom
 8 Luster and Ann Kenny?
 9 A. I'm sorry. You said I sent a message?
 10 Q. Well, apparently you did, because McCrea
 11 says, "I understand from Ray Hellwig," so what I'm
 12 asking you is that must have occurred sometime between
 13 October 18 and October 24; is that correct?
 14 A. That's correct. I don't remember speaking
 15 with Rachel directly or if I had talked to Kate Snider
 16 or what.
~~17 Q. Now, when was Tom told to your knowledge that
 18 he was being removed? We've got this e-mail from him
 19 on the 18th, and it doesn't indicate any knowledge of
 20 that, so do you have any idea when he was told he was
 21 off the case?
 22 A. I don't have information on the exact time.
 23 I don't recall the exact time he was notified.~~
 24 Q. When were you notified?
 25 A. Well, it had to have been right in this time

1 frame here within these few days. I would have been
 2 notified by Gordon White and/or Paula Ehlers.
 3 Q. That Tom Luster was no longer working for
 4 ecology on the 401 certification for the airport; is
 5 that correct?
 6 A. That's correct.
 7 (Deposition Exhibit No. 89 was marked for
 8 identification.)
 9 Q. (BY MR. EGLICK) Looking at what's been marked
 10 as Exhibit 89 to your deposition. Can you identify
 11 what's been marked as Exhibit 89 to your deposition?
 12 A. This is an e-mail from Ray Hellwig to Ann
 13 Kenny, from myself to Ann Kenny dated October 26
 14 regarding third runway notes and next meetings, and it
 15 has attached to it -- well, it has the notes attached,
 16 and then beneath that is an e-mail from Tom Luster to
 17 myself and Kevin and Eric and Joan Marchioro. Subject
 18 is third runway notes and next meetings.
 19 Q. So you've seen these before, haven't you?
 20 A. Yes.
 21 Q. They're from ecology's records?
 22 A. Yes.
 23 Q. Now, Tom refers to a 10-20 meeting, and then
 24 you forward this on to Ann. I'm sorry. I keep on
 25 saying Tom and Ann because obviously I feel like I know

1 these people having worked with them. Do you
 2 understand who I mean when I say Tom and Ann?
 3 A. Tom Luster and Ann Kenny.
 4 Q. If you're ever confused, let me know.
 5 Obviously we've been corresponding for a few years. So
 6 Tom Luster refers to a 10-20 meeting. Do you see that?
 7 A. Yes.
 8 Q. Was that one of these what Rachel McCrea
 9 called permit negotiations?
 10 A. What Rachel McCrea referred to as permit
 11 negotiations, yes.
 12 Q. And was that the first one?
 13 A. Let me think here. I'm sorry. Did you say
 14 was that the first one?
 15 Q. Yeah. Or was that the second?
 16 A. I believe it was the second.
 17 Q. Why don't you look on the second page. That
 18 might help you. Look at the bottom.
 19 A. If I look at the second page here, "greetings
 20 all," this is from Rachel McCrea. She's now referring
 21 to it as third runway notes and next meetings and not
 22 negotiations, and she indicates, "Greetings all. The
 23 draft 10-20 notes and final 10-13 notes are attached.
 24 Please forward your comments/edits." Of course, that
 25 was to try to achieve accuracy with respect to our

1 different recollections of what happened at a meeting
 2 so then she could do final notes, so there was
 3 apparently the 10-13 meeting.
 4 Q. So there was the first of these what Rachel
 5 McCrea at least is calling permit negotiations was on
 6 October 13; is that correct?
 7 A. Yes. And then apparently she changed her
 8 reference to them.
 9 Q. And Tom Luster attended that first 10-13
 10 meeting, didn't he?
 11 A. That's my recollection.
 12 Q. And after that 10-13 meeting, on October 17
 13 there was an internal ecology meeting; is that correct?
 14 A. Let me look back here. Yes. Yes.
 15 Q. And then after that internal ecology meeting
 16 on October 17, then Tom Luster sent you his e-mail and
 17 his minority opinion memo on October 18; is that
 18 correct?
 19 A. Yes.
 20 Q. And that's Exhibit 87 if you recall.
 21 A. I'm looking at that, yes.
 22 Q. And then on October 23, Tom Luster sends an
 23 e-mail, and that's Exhibit 89, right?
 24 A. Yes.
 25 ~~Q. It says, "Even though I was not at the 10-20~~

~~1 meeting." That was the meeting at the port, right, the
 2 second permit negotiation meeting as Rachel McCrea
 3 called them; is that right?
 4 A. Yes.
 5 Q. And he says even though I wasn't at that
 6 meeting, the meeting draft notes, quote, do not reflect
 7 those discussions and agreements and unless the notes
 8 are changed may end up being used to justify issuance
 9 of a 401 that does not meet 401 requirements, end
 10 quote. Do you see where it says that in Exhibit 89?
 11 A. Yes.
 12 Q. And he sent that E-mail on October 23, right?
 13 A. That's what it says.
 14 Q. So by October 23, he'd already been removed,
 15 hadn't he?
 16 A. I'm not sure when he was notified by his
 17 supervisors that his assignments had changed.
 18 Q. Look at the next paragraph that says "since I
 19 wasn't at the meeting."
 20 A. I don't know that he wasn't at the meeting
 21 because he'd already been reassigned or notified that
 22 he'd hadn't been reassigned.
 23 Q. Why don't you read the first clause up to the
 24 comma in the second paragraph in Tom's e-mail. It
 25 starts with the word "since."~~

~~1 A. "Since I wasn't at the meeting and since I
 2 am" -- okay. I'm sorry. I wasn't reading the right
 3 place. "Since I wasn't at the meeting and since I am
 4 being transitioned away from Sea-Tac review." Okay.
 5 Q. So by the 23rd he'd been removed, the
 6 chronology being first meeting with the port, Tom then
 7 writes his e-mail and memo after the internal ecology
 8 meeting on the 17th, and then by the 23rd he's been
 9 removed, correct?
 10 A. He's been reassigned, yes.
 11 Q. Removed from responsibility for the Sea-Tac
 12 project; is that correct?
 13 A. That's correct.
 14 (Deposition Exhibit No. 90 was marked for
 15 identification.)
 16 Q. (BY MR. EGLICK) Looking at what's been marked
 17 as Exhibit 90 to your deposition. Can you identify it?
 18 A. This is from Joan Marchioro to me, and it's
 19 new method A soil cleanup levels, and the note from
 20 Joan says, "This is not to be produced as deliberative
 21 but needs to be identified in the list to ACC and any
 22 other public disclosure requesters," and it has
 23 attached to it something forwarded by Chung Yee to '
 24 and something underneath that.
 25 The string is from -- it was from Pete Kmet~~

1 to Chung Yee and Kevin Fitzpatrick, and that message
2 new method A soil clean-up levels starts, "Here are a
3 series of tables showing the calculations for the new
4 Method A soil cleanup levels and providing a comparison
5 to the current Method A values," and then there's an
6 attachment and more verbiage.

7 Q. Now, this is something that you saw
8 contemporaneous with its transmittal or approximately,
9 then?

10 A. Yes.

11 Q. Now, Pete Kmet again is an engineer in the
12 toxics program; is that correct?

13 A. Yes. Toxics clean-up program.

14 Q. Do you see where Mr. Kmet says, quote, we
15 believe the current standards are not protective for
16 several chemicals, end quote?

17 A. Yes.

18 Q. What's that referring to? Do you know?

19 A. The current method A MTCA clean-up criteria.

20 Q. And then take a look at the next paragraph.

21 You see it's referring to arsenic? Do you see that?

22 A. Yes.

23 Q. And he suggests that the background in
24 uncontaminated areas for arsenic is 7 PPM. Do you know
25 what 7 PPM is?

1 A. Parts per million.

2 Q. Now, is that the criterion for arsenic
3 incorporated in the 401 that ecology issued if you
4 know?

5 A. I would have to look.

6 Q. You don't know?

7 A. I don't have the 401 memorized, no.

8 Q. Do you have your copy there? I think I
9 handed them out before. I don't know whether you've
10 got one.

11 A. I believe that you -- yes.

12 Q. Take a look at the September one.

13 A. What page is that?

14 Q. Try condition E. I'm not sure which page
15 it's on.

16 A. I've got fill criteria on page 16.

17 Q. Try 17. I don't want to lead you. I'll let
18 your counsel tell if you she would, but I think it's
19 page 17.

20 A. I got it.

21 Q. You see the table there that says milligrams
22 per kilogram squared, and do you know whether that's
23 the same as parts per million?

24 A. I don't.

25 Q. You don't?

1 A. No.

2 Q. Well, let's assume that it is for a moment.

3 A. Okay.

4 Q. If I'm wrong, I'm sure somebody will point it
5 out to me. What's the value in the table here?

6 A. 20.

~~7 Q. How did you decide to go with 20?~~

~~8 MS. MARCHIORO: Objection. There's no
9 foundation that Mr. Hellwig decided anything with
10 respect to the clean fill criteria.~~

~~11 MR. EGLICK: I guess I was asking him how
12 ecology decided to go with 20, and since he's been so
13 intimately involved in the process, I thought he might
14 know.~~

15 Q. (BY MR. EGLICK) Let me ask you that,
16 Mr. Hellwig. Was there some decision made with regard
17 to the fill criteria that you wouldn't have been
18 involved in?

19 A. I wasn't involved in every single technical
20 decision. I did defer heavily to the technical people,
21 the experts making the recommendations on all the
22 technical issues.

23 Q. Were you involved in getting those
24 recommendations and deciding whether or not to accept
25 them?

1 A. I remember discussions, but I don't remember
2 them specifically. I remember some discussions around
3 the clean fill criteria with respect to background,
4 with respect to what would be protective of
5 groundwater. But I remember it generally. I don't
6 remember it specifically.

7 Q. So you're not able to testify as to what the
8 rationale was for going with a different value than the
9 value referred to in this Exhibit 90 for arsenic, are
10 you?

11 A. I'm looking over the materials, and I've
12 forgotten your question now.

13 MR. EGLICK: Why don't you read back the
14 question, please.

15 (The reporter read back as requested.)

16 A. Not right now.

17 Q. (BY MR. EGLICK) Now, when you sent this draft
18 401 that Ann Kenny worked on and you reviewed up to
19 Gordon White --

20 MS. MARCHIORO: Objection; mischaracterizes
21 the testimony of the witness. He did not send the 401
22 to Gordon White. I think the reporter can find that
23 question and find the correct answer.

24 MR. EGLICK: Well, the proper objection is
25 not testimony by counsel.

1 Q. (BY MR. EGLICK) Mr. Hellwig, did you have any
2 involvement in sending the recommended 401 decision up
3 to Gordon White for signature?

4 A. I'm trying to recollect the series of events.
5 It could be at the point where Gordon got a copy of the
6 draft that included this information. He might have
7 been receiving the draft at the same time I was. I'm
8 not recalling specifically the sequence of events as
9 far as how the information was developed and exchanged
10 and shared internally.

11 Q. You were the point person on this, weren't
12 you?

13 A. I was the management lead for purposes of
14 driving the process, making sure people were talking to
15 each other, making sure they were working through and
16 resolving issues and that that 401 would be written.

17 Q. Weren't you also the lead in terms of
18 justifying and assuring ecology management above your
19 level that there was reasonable assurance to issue this
20 401?

21 A. I had every confidence that in conversations
22 that would happen subsequent to this that we would go
23 over the issues and that any concerns that other
24 managers might have would be identified and discussed
25 to everyone's satisfaction and that we wouldn't make a

1 decision regarding reasonable assurance and that Gordon
2 wouldn't do that until he was comfortable with that
3 recommendation.

4 MR. EGLICK: Could you read back the
5 question, please?

6 (The reporter read back as requested.)

7 A. I had lead in organizing meetings to make
8 sure that issues were discussed.

9 ~~Q. (BY MR. EGLICK) Please answer the question
10 Mr. Hellwig, and if the answer is no, you can say no.
11 If the answer is yes, you can say yes. Otherwise I'll
12 just have the reporter read back the question again.~~

13 ~~THE WITNESS: Why don't you read the question
14 again.~~

15 ~~(The reporter read back as requested.)~~

16 ~~A. No.~~

17 ~~Q. (BY MR. EGLICK) Who prepared the briefing
18 memo for the director on the 401 decision?~~

19 ~~A. Do you have that document?~~

20 ~~Q. Mr. Hellwig, I'm asking the questions here
21 Do you know?~~

22 A. I'm not recalling the briefing document. I'm
23 not recalling the briefing document that went with the
24 401.

25 Q. So it's your testimony you can't recall

1 preparing a briefing memorandum for the director on the
2 401 recommendation?

3 A. I prepared -- okay. I was thinking about
4 another chain of documents and events. Yes. I
5 prepared briefing documents on the 401 decision. I
6 prepared briefing documents for the director and for
7 presentations to the senior management team. I
8 prepared briefing documents for other meetings with
9 managers over time.

10 Q. I appreciate that, but the question I asked
11 you was whether you prepared the briefing memorandum
12 for the director of your department on the 401
13 recommended decision.

14 A. I believe that I did.

15 Q. Gordon White didn't prepare it, did he?

16 A. No.

17 Q. And didn't that briefing document attempt to
18 justify and explain the recommendation for 401 approval
19 that had been reached?

20 A. Well, as with any briefing document, it
21 provides information that indicates whether or not it's
22 an appropriate decision.

23 Q. So is that a yes?

24 A. Well, I'm not sure that I understand what
25 your definition of justification would be in this case,

1 so that's why I rephrased my answer.

2 Q. Rationale.

3 A. Okay. Rationale.

4 Q. Reasons.

5 A. Reasons, yes.

6 Q. And as part of that, didn't you explain the
7 rationale for the fill criteria that had been adopted
8 in the 401 recommended decision?

9 A. I believe that there's a section on clean
10 fill or acceptable fill.

11 Q. So you were the person who spoke for the
12 levels below the director in explaining to the director
13 the recommendation for the 401 certification decision;
14 is that correct?

15 A. I wrote the briefing document, yes.

16 Q. Was there somebody else who wrote a briefing
17 document too?

18 A. It's possible that I had the briefing
19 document reviewed by other staff before I finalized it,
20 but I'm not recalling specifically if I did that or
21 not.

22 Q. Did anyone else write a briefing document?

23 A. Not that I recall.

24 Q. Having gone through all that information, are
25 you able to explain the rationale for the arsenic value

1 placed in the 401 certification fill criteria?

2 A. If it's not in the briefing document, then
3 I'm recollecting that we had conversations about what
4 would be acceptable, but I'm not in a position right
5 now to explain it, no.

6 Q. What about have you read the PCHB decision on
7 the stay?

8 A. I went through it.

9 Q. Did you see the discussion in the PCHB
10 decision about petroleum-based contaminants?

11 A. I did.

12 Q. I don't want to misquote the PCHB, but would
13 you agree there were words in the decision to the
14 effect there is no natural background for
15 petroleum-based contaminants in Puget Sound soils?

16 A. Something to that effect.

17 Q. Do you disagree with that?

18 A. Not necessarily.

19 Q. Well, I'm not asking you necessarily. I'm
20 asking you -- you're here today. You're the northwest
21 regional director of the Department of Ecology. Do you
22 disagree with that concept that there's no natural
23 occurring background level for petroleum in the Puget
24 Sound region?

25 A. No. I don't disagree with the concept.

1 Q. Is there any evidence you have that petroleum
2 is naturally occurring in Puget Sound soils?

3 A. No.

4 Q. Can you explain the basis on which the 401
5 certification allowed a level of so-called naturally
6 occurring petroleum to be included or to be present in
7 fill?

8 A. No.

9 Q. Is that something that you brought -- and by
10 that I mean this issue of the petroleum naturally
11 occurring or not -- did you bring that to the attention
12 of the director when explaining the rationale for the
13 401 certification?

14 A. I don't recall doing that.

15 (Deposition Exhibit No. 91 was marked for
16 identification.)

~~17 Q. (BY MR. BGLICK) Showing you what's been
18 marked as Exhibit 91 to your deposition. Can you
19 identify it, please?~~

~~20 A. It's a fax to Ann Kenny from Olivia Yvonne.~~

~~21 Q. And what's attached?~~

~~22 A. It's a letter to Mic Dinsmore, Executive
23 Director, Port of Seattle, from Tom Fitzsimmons, and
24 it's not on letterhead, so I don't know if it's a draft
25 or not. It's dated September 28, 2000.~~

~~1 Q. Is this the letter that came out of that
2 meeting when Mic Dinsmore flew in from Europe and you
3 all had to go down and meet in the port office to talk
4 about the withdrawal?~~

~~5 A. May I have a moment to look at it?~~

~~6 Q. Sure.~~

~~7 A. This is it, yes.~~

~~8 Q. Now, was this letter -- the wording of this
9 letter drafted at that meeting?~~

~~10 A. I seem to recall that some of it was.~~

~~11 Q. In other words, you actually sat down there
12 with the governor's chief of staff and worked out the
13 wording of a letter that would be sent; isn't that
14 right?~~

~~15 A. We discussed commitments that would be
16 appropriate from there forward and came up with some
17 draft language, yes.~~

~~18 (Mr. Witek left the room.)~~

~~19 Q. And this is once again the meeting that we
20 discussed that Tom Luster was not present at even
21 though at that point he was still the 401 coordinator
22 and responsible for the third runaway application; is
23 that correct?~~

~~24 A. That's correct.~~

~~25 Q. Now, could you take a look back if you still~~

1 have it -- and if not, I can try and dig it up -- at
2 Exhibit 86?

3 A. Yeah. I got it.

4 Q. Do you see on the second point there,
5 "Managers should not reward project applicants'
6 attempts to get early assurances"? Do you see that?

7 A. Yes.

8 Q. Do you see the sentence that says, quote,
9 many project applicants will try to get ecology
10 managers to assure them that a project is, single
11 quote, permissible, single quote, end quote?

12 A. I see that, yes.

13 Q. Now, let's just take a look at this Exhibit
14 91. If you look down in the third paragraph, there's a
15 sentence there that starts with the words "we
16 anticipate." Do you see that?

17 A. I was still looking at the other document.
18 Okay. I'm looking at the letter again. Which
19 paragraph, please?

20 Q. Third paragraph down. Do you see the
21 sentence that says "we anticipate"?

22 A. Yes. I see that.

23 Q. Could you read that sentence into the record?

24 A. "We anticipate that the Port will be able to
25 adequately address remaining issues. In light of" --

1 Q. I asked you to read that sentence, but go
2 ahead. Why don't you read the next sentence after the
3 colon.

4 A. "In light of this perspective, we believe
5 that it is possible to issue a 401 Certification
6 consistent with the following."

7 Q. Now, your 401 coordinator's not there. He's
8 still assigned to the project, but he's not there. The
9 language of this letter is apparently being hammered
10 out in the room, and aren't you making those very kinds
11 of reassurances that the lessons learned memo says to
12 avoid?

13 A. Well, first of all, I don't agree straight up
14 with all the bullets in the lessons learned memo.

15 Q. So as far as you're concerned, some of those
16 just aren't good advice; is that correct?

17 A. I think that in some instances they're not
18 good advice. It depends on the circumstances. It
19 depends on the situation.

20 Q. Now, did you ever send your own memo around
21 and say, well, I don't think this applies to me or to
22 the northwest regional office or to the third runway
23 application?

24 A. The lessons learned document was a document
25 presented by staff for discussion purpose so we could

1 learn to improve the way we dealt with major projects,
2 and so it isn't agency policy. It wasn't adopted as a
3 doctrine. It was good input from staff for us to
4 consider when working major projects.

5 Q. And in answer to my question, you never sent
6 around any revisions or corrections or things that you
7 thought should be changed in this document, did you?
8 By this document, I mean the lessons learned memo.

9 A. Well, I know that pursuant to different
10 discussions that the agency's had other documents have
11 been produced, but I don't know if they were produced
12 in direct response to or for purposes of amending this
13 document.

14 (Deposition Exhibit No. 92 was marked for
15 identification.)

~~16 Q. (By Mr. BOLLICK) Showing you what has been
17 marked as Exhibit 92 to your deposition. Can you
18 identify it.~~

~~19 A. Yes. It's to Gary Zeiler dated May 12, 2000.
20 That's a wrong date.~~

~~21 Q. In fact, if you look at the second page,
22 isn't this really from November 2001?~~

~~23 A. Yeah. I have a memo document on file, and I
24 assumed that the date function would update
25 automatically. In this particular case, it didn't. I~~

~~1 seem to recall that this is to Gary Zeiler from me.
2 It's staff recognition checks. I seem to recall Gary
3 calling me up and asking me to look at the date. I
4 believe I sent him a corrected version. I don't know
5 for sure. I may have sent him a corrected version.
6 Maybe we just checked it over the phone.~~

~~7 Q. Now, as I understand it from this memo, you
8 were holding a meeting on November 13 that you called a
9 decision debriefing meeting?~~

~~10 A. Yes.~~

~~11 Q. That's November 13, 2001?~~

~~12 A. That's correct.~~

~~13 Q. And was that an internal ecology meeting?~~

~~14 A. Yes.~~

~~15 Q. So nobody except from ecology was there; is
16 that correct?~~

~~17 A. Well, this was -- it would also include
18 friends or partners of individuals being recognized,
19 and it also included -- was to include our outside
20 consultants from King County and from Shannon & Wilson.~~

~~21 Q. Anyone from the port?~~

~~22 A. No.~~

~~23 Q. And this was for the purpose of presenting
24 checks to the staff persons who had worked on the 401
25 certification?~~

~~1 A. It was for a meeting where some people would
2 receive checks who had worked on the certification.
3 Other folks were invited to attend the meeting who were
4 being given letters of appreciation or certificates of
5 appreciation, so this was just for the individuals who
6 would be receiving a check.~~

~~7 Q. And the checks are something from ecology for
8 work performed on the 401 certifications?~~

~~9 A. That's correct.~~

~~10 Q. And did you pick the names who would get the
11 checks?~~

~~12 A. I picked out the names. I ran them by Tom
13 Fitzsimmons, and I believe that the e-mail where I did
14 that was disclosed. He sent back a message either on
15 the phone or through the e-mail concurring with the
16 names that I had here.~~

~~17 Q. Now, Pete Kmet worked on the 401 at some
18 point, didn't he?~~

~~19 A. As did dozens of other people.~~

~~20 Q. Pete Kmet wasn't on this list; is that right?~~

~~21 A. No, he's not. I believe that I had another
22 list of folks who received certificates of
23 appreciation, and I think I had Chung Yee on that.
24 I don't believe I had Pete Kmet.~~

~~25 Q. Now, these meetings that you were holding~~

1 with the port, in holding those meetings with the port,
2 you prepared matrices, didn't you, of where decision
3 issues were on the 401?

4 A. So we're jumping back to May 2000 now?

5 Q. No. Actually, we're jumping to starting in
6 October 2000 when the meetings with the port started.

7 A. Okay. The facilitated meetings. Right.

8 Yes.

9 Q. And those matrices were prepared and
10 distributed to whom?

11 A. All the individuals with responsibility for
12 working together to internally and then externally too
13 at the port to resolve issues and to Tom Fitzsimmons,
14 and I'm not remembering other managers at this point.

15 Q. So did those matrices get shared with the
16 port at these negotiation meetings?

17 A. Well, they weren't negotiation meetings. I
18 think in the very beginning I think that the port-hired
19 facilitator referred to the meetings as negotiations.
20 I think that they weren't referred to as negotiations
21 after the meetings got underway.

22 They were facilitated technical meetings to
23 work through issues related to the port's stormwater
24 management plan proposal and their low flow mitigations
25 plan, and since the meetings were facilitated on behalf

1 of ecology and the port, of course the port would get
2 copies of those notes too.

3 Q. Those matrices, are there kind of -- I don't
4 know what kind of computer program you do them on, but
5 they're kind of documents with lines going horizontally
6 and vertically and it talks about an issue and then
7 where the issue is in the process?

8 A. Right. Initially I thought you were
9 referring to some tables that I used to produce myself,
10 but, yeah, these tables or matrices if you will were
11 probably produced in Word.

12 Q. Those have boxes in them with notations on
13 various issues?

14 A. Yes.

15 Q. And those were shared with the port as part
16 of this facilitated process?

17 A. With the port and then of course ultimately
18 with ACC and anyone else who made a request to get a
19 copy.

20 Q. Now, what do you mean by ultimately?

21 A. They were made available through public
22 disclosure.

23 Q. Weren't they withheld as deliberative?

24 A. Not the -- the matrices that I'm recalling
25 that were produced to document the technical meetings

1 that were facilitated by Kate Snider, meetings between
2 the port and ecology, that information was not held.
3 That information was made available on a regular basis
4 to the ACC unless there's another matrix or a table
5 that you're referring to and I maybe have a different
6 one in mind. But I'm referring to the facilitated
7 technical meetings. All of that information was made
8 available.

9 Q. Let's see what we've got here.

10 (Deposition Exhibit No. 93 was marked for
11 identification.)

12 Q. (BY MR. EGLICK) Can you take a look at what's
13 been marked as Exhibit 93?

14 A. Yes.

15 Q. Is this the kind of matrix that you were
16 referring to?

17 A. No. No. This is -- I was referring to the
18 matrices or tables that were produced along with the
19 notes that documented the facilitated technical
20 meetings between the port and ecology. This is not the
21 table that I was referring to.

22 Q. Well, who produced the matrix in Exhibit 93?

23 A. This is one that I produced.

24 Q. And so who did this go to?

25 A. This went to Tom Fitzsimmons.

1 Q. And to anyone else?

2 A. Ann Kenny.

3 Q. Anyone else?

4 A. I don't think so.

5 Q. Well, I'm looking at your e-mail dated May
6 17. Do you see Exhibit 93? It says, "This, quote,
7 updated, quote, table should assist in discussions with
8 Port of Seattle staff and managers." Do you see that?

9 A. Yes.

10 Q. Now, who was it going to assist?

11 A. Let me look at it for a minute.

12 Q. Sure.

13 A. This was to assist us in our internal
14 discussions and subsequent discussions with the port in
15 understanding the relationship between the natural
16 resource mitigation plan, the low flow mitigation plan
17 requirements and the stormwater plan, the idea being
18 that there needed to be analysis relating to the
19 integration of them.

20 Q. So was this shared with the port?

21 A. Well, let me see. I don't believe it was.
22 It may have been at a later date after it was
23 ultimately released, but I believe its usefulness was
24 short-lived; that a point needed to be made with
25 respect to the need to have these plans integrate, and

1 after the point was made, after we discussed it, I
2 don't believe it was used much into the future.
3 (Deposition Exhibit No. 94 was marked for
4 identification.)
5 Q. (BY MR. EGLICK) Looking at what's been marked
6 Exhibit 94 to your deposition. Can you identify it?
7 A. This is an e-mail from Ann Kenny to myself.
8 It's dated July 29, 2001, last summer, to Kevin
9 Fitzpatrick, John Drabeck, others at ecology. It was
10 at the time deliberative, and it was a preliminary
11 draft 401 water quality certification for the third
12 runway. It also went out to our consultants, Katie
13 Walter and Kelly Whiting.
14 MS. MARCHIORO: I'm going to interject. I
15 believe this is a previously marked exhibit for the
16 deposition of Ann Kenny.
17 MR. EGLICK: I don't know if it's the same
18 one. Maybe it is. We'll have a dup.
19 Q. (BY MR. EGLICK) So you got one of these,
20 right?
21 A. Right.
22 Q. And you commented on it to the extent you had
23 comments?
24 A. I believe I would have, yes.
25 Q. Do you see this cover note here where

1 Ms. Kenny says, quote, it is still very rough, but
2 given the time constraints ahead of us, I want to get
3 this to you so that you can start looking it over and
4 provide me with feedback, end quote?
5 A. Yes.
6 Q. This is an e-mail dated July 29.
7 A. Correct.
8 Q. So what's the time constraint if the deadline
9 -- what was the deadline for 401 certification based on
10 that one-year requirement? Wasn't it December 27,
11 2001?
12 A. It was a few months out.
13 Q. It was December, wasn't it?
14 A. I believe so.
15 Q. So here's Ms. Kenny sending an e-mail on
16 Sunday, July 29, saying given the time constraints
17 ahead of us, I wanted to get this to you. What time
18 constraint is she referring to?
19 A. She's referring to a block of time that we
20 estimated would be adequate for making a 401 decision.
21 Q. A block of time you estimated to whom?
22 A. Internally amongst ourselves.
23 Q. And was that estimate transmitted to someone
24 who was relying on it?
25 A. I believe that -- well, there was a lot of

1 interest in the status of the decision-making process
2 from the proponent and of course from the opponents,
3 and as part of my job in coordinating with the
4 technical people as I mentioned previously, I would ask
5 that estimates be made with regard to how long it would
6 take to review given documents and given their adequacy
7 to speculate around when we might be able to make a
8 decision, and the time frame that's being referred to
9 here or the time constraints relate to a time frame
10 produced by that process.
11 Q. Well, surely, Mr. Hellwig, you're not
12 testifying that the Airport Communities Coalition
13 placed a time constraint on ecology in which it wanted
14 a decision issued, are you?
15 A. No.
16 Q. And you understand, don't you, the definition
17 of the word "constraint," or should I bring in a
18 dictionary?
19 MS. MARCHIORO: Objection; argumentative.
20 A. I understand.
21 Q. (BY MR. EGLICK) Estimate is not a synonym for
22 constraint, is it?
23 A. Constraint doesn't necessarily imply an exact
24 date.
25 Q. I didn't ask you that. To your

1 understanding, is estimate a synonym for constraint?
2 A. Not to my understanding.
3 Q. So who's putting on the time constraint
4 referred to by Ann Kenny in this e-mail?
5 A. The agency imposed it upon itself to make a
6 decision.
7 Q. By when?
8 A. The block of time that we had in front of us
9 for making a decision moved several times, and so I'm
10 pausing because I'm trying to recollect what we'd
11 established for ourselves at this time. At one time it
12 was June. Then it was July, and now we're into August.
13 It would move as a function of us not getting what we
14 needed or having enough time to review what we had to
15 make a decision and be comfortable with it. So I'm not
16 recalling a deadline associated with this time
17 constraint right here.
18 Q. So Ann Kenny was working weekends and
19 referring to time constraints, but to your knowledge,
20 there really wasn't one?
21 A. We were attempting to make a decision in an
22 effective and efficient manner.
23 Q. Well, weren't you getting pressure from
24 higher-ups to get that certification out?
25 A. We had continuous pressure, and as you've

1 pointed it out me, I've indicated in previous documents
2 at times I thought it was substantial pressure to move
3 ahead with a decision, the pressure being interest from
4 the proponent and interest -- pressure came at us from
5 multiple directions.

6 Q. Let me go back and ask the question I asked
7 you before again to just make sure we're not getting
8 confused here. Are you testifying that there was
9 pressure from the Airport Communities Coalition to
10 issue the decision quickly?

11 A. No.

12 Q. And you're not testifying that there was
13 pressure from the Airport Communities Coalition to
14 issue a certification, are you?

15 A. No. Quite the contrary.

16 Q. So the pressure to issue a decision quickly
17 was coming from higher-ups in state government, wasn't
18 it? Wasn't it?

19 A. The interest in a quick decision had been
20 there for a matter of years on the part of the project
21 proponent.

22 Q. Please answer my question.

23 A. Please repeat the question.

24 Q. The pressure for a quick decision was coming
25 from higher-ups in state government, wasn't it?

1 A. No.

2 Q. No pressure from the governor's office?

3 A. Lots of interest from the governor's office
4 and on the part of agency management in the
5 decision-making process.

6 Q. Interest from the governor's office expressed
7 how?

8 A. Expressed in wanting to know what the status
9 of the decision was.

~~10 Q. And how did you hear that the governor's
11 office wanted to know what the status was?~~

~~12 A. Director Fitzsimmons in one instance would
13 have a conversation with the chief of staff --~~

~~14 Q. This Joe Dear person?~~

~~15 A. Paul Isaki.~~

~~16 Q. Joe Dear was gone by then?~~

~~17 A. Joe Dear was gone.~~

~~18 Q. Okay.~~

~~19 A. And I would provide updates or briefings.~~

~~20 Q. How many 401s have you worked on where Paul
21 Isaki is calling and asking when it's going to be out?~~

~~22 A. One.~~

~~23 Q. Sea-Tac, right?~~

~~24 A. Correct.~~

~~25 Q. Take a look if you would at page 10 of this~~

1 Exhibit 94. Look at the top of the page if you would.

2 A. Okay.

3 Q. Do you see where it says "basis"?

4 A. Yes.

5 Q. Now, that didn't show up -- that bold
6 paragraph of print basis there text didn't show up, did
7 it, in the August or September certifications, did it,
8 the ones that were actually issued?

9 A. I'm looking at that, and I don't see it.

10 Q. Now, could you read the first -- actually,
11 why don't you read the whole thing into the record,
12 that basis paragraph that's in Exhibit 94 which was the
13 draft that Ann Kenny circulated on July 29.

14 A. "Basis: The fill source sampling schedule is
15 as proposed by the Northwest Regional Office Water
16 Quality Program. The Toxics Cleanup Program has
17 provided guidance for the sampling of
18 petroleum-contaminated soil stockpiles (Publication
19 Number 91-30). The guidance recommended a much higher
20 sampling schedule than as proposed in the fill
21 criteria. For example, for a 200,000-cubic yard
22 stockpile, the Toxics Cleanup Program guidance
23 recommended a minimum number of 226 samples as compared
24 to six samples as proposed above. In the absence of
25 Ecology guidance for the sampling of borrow sites, the

1 fill source sampling schedule will be as proposed by
2 the Northwest Regional Office Water Quality Program."

3 Q. So can you explain as you're sitting here
4 today the rationale for going with the lesser number of
5 samples, six as opposed to the 226 recommended by the
6 toxics clean-up program?

7 A. The rationale is with the water quality
8 program and the 401 coordinator that I would rely upon.
9 I don't have rationale beyond that.

10 Q. Was cost a factor, cost for the port?

11 A. I'm pausing because cost had been brought up
12 as a factor by the port. I'm not recalling that it was
13 a factor in this decision.

14 Q. Wasn't there another draft of this decision
15 that actually called out that cost was a factor?

16 A. I'm not recalling it. There may be one.
17 (Deposition Exhibit No. 95 was marked for
18 identification.)

19 Q. (BY MR. EGLICK) Looking at what's been marked
20 as Exhibit 95 to your deposition. Can you identify it?
21 Can you identify it?

22 A. It's an e-mail from Tom Fitzsimmons to
23 myself, Sheryl Hutchison, our public information
24 manager in Lacey for the agency, and Dianne Pastore,
25 who is Tom Fitzsimmons' assistant, regarding Seattle

1 editorials by phone about the third runway decision and
2 Tom's schedule on August 9.

3 Q. So what's that all about?

4 A. It was in anticipation of -- let me look at
5 it briefly.

6 Q. Sure.

7 A. It had to do with the timing of announcing
8 our decision knowing that there was interest in the
9 media and by other parties that we wouldn't want to
10 announce a decision prior to making it.

11 Q. Well, this kind of sets some parameters,
12 doesn't it, in terms of what your time frame is for a
13 decision?

14 A. It does.

15 Q. What's an E-Board by the way?

16 A. Editorial board.

17 Q. So part of the decision making was then
18 immediately or part of the discussion about decision
19 making was immediately trying to explain it to people
20 who write editorials for newspapers?

21 A. We knew that we'd be contacted. Now that I'm
22 seeing this and I'm thinking about my earlier answers,
23 I am recalling that as we got to the end we did project
24 what week we thought we would be able to make a
25 decision.

1 Q. And what week was that?

2 A. It was the week of August 10 or August 9.

3 Q. So all of this scheduling was done around
4 that constraint?

5 A. When we got to within a couple of weeks of
6 early August, it became much clearer when we thought we
7 could get a decision out, so we committed to making a
8 decision and trying to do it, and now I'm recalling
9 that's probably why Ann was needing to work on the
10 weekend, although she did that on her own.

11 MS. MARCHIORO: Can we take a break?

12 MR. EGLICK: Sure.

13 (Recess taken.)

14 (Ms. Leavitt left the proceedings.)

15 Q. (BY MR. EGLICK) What's SMT mean, Mr. Hellwig?

16 A. Senior management team.

17 Q. And what does that refer to?

18 A. Well, senior management team consists of the
19 following executive managers: the director, the deputy
20 director, the regional directors, chief financial
21 officer, director of personnel, and the legislative
22 liaison or intergovernmental affairs director, and our
23 division chief for the AAG sits in. The director's
24 assistant and special assistant to the director will be
25 there off and on. At the time it was Joe Williams, I

1 believe. Keith Phillips, special assistant to director
2 on water resource issues, used to be program manager
3 for water resources program.

4 Q. Are there votes taken at senior management
5 team meetings? Is that how it works?

6 A. No.

7 Q. So it's just discussion?

8 A. We have discussion, try to reach consensus on
9 important issues.

10 Q. On the water rights issue -- do you know what
11 I'm referring to when I say the water rights issue?

12 A. Yes.

13 Q. What's your understanding of what I'm
14 referring to?

15 A. It's my understanding you're most likely
16 referring to the issue related to whether or not the
17 port should be required to obtain a water right for the
18 stormwater that it manages to protect water quality.

19 Q. And the management of the stormwater as you
20 put it includes relying on that stormwater for
21 mitigation in perpetuity for stream flows; is that
22 correct?

23 A. To rely on that stormwater to -- well, to
24 manage it, to protect against problems associated with
25 peak flows, and to then also use it to mimic the

1 natural hydrologic cycle in perpetuity.

2 Q. Did the senior management team discuss the
3 water right issue?

4 A. Yes.

5 Q. Was everyone at the senior management team
6 unanimously in agreement that no water rights should be
7 required to the port?

8 A. I don't recall touching base with every
9 member on the team with regard to whether or not they
10 agreed with the approach or the decision.

11 Q. Well, the decision was discussed, wasn't it?

12 A. Yes.

13 Q. At the senior management team meeting on
14 what, April 3, 2001?

15 A. I would have to check my calendar.

16 Q. Was it sometime in the spring of 2001?

17 A. I believe so.

18 Q. And you don't recall whether anyone at the
19 meeting said, no, they need a water right?

20 A. I touched base with a couple of the members
21 prior to the meeting and don't recall that, and then
22 during the meeting, our AAG support had provided
23 information that could be used to -- well, informa'
24 on both sides of the issue for us to consider.

25 Q. Who provided information on both sides of the

1 issue?

2 A. In consultation with program managers and
3 other program staff and with assistance from the
4 attorneys, we got help in understanding the issues on
5 both sides -- or the elements of the debate on each
6 side of the issue.

7 Q. And then who made the decision not to require
8 a water right?

9 A. Senior management team.

10 Q. Any particular way that that decision by the
11 senior management team was accomplished? Was there a
12 vote taken?

13 A. Well, it wasn't a vote, but we asked for --
14 essentially the question was posed and asked for
15 concurrence, and the heads nodded. Tom's head nodded,
16 which is the most important one in the room.

17 Q. Tom who?

18 A. Tom Fitzsimmons as the director.

19 Q. He was at the meeting?

20 A. He was at the meeting.

21 Q. Did he disclose that he'd had a conference
22 call on the water rights topic among other things with
23 Joan Marchioro and Jay Manning in the few days leading
24 up to the senior management team meeting?

25 A. I don't recall if he disclosed that or not.

1 Q. Do you know who Jay Manning is?

2 A. Yes.

3 Q. Who is he?

4 A. Well, he works for private practice now, but
5 he was division lead for the ecology division AAC's
6 supporting ecology for a few years.

7 Q. Lead meaning he supervised all the ecology
8 attorneys representing ecology in advising ecology?

9 A. Right. That's correct.

10 Q. And he was and is now, is he not, an attorney
11 for Port of Seattle?

12 A. I believe that he's wearing a lot of hats
13 right now. He supports the Washington Environmental
14 Council and I believe a private firm. He belongs to a
15 private firm and then also has provided support to the
16 Port of Seattle as well.

17 Q. So when you say he supports the Washington
18 Environmental Council, do you mean with regard to the
19 third runway application?

20 A. No. No. He's just a member of the council.

21 Q. So why are we having in a response to a
22 question about whether he represented the Port of
23 Seattle inclusion of a reference to the Washington
24 Environmental Council? Is there some connection in
your mind.

1 A. No.

2 Q. Did Mr. Manning's participation in the
3 Washington Environmental Council have any relevance in
4 your mind --

5 A. I think I was sorting it out in my mind to
6 answer the question.

7 Q. So who did he represent and who does he
8 represent, then?

9 A. The port.

10 Q. Now, you don't remember, then, the director
11 saying, well, I was on the phone with Jay Manning about
12 that when you were deciding this issue with the senior
13 management team, do you?

14 A. I'm not remembering that.

15 Q. Well, did you ever learn afterward that Jay
16 Manning had been on a conference call with Joan
17 Marchioro and the director?

18 A. I remember hearing references to such
19 conversation, but I'm not remembering it specifically.

20 (Deposition Exhibit No. 86 was marked for
21 identification.)

22 Q. (BY MR. EGLICK) Looking at what's been marked
23 Exhibit 96. Can you identify it?

24 A. This is an e-mail from Dianne Pastore to
25 myself and Curt Hart, who was my public information

1 manager in the region, with copies to Tom Fitzsimmons
2 and Sheryl Hutchison regarding briefing material for
3 the governor, and it's a request that briefing
4 materials being prepared for Tom's meeting with the
5 governor and Paul Isaki on the third runway be sent to
6 him close of business on Tuesday, August 7.

7 Q. So is this one of those constraints that Ann
8 Kenny was referring to?

9 A. Yeah. I think I mentioned earlier that once
10 the materials got in front of me I'd begin to recall
11 that we had -- as we got close to the beginning of
12 August that we set a goal for trying to make a decision
13 if all the pieces would fall together in the week of
14 the 10th.

15 Q. And when you say you set a goal, set a goal
16 and communicated it to whom?

17 A. To Ms. Kenny and any other staff who would
18 need to be assisting her with input for the 401.

19 Q. Was the as you put it goal communicated to
20 the port?

21 A. I believe that I had at least one
22 conversation with Elizabeth Leavitt a week to a week
23 and a half in advance of the week of the 10th telling
24 her that we might be able to make a decision that week.
25 I said we were trying to make a decision. I was less

1 definite externally than I was internally.

2 Q. What do you mean by less definite?

3 A. I was deliberately vague with the port to
4 help manage expectations around what we might or might
5 not be able to do.

6 Q. You never did get that complete low flow plan
7 you were waiting for by the time you issued the 401
8 certification in August, did you?

9 A. We had enough information to make a decision.

10 Q. Did you have a complete low flow plan?

11 A. We had a calculated impact and we had
12 conceptual plans, and so we had what we needed to be
13 able to make a decision.

14 Q. Is that what you had told the port originally
15 that you needed to have to make a decision?

16 A. I believe that we had been telling the port
17 for months that we would not make a decision on the 401
18 until we had confidence in a calculated impact to the
19 creeks that would need to be offset.

20 (Deposition Exhibit No. 97 was marked for
21 identification.)

22 Q. (BY MR. EGLICK) Showing you what has been
23 marked as Exhibit 97 to your deposition. Can you
24 identify it?

25 A. This is a draft memo to Tom Fitzsimmons, the

1 director, from myself, and it's a briefing decision for
2 Port of Seattle Sea-Tac International Airport third
3 runway proposals expanded version for Tuesday meeting,
4 so it's an expanded version of another document I'd
5 created for purposes of going over the decision that we
6 were headed towards with senior management team.

7 Q. Now, when you say that this is a draft, you
8 notice the logo on here says "Tom Fitz copy" or the
9 handwritten notation says "Tom Fitz copy." Do you see
10 that?

11 A. Yes.

12 Q. So I assume -- and perhaps you can tell me --
13 this means that this was the copy that was sent to
14 Mr. Fitzsimmons and then ultimately produced to ACC on
15 public disclosure?

16 A. Yes. That must be.

17 Q. Then while this is labeled draft, it was
18 actually transmitted from you to Mr. Fitzsimmons; is
19 that correct?

20 A. Yes. It would have been.

21 Q. And then is this a draft because it needed
22 Mr. Fitzsimmons' approval before it went in a package,
23 for example, to the governor?

24 A. It was draft because it needed to be looked
25 at to make sure it was accurate before being considered

1 final, and it was not the version intended to go to --
2 a draft of the version intended to go to the governor's
3 office.

4 Q. Were any changes made in this document after
5 it was sent to Mr. Fitzsimmons?

6 A. I don't recall that there were any changes
7 made; that it was adequate for its purpose to brief
8 senior management team.

9 Q. And as far as you know, what's in it is
10 accurate; is that correct?

11 A. As far as I can tell.

12 Q. Well, you wrote it, right?

13 A. Correct. I'm just -- in response to your
14 question was there a subsequent version, I'm not
15 recalling if there was or not.

16 Q. I mean, in this particular exhibit here, did
17 you put anything in it intentionally that was
18 inaccurate?

19 A. Of course not.

20 Q. So as far as you know, Exhibit 97 is accurate
21 as far as you know?

22 A. It was meant to be accurate, yes.

23 Q. Now, let's take a look at --

24 (Deposition Exhibit No. 98 was marked for
25 identification.)

1 Q. (BY MR. EGLICK) -- Exhibit 98 to your
2 deposition. Can you identify it?

3 A. This is a news release. It was a
4 confidential discussion draft press release in the
5 event the Department of Ecology renders an approval
6 decision for the Port of Seattle's 401 permit
7 application to construct a third runway at
8 Seattle-Tacoma International Airport.

9 Q. Now, I notice although Gordon White had the
10 honor of signing the certification, you got the quote.
11 Do you see that on the second page?

12 A. Yes.

13 Q. So how come?

14 A. In my role as regional director, I am a
15 spokesperson in the region for the director, a member
16 of the senior management team, and the assumption being
17 it's appropriate for a senior manager to speak on
18 behalf of an action taken by Department of Ecology.

19 Q. And Gordon White isn't a senior manager?

20 A. Gordon is part of the executive management
21 team. He's not part of the senior management team.
22 The senior management team is extended to constitute
23 the executive management team when we add to it the
24 program managers for all the operating programs.
25 That's called the executive management team.

1 Q. And you were more hands-on anyway, weren't
2 you, on the decision?

3 A. I was more hands-on in terms of driving the
4 process, yes.

5 Q. And you're quoted here as saying, "I am
6 confident that Ecology has reached a decision that is
7 scientifically sound, technically feasible and legally
8 defensible."

9 A. That's correct.

10 Q. And this was with regard to the August 10,
11 2001, certification; is that right?

12 A. Yes. Yes, it was.

13 Q. And is there anything inaccurate in that
14 quote?

15 A. No. The quote is good.

16 Q. So there's nothing inaccurate in it?

17 A. No.

18 Q. By the way, when the modified certification
19 was issued on September 21 -- do you recall?

20 A. Yes.

21 Q. -- did you issue a press release and have a
22 quote in that?

23 A. I believe that we drafted talking points that
24 included that quote, but I don't know that we did -- I
25 don't believe we did a press release, but the quote

1 stands.

2 Q. The quote about the August 10 decision?

3 A. And it's applicable also to the September 21
4 decision.

5 (Deposition Exhibit No. 99 was marked for
6 identification.)

7 Q. (BY MR. EGLICK) Showing you what has been
8 marked as Exhibit 99. Can you identify it?

9 A. It's a briefing document. If you can give me
10 a moment to look at it.

11 Q. Sure.

12 A. It looks to be documents and notes I put
13 together for purposes of -- just a minute.

14 Q. It's dated in the upper left August 16, 2001,
15 right?

16 A. That's correct.

17 Q. So that's six days after the date of the
18 certification that was issued in August, right?

19 A. Yes.

20 Q. So what's this all about?

21 A. I believe this was prepared for purposes of a
22 meeting that Tom Fitzsimmons and I had with port
23 officials and Paul Isaki in downtown Seattle.

~~24 Q. Now, what's Paul Isaki doing having a
25 meeting? He's got his own issues for the port, is~~

~~1 August 10, why are you having a meeting when he's
2 the guy from the governor's office, isn't he the chief
3 of staff?~~

~~4 A. Yes.~~

~~5 Q. So what's going on?~~

6 A. The port had some questions about -- the port
7 had questions relating to some of the terms and
8 conditions in the 401 and was asking for clarification.
9 Not knowing what all of the questions might be, I
10 believe this document is an attempt to anticipate some
11 of the concerns that might be discussed at the meeting.

12 Q. Let me ask you a question about this. You
13 have Elizabeth Leavitt's phone number, don't you?

14 A. I do.

15 Q. And I bet you're on her speed dial, don't you
16 think?

17 A. Probably.

18 Q. So why is it that or do you know why the
19 certification's issued on August 10 and you're finding
20 out through Paul Isaki, the governor's chief of staff,
21 that the port has questions about the certification?

22 A. No. I was aware that the port had some
23 questions prior to that.

24 Q. Now, how were you aware of that?

25 A. Tom Fitzsimmons and I had attended a port

1 commissioner meeting -- I believe it was a day or two
2 after the decision, but I would have to check -- to be
3 available to announce our decision to that body.

4 Q. Wasn't that on the 14th?

5 A. That may have been.

6 Q. Of August?

7 A. Yes. And at that meeting, following the
8 commissioner's meeting in a brief exchange with Gina
9 Marie Lindsey and Tom, I became more aware in general
10 terms of some concerns that the port had with terms and
11 conditions, not understanding them, needing clarity.

12 Q. What do you mean more aware? Were you aware
13 of it before?

14 A. I should say made aware of. I can't recall
15 if I had a conversation with Elizabeth prior to that
16 commissioner meeting or not. It's possible that I did
17 and she gave me a hint of some concern that they might
18 have and the need for some clarification.

19 Michael Cheyne was also at the commissioner
20 meeting with Gina Marie Lindsey and made a few
21 generalized statements about concerns they had that
22 they needed clarification around some of the terms and
23 conditions, so that was where my understanding that
24 there were concerns was clarified somewhat.

~~25 Q. So where does Paul Isaki fit in the picture,~~

~~1 then? If you had this exchange with the port staff at
 2 the port commission, how did it happen that Paul Isaki
 3 then is in the picture?~~

~~4 A. My understanding is that he would have
 5 received a call from Mic Dinsmore.~~

6 Q. Mic Dinsmore is the port executive director?

7 A. Port executive director.

8 Q. Meanwhile, had you told staff that -- port
 9 staff that you thought you'd done a fine job, the 401
 10 was clear, and DOE was not going to entertain changes
 11 or words to that effect?

12 A. Words to that effect. I believe that we felt
 13 comfortable that it was clear. At the same time, we
 14 understood that it was possible some of the language in
 15 the 401 could be modified to clarify intent without
 16 weakening it.

~~17 Q. So Exhibit 99 was prepared after this
 18 encounter at the port, after Mic Dinsmore called the
 19 governor's chief of staff Paul Isaki, and complained,
 20 and in anticipation of a meeting that was going to
 21 with the port. Is that the correct content?~~

~~22 A. Yes.~~

23 MR. REAVIS: Objection; lack of foundation.

24 Q. (BY MR. EGLICK) Then looking at Exhibit 99,
 25 there's some handwritten notes at the top, and I assume

1 those are your handwriting?

2 A. They are.

3 Q. And can you read those into the record if you
 4 would?

5 A. I'll try.

6 Q. By the way, I should clarify. Where it says
 7 -- I believe your copy says on it in the upper right
 8 "AEG copy." Do you see that?

9 A. Yes.

10 Q. That's Andrea Elizabeth Grad copy. That's a
 11 notation by Hellsell Fetterman paralegal. Just for the
 12 record so everyone knows that's not part of the
 13 document, is it?

14 A. The monitoring and reporting requirements in
 15 the 401 and additional planned information submittals
 16 increases the chance of success to the mitigation. If
 17 it fails, the conditions require more mitigation. It's
 18 what makes the 401 defensible.

19 Q. Let me ask you a question, and maybe I guess
 20 you're the best judge of your writing, but I see where
 21 it says the word "monitoring" and then it says "slash
 22 reporting." Do you see that?

23 A. Yes.

24 Q. And then there's a forward slash. Do you see
 25 that?

1 A. Yes.

2 Q. And then is that supposed to be a caret of
 3 some sort?

4 A. That's a greater than.

5 Q. And then it says "plans."

6 A. So more plans.

7 Q. And then what are the next letters? You said
 8 increase.

9 A. Ensure.

10 Q. So it's ensure; it's not increase?

11 A. It's ensure.

12 Q. "Success of mit," is that mitigation?

13 A. Mitigation. If it fails, conditions require
 14 more mitigation. It's what makes the 401 defensible.

15 Q. And on the right-hand side in the margin you
 16 have something that looks like FTES.

17 A. FTES, and that's related to --

18 Q. Full-time equivalents?

19 A. Full-time equivalents. The port agreed in
 20 concept before we even made a decision that if we ever
 21 got to the point of a decision that it would make
 22 resources available to ecology to help us oversee
 23 compliance with the terms and conditions of the 401.
 24 Otherwise for us to do so it created a capacity issue
 25 for us in the region.

1 Q. Now, looking at the typewritten -- well,
 2 actually, on the bottom right, does that say back thru?

3 A. "Break thru."

4 Q. What does that mean?

5 A. I would need to read this document, and even
 6 then I still might not remember the context, but let me
 7 see. I can't recall.

8 Q. Now, look at the top portion of the document,
 9 then. Overriding messages, that was the message you
 10 were going to give to the port in the meeting; is that
 11 right?

12 A. These are overriding messages that I talked
 13 with -- I was getting ready -- I was supposed to be --
 14 I was packing my car going on vacation that day. Tom
 15 picked me up at the house. This is a document I used
 16 to brief him on the way up to Seattle.

17 Q. So this is what you're telling Tom, ecology
 18 is overriding messages?

19 A. It was my perspective of what would be some
 20 good overriding messages.

21 Q. For ecology?

22 A. For ecology.

23 Q. Now, the first bullet here is, quote, we
 24 believe the 401 is clear, end quote; is that right?

25 A. That's right.

1 Q. Then you say, quote, the port should not be
2 surprised by the conditions?

3 A. Yes. By the conditions. Would you like me
4 to read it?

5 Q. Well, I just want to make sure I'm
6 understanding this. You're talking about the
7 conditions in the 401, right?

8 A. That's right.

9 Q. In the August 10 401?

10 A. That's right.

11 Q. You're saying the certification's clear, the
12 conditions shouldn't be a surprise. Then you say in
13 the second bullet, "Essentially the Port got what it
14 wanted given the time constraints"; is that right?

15 A. That's what it says.

16 Q. Now, are you talking about the time
17 constraints we established before? You didn't have to
18 issue that certification until December 2001, did you?

19 A. That's correct.

20 Q. So what time constraint are we talking about
21 again there? If it's a self-imposed time constraint by
22 ecology, why would you be saying in here essentially
23 the port got what it wanted given the time constraints
24 if ecology didn't impose the time constraints?

25 A. We imposed the constraints on ourselves.

1 Q. So why is that the port's fault?

2 A. It's no secret the port was interested in a
3 decision sooner rather than later.

4 Q. So you're talking about time constraints that
5 the port through one means or another was able to
6 impose on the decision?

7 A. No. I wouldn't conclude that. I would
8 conclude that given the amount of time we've had the
9 runway in front of us, the amount of information we had
10 in front of us, we set a very aggressive goal to make a
11 decision. Yes, there was pressure out there. Yes,
12 there was interest. But the actual time frame was
13 self-imposed.

14 Q. And it was self-imposed in light of the
15 pressure coming from the port, right?

16 A. In light of our need to move that decision,
17 in light of our need to get on to other work, in light
18 of all of the circumstances around us.

19 Q. In light of the pressure coming from the
20 port, correct?

21 A. Pressure from the port was one variable.

22 Q. And, in fact, the time constraint wouldn't
23 have been set for August were it not for pressure from
24 the port and from the port through the governor's
25 office and so on down the chain, correct?

1 A. I won't agree with that.

2 Q. Well, would you disagree with it?

3 A. As I just said, it was one of the variables.

4 Q. What's "it"?

5 A. Pressure from the port, interest on the part
6 of the port in the decision sooner rather than later
7 was one of the variables affecting the self-imposed
8 time constraints.

9 Q. So the second sentence of this bulleted item
10 says, "Now it wants us to build back in more certainty
11 after the fact." You're saying here, well, we could
12 have done better if the port had given us more time,
13 aren't you?

14 A. This is an informal briefing document, and
15 I'm pausing because I'm wanting to remember the context
16 around this and the intent. The port was asking for
17 clarity, clarity that would give it more certainty with
18 regard to what the terms and conditions require, and I
19 think the context here is that if we had taken more
20 time to make the decision, perhaps the language would
21 have been clearer.

22 Q. And more to the port's satisfaction?

23 A. Well, if the port understood it, I suppose it
24 would have been more satisfied.

25 Q. But you didn't agree that it was unclear to

1 begin with, did you?

2 A. We thought it was clear, but once the -- when
3 the questions were posed by the port, we understood
4 after we heard the questions that it might be
5 appropriate to do some clarifying of the language to
6 give them certainty with respect to what the terms and
7 conditions meant.

8 Q. Is there anything in the August 10 401 that
9 you think now is unclear?

10 A. We understood the intent. Ecology
11 understood. It was clear from ecology's perspective
12 what the 401 meant. I think it's understandable and
13 reasonable for the port to have questions about the
14 language, which they did, and so we agreed it was
15 appropriate to clarify some language.

16 Q. Is there anything in the August 401 that you
17 think even now is unclear?

18 A. I can't answer that now. I'd have to go back
19 and read the entire document.

20 Q. You're not familiar enough with the August 10
21 401 to know whether you think there's something unclear
22 in it?

23 A. I don't have the August 10 401 memorized. I
24 would need to go back and look at it.

25 Q. Can you think of anything off the --

1 A. At the time, I recall thinking it was clear.
 2 Q. Going on in this Exhibit 99 --
 3 A. Excuse me. Can we pause and I can make a
 4 phone call? Then I'm more than happy to continue.
 5 Q. Absolutely.
 6 (Recess taken.)
 7 (Deposition Exhibit No. 100 was marked for
 8 identification.)
 9 Q. (BY MR. EGLICK) Could you take a look at
 10 Exhibit 100? It's actually an e-mail string, but what
 11 I'm particularly interested in your looking at is the
 12 part of the string that relates to e-mail from Chung
 13 Yee to Craig Thompson cc Kevin Fitzpatrick, which
 14 starts on the bottom of the first page of Exhibit 100.
 15 Do you see that?
 16 A. Yes.
 17 Q. If you could take a look at the first and
 18 second page, that would be helpful.
 19 A. Okay.
 20 (Mr. Witek returned.)
 21 A. I've reviewed those first two pages.
 22 Q. Now, what I wanted you to focus on in
 23 particular is the Chung Yee e-mail as I said June 26 to
 24 Craig Thompson and Kevin Fitzpatrick. Now, who was
 25 Chung Yee on June 26, 2001?

1 A. Chung Yee at that time I believe was down
 2 working for the toxics clean-up program in Lacey.
 3 Q. And now he works where?
 4 A. I believe he's still there.
 5 Q. Who is Craig Thompson?
 6 A. I'm not remembering who Craig is.
 7 Q. Do you know who Kevin Fitzpatrick is?
 8 A. Yes. He's the section manager for the water
 9 quality program in the Bellevue office.
 10 Q. Now, I want you to look over on the second
 11 page of this Exhibit 100, and you'll agree with me that
 12 Chung Yee is talking about what the NWRO/WQP has
 13 proposed for a soil sampling schedule for petroleum?
 14 Do you see that?
 15 A. Which paragraph is that?
 16 Q. That's the second to the last paragraph on
 17 the second page of Exhibit 100.
 18 A. Okay. Yes.
 19 Q. And what's the NWRO/WQP?
 20 A. Northwest regional office water quality
 21 program.
 22 Q. So who is that? Is that Kevin Fitzpatrick?
 23 A. Yes.
 24 Q. Now, a soil sampling schedule proposed by the
 25 NWRO/WQP we already talked about, isn't it? It's the

1 one that says six samples, right?
 2 A. Yes.
 3 Q. As opposed to what was the recommendation
 4 otherwise made by the toxics program? Do you recall
 5 how many samples?
 6 A. 226.
 7 Q. Or was it 236?
 8 A. It says 226 on this document.
 9 Q. I'll accept that. So could you read the
 10 sentence where -- would you agree Chung Yee is
 11 explaining here why he went with NWRO/WQP's
 12 recommendation rather than the TCP guidance?
 13 A. I did not change the -- I'm reading from that
 14 document. I did not change the soil sampling schedule
 15 as proposed by the Northwest Regional Office Water
 16 Quality Program since I consider the toxic clean-up
 17 program's guidance for a petroleum-contaminated soil
 18 may not be applicable to this project. Cost issue.
 19 Q. He puts in parentheses cost issue, right?
 20 A. Yes.
 21 Q. Now, was this -- if you recall, I asked you
 22 before about this cost issue. This was a factor,
 23 wasn't it, that was discussed by the NWRO/WQP that it
 24 didn't want to require the sampling that the TCP
 25 guidance called for because it would be too expensive

1 for the port?
 2 A. The water quality program wouldn't have
 3 agreed to concur that we could have reasonable
 4 assurance that water quality would be protected if it
 5 thought that this wasn't appropriate.
 6 Q. Well, I appreciate that, but I'm going to ask
 7 you, Mr. Hellwig, especially now that we're after five,
 8 if you could answer my question, so I'll have the
 9 reporter read it back.
 10 (The reporter read back as requested.)
 11 A. I'm trying to answer your question. We have
 12 a goal to be reasonable in our decision making, but I
 13 don't think that this cost issue was a basis for this
 14 what was driving our need to be reasonable and
 15 appropriate and at the same time make a defensible
 16 decision.
 17 Q. (BY MR. EGLICK) So Chung Yee must have
 18 misunderstood something that the NWRO/WQP had indicated
 19 about whether the TCP guidance was applicable?
 20 A. I'm not sure I understand. I mean, there's a
 21 cost issue. There can be a cost issue, but the cost
 22 issue doesn't necessarily drive or formulate the basis
 23 of a decision.
 24 Q. Well, can you show me anywhere where an issu
 25 other than cost is identified as the basis for going

1 with the substantially, I think you would agree, less
 2 samples than the 226 that the TCP guidance called for?
 3 A. I'm recalling two cost issues. One was a
 4 cost issue to the port. One is the cost issue to
 5 ecology to review samples or to look at them or to do
 6 the work that we have to do associated with that.
 7 Q. So you're saying there were two cost issues?
 8 A. I'm recalling two cost issues as we continue
 9 this question-and-answer discussion. I'm not sure now
 10 that we've continued to talk about it if this cost
 11 issue is relating to what might have been a cost issue
 12 for the port or a cost issue that he heard about with
 13 respect to ecology not having the capacity to screen or
 14 review samples.
 15 Q. Either way, with regard to the cost issue or
 16 issues, the result was that the TCP guidance was not
 17 adopted and instead, as I said I think you would agree,
 18 substantially fewer, six as opposed to 226, samples was
 19 required; is that correct?
 20 A. Yes. That's substantially fewer samples.
 21 Q. Just to make sure, because I asked this and
 22 I'm not sure you addressed it directly, could you point
 23 to any other basis on which -- other than one cost
 24 issue or another on which it was decided to go with six
 25 samples rather than 226 samples?

1 A. No.
 2 Q. Now, if we could go back to Exhibit 99, and
 3 that was the overriding message exhibit.
 4 A. Yes. I have it.
 5 Q. And look at the second page if you would,
 6 which is, I think, going to be very challenging. It's
 7 your handwriting, isn't it?
 8 A. Yes, it is.
 9 Q. And you've got a date on the upper left of
 10 August 17, 2001.
 11 A. That's correct.
 12 Q. And on this exhibit, you seem to have been
 13 taking notes, and were these notes taken at this
 14 meeting with the port and Paul Isaki? I could be
 15 wrong. I'm just asking.
 16 A. May I have a moment?
 17 Q. Sure. Absolutely.
 18 A. Yes.
 19 ~~Q. Just because we kind of interrupted to finish~~
 20 ~~off that other exhibit, where did that meeting take~~
 21 ~~place on August 17, 2001?~~
 22 A. I'm not remembering the name of the building.
 23 It was in downtown Seattle.
 24 Q. Was it in a port office?
 25 A. No. I'm just not remembering.

~~1 Q. It was in a port office, though?~~
~~2 A. Yes.~~
 3 Q. And attendees were yourself, Tom Fitzsimmons,
 4 Paul Isaki, and anyone else?
 5 A. Mic Dinsmore and Gina Marie Lindsey.
 6 Q. And we've already identified who they are.
 7 They're folks from the port.
 8 Now, these are then -- these handwritten
 9 notations then were taken contemporaneous with that
 10 meeting?
 11 A. Yes.
 12 Q. And how long did that meeting last
 13 approximately?
 14 A. Half hour to 45 minutes.
 15 Q. And was there a copy or copies of the August
 16 certification there at the meeting?
 17 A. I believe so.
 18 Q. And did Mr. Isaki participate actively in the
 19 meeting?
 20 A. No.
 21 Q. What did he do?
 22 A. He mostly just listened, observed, and made a
 23 couple of comments in the end.
 24 Q. And what were the comments he made in the
 25 end?

1 A. I believe the comments in the end related to
 2 it sounds like you're talking to each other and you
 3 know where you can -- I don't remember the exact words.
 4 Something to the effect it looks like you're working
 5 together on this.
 6 Q. Working together on this?
 7 A. On the issues that the port was presenting.
 8 Q. So I take it, then, that by the time the
 9 meeting was over and Mr. Isaki made those comments the
 10 typewritten notes of August 16 were at least in part
 11 inoperative because you were working together with the
 12 port on making changes to the August certification; is
 13 that correct?
 14 A. The purpose of the meeting was to identify
 15 areas of concern where the port needed clarity, and I
 16 believe it also involved a little bit of discussion
 17 about our working relationship. In the end, I don't
 18 recall any specific direction from Paul Isaki.
 19 What I recall is agreement with Fitzsimmons
 20 -- between Fitzsimmons, myself, and Gina Marie Lindsey
 21 and Mic Dinsmore to having respective internal meetings
 22 and then talk about the need to get together and
 23 identify ways to add clarity to the language in the
 24 401.
 25 Q. Looking at the previous page, typewritten

1 page. Do you see the bulleted point that says, "But -
2 first we should ask the port to put into writing what
3 is unclear"?

4 A. Yes.

5 Q. Did you ever get that?

6 A. What we decided was that we would have a
7 conference call, and from that call we would document
8 the concerns that way.

9 Q. So you didn't ever get the first put it in
10 writing that you have put in your August 16 note?

11 A. I don't recall that we did that. I'm not
12 remembering the exact reason why we changed our
13 approach.

14 Q. And looking at the bottom of this page, you
15 say "Special Note," quote, we are now in a
16 prelitigation or litigation prep mode and should not
17 release information pursuant to the PDA until we get
18 clarification from the AAGs, end quote. That's the
19 assistant attorney generals?

20 A. That's correct.

21 Q. So you had these notes about a meeting with
22 the port where the port was asking for changes in the
23 401 that had just been issued and you were saying we're
24 not going to release these notes pursuant to any public
25 disclosure request; is that right?

1 A. It would be -- documents I would be referring
2 to would be briefing documents that I prepared for Tom
3 and I, not notes taken at a meeting with the port,
4 although -- and the attorneys would remind us regular.
5 what should and should not be held for any particular
6 reason.

7 Q. Well, your note at the bottom of this Exhibit
8 99 first page says we should not release information.
9 It doesn't discriminate.

10 A. That's correct. I'm trying to think back to
11 that time. I had questions -- I needed clarity, and so
12 I would need -- that's just indicating that I would
13 need to continue to touch base with our attorneys with
14 respect to what should be disclosed pursuant to the
15 PDA.

16 (Deposition Exhibit No. 101 was marked for
17 identification.)

18 ~~Q. (BY MR. EGLICK) Showing you what has been
19 marked as Exhibit 101 to your deposition. Can you
20 identify it?~~

21 ~~A. It's an e-mail from myself to Tom Fitzsimmons
22 dated August 16. It says, Attached are some ideas from
23 conversations I had with you, Paul Isaki, and Joan
24 Marchioro. "Please see special note regarding public
25 disclosure. See you at 1:15."~~

~~1 Q. So you're attaching your August 16 memo,
2 which has these statements and information in it about
3 the port's complaints and what ecology's responses and
4 message should be, and you're telling the director of
5 the Department of Ecology to take a look at that
6 special note at the bottom of the page about not
7 releasing this information to the public; is that
8 right?~~

~~9 A. Yes.~~

~~10 Q. Now, did you ever issue a press release
11 saying -- responding to the port's complaints and
12 saying we're really disappointed in the port for
13 putting us through all this and then immediately asking
14 us to do it over?~~

~~15 A. No. Not that I recall.~~

~~16 Q. So when someone complains about a decision
17 you've issued, that's not a topic for a press release,
18 is it?~~

~~19 A. Not typically.~~

~~20 (Deposition Exhibit No. 102 was marked for
21 identification.)~~

~~22 Q. (BY MR. EGLICK) Take a look at Exhibit 102
23 and identify it.~~

~~24 A. That's a document produced by Curt Hart, who
25 was at the time the public information manager for me~~

~~1 at northwest regional office, to myself, Ann Kenny,
2 Joan Marchioro, and Gordon White, draft talking points
3 third runway permit appeal and attachments, and here it
4 is.~~

~~5 Q. Now, what's the date on this?~~

~~6 A. August 27.~~

~~7 Q. Now, your meeting with the port was August
8 17?~~

~~9 A. I believe so.~~

~~10 Q. So we're at August 27. We got draft talking
11 points from Curt Hart, and did you have any problem
12 with any of these talking points, any corrections,
13 changes?~~

~~14 A. May I have a moment?~~

~~15 Q. Sure.~~

~~16 A. Looking it over briefly, I don't catch any
17 concern off the top of my head. This is not a press
18 release, of course. This is internal talking points.~~

~~19 Q. Talking points that were prepared by the
20 public information officer so when the press calls this
21 is what you're supposed to talk off of, right?~~

~~22 A. Yes.~~

~~23 Q. It's what's called in the PR business
24 staying, quote, on message, quote?~~

~~25 A. Yes.~~

1 Q. Now, looking at the third paragraph down, it
 2 says, quote, we are disappointed by the Coalition's
 3 action. That's a reference to ACC, my client, isn't
 4 it?
 5 A. Yes.
 6 Q. Quote, because we are confident our permit is
 7 scientifically sound, technically feasible and legally
 8 defensible, and quote.
 9 A. Right.
 10 Q. So there you are. It's August 27 and ecology
 11 still feels that way; is that right?
 12 A. Yes.
 13 Q. Now, how many days was it after that that you
 14 agreed with the port to rescind and issue a new
 15 modified 401?
 16 A. Well, that was in September.
 17 Q. Is there anything in these talking points
 18 that refers to the fact that you're negotiating with
 19 the port on changes to the 401 certification issued in
 20 August?
 21 A. I'm not detecting them right away.
 22 Q. Do you need more time or are you pretty
 23 certain of that?
 24 A. I'm pretty certain of that.
 25 Q. Let's look back on Exhibit 69, the

1 handwritten page which is the second page of Exhibit
 2 69.
 3 A. Okay.
 4 Q. These are your notes once again of the
 5 meeting that took place and you said you in an office
 6 building but you don't know which one?
 7 A. I don't recall --
 8 Q. And you don't know whose office it was?
 9 A. It was -- it's slipping my mind. It's a
 10 club. It wasn't in the port offices. It wasn't law
 11 offices.
 12 Q. Rainier Club?
 13 A. No. Not the Rainier Club.
 14 Q. College Club?
 15 A. No. It might have been that one. I'm just
 16 not remembering the name of the building, but it was
 17 downtown.
 18 Q. Harvard Club?
 19 A. That was it.
 20 Q. How appropriate. It's the port, right?
 21 A. There you go.
 22 Q. So you were in a meeting at the Harvard Club
 23 I guess in a meeting room or you were having lunch
 24 there?
 25 A. Meeting room. There was coffee.

1 Q. And you're going over this list, and the port
 2 is telling you what's wrong with the 401; is that
 3 right?
 4 A. They were going over the concerns that they
 5 had.
 6 Q. Why don't you just run through these notes
 7 quickly if you could so the reporter can get them down,
 8 or if you want, I'll run through them and you can tell
 9 me if I've got it wrong, but I don't know which is
 10 faster. It's up to you.
 11 A. I can go through them. I'm not sure how much
 12 sense they're going to make at this stage of the game.
 13 The first point I have here, I have a little star at
 14 the top of it where I have underlined clarity and that
 15 would be reasonableness is our intent. There's an
 16 arrow drawn toward intent.
 17 There's notes up there about depositions. I
 18 suppose that would be in reference to future
 19 depositions. FTEs, help. Ecology would be looking for
 20 resources from the port to help -- that we would manage
 21 to help us oversee compliance. Reference to appeal,
 22 rescind --
 23 Q. Now, who is going to appeal?
 24 A. The port.
 25 Q. And who is going to rescind?

1 A. Possibly ecology.
 2 Q. Well, nobody else could rescind --
 3 A. Right. It's there as an option, as an
 4 alternative.
 5 Q. Let me ask you a question, because it just
 6 caught my eye here. Do I see my client referred to
 7 kind of to the left of the words appeal and rescind?
 8 A. Yes.
 9 Q. What does that say?
 10 A. It says increased exposure with ACC et al.
 11 Q. What does that mean?
 12 A. Let me start at the top here with these
 13 little bullets in my notes. Categories of concern,
 14 ambiguities. That was in reference to identifying
 15 them. Approval required 401 shoreline permits. I'm
 16 not recalling specifically what that was in reference
 17 to.
 18 Time frame, just a discussion about the
 19 appeal period with respect to whether or not there
 20 needed to be an appeal or what the appeal time frame
 21 was, I expect. Next bullet has to do with retrofitting
 22 two for one. What was the intent? Was ecology --
 23 there was a need for clarification from ecology
 24 regarding retrofitting requirements.
 25 Q. According to the port; is that correct?

1 A. According to the port. And I think that's
 2 one of the areas where we looked at the 401 and we
 3 thought there was room for some clarification if I
 4 recall. Then increased exposure with ACC et al. I
 5 think that we were cognizant that meeting with the port
 6 and discussing possible clarifying language to the
 7 initial 401 would not be viewed in a positive manner by
 8 opponent groups.
 9 Q. That's what you meant by increased exposure,
 10 or was it legal exposure?
 11 A. I don't believe it was legal exposure. I
 12 think it was increased exposure, just us meeting with
 13 the port, discussing the issues exposed us to criticism
 14 by ACC and others.
 15 Q. Because the 401 certification had already
 16 been issued?
 17 A. Because we'd issued it and there would be a
 18 perception possibly that ecology would consider
 19 weakening the 401, which we would not and did not do.
 20 Q. Now, looking down below here, I'm going to
 21 skip some of these things. I've got a question here.
 22 You have a circled item in the middle of the page
 23 almost, and if I'm reading it correctly, does it say
 24 retrofit schedule behind already?
 25 A. Yes.

1 Q. Now, that is a reference to the port schedule
 2 for retrofitting that was part of one of the conditions
 3 in the certification, wasn't it?
 4 A. There's reference to a retrofit schedule and
 5 a percentage of retrofitting that would occur as the
 6 project was built and some concern that the way the
 7 condition was written if I recall -- and I could be
 8 wrong here -- that the port was already behind schedule
 9 and how -- the question was how is that reasonable?
 10 Q. So, in other words, the port's point was if
 11 we're already behind schedule in retrofit, then it's
 12 not reasonable to impose that schedule in the 401?
 13 A. I believe their contention was that the
 14 condition might not even be logical given the
 15 requirement, but I'm not recalling the specifics.
 16 Q. So, in other words, the schedule bends to the
 17 port rather than the port to the schedule?
 18 A. I'm not sure.
 19 Q. Well, if the schedule is appropriate and the
 20 port is behind, what should bend?
 21 A. I'm not sure I was clear with my earlier
 22 statements, and I'm not sure I understand your
 23 question.
 24 Q. Well, then let me ask another one rather than
 25 you trying to answer one you don't understand. The

1 port expressed concern that it was already behind on
 2 its retrofit schedule; is that correct?
 3 A. Its interpretation of the retrofit schedule
 4 with regard to a certain percent of the existing
 5 facility would need to be retrofitted in conjunction
 6 with a certain build-out of the new project that my
 7 recollection is the way it was drafted they were
 8 already behind retrofitting.
 9 Q. So if they would have had to comply with that
 10 schedule, it would have delayed their build-out; is
 11 that correct?
 12 A. Possibly, but I might not have that right.
 13 Q. And the retrofit was required for reasons of
 14 water quality, was it not?
 15 A. Yes.
 16 Q. And the retrofit condition and schedule in
 17 the August 401 certification had been reviewed by
 18 everyone who reviewed the certification, and to your
 19 knowledge, isn't it true, no one within ecology raised
 20 any objection to it, correct?
 21 A. I believe it was discussed, and I'm not
 22 recalling if there was an objection or not. I don't
 23 believe there was.
 24 Q. There's a reference here -- do you see just
 25 below the one about the retrofit schedule there's a

1 reference to fill criteria? Do you see that?
 2 A. So you're looking at the fill criteria note?
 3 Q. It says fill criteria --
 4 A. It says beyond -- what we're requiring out of
 5 the port is already beyond what Fish and Wildlife and
 6 its services would require, and it was a discussion
 7 relating to the federal regulations saying that toxic
 8 fill can't be brought in in toxic amounts but there's
 9 no federal guidance and that what ecology was requiring
 10 for this project was already way far beyond what we
 11 were requiring in terms of any significant project in
 12 terms of fill.
 13 Q. Wasn't the issue for the fill not just the
 14 rubric of toxic fill and toxic amounts but also having
 15 procedures and criteria in place to ensure that water
 16 quality standards, including the anti-degradation
 17 standard, is not violated?
 18 A. I believe that's correct.
 19 Q. So, in other words, it wouldn't necessarily
 20 have to be toxic amounts for there to be a problem if
 21 fill was if you will dirty enough to create or violate
 22 the anti-degradation standards; isn't that correct?
 23 A. We had reasonable assurance that would not
 24 happen.
 25 Q. Well, I'm not asking you that. I'm asking

1 you whether the anti-degradation standard is a
2 requirement that has to be met regardless of whether
3 these are toxic amounts.

4 A. That's my understanding, but I would consult
5 with our water quality people as needed.

6 Q. By the way, are you aware that ecology in
7 some pleadings has apparently adopted the position that
8 there are now no restrictions on importation of fill to
9 the third runway or airport site?

10 A. I'm not aware of that.

11 Q. Do you agree or disagree that there are now
12 restrictions criteria that apply to the importation of
13 fill to the airport site?

14 A. My understanding is that -- let me pause
15 here. My understanding is that there are some concerns
16 related to how the effect of legal proceeding -- that
17 the effect of the legal proceedings on the 401 might be
18 to lower some protections. Now, if that pertains to
19 fill criteria, then that would be a concern, but I
20 would need to talk to staff and to our attorneys about
21 the effect of the stay on the terms of the 401 and what
22 is or is not in effect subsequent to any effect of the
23 stay on the 401.

24 Q. Well, what was -- I'm sorry. Did you want to
25 say more?

1 A. No. That's it.

2 Q. What was in effect prior to issuance of the
3 401?

4 A. We had a clean fill criteria agreement with
5 the port going back several years that my recollection
6 is was negotiated or developed and imposed by the
7 clean-up program on the port.

8 Q. And do you have any information that that
9 agreement is now not in effect?

10 A. I'm not aware of the status of the agreement
11 right now.

12 Q. Do you have any information that the
13 agreement is not in effect?

14 A. No.

15 Q. So as far as you know, what was in effect for
16 the whole period of time before there was a 401 in
17 terms of fill criteria is still in effect as far as you
18 know?

19 A. I don't know.

20 Q. Anyone given you notice in your capacity as
21 management lead in all those other things that you
22 described for the airport project that it's not in
23 effect anymore?

24 A. No.

25 Q. That's something as director of the northwest

1 regional office you would expect to know, wouldn't you?

2 A. I don't need to be aware of every single
3 detail recommended to every single project that's being
4 implemented in the northwest region.

5 Q. Do you consider it to be a mere detail
6 whether there are fill criteria in effect for the
7 importation of millions of cubic yards of fill to the
8 airport site, Mr. Hellwig?

9 A. I didn't say that.

10 Q. Well, is that what you are communicating that
11 it's a detail?

12 A. I would want to stay informed.

13 Q. And you would expect that your staff would
14 inform you, wouldn't you?

15 A. Yes. For that particular situation, yes.

16 Q. And as director of the northwest regional
17 office of the Department of Ecology, would you sit
18 still for the port importing quantities of fill to the
19 airport site without fill criteria?

20 A. No.

21 (Deposition Exhibit No. 103 was marked for
22 identification.)

23 Q. (BY MR. EGLICK) Looking at what's been marked
24 as Exhibit 103 to your deposition. Can you identify
25 it, please?

1 A. Let's see. This is a copy of a message to me
2 from Joan Marchioro on August 28 regarding a letter
3 from the board setting a hearing for March 18 through
4 29, 2002, for the ACC's appeal.

5 Q. And what's attached?

6 A. It's a document, my notes, with a title of
7 Questions/Ideas.

8 Q. And what's it dated?

9 A. It was dated August 27, '01.

10 Q. So by then, are you in the middle of
11 negotiations with the port about changes to the August
12 10 401?

13 A. I'm not recalling when we had our meetings
14 with the port where we had our conference call and
15 worked through the concerns that we were hearing from
16 them, so I'm not sure exactly where this is in relation
17 to that. I believe that this is most likely -- let me
18 look at it for a minute. This was most likely in
19 preparation for a part of that process, those meetings
20 and that process. This looks like a summary of
21 concerns that I expected we would be discussing.

22 Q. So one was Port of Seattle business-related
23 concerns-costs. Do you see that?

24 A. Yes.

25 Q. And then you have written on the side

1 apparently in response to that concern, quote, too bad,
2 quote.

3 A. Too bad. Not an issue for us. We want a
4 defensible decision. If it's going to cost them, it's
5 going to cost them.

6 Q. So this was an argument against changing the
7 401 that had been issued on August 10; is that right?

8 A. It was an argument to not weaken the 401.

9 Q. So these things with the arrows on the left
10 of them are all arguments -- points the port was making
11 and then your response on why the 401 should not be
12 altered; is that right?

13 A. I believe these were notes to myself in
14 preparation for meetings and things I wanted to be
15 prepared to discuss that I may or may not have gone
16 over with other staff on prior to conference calls or
17 meetings with the port and a list of things I expected
18 we'd be discussing.

19 Q. Could you look down at the arrow that then is
20 followed by the letters? Is that AFC?

21 A. That's acceptable fill criteria.

22 Q. And then you have "does"?

23 A. Yes.

24 Q. And then it says, quote, applies to all MPU
25 projects.

1 A. This is where I'm indicating that this will
2 be something that we discuss, a question I needed to
3 ask that I expected the port would want us to discuss
4 Does the acceptable fill criteria apply to all MPU
5 projects? Is there a cumulative effect concern?

6 Q. Now, I don't see the words is there a
7 cumulative effect concern? I just see the words
8 cumulative effect concern. So are you adding the "is
9 there" in reading the notes?

10 A. I added the "is."

11 Q. When you wrote these notes on August 27, what
12 was your understanding as to whether the fill criteria
13 applied to all MPU projects?

14 A. I believe that I didn't have a clear
15 understanding of the applicability of that acceptable
16 fill criteria, and that's one of the reasons it's on
17 here.

18 Q. So you didn't know whether the fill criteria
19 applied to all MPU projects?

20 A. I believe that my general understanding was
21 that it did.

22 Q. And isn't that because the August 401 said
23 that it applied to all MPU projects, didn't it?

24 A. I believe that it did.

25 Q. And that's one of the things that was

1 changed, wasn't it, in the September 21, 2001, modified
2 certification?

3 A. Yes.

4 Q. And what's the difference?

5 A. My recollection is that we agreed it was
6 reasonable given the circumstances for some of the
7 projects to not require the application of the criteria
8 and that in so doing we still would have reasonable
9 assurance that water quality would be protected given
10 the circumstances or nature of those projects.

11 Q. And what I'd like you to do is take a moment,
12 look at the August certification, the September
13 certification, and show me where if I am the Pollution
14 Control Hearing Board and I'm trying to figure out
15 whether you had reasonable assurance and so on where I
16 could go look in the September certification, for
17 example, to know which MPU projects are in and which
18 are out with regard to the fill criteria.

19 A. Well, now, that might take some time. If you
20 know where you think that is --

21 Q. I can't find any clear answer to that,
22 Mr. Hellwig, now that you've asked me, but I'm hoping
23 you'll educate me.

24 A. I believe I would need some time to look at
25 the documents. Do you want to do that now?

1 Q. It depends how familiar you are with them.

2 A. I think if we look at section E. I believe
3 it's section E, so that starts on page 14, conditions
4 for acceptance of fill to be used in construction of
5 the third runway. Now let me get to that section in
6 each document. The first paragraph refers to -- reads,
7 The use of imported fill for projects for which the
8 section 404 permit was sought; e.g. or example, third
9 runway, runway safety areas, south aviation support
10 area, and other appropriate master plan improvements as
11 determined by ecology --

12 Q. Now, stop right there if you would, please.
13 Now, what page are we on?

14 A. We're on page 14 at the bottom.

15 Q. Of which certification?

16 A. The September certification.

17 Q. That's what I needed. So the answer is,
18 then, these listed projects -- and there's the third
19 runway, the RSAs, the SASAs, and then it says and other
20 appropriate master plan update improvements as
21 determined by ecology, port 404 projects may result in
22 impacts to wetlands or other waters of the state, end
23 quote. That's what you're relying on; is that right?

24 A. Yes.

25 Q. Now, when did ecology make the determination

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1 as to what those other appropriate projects that come
2 under the fill criteria were?

3 A. My understanding was we were going to receive
4 or would be receiving a list of projects from the port
5 and that we would be making a determination with
6 respect to that question once we had the list. I'm not
7 sure what the status of the situation is with the list
8 and determinations that we've made.

9 Q. So if I want to know what your reasonable
10 assurance is in terms of a particular project that's
11 part of the master plan improvements with regard to
12 fill criteria, I got to wait until I get that list and
13 know what ecology has determined is in and out and then
14 know the basis on which ecology determined that
15 sometime in the future and then we can talk about it;
16 is that right?

17 A. If I understand what you said, that's
18 probably correct. What will have to happen is ecology
19 -- the port will have to get approval from ecology for
20 the fill criteria not to be applied to a given project,
21 and you can ascertain that information from ecology.

22 Q. So when we're in front of the PCHB in March
23 and the PCHB is trying to decide, well, has the
24 coverage of the fill criteria been cut back in some way
25 that eliminates reasonable assurance between August and

1 September, how is the PCHB going to know based on this
2 September 401 what's in and what's out?

3 A. My assumption is by then we're going to have
4 the information.

5 Q. By March what?

6 A. By the time of the hearing. We may have the
7 information now. As I indicated earlier, I don't know
8 if we've received the list of projects and how far
9 we've gotten into looking at them and making a
10 determination with respect to where the fill criteria
11 applies or not. I don't know where that's at.

12 Q. In fact, it wouldn't be just a matter of
13 getting the port's list. Then ecology would have to go
14 back and decide whether it agreed with whatever pitch
15 the port had made as to what was in and out; isn't that
16 right?

17 A. That's probably correct.

18 Q. Now, originally there was a JARPA, wasn't
19 there, an application for this port master plan and
20 improvements, right?

21 A. Yes.

22 Q. Now, the JARPA essentially was tracked by the
23 August 401 that said everything's in, all the MPU
24 improvements; is that right?

25 A. That's correct.

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1 Q. And the difference then if I'm understanding
2 correctly between the August certification and the
3 September certification is the September certification
4 has removed some portion of what was covered in the
5 JARPA and covered in the August certification, but we
6 don't know precisely what that portion is yet; is that
7 correct?

8 A. That's being determined.

9 Q. So we don't know it right now, do we?

10 A. My understanding is we don't have that
11 clarity yet, no.

12 Q. Now, is there a list of criteria that have
13 been developed that you can refer me to that talk about
14 how you decide whether something should be in or out?

15 A. I'm reading through the document briefly, and
16 I believe that I'm forgetting the question now.

17 Q. My question is -- and let me put it to you in
18 a slightly different form. If I want to know what the
19 fill criteria are for better or worse, I can read them
20 in the 401, can't I?

21 A. Yes.

22 Q. If I want to know what the criteria are for
23 deciding whether a project is going to be subject to
24 the fill criteria, this future decision that's going to
25 be made, where can I read that?

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1 A. I don't believe we have that.

2 Q. Now, looking at Exhibit 103 some more, I
3 guess in the interest of time I'm going to assume I can
4 -- I've actually gotten pretty good at reading your
5 writing.

6 A. It's not that bad, is it?

7 Q. My writing is so much worse that I can't
8 disagree with you.

9 Looking at the arrow here about two-thirds
10 down the page, it says yes to Canadian fill. Do you
11 see that?

12 A. I saw it earlier. I'm trying to find it
13 again.

14 Q. It's under the one that says seven years 401,
15 et cetera.

16 A. Oh, yes.

17 Q. You see where it says yes to Canadian fill?

18 A. Yes. I see that.

19 Q. I'm wondering why are we saying yes to
20 Canadian fill? What's that all about?

21 A. My recollection isn't as clear as I would
22 like it to be, but I believe that the way the August
23 version of the 401 was written it would not have
24 allowed for consideration of Canadian fill, and I
25 believe we were being asked to consider that if the

1 fill comes from Canada and it meets the criteria what's
2 it matter?

3 Q. What in the August 401 prevented use of
4 Canadian fill?

5 A. Well, I'd have to look. I believe that
6 something to do with -- without having the benefit of
7 looking through the document, my recollection is that
8 we had some reference to state-approved sites, and it
9 was that reference that would exclude from
10 consideration the Canadian fill.

11 Q. And the reference to state-approved sites was
12 in the certification because that provided another
13 level of protection, did it not, with regard to the
14 fill?

15 A. I believe it provided a minimal level of
16 protection. I think the real protection is in the 401
17 itself with regard to reporting requirements imposed on
18 the port with respect to when it can accept the fill,
19 and the reporting required an opportunity for us to
20 review documents before they accept fill. I believe
21 that the state certification is there for purposes of
22 what DOT can use at transportation sites or projects.

23 Q. But if I understand correctly, if it's a
24 state-approved site, that gives you a threshold level
25 of assurance that the site has arguably cleaner fill

1 than if it's not state approved; is that correct?

2 A. I believe that's correct.

3 Q. Now, is there any Canadian analogy that's
4 been required in the September 401 certification?

5 A. The acceptable fill criteria that we're
6 imposing on the port far exceeds what a state-certified
7 source would require. Therefore, if the Canadian fill
8 could -- the logic goes if the Canadian fill can pass
9 the higher standard of acceptable fill criteria for the
10 401, it therefore would exceed the requirements of a
11 state-certified source.

12 Q. But that logic would have applied in the
13 August 401 as well, wouldn't it have? The fill
14 criteria didn't change in that respect between the
15 August and September 401, did they?

16 A. I'll take a moment here to look at the August
17 document. I'm looking at E2A, fill sources. Fill
18 materials for proposed third runway embankment or other
19 master plan update projects shall be limited to the
20 following three sources: state-certified borrow sites,
21 contractor-certified construction sites, Port of
22 Seattle-owned properties. I believe that the concern
23 was that that would exempt or exclude from
24 consideration Canadian sources.

25 Q. And in doing the requirement in the August

1 401, what ecology was doing was saying that it wanted
2 sites about which it could obtain information at least
3 within the state; is that correct?

4 (Mr. Witek left the room.)

5 A. I don't remember. Now that I'm looking at
6 both documents, I'm not seeing a difference here in
7 fill source requirements. They look the same. I'm not
8 recalling -- I know that the port was in need of some
9 clarification with regard to whether or not they could
10 use Canadian fill.

11 Q. And your notes say yes to Canadian fill,
12 don't they?

13 A. They do. I would have to look at this
14 further, talk to staff, maybe the attorneys to improve
15 my understanding of the difference between the
16 documents.

17 Q. I'm actually almost at the back here of the
18 notebook, but I did want to ask you --

19 (Deposition Exhibit No. 104 was marked for
20 identification.)

21 Q. (BY MR. EGLICK) This is something that maybe
22 you can clear up. Looking at what's been marked
23 Exhibit 104 to your deposition.

24 A. This is an e-mail from myself to Tom
25 Fitzsimmons copied to other members of the senior

1 management team and Ann Kenny and Carol Jolly and the
2 governor's office policy staff, Sea-Tac third runway
3 certification. It's a northwest update.

4 Q. I'll just ask you a couple questions about
5 the background on this. At some point you reached
6 agreement with the port, and then to implement the
7 agreement -- when I say you, I mean ecology -- the port
8 filed an appeal, didn't it, of your August 401
9 certification?

10 A. That's correct.

11 Q. And then immediately the document settling
12 the appeal was also then made of record; is that right?

13 A. That's correct.

14 Q. So that was the mechanism that was hit upon
15 to attempt to change the 401 was to have an appeal and
16 then a settlement without rescinding the August 401; is
17 that right?

18 A. That was my understanding of it.

19 Q. And in the end, that didn't work out, did it?

20 A. What do you mean?

21 Q. You had to rescind the 401, didn't you?

22 A. I'm not remembering the details of the legal
23 process.

24 Q. Well, the 401 -- the August 401 ended up
25 being rescinded, didn't it?

1 A. I believe we needed to do that to make the --
 2 to then implement and then reissue it with the changes.
 3 Q. Now, how did you know what changes to make
 4 when you issued the September, the new modified 401?
 5 You had an agreement with the port, didn't you?
 6 A. We had an agreement, yes.
 7 Q. Now, was there a period of time then when
 8 there was no 401 certification?
 9 A. To my assumption, there would have been a
 10 brief period where there was not a certification.
 11 Q. And was there a new application submitted for
 12 a 401 certification?
 13 A. Not that I'm aware of.
 14 Q. So did the port come in with any document
 15 that said we hereby apply for a 401 certification with
 16 the following changes?
 17 A. Not that I'm aware of. My assumption is that
 18 the rescission and reissuance was consistent with
 19 requirements of the board and the law.
 20 Q. And you remember when the 401 application was
 21 withdrawn by the port and then a new one was submitted
 22 back in September, October 2000?
 23 A. Yes.
 24 Q. And then there was a new public notice
 25 published, wasn't there?

1 A. Yes.
 2 (Mr. Witek returned.)
 3 Q. And a new comment period was run, wasn't
 4 there?
 5 A. Yes, sir.
 6 Q. Were there big changes between the
 7 application that was withdrawn and the one that was
 8 resubmitted or was it the same project?
 9 A. Same project with the expectation that there
 10 would be significant changes in submittals for the
 11 project to satisfy our requirements for stormwater
 12 management, et cetera.
 13 Q. Same project noticed, right --
 14 A. Yes.
 15 Q. -- for public comment?
 16 So was there any idea or thought given that
 17 after you had all these interactions with the port and
 18 with Paul Isaki and came to all these agreements about
 19 changing the August certification and then rescinding
 20 it and then issuing a new one in September that before
 21 that new certification was issued ecology should give
 22 public notice and ask for comments on the changes?
 23 A. I'm pausing. I'm reflecting back. My
 24 understanding, my recollection is that we didn't have a
 25 situation where we had significant enough or

1 substantive changes to the degree that it was necessary
 2 to go through a public process.
 3 Q. And in whose view were the changes not
 4 substantive enough?
 5 A. I don't know.
 6 Q. Did you even consider giving public notice
 7 and an opportunity for comment before issuing the
 8 modified 401 in September?
 9 A. I believe that my assumption was that with
 10 the reissuance and the continuance of the appeal or the
 11 reissuance of the appeal afforded the public the
 12 process it needed to challenge the 401.
 13 Q. Did ecology in the course of the how many
 14 years -- three or four years total review of the
 15 Sea-Tac project?
 16 A. Three and a half, four years.
 17 Q. -- receive hundreds, thousands of comments
 18 from members of the public?
 19 A. Well, scores of them.
 20 Q. You don't think it was hundreds?
 21 A. It may have been.
 22 Q. And were all those people who submitted
 23 comments parties to the one appeal that was filed of
 24 the August certification?
 25 A. I don't know. I don't know.

1 Q. Do you know who was the appellant?
 2 A. The Airport Communities Coalition --
 3 Q. Now --
 4 A. -- representing according to its agents
 5 hundreds of thousands of people in and around Sea-Tac
 6 airport.
 7 Q. Well, the Airport Communities Coalition is --
 8 do you know what it's composed of?
 9 A. Composed of City of Federal Way where I live,
 10 Des Moines, Burien, Normandy Park, Highline School
 11 District.
 12 Q. So it represents municipalities and a school
 13 district; is that right?
 14 A. Yes.
 15 Q. And did ecology receive comments from members
 16 of the public who, for example, didn't live in the ACC
 17 cities?
 18 A. Yes, we have.
 19 Q. Did those folks have any participation in the
 20 September modified certification?
 21 A. Not that I'm aware of.
 22 Q. Isn't it true that as a result of the
 23 September certification the scope of the 401 in its
 24 entirety was no longer coincident with the scope of the
 25 project described in the JARPA for which a public

1 notice had been issued back in the year 2000?
 2 A. I wouldn't agree with that.
 3 Q. Well, there were -- we've already agreed that
 4 there were parts of what was described in the JARPA in
 5 the year 2000 for which a public notice was issued that
 6 were no longer automatically subject to the fill
 7 criteria; isn't that correct?
 8 A. I did.
 9 Q. Did any member of the public have a chance to
 10 comment on that change before it was implemented in the
 11 modified 401?
 12 A. No.
 13 Q. Do you think public comment on that issue
 14 would have been worthwhile?
 15 A. Probably not.
 16 Q. And is that because you know what the public
 17 comment would have said?
 18 A. No.
 19 Q. Well, why would public comment, then, not be
 20 worthwhile if comment from the port was?
 21 A. The port had information to give us relating
 22 to some projects that they felt it was reasonable for
 23 us to consider as being exempt from the fill criteria.
 24 We said we would do that. It seemed reasonable to do
 25 that based on what was in front of us, based on the

1 port providing a list of projects to us that we would
 2 still have to approve, wherein if we determined that
 3 there was no threat, given that the major projects, the
 4 embankment and the other major projects weren't being
 5 exempted, but that it was possible -- accepting that it
 6 was possible that fill for some other projects might
 7 not cause risk, that it was reasonable to consider
 8 that.
 9 Q. Now, and your argument is that that
 10 information from the port was appropriate to consider
 11 but you didn't need to hear from the public on what the
 12 port had to say; is that right?
 13 A. I'm not sure I'm saying that. You asked a
 14 question as to whether or not I thought it would make a
 15 difference if we did, and I think my answer was that
 16 probably not, but otherwise I'm just speculating.
 17 Q. In other words, you don't know what the
 18 public might have said that might have --
 19 A. No, I don't.
 20 Q. Now, the determination that you say is going
 21 to be made later by ecology as to what's in and what's
 22 out, let's say, for the acceptable fill criteria under
 23 the September 401, do you know what I'm referring to?
 24 A. Yes.
 25 Q. Is that determination going to come in the

1 form of amendments to the 401 or in the form of
 2 administrative decisions just between ecology and the
 3 port?
 4 A. My understanding is the 401 sets that up as
 5 an administrative process.
 6 Q. So that's not going to come in the form of
 7 another modification to the 401; is that correct? Is
 8 that your understanding?
 9 A. That's my understanding. I'm reaching for
 10 the 401 now. In the interest of time, I'm going
 11 through here fairly rapidly, and I'm not identifying
 12 right off where I see reference to this function we're
 13 discussing where ecology makes its -- has an
 14 opportunity to consider whether or not the fill should
 15 apply to some projects.
 16 Q. The fill criteria?
 17 A. The fill criteria.
 18 Q. So if this is an internal essentially
 19 decision that ecology makes between itself and the
 20 port, then that occurs after PCHB review, doesn't it,
 21 and -- well, answer that.
 22 A. That's my current understanding of the
 23 approach.
 24 (Deposition Exhibit No. 105 was marked for
 25 identification.)

1 Q. (BY MR. EGLICK) Showing you what has been
 2 marked as Exhibit 105 to your deposition. Do you
 3 recognize and can you identify it?
 4 A. This first document here is an e-mail from
 5 Ann Kenny to Kevin Fitzpatrick, John Drabeck, Ed
 6 Abbasi, Ray Hellwig, Joan Marchioro, Tom Young dated
 7 October 23, 2001. It has several attachments to it.
 8 This is criteria for your evaluation from the port re
 9 fill criteria -- or for your evaluation from the port
 10 re fill criteria. Please review and get back to me
 11 with your comments. And there's several attachments.
 12 Underneath that is the e-mail that was from
 13 Elizabeth Leavitt at the port to Ann Kenny and myself
 14 with copies to staff at the port. It's a follow-up to
 15 the meeting you had a few weeks ago to begin discussion
 16 on which projects and types of materials the fill
 17 criteria conditions would apply to, et cetera.
 18 So this is apparently getting at what we've
 19 been discussing with regard to the process by which the
 20 port would expect us to consider not applying the fill
 21 criteria to some projects.
 22 Q. As I understand it here, if we look on the
 23 first page, let's see if we're tracking on this.
 24 There's a quote what Leavitt is telling Ann and
 25 yourself -- excuse me -- Ann Kenny and yourself.

1 Quote, we are proposing for your consideration that
2 topsoil utility backfill and base course not be subject
3 to fill criteria, end quote. Do you see that?

4 A. I was looking at the other pages. Tell me
5 again where that is.

6 Q. It's on the first page of Exhibit 105.

7 A. Okay.

8 Q. So is there anything -- if you were to just
9 look at the 401 certifications, is there anything in
10 there that says that you should anticipate these
11 exceptions are coming down the pike?

12 A. I was looking through the document as you
13 were introducing the next exhibit, and I didn't
14 identify it. I may have gone through this document too
15 fast.

16 Q. You were saying this starts the process we're
17 talking about, and I do see where Elizabeth Leavitt in
18 this e-mail says, quote, this e-mail follows up on the
19 meeting we had a few weeks ago to begin discussions on
20 which projects and types of materials the, quote, fill
21 criteria, quote, condition of the 401 might apply to,
22 end quote. But as you look at Exhibit 105 and as you
23 looked at it when you received it, is there anything in
24 here that talks about which projects are in and out?

25 A. Just a moment, please.

1 Q. Sure.

2 A. It could be jumping back a little bit that
3 the paragraph that starts off condition E, page 14 of
4 the certification, is what sets this up, but now I'm
5 jumping to this next exhibit here that you provided,
6 Exhibit 105, and you asked me if this -- if there's
7 anything in this document indicating a list of projects
8 that we might consider?

9 Q. Yeah. There's nothing in this Exhibit 105,
10 is there, that talks about which projects are in and
11 out under the fill criteria, is there?

12 A. I don't see it. It looks more like this is a
13 best management practice information and requirements
14 to govern how fill is used under certain circumstances,
15 but I don't see a list of projects, no.

16 Q. Actually, this is a proposal from the port,
17 isn't it, to have ecology agree that topsoil utility
18 backfill and base course, c-o-u-r-s-e, won't be subject
19 to fill criteria, isn't it? Look at the Leavitt e-mail
20 on the first page of exhibit --

21 A. Yeah. Apparently that's it. Apparently
22 that's correct.

23 Q. I'm down to my last two documents. Have you
24 had an opportunity to review the port's new low flow
25 plan? I believe it was submitted in December.

1 A. I have not seen it.

2 Q. Is there a process now going on within
3 ecology to determine whether or not that low flow plan
4 will be acceptable under the September certification?

5 A. We will have that document reviewed by our
6 consultant at King County, Kelly Whiting.

7 Q. Has any -- and I'll use this term advisedly
8 -- constraint been placed on the timing of that review?

9 A. There may be a constraint referred to in the
10 contract with the county. I know that the county
11 consultant, the individual functioning as our
12 consultant, has plenty of other work to do on behalf of
13 the county and is motivated to get through the analysis
14 expeditiously, but I'm not aware of a specific
15 constraint.

16 Q. Well, do you have any -- another term we've
17 used in this deposition -- any estimate of when the
18 review will be completed?

19 A. No.

20 Q. And when ecology will determine whether or
21 not the port's submission is in ecology's view
22 acceptable under the September certification?

23 A. I do not.

24 Q. Are any meetings scheduled to go over that
25 either internally or with the port?

1 A. My assumption is that meetings will be
2 arranged. I'm not aware that any have been arranged
3 yet.

4 Q. So as of right now, there's no approval by
5 ecology of the low flow plan that was submitted in
6 December; is that correct?

7 A. That's correct. We have not approved it.

8 Q. What if ecology never approved the port's low
9 flow plan and just said it's unacceptable and the port
10 didn't submit a better one?

11 A. My understanding is if the port does not
12 comply with the terms and conditions of the 401, then
13 we can rescind the 401.

14 Q. And so where the 401 requires submission of a
15 low flow plan by a date certain -- by the way, that
16 date was extended once already, wasn't it?

17 A. Yes.

18 Q. Anyway, where the 401 requires submission of
19 a low flow plan by a date certain, that's something
20 that is required to support the 401; is that correct?

21 A. That's correct. I believe that the way the
22 401 is written, if the port requests for additional
23 time and we think it's a reasonable request, we can
24 grant that.

25 Q. Now, if the 401 had not required an

1 additional submission, would there have been reasonable
2 assurance for its issuance?

3 MR. REAVIS: Submission of the low flow plan?

4 MR. EGLICK: That's right.

5 A. I'm retracing the events here.

6 Q. (BY MR. EGLICK) Would you like me to have her
7 read back the question?

8 A. No. That's all right. My recollection is
9 that the port asked us to consider this new
10 information. If the port had not asked that, then,
11 yes, we have reasonable assurance with the 401 as
12 written.

13 Q. But the 401 as written includes a condition,
14 does it not -- in fact, it's a lengthy condition or set
15 of conditions -- that requires submission of an
16 augmented or substitute -- pick your word, Mr. Hellwig
17 -- low flow plan; isn't that correct?

18 A. I believe a refined, more detailed plan.

19 Q. Could the 401 have been issued without that
20 condition and still have a reasonable assurance basis
21 as required under the Clean Water Act?

22 A. No. That was a necessary condition is my
23 understanding.

24 Q. And was the 401 then issued in anticipation
25 that when the low flow plan came in it would be

1 acceptable?

2 A. Yes.

3 Q. And the 401 was issued, was it not, in
4 September -- certification was issued in September fo
5 a certification process that had a deadline of the end
6 of December 2001; is that correct?

7 A. I would need to check. I believe that's
8 correct.

9 Q. So if ecology was in need of this augmented
10 or new or whatever word you want to use low flow plan,
11 why did ecology issue a certification in September that
12 depends on a plan to be submitted later when the
13 deadline for the ecology certification decision wasn't
14 until the end of December? In other words, why not
15 just wait until you had an acceptable plan in hand to
16 review?

17 A. We had analysis telling us what the impact
18 was and requirements in the 401 that the port would in
19 its plan account for that impact, and we had the
20 conceptual plan in front of us. We had all the other
21 requirements in the 401 where we wanted them. We had
22 reasonable assurance.

23 Q. Did you have reasonable assurance in
24 September with regard to the low flow plan as the
25 record stood when the September certification was

1 issued?

2 A. Yes.

3 Q. So whatever the port submits now, then, does
4 not matter?

5 A. No. It matters. It still has to satisfy our
6 ongoing requirements.

7 Q. Is there anything in the conditions that have
8 been imposed with regard to the low flow plan --

9 A. I'm sorry. I'm looking at that section of
10 the low flow plan now. Would you please repeat the
11 question?

12 Q. Do you need to have a minute to look at it
13 without me asking you a question?

14 A. No. Go ahead, and if I need to look, I'll
15 look.

16 Q. Is there anything in the September 401
17 certification with regard to the low flow plan that you
18 could do without, you being ecology?

19 A. I'm not aware of any element or piece off the
20 top of my head.

21 Q. So the deliverables, I guess isn't that one
22 term that's used in this context?

23 A. Yes.

24 Q. So the deliverables called for in the
25 September 401 are all in your understanding essential?

1 A. Yes.

2 Q. Just give me a minute to check my notes, but
3 I think I may be done. Do you know who Bob Barwin is?
4 I forgot to ask you that.

5 A. Yeah. He's a supervisor for the water
6 resources program central regional office. He's also
7 -- he was on the water quality program program
8 management team when I was with the water quality
9 program in the early '90s, and I know him fairly well.

10 Q. Because I'm looking at ecology's answers to
11 discovery, which we just received yesterday, and he was
12 the only name on there I didn't really recognize. It's
13 referring to a March 22, 2001, telephone call
14 discussing the port's proposal with regard to use of
15 water right or the need for water right for
16 implementation of flow mitigation, so why would Bob
17 Barwin be on a call like that?

18 A. Given his experience with the water resources
19 program, it was agreed -- I'm not sure who agreed to
20 it, but I was happy to have him on the call -- that
21 given his experience with the programs, it would be
22 helpful to have him consult with us on the water right
23 issue.

24 There was, for example, a situation in
25 eastern Washington where stormwater had been detained

1 and used in an industrial facility as a cleaning tower,
 2 and that was beneficial use that triggered a
 3 requirement for water right, and I believe that's one
 4 of the examples that folks from the east side of the
 5 mountains -- I don't know if it was Bob or not --
 6 wanted to make sure it was considered. Of course, it
 7 was sort of an apples and oranges situation with regard
 8 to what the port is proposing.

9 Q. So Bob Barwin was describing a situation that
 10 he'd encountered in the course of his work for ecology
 11 east of the mountains where someone had established a
 12 beneficial use without the benefit of a water right,
 13 and he was drawing an analogy to the situation with
 14 regard to the port proposal?

15 A. I don't believe he was drawing an analogy. I
 16 think he wanted to just put it out there for
 17 consideration. Actually, it might have happened in the
 18 eastern regional office. It might have been a Spokane
 19 office issue. But Bob would be aware of it. Bob has
 20 years of experience with both water resources and water
 21 quality, and I value his ideas and thinking, so I was
 22 glad to have him on the call.

23 Q. And did he opine as to whether or not the
 24 port should be required to obtain a water right?

25 A. Bob agreed with several other program staff

1 that the issue was in what I think some folks refer to
 2 as a gray zone under the law where it wasn't as clear
 3 as folks would prefer, but I think that he thought
 4 arguments could be made if I recall that a water right
 5 could be required.

6 Q. But I don't want to have you testifying as to
 7 what Bob thought. I want to ask you to testify as to
 8 what Bob said, unless when you say thought you meant
 9 said.

10 A. I think I did. Bob said as I recall -- this
 11 was some time ago, many months ago -- that it's a tough
 12 issue; that it's in the gray zone of the law; that we
 13 could win on that issue and we could lose on it, his
 14 opinion. It could go either way. My understanding of
 15 listening to Bob was that it was his opinion it would
 16 be appropriate to require the water right.

17 MR. EGLICK: I don't think I have anything
 18 else at this time. You guys can go ahead and ask your
 19 questions.

20 MS. MARCHIORO: That concludes the
 21 deposition.

22 MR. REAVIS: Given the hour, I think we'll
 23 not do that. I don't want to waive my right to ask
 24 questions at a later date, but I don't anticipate that
 25 will be necessary.

1 (Deposition concluded at 6:35 p.m.)
 2 (Signature was reserved.)
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1 CORRECTION & SIGNATURE PAGE
 2
 3 RE: ACC v. DOE; PCHB; 01-160
 4 Ray Hellwig; January 8, 2002
 5
 6 I, Ray Hellwig, have read the within transcript
 7 taken January 8, 2002, and the same is true and
 8 accurate except for any changes and/or corrections, if
 9 any, as follows:
 10 PAGE LINE CORRECTION
 11
 12
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 14
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 20
 21
 22 Signed at _____, Washington, on the
 23 _____ day of _____, 2002.
 24
 25 Ray Hellwig

C E R T I F I C A T E

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I, Mary L. Green, the undersigned Certified Court Reporter and Notary Public, do hereby certify:

That the testimony and/or proceedings, a transcript of which is attached, was given before me at the time and place stated therein; that any and/or all witness(es) were by me duly sworn to tell the truth; that the sworn testimony and/or proceedings were by me stenographically recorded and transcribed under my supervision to the best of my ability; that the foregoing transcript contains a full, true, and accurate record of all the sworn testimony and/or proceedings given and occurring at the time and place stated in the transcript; that I am in no way related to any party to the matter, nor to any counsel, nor do I have any financial interest in the event of the cause.

WITNESS MY HAND AND SEAL THIS 9TH DAY OF JANUARY 2002.

MARY L. GREEN, CSR #GREENML497R2
Notary Public for the State of Washington,
residing in King County.
My appointment expires 4/4/05.

X PJE, MPW, KLS
X R. P.-O.
X Poulin

**DEPOSITION UNDER
ORAL EXAMINATION OF**

ANN KENNY

DECEMBER 20, 2001

**AIRPORT COMMUNITIES COALITION
VS.
STATE OF WASHINGTON, et al.**

DIANE MILLS, CCR, RMR, CRR

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AR 001688

CORRECTION & SIGNATURE PAGE

ORIGINAL

RE: AIRPORT COMMUNITIES COALITION VS. STATE OF
WASHINGTON, et al.
BEFORE THE POLLUTION CONTROL HEARINGS BOARD
DEPOSITION OF: ANN KENNY; DECEMBER 20, 2001

I, ANN KENNY, have read the
within transcript taken DECEMBER 20, 2001, and the same
is true and accurate except for any changes and/or
corrections, if any, as follows:

PAGE	LINE	CORRECTION
8	19	"Where" to "When"
41	23	"Eric" to "Erik"
43	17	"Eric" to "Erik"
48	7	"Eric" to "Erik"
52	11	"Divitt" to "Devitt"
58	7	"Divitt" to "Devitt"
58	9	"D-i-v-i-t-t" to "D-e-v-i-t-t"
68	22	"Eric" to "Erik"
118	23	"Divitt" to "Devitt"
132	12	"ACART" to "AKART"
132	15	"ACART" to "AKART"
132	21	"ACART" to "AKART"
133	1	"ACART" to "AKART"
163	21	"Eric" to "Erik"
171	7	"Eric" to "Erik"

Signed at Bellevue, Washington,
on the 22nd day of January, 2002
Ann E. Kenny

ANN KENNY

AR 001689

1 POLLUTION CONTROL HEARINGS BOARD
 2 FOR THE STATE OF WASHINGTON
 3
 4 AIRPORT COMMUNITIES COALITION,
 5 Appellant,)
 6 vs.) PCB# No. 01-160
 7 STATE OF WASHINGTON,)
 8 DEPARTMENT OF ECOLOGY; and)
 9 THE PORT OF SEATTLE,)
 10 Respondents.)
 11
 12 DEPOSITION UPON ORAL EXAMINATION
 13 OF
 14 ANN KENNY
 15
 16
 17 9:00 A.M.
 18 DECEMBER 20, 2001
 19 1325 FOURTH AVENUE, SUITE 1700
 20 SEATTLE, WASHINGTON
 21
 22
 23
 24
 25 DIANE MILLS, CSR# MI-LL-SD-M380N3

1 I N D E X
 2
 3 EXAMINATION BY: PAGE
 4 MR. STOCK
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 6
 7
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 13 EXHIBITS FOR IDENTIFICATION PAGE
 14 70 - E-mail correspondence 92
 15 71 - E-mail w/attached preliminary 401 WQC 101
 16
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1 A P P E A R A N C E S
 2
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 12 DEPARTMENT OF ECOLOGY:
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 18
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 21 Marten Brown
 22 1191 Second Avenue
 23 Suite 2200
 24 Seattle, Washington 98101
 25

1 SEATTLE, WASHINGTON; DECEMBER 20, 2001
 2 9:00 A.M.
 3 --oOo--
 4
 5 ANN KENNY,
 6 sworn as a witness by the Notary Public,
 7 testified as follows:
 8
 9 EXAMINATION
 10
 11 BY MR. STOCK: **AR 001690**
 12 Q. Good morning.
 13 A. Good morning.
 14 Q. Could you state your name for the record,
 15 please.
 16 A. My name is Ann Kenny.
 17 Q. And, Ms. Kenny, what is your residential
 18 address?
 19 A. 2109 - 188th Avenue Northeast, Bellevue,
 20 Washington.
 21 Q. Have you ever had your deposition taken
 22 before?
 23 A. No.
 24 Q. This is the first time?
 25 A. Yes.

1 Q. You understand that I'm going to be asking
2 you questions and you are required to answer the
3 questions unless the Department of Ecology's attorney
4 instructs you not to answer the question?

5 A. I do.

6 Q. If at any time you want to take a break
7 either to use the restroom or to talk to Ms. Marchioro,
8 please speak up and we'll accommodate that. Also, if I
9 ask a question that you don't understand or don't hear,
10 will you ask me to repeat it?

11 A. Yes.

12 Q. And do you understand you're under oath?

13 A. I do.

14 Q. And what does the oath mean to you?

15 A. That I've sworn to tell the truth.

16 Q. And you plan to do that today; is that right?

17 A. I do.

18 Q. Let's start out by having you give us a
19 thumbnail sketch of your educational background.

20 A. I have a bachelor's degree in political
21 science from Montana State University and a master's
22 degree in public administration from the University of
23 Washington.

24 Q. What year did you get your bachelor's in
25 political science?

1 A. 1980.

2 Q. What year did you get your master's in public
3 administration?

4 A. 1990.

5 Q. And that was from WSU?

6 A. No, that was -- the master's degree was from
7 the University of Washington.

8 Q. Since graduating -- what did you do between
9 the time that you graduated with your bachelor's and
10 the time that you went back to school to get your MPA?

11 A. I spent one year in law school at the
12 University of Montana School of Law. I successfully
13 completed that year and then I decided I didn't want to
14 continue in that vein. And so I came back to my
15 hometown of Helena and I worked for a year as a long-
16 distance operator for Ma Bell before she was broke up.

17 And then I went to work for three years for
18 the Montana Department of Revenue as a paralegal; that
19 was about 1982 to 1985. And then in 1985 I moved out
20 to Seattle where I worked as a freelance paralegal for
21 several years, and then I went back to school at the
22 University of Washington.

23 Q. What types of things did you do here in
24 Seattle as a paralegal?

25 A. My first assignment out here was with the

1 King County Prosecuting Attorney's Office. I worked as
2 a paralegal helping represent the King County Solid
3 Waste Division in a lawsuit involving the Cedar Hills
4 Landfill. And that was primarily Clean Water Act and
5 RCRA concerns as well as -- so we went to U.S. District
6 Court. And there was a separate case, it was more of a
7 property claim taking issue, that went to State
8 Superior Court. And then I worked on bankruptcy cases
9 and various sundry assignments for different law firms.

10 Q. What led you to get your MPA?

11 A. Well, I originally went back to the
12 University of Washington to pursue a Ph.D. in political
13 science, but after being in that program for a year I
14 decided it would be more practical to get a master's
15 degree in public administration. And I wanted to go
16 back to public service; I had enjoyed my time in
17 working with the State of Montana.

18 Q. You say 1990 you graduated with your MPA?

19 A. Yes, I did.

20 Q. What did you do after you graduated?

21 A. I went almost immediately to work. I
22 graduated in June and I went to work in September for
23 the Department of Ecology.

24 Q. Why don't you march through your positions
25 with the Department of Ecology. Just give me the

1 positions and then we'll go back and you can explain
2 what you did with each one.

3 A. My first position there was as an Away With
4 Waste educational instructor. That was an educational
5 program for schools, K through 12.

6 My second position was as the moderate risk
7 waste coordinator where I worked with issues related to
8 household hazardous waste and small quantity generator
9 waste.

10 From that position I moved into a toxics
11 reduction planner position which was working with
12 generators of hazardous waste who were required under
13 state law to prepare toxics reduction plans.

14 From that position I went to the Shorelands
15 and Water Resources Program where I worked as a
16 shoreline permit reviewer.

17 Q. What year was this?

18 A. 1996. I worked in that position until
19 February of 1998 where I took on the regional position
20 of a federal permit coordinator working on Section 401
21 water quality certifications.

22 Q. What types of permits were you involved with
23 when you were in the Shorelands and Environmental
24 Systems Program relating to the water permits in 1996?
25 Tell me again the position you held.

1 A. Shoreline permit reviewer.

2 Q. And what permits were you involved with?

3 A. Those were permits that are required under
4 the Shoreline Management Act.

5 Q. What standards did you use to determine
6 whether a permit was issued in that case?

7 A. In that case the standards -- depending on
8 the type of permit issued by local government, if the
9 permit was a substantial development permit, Ecology
10 has the authority to review it for compliance with the
11 local Shoreline Master Program. So we would review it
12 and determine if it was in compliance with its
13 shoreline master plan. If so, we would write a letter
14 basically of verification.

15 There are two other kinds of permits where
16 Ecology had more review authority, the first being a
17 conditional use permit. And then in that case we could
18 look at that permit and attach additional conditions to
19 the permit or deny the permit if we felt that it was
20 not in compliance with the Shoreline Master Program or
21 that the environmental impacts of that project had not
22 been suitably mitigated.

23 The third kind of permit was for variance,
24 and that's a variance from the local planning codes and
25 the Shoreline Master Program. And it's the same setup

1 shoreline there.

2 Q. How much time did you spend on the H&H
3 Properties project?

4 A. Altogether it spanned a period of about six
5 months, and intensively two months, before we made our
6 permit decision.

7 Q. Were you the lead permit coordinator on that
8 project?

9 A. I was.

10 Q. Did you sign the permit?

11 A. I did not sign the permit. That was signed
12 by the Regional Shoreland Program section head.

13 Q. Who was that at the time?

14 A. That would have been Ray Helliwig.

15 Q. So in 1998 you became the federal permit
16 coordinator?

17 A. That's correct.

18 Q. And is that the position you hold today?

19 A. No, it is not.

20 Q. How long were you the federal permit
21 coordinator?

22 A. From February of 1998 to the end of July
23 1999.

24 Q. And in July 1999 what position did you take?

25 A. I moved into a promotional opportunity which

1 where Ecology could approve, approve with conditions,
2 or deny.

3 Q. What was the largest project that you worked
4 on during the time that you were reviewing shoreline
5 permits?

6 A. I would say the one that I spent the most
7 time on was a large development up in Island County
8 being proposed by a development company on a land spit,
9 basically sand area, for development into homes.

10 Q. Do you remember the name of the project?

11 A. H&H Properties on Deer Lagoon.

12 Q. Can you give me a sense of the size of the
13 project using any sort of measure you want?

14 A. I don't recall the exact acreages involved.
15 There were basically four to six lots. They would have
16 been multi-million-dollar lots, being shorefront
17 property. On the north side of the sand spit was a
18 large freshwater wetland complex, and on the other
19 side, part of the property was an emergent wetland.

20 And those were some of the substantive issues
21 that we worked with to clearly define the wetland
22 boundaries and to establish conditions on the permit
23 that were protective of the environment that would
24 allow for the development of the homes without
25 adversely impacting the native vegetation of the

1 was a newly-created regional position for the Permit
2 Assistance Center.

3 Q. Was the position created especially for you?

4 A. No, it was not.

5 Q. And what was your job title?

6 A. Senior permit specialist.

7 Q. And how long were you in this position for
8 the Permit Assistance Center?

9 A. I worked in that position from the beginning
10 of August 1999 until about the end of October.

11 Q. 2000?

12 A. 2000, when I took on responsibilities for the
13 401 permitting for the Sea-Tac Third Runway Project.

14 Q. Was there a change in your job title in
15 October 2000?

16 A. I basically was put on loan to the project by
17 my program so there was no change to my title or my job
18 classification.

19 Q. Just change in responsibilities?

20 A. A change in responsibilities.

21 Q. Let's go back to the period February '98 to
22 July '99, and explain to me what your responsibility
23 were as federal permit coordinator.

24 A. My primary responsibilities in that job were
25 to process and administer applications for Section 401

1 water quality certifications, along which always come
2 an application for coastal zone management consistency
3 determination. I also reviewed numerous applications
4 or reviewed nationwide permits issued by the Corps of
5 Engineers. I reviewed Section 10 applications to the
6 Corps.

7 And my primary role in the review of that
8 workload was to coordinate review by technical experts
9 in our program and to write 401 certifications, if
10 that's what was called for, or to issue letters of
11 verification for various actions that the Corps took or
12 to issue coastal zone management consistency
13 determinations.

14 Q. What percent of your time while you were the
15 federal permit coordinator did you spend coordinating
16 review of 401 applications?

17 A. 75 percent probably.

18 Q. What was the largest project that you worked
19 on as the federal permit coordinator?

20 A. The largest project that I worked on and the
21 most intensively was a project that was not yet before
22 the Corps of Engineers for review, but certainly we
23 spent many, many hours in meetings and site visits, and
24 that was the Sound Transit proposal for the commuter
25 rail from Seattle to Everett.

1 the project is right now, but it was approximately a
2 340-acre restoration project that would take wetlands
3 and -- well, they were now freshwater wetlands, and
4 remove dikes from the area and restore that area to
5 intertidal influence.

6 Q. During the time that you were the federal
7 permit coordinator, what was the largest development
8 project that you worked on that a JARPA had been
9 submitted?

10 A. Without checking my records, my recollection
11 is there were several large development projects. One
12 was the East Village project out in Issaquah which was
13 a residential development on the west side of Issaquah
14 for I think it was a 300-acre site. I can't remember
15 how many homes were being located there.

16 Q. How many acres of wetlands were impacted?

17 A. I don't recall.

18 Q. Ballpark estimate?

19 A. What I recall about that project was there
20 were a number of wetlands but they had done a fairly
21 good job of minimizing the actual impact to the
22 wetlands. And they had set aside quite a large acreage
23 of the wetland area in the way they had designed the
24 development to avoid -- so they avoided the impact to
25 the wetlands. So the actual impact number was two or

1 Q. Had Sound Transit made an application for a
2 401 certification?

3 A. They were involved in a pre-application
4 process with the Corps of Engineers, which is typical
5 for a large project. The Corps hosted meetings with
6 the applicant and other regulatory agencies to try to
7 get that project to the point where they could submit a
8 JARPA form, J-A-R-P-A, Joint Aquatic Resource Permit
9 Application, to the Corps which would commence the
10 formal process for both the 404 application and the 401
11 application.

12 Q. During the time that you were the federal
13 permit coordinator, was a JARPA submitted on the
14 Seattle to Everett run by Sound Transit?

15 A. They have never yet submitted a JARPA for
16 that particular project.

17 Q. During the time that you were the federal
18 permit coordinator, what is the largest project that
19 you worked on on which a JARPA had been submitted?

20 A. In terms of impact acreage, I would say the
21 largest project was a project in Skagit County that the
22 Corps of Engineers was proposing to restore habitat,
23 intertidal habitat, to an area adjacent to the Skagit
24 River not far from Fir Island.

25 And it's escaping me exactly what the name of

1 three acres.

2 Q. You were going to tell me about another
3 development project, several, one being the East
4 Village in Issaquah. What others did you work on of
5 some significance?

6 A. Well, another project that I worked on not
7 during my tenure as the 401 permit coordinator but
8 another special assignment while I was in the PAC
9 position was the Sumas Energy 2.

10 Q. This was after July 1999?

11 A. Right.

12 Q. Sumas Energy?

13 A. Sumas Energy 2. That's a cogeneration
14 facility proposed up in Whatcom County under the
15 jurisdiction of EFSEC, E-F-S-E-C, the Energy Facilities
16 Site Evaluation Council. That project sat on an area
17 of 40 to 42 acres, and the project would have impacted
18 about 35 acres of that site.

19 Q. Was the 401 certification issued on the Sumas
20 Energy 2 project?

21 A. In that circumstance, jurisdiction for the
22 401 certification was held by the EFSEC Council.
23 Ecology was hired as a contractor to EFSEC to prepare
24 recommendations and conditions that would be
25 incorporated into the Site Certification Agreement or

1 whatever the document is that EFSEC prepares when they
2 issue their permits to the applicant.

3 Q. Was this Site Certification Agreement
4 something that the Corps needed in order to assure a
5 404 permit on that project?

6 A. I can't say with certainty, but the law that
7 EFSEC operates under their authority supersedes
8 Ecology's authority for 401. So I would assume, I
9 don't know, I would assume that when EFSEC issues their
10 Site Certification Agreement, that that would be
11 sufficient for the Corps to say that the State of
12 Washington has found that this project is -- they have
13 reasonable assurance the project will not adversely
14 impact water quality.

15 Q. Well, that was my next question. Did you
16 have to come to a conclusion of reasonable assurance on
17 this Sumas Energy 2 project?

18 A. We never got that far in the process.

19 Q. Why not?

20 A. Because the EFSEC Council issued a decision
21 basically to deny the application. We didn't complete
22 our work in that project.

23 Q. Any other projects of significance that
24 you've worked on other than the Third Runway project
25 where a JARPA had been submitted?

1 Q. What is?

2 A. Probably this project I described up in
3 Skagit County, and the name was Deep Water Slough.
4 That was that area of 540 acres approximately.

5 Q. That wasn't a development project; correct?

6 A. Correct.

7 Q. Let's focus on development projects. Of the
8 development projects that you've worked on, is Sea-Tac
9 the largest project you've worked on where a JARPA has
10 been submitted where Ecology has to come to a
11 conclusion of reasonable assurance?

12 A. I can't say that without checking my records.

13 Q. Sitting here today, you can't think of any
14 other project that has been larger in that regard than
15 Sea-Tac?

16 A. No.

17 Q. Let's talk about the 401 process in general.
18 What steps do you take as the -- strike that.

19 What position do you hold with respect to
20 review of the JARPA for Sea-Tac?

21 A. Could you repeat or restate that question?

22 Q. What responsibilities have you had with
23 respect to the Port of Seattle's application for a 401
24 certification of the Third Runway project?

25 A. My responsibilities for review of the 401 in

1 A. Right. I've worked on several -- actually,
2 three different golf courses which involved quite a bit
3 of acreage; one up in Whatcom County, the Willows Run
4 golf course outside of Redmond, and then another one.
5 There were several large -- there was one large
6 development in an industrial kind of area up in Whatcom
7 County. I didn't bring my whole list of projects from
8 that era of my career, but a number of large projects
9 with a variety of concerns and issues.

10 Q. Is Sea-Tac the largest project you've worked
11 on in terms of impact to wetlands?

12 A. No.

13 Q. What is?

14 A. The Sound Transit project that we worked on
15 as a pre-application project. Although it wasn't quite
16 wetlands, it originally started out as an impact of 35
17 acres of intertidal habitat.

18 Q. You didn't have to come to a reasonable
19 assurance conclusion on the Seattle to Everett run for
20 Sound Transit; is that right?

21 A. No.

22 Q. What I want is on any project where you had
23 to come to a conclusion of reasonable assurance.

24 Is Sea-Tac the largest project that you've worked on?

25 A. No.

1 the case of the Third Runway project are and have been
2 identical to the responsibilities that I've held for
3 all of the other 401 projects that I have reviewed.

4 The primary responsibility is to review the
5 application, the JARPA application, and all of any
6 additional materials that an applicant might submit for
7 compliance with state law regarding water quality, any
8 other laws that the project might have a relationship
9 to, and to coordinate the review of the substance of
10 the project by technical experts within the agency. Or
11 in the case of Sea-Tac, we contracted out some of those
12 responsibilities to other entities to go through a
13 process of evaluating the adequacy of the application
14 and to ultimately render a decision as to whether or
15 not a 401 certification can be issued.

16 Q. Is part of your job in reviewing these 401
17 applications to come to a decision as to whether
18 Ecology has reasonable assurance that the project won't
19 violate state water quality standards? I'm talking
20 about you personally.

21 A. My responsibility, in coordination and with
22 comment and input from the various technical and pro-
23 regulatory staff that are involved in the review of
24 project, is to collate and synthesize those opinions
25 into a recommendation that says either the project does

1 provide the state with reasonable assurance that water
2 quality standards and other state laws will be met, or
3 that it doesn't.

4 Q. So you personally come up with the
5 recommendation on these JARPA applications that you
6 review whether there's reasonable assurance or not?

7 A. What I come up with represents a consensus
8 among the staff who are involved, Ecology staff who are
9 involved in the project, as to whether or not there is
10 reasonable assurance.

11 Q. If you don't agree with that consensus, does
12 your opinion govern over the recommendation that you
13 make?

14 A. I haven't been in a situation where I've had
15 a differing opinion from other staff working on a
16 project.

17 Q. You've always agreed with other staff --

18 A. Yes, I have.

19 Q. -- in terms of whether there's reasonable
20 assurance or not; is that correct?

21 A. That's correct.

22 Q. You said as part of your responsibility that
23 you reviewed the application and that you coordinated
24 the review of the substance of the project by technical
25 experts; is that right?

1 A. That's correct.

2 Q. What is the difference in the type of review
3 that you personally make of the application versus your
4 coordination of the review of the substance of the
5 project by technical experts?

6 A. Another responsibility that I have is to be
7 knowledgeable about the 401 process, to be responsible
8 for ensuring that the applicant has met their
9 responsibilities and their procedural requirements for
10 coastal zone management consistency which involves a
11 number of aspects. And part of it is, I would call it
12 more of an administrative role to get an applicant
13 through the process. There are time lines that are
14 associated with issuing the 401 certification, there
15 are requirements for public notice.

16 In the case of the Sea-Tac project, we had a
17 public hearing, we had a public comment period. There
18 were administrative elements of managing contracts, in
19 this case coordinating meetings, bringing staff
20 together at the right time. That kind of role.

21 Q. So based upon that description, is it fair to
22 say that your role in reviewing the Sea-Tac JARPA
23 application was administrative as opposed to technical?

24 A. It was not entirely administrative.

25 Q. How was it not? That's what I'm trying to

1 get at is the distinction between what your review was
2 versus what the technical review was by those that you
3 coordinated.

4 A. Right. As I believe is described in my
5 Declaration, there were training requirements and a
6 level of knowledge and skill required for the job.
7 As a part of those requirements, I went through wetland
8 delineation training with the U.S. Army Corps of
9 Engineers; that was a week long training course. I've
10 attended training in salmon ecology. Because of my
11 background and experience, I have a solid understanding
12 of the principles of hydrogeology.

13 Q. I'm sorry, I missed that, Ann. You have
14 solid training in what?

15 A. The principles of hydrogeology.

16 Q. What is that solid training?

17 A. That solid training is my work with King
18 County on the Cedar Hills Landfill working directly
19 with expert witnesses on preparing their testimony and
20 sitting through seven weeks of trial in U.S. District
21 Court and five weeks of trial at State Superior Court
22 listening to expert witness testimony from both the
23 County's perspective and from the Appellant's
24 perspective.

25 Q. And that was as a paralegal?

1 A. That was as a paralegal.

2 Q. From the King County Prosecutor's Office?

3 A. That's correct.

4 Q. So let's get back to my question in terms of
5 the review you performed on the Sea-Tac JARPA versus
6 the coordination you did in your role in terms of
7 coordinating the technical experts.

8 And my question was, is it fair to say that
9 your role was more administrative in nature as opposed
10 to a technical review of the JARPA?

11 A. Yes.

12 Q. As part of that administrative review, one of
13 your responsibilities was to coordinate technical
14 experts both inside and outside of Ecology; is that
15 right?

16 A. That's correct.

17 Q. Did you also coordinate review with the Port
18 retained experts?

19 A. You'll have to be more specific.

20 Q. Well, when you said you coordinated review of
21 the substance of the project by technical experts for
22 evaluating the adequacy of the application, what I want
23 to know is, who were those experts? Were they Ecology
24 experts in-house, employees of Ecology, outside
25 consultants like Kelly Whiting retained by Ecology, and

1 ~~did they also include the Port experts, the experts~~
 2 ~~retained and paid by the Port of Seattle?~~
 3 ~~A. The review that I coordinated was of Ecology~~
 4 ~~employees or technical experts that Ecology contracted~~
 5 ~~with to review material submitted to us by the Port of~~
 6 ~~Seattle. I did not review -- or I'm sorry, I did not~~
 7 ~~direct the work of any of the Port of Seattle~~
 8 ~~consultants. We reviewed the materials submitted by~~
 9 ~~them to us, and then provided the Port back with~~
 10 ~~comments on the adequacy of the material that they had~~
 11 ~~submitted.~~

12 Q. How did you go about coming to a reasonable
 13 assurance conclusion on the Port's 401 application?

14 A. That final determination of reasonable
 15 assurance was arrived at after a long process of
 16 very -- and a very thorough review of all of the
 17 materials submitted to us by the Port of Seattle.

18 Q. You yourself believe that Ecology had
 19 reasonable assurance to issue the 401 certificate on
 20 August 10; is that correct?

21 A. I do.

22 Q. That was part of the consensus that was
 23 reached on or before August 10?

24 A. That's correct.

25 Q. Ecology needed to have reasonable assurance

1 Q. And you made that recommendation because it
 2 was your belief on August 10 Ecology had reasonable
 3 assurance?

4 A. Yes.

5 Q. What definition of "reasonable assurance" did
 6 you use to make the recommendation to your management
 7 that the 401 certification be signed, the one issued on
 8 August 10?

9 A. The definition that I used is what is
 10 described in my Declaration. It is the definition and
 11 the process described by Tom Luster in the desk manual
 12 that he prepared for Ecology, the draft desk manual.

13 Q. You reviewed that desk manual before making
 14 the recommendation to Gordon White?

15 A. I didn't pull it out and reread it. What I
 16 did do is applied the training that I had received from
 17 Mr. Luster and my own experience in issuing nearly 60
 18 water quality certifications to come to the conclusion,
 19 after based on lengthy review of all of the material
 20 before the Department and input from the technical
 21 experts and the regulatory experts and the policy
 22 experts, that we had reasonable assurance at the time
 23 we issued that certification.

24 Q. How did it come about that the certification
 25 was going to be issued on August 10?

1 on or before August 10 to issue that 401 certification;
 2 correct?

3 MR. REAVIS: Object to the extent it calls
 4 for a legal conclusion.

5 Q. (BY MR. STOCK) That's your understanding,
 6 isn't it?

7 A. That's correct.

8 Q. That was your objective, to come to a
 9 conclusion of reasonable assurance in issuing the 401
 10 certification?

11 A. Could you restate that, please?

12 Q. Sure. That was your job, wasn't it, to come
 13 to a conclusion of reasonable assurance before you
 14 issued the 401 certification to the Port of Seattle?

15 A. That's correct.

16 Q. And to come to that conclusion, you relied
 17 upon the review by experts both in-house at Ecology and
 18 consultants retained by Ecology?

19 A. Yes.

20 Q. Did Ecology have that reasonable assurance on
 21 August 10 when it issued the 401 certification?

22 A. Yes.

23 Q. Did you make the recommendation that the 401
 24 certification be signed?

25 A. Yes.

1 A. We had essentially completed our work and
 2 were ready to issue the certification at that point in
 3 time.

4 Q. You were under pressure, weren't you, to get
 5 the certification done and out by August 10?

6 A. How do you define "pressure"?

7 Q. Well, you were being told, weren't you, that
 8 the Port was anxious to get the 401 certification?

9 A. The Port was anxious to get their 401
 10 certification when I started back in October of 2000.
 11 That didn't change.

12 Q. Did you sense any increasing pressure up to
 13 the point that it was issued on August 10 to get the
 14 401 certification out?

15 MR. REAVIS: Objection; vague.

16 Q. (BY MR. STOCK) Go ahead and answer.

17 A. I don't think that the pressure increased.
 18 It was consistent throughout the process.

19 Q. Well, didn't you start working weekends in
 20 July 2001 to get the 401 certification out?

21 A. Yes, I did.

22 Q. And you hadn't worked weekends before, had
 23 you?

24 A. No.

25 Q. And you worked the weekends in July because

1 you were under pressure from upper management to get
2 the 401 certification issued?

3 A. I worked with upper management to provide
4 them with my best estimate of when I believed I would
5 be able to get a draft certification prepared, as well
6 as my estimate of when I believed the remaining issues
7 that we had concerning the Port's application would be
8 resolved. And that resulted in an estimate to Ray
9 Hellwig, and that estimate was passed on to whoever he
10 passed it on to, I can't say with certainty. But
11 ultimately I believe that estimate was passed on to
12 Paul Isaki, the governor's chief of staff.

13 Q. I understand that. And you're telling me
14 that's the reason you worked weekends in July?

15 A. The reason I worked weekends in July and
16 maybe even -- yeah, it was July, was because I was so
17 busy during the week going to meetings, technical
18 meetings, stormwater meetings, low flow meetings,
19 wetland meetings, that I didn't have any time to sit
20 down in a quiet manner to do the kind of writing and
21 thinking that I needed to do to thoughtfully prepare a
22 thorough 401 certification. So I came in during the
23 weekends to do that work when it was quiet and there
24 would be no disruptions.

25 Q. Do you had conversations with Mr. Hellwig

1 about the schedule as to when you were going to be able
2 to make the recommendation of reasonable assurance?

3 A. I did.

4 Q. That's what Mr. Hellwig was looking to you
5 for, the recommendation for reasonable assurance?

6 A. That's correct.

7 Q. And he came to you and he said, Ms. Kenny, or
8 Ann, tell me when you're going to get this reasonable
9 assurance decision made?

10 A. That's correct.

11 Q. He told you in fact that he was getting
12 pressure from Gordon White to get the 401 certification
13 out, didn't he?

14 A. No.

15 Q. Was there any conversation with Mr. Hellwig
16 about conversations he had with Mr. White or
17 Mr. Fitzsimmons about the need to get the 401
18 certification issued in August?

19 A. My recollection is somewhat hazy as to what
20 happened because I was not a party to those
21 discussions.

22 I believe what happened was that based on my
23 estimate of the amount of time I felt it would take to
24 get the technical work done and get the certification
25 drafted and reviewed put us out to the first week of

1 August, more or less. And that information was
2 conveyed up the chain of command, to whom I don't know
3 for sure because I didn't pass that information on.
4 Ultimately I believe that that information was handed
5 onto by the governor's office, again, I can't say
6 because I don't work in the governor's office. And a
7 target date of the first or second week of August
8 became pretty set in stone.

9 Q. No, I understand all that and I'm not trying
10 to trick you. What I'm trying to get at is, the reason
11 Ray Hellwig came to you and said, We've got to get this
12 certification out, is because he was getting pressure
13 from Gordon White, Tom Fitzsimmons, and the governor's
14 office, and so he came to you and he said, What's the
15 schedule? Isn't that a fair assessment what happened?

16 A. He wanted to know what the schedule was, and
17 I told him.

18 Q. Is that a fair assessment of what happened?

19 MR. REWIS: Object to the extent the
20 question mischaracterizes her earlier testimony.

21 Q. (BY MR. STOCK) I'm not trying to
22 mischaracterize your testimony, Ms. Kenny. That is a
23 fair assessment of what happened, isn't it?

24 MS. MARCHIORO: Objection. I think you're
25 asking her to speculate as to what was in Mr. Hellwig's

1 mind. And unless the witness can testify that
2 Mr. Hellwig expressed that to her, I think you're
3 asking her to speculate on something she may not have
4 any knowledge of.

5 MR. STOCK: That is a leading objection as
6 far as I'm concerned. State your objection and that it
7 mischaracterizes the testimony and we'll move on.

8 Q. (BY MR. STOCK) What I want to know, is it a
9 fair assessment that Mr. Hellwig came to you and asked
10 you what the schedule was because he was getting
11 pressure from Gordon White, Tom Fitzsimmons and the
12 governor's office?

13 A. I don't believe he ever had any pressure from
14 Gordon White concerning the time line of the permit.

15 Q. How about Tom Fitzsimmons?

16 A. From Tom Fitzsimmons, I know from
17 conversations with Ray that there was certainly
18 continued concern from the governor's office as to the
19 timing of the permit. And that was the context in
20 which we were trying to get that information back out
21 to management of, okay, when are we going to get done
22 with this.

23 Q. Right. Mr. Hellwig told you about the
24 pressure he was getting from Tom Fitzsimmons, didn't
25 he?

1 A. Tom Fitzsimmons was not providing pressure on
 2 me or I believe Ray.
 3 Q. That's not my question.
 4 A. But the pressure was coming from a higher
 5 level.
 6 Q. From the governor's office?
 7 A. From the governor's office, because of the
 8 pressure being put on the governor's office by the Port
 9 of Seattle.
 10 Q. So Ray Hellwig comes to you and says, Ann,
 11 we've got to get this 401 certification out because the
 12 governor's office wants this 401 certification out?
 13 That's a fair assessment?
 14 A. He didn't say that.
 15 Q. Well, not in those words, but that's a fair
 16 assessment, isn't it?
 17 A. I'd say that it's fair to say that there was
 18 certainly interest in Ecology not prolonging that
 19 decision-making process.
 20 Q. I'm not going to mince words with you.
 21 It's a fair assessment that Ray Hellwig came to you and
 22 said, we've got to get this 401 certification out
 23 because the governor's office wants the 401
 24 certification out; isn't that a fair assessment?
 25 MS. MARCHIARO: Objection; asked and

1 Q. Have you
 2 A. And Mr. Isaki at that point said, Well, that
 3 work needs to get done and Ecology needs to have time
 4 to review it. And he did not in that meeting make a
 5 promise to the Port as to when they would get a 401
 6 certification from the Department of Ecology.
 7 Q. Not in that meeting?
 8 A. Not in that meeting.
 9 Q. And that was at the end of July?
 10 A. Somewhere around that time.
 11 Q. Have you ever before been in the governor's
 12 office sitting with the governor's chief of staff on a
 13 401 application?
 14 A. No, I have not.
 15 Q. That was very unusual, wasn't it?
 16 A. Certainly.
 17 Q. And you had worked weekends before this
 18 meeting in the governor's office to get the 401
 19 application out, isn't that right?
 20 A. Could you restate that question?
 21 Q. Sure. You were working weekends in July
 22 before this meeting in the governor's office to move
 23 the 401 application along to get it issued in August?
 24 A. I can't be certain of the time line of the
 25 meeting relative to my working weekends. It was

1 answered.
 2 MR. REAVIS: I'm going to object to the
 3 question because it appears that you're asking her not
 4 to tell you what Ray Hellwig told her but to
 5 characterize an assessment Ray Hellwig told her. So I
 6 think the question is vague and misleading.
 7 Q. (BY MR. STOCK) Go ahead and answer.
 8 MR. STOCK: Why don't we reread the question
 9 for her.
 10 (Reporter read back as requested.)
 11 A. That's not correct and I'll tell you why.
 12 Because I participated in a meeting in Paul Isaki's --
 13 in the governor's conference room at the Capitol
 14 Building with Paul Isaki, Ray Hellwig, Tom Fitzsimmons,
 15 Mick Dinsmore, Gina Marie Lindsey, Elizabeth Leavitt
 16 and myself. And I can't remember the exact time line,
 17 but it was before -- it was near the end of July.
 18 And certainly the Port was there expressing
 19 concern and frustration about the time that it was
 20 taking to get the permit out. We in no uncertain terms
 21 told the Port in front of Mr. Isaki that the reason it
 22 was taking so long was not because of Ecology's
 23 protracted review but because of the Port's inability
 24 to get the work done in a timely manner and the
 25 inability of their consultants to get their work done.

1 about -- I'd have to go back and check my time sheets
 2 but, you know, I did basically work continually for
 3 about three weeks prior to issuance of the permit.
 4 Q. I'm going to move on, but in any event, to
 5 sum up, you were under intense pressure to get that 401
 6 certification issued, weren't you?
 7 A. I was under pressure.
 8 Q. Intense pressure?
 9 A. Intense pressure. I also wanted to have a
 10 summer vacation.
 11 Q. Okay, why don't we take a brief break.
 12 A. Okay, sounds good.
 13 (Recess taken.)
 14 Q. (BY MR. STOCK) Let's go back to the
 15 governor's office for a minute. You said that Ecology
 16 told the Port at that meeting that there was
 17 information that was still needed; is that right?
 18 A. We had been telling the Port staff that we
 19 had been working with that there was information
 20 needed. Apparently Mick Dinsmore and Gina Marie
 21 Lindsey hadn't been getting the same feedback from
 22 their own staff as to the status of the project or
 23 time line or the delays.
 24 Q. The reason for the delays?
 25 A. The reason for the delays

1 Q. And your objective was to educate
 2 Mr. Dinsmore and Ms. Lindsey as to what additional
 3 information was needed --
 4 A. Correct.
 5 Q. -- before a 401 certification could be
 6 issued; is that right?
 7 A. Correct.
 8 Q. What was the information that you told the
 9 Port and the governor's office that was needed in order
 10 to issue the 401 certification?
 11 A. The only information that was outstanding at
 12 that point in time was resolving the impact of analysis
 13 for the low flow work.
 14 Q. Was that the only information you said that
 15 was outstanding at that meeting?
 16 A. I believe that was the only major item that
 17 was outstanding at that point.
 18 Q. What I want is, did you tell the Port and the
 19 governor's office whether there was anything else
 20 outstanding other than the impact analysis for the low
 21 flow work?
 22 A. I don't recall.
 23 Q. Sitting here today, you can't think of
 24 anything else?
 25 A. No.

1 Q. Have you been in the governor's office on any
 2 other occasion relating to the Sea-Tac project?
 3 A. That was the only time I've been at the
 4 governor's office.
 5 Q. Did Governor Locke stick his head in?
 6 A. No.
 7 Q. Any part of his body? He wasn't present?
 8 A. No, he was not present at any time during
 9 that meeting. Never got to meet him.
 10 Q. Was there any decision reached at this
 11 meeting?
 12 A. No. The message back to the Port from Paul
 13 Isaki, as I recall it is, Well, the work needs to get
 14 done and Ecology needs to do their job.
 15 Q. Did Mick Dinsmore speak at this meeting?
 16 A. Yes.
 17 Q. What did he tell Paul Isaki?
 18 A. He expressed concern about the time that it
 19 was taking and frustration about the process.
 20 Q. Was he angry?
 21 A. No. I can't say whether he was angry. He
 22 didn't appear --
 23 Q. Did he seem agitated to you?
 24 A. No, he seemed to be himself.
 25 Q. What do you mean by that?

1 A. Just in other times that I've heard him speak
 2 or seen him, he's a rather animated, interesting
 3 character.
 4 Q. He was animated at this meeting when he was
 5 expressing frustration?
 6 A. Yeah, just normal -- his normal -- I think
 7 that's his normal communication style.
 8 Q. In any event, he was animated when he was
 9 expressing his frustration at the lack of a 401
 10 certification at this meeting in the governor's office;
 11 correct?
 12 A. My impression was that he was certainly
 13 interested in the subject.
 14 Q. So what did you do in response to this
 15 meeting at the governor's office?
 16 A. I don't recall specifically, other than just
 17 going back to work whenever I went back to work and
 18 kept working. We did not take any specific action or
 19 change any course of our review or our process as a
 20 result of this meeting.
 21 Q. Other than to get it out as quickly as you
 22 could?
 23 A. The work on that was something that I just
 24 worked at steadily over that course of three to four
 25 weeks to get that certification to the point where it

1 could go out.
 2 There were parts of the project that were --
 3 a 401 certification involves -- part of it is pretty
 4 much boilerplate and then you have to go in and
 5 customize it to the project. And there were large
 6 parts of this project that were already done, and so
 7 there was work that I could begin on the certification,
 8 which was a very lengthy certification, the longest,
 9 largest, most complex certification that I certainly
 10 have ever issued or I believe that the state has ever
 11 issued. So it was very time consuming to pull that
 12 together.
 13 Q. Did you author the 401 certification?
 14 A. I pulled together -- parts of it were
 15 boilerplate, part of the language came from other
 16 staff, I drafted some conditions. It was a
 17 collaborative effort. I was the primary author,
 18 however, responsible for pulling it together in one
 19 comprehensive, cohesive document.
 20 Q. Did you write any of the technical sections
 21 of the 401 certification?
 22 A. I may have made suggestions or added language
 23 to language provided by some of the staff. There were
 24 sections that -- on the acceptable fill criteria, that
 25 I didn't do anything with other than just cut and paste

1 and just dropped it in verbatim. And there was
2 language provided by John Drabek where I essentially
3 did the same thing. There were subsequent changes made
4 after he reviewed it and others reviewed it.

5 So mostly the technical work was fairly
6 verbatim, the exception being the work that I got from
7 Shannon and Wilson needed some work to take their
8 concerns and recommendations and put them into more of
9 a regulatory format versus the way the recommendation
10 was written. I translated that into --

11 Q. Is this the wetlands section?

12 A. The wetlands section, yes.

13 Q. You said that you relied upon technical
14 policy and regulatory staff in your coordination
15 efforts and that you collated and synthesized what they
16 did into a recommendation of reasonable assurance; is
17 that right?

18 A. That's correct.

19 Q. What technical people did you rely upon to
20 come to your recommendation of reasonable assurance?

21 A. I relied on the work of Katie Walter of
22 Shannon and Wilson who had some hydrogeologic support
23 from someone in her firm; I relied on Eric Stockdale
24 who is with the Department of Ecology. Those were the
25 primary people for wetlands.

1 dam safety at the airport site in terms of the proposed
2 facility.

3 Q. Who?

4 A. The primary person who I got comments from
5 was Gerald LaVasser. I may have spoken with his
6 supervisor in passing about what the dam safety
7 regulations were and when they applied.

8 Q. Any other technical experts?

9 A. I don't think so.

10 Q. How about policy staff? You say your
11 coordination included policy staff and regulatory
12 staff, so what I want from you is policy staff and
13 regulatory staff that you relied upon to come to a
14 reasonable assurance.

15 A. Right. Often our staff have multiple roles,
16 so in terms of wetland policy and regulation, that
17 would have been Eric Stockdale. And to -- no, we did
18 not involve Andy McMillen directly, I don't believe, at
19 headquarters.

20 In terms of water quality policy and
21 regulation, the key person there was Kevin Fitzpatrick
22 and John Drabek. The dam safety people were Gerald
23 LaVasser. On the acceptable fill issue, that I left to
24 Kevin Fitzpatrick's responsibility.

25 Q. Did you ever talk to Pete Kennett?

1 On the acceptable fill criteria I relied on
2 the work prepared by Chung Yee and Kevin Fitzpatrick.

3 On the issue of potential preferred pathways
4 and contamination from the airport operation
5 maintenance area I relied on Ching Pi Wang.

6 For water quality concerns I relied on Kevin
7 Fitzpatrick, John Drabek.

8 And in terms of the real intense technical
9 review of the Stormwater Management Plan and the Low
10 Flow Analysis, I relied on our contractor, Kelly
11 Whiting, who works for King County. There may be
12 others.

13 Q. That's my question. Any other technical
14 people that you relied upon to come to your
15 recommendation of reasonable assurance?

16 A. Uh-huh. Mr. Dave Garland who is a
17 hydrogeologist in the Water Quality Program provided
18 comments on portions of the Low Flow Analysis.

19 Mr. Roger Nye who works in the Toxics Cleanup
20 Program provided me with background information on
21 toxics issues related to the airport operation
22 maintenance area and the Agreed Order. That was
23 primarily background information.

24 I tapped into some of the knowledge of our
25 dam safety people at headquarters regarding issues of

1 A. Kennet.

2 Q. Kennet.

3 A. No.

4 Q. Why not?

5 A. I was not personally involved in the
6 preparation of those criteria.

7 Q. You let Kevin Fitzpatrick handle that?

8 A. I let Kevin Fitzpatrick manage that process.

9 Q. Okay, any other policy or regulatory staff
10 you relied upon to come to a reasonable assurance
11 conclusion?

12 A. There may be others, but I can't think of
13 them at the moment.

14 Q. How did you decide what experts, technical
15 experts you would rely upon to come to your reasonable
16 assurance conclusion?

17 A. The staff who were involved in the project
18 were primarily already involved in the project prior to
19 my involvement, and those people had been brought in by
20 Mr. Jaster and as determined appropriate by the Water
21 Quality Program in our region. Those decisions were
22 made primarily before I got involved in the project.

23 Q. Let me go down Ecology's witness list and get
24 you to react to some of these names just in terms of
25 who they are and how you may have used them, or if you

1 did. There are only two referenced that you haven't
2 mentioned, Gordon White and Ed O'Brien.

3 Did you have any contact with Ed O'Brien
4 regarding the Sea-Tac Third Runway application?

5 A. No.

6 Q. Any understanding of why he's on Ecology's
7 witness list?

8 A. I believe he would be on Ecology's witness
9 list because he is our expert on stormwater management
10 issues for the state and is the primary author of our
11 newly revised Western Washington Stormwater Management
12 Manual.

13 Q. Gordon White?

14 A. Gordon White is the program manager for the
15 Shorelands and Environmental Assistance Program. He is
16 the person who signed the 401 certification.

17 Q. What involvement did you have with him
18 throughout this whole process?

19 A. I kept Mr. White informed of the status of
20 the project throughout the process.

21 Q. How often did you speak to Mr. White about
22 the Port's application?

23 A. When I first started working on the project
24 it was maybe once or twice a month, and then as we
25 progressed towards the decision, it may have been

1 sometimes daily near the very end to let him know what
2 the status of the project was and to keep him apprised
3 of the issues we were working on.

4 Q. Why were you talking to him daily near the
5 end of the project?

6 A. To keep him apprised of the status. Because
7 he was responsible for signing the permit, he wanted to
8 know where we were at.

9 Q. Did you have a scheduled call each day with
10 him?

11 A. No.

12 Q. Would he call or you call?

13 A. I would generally just leave a voicemail for
14 him with it and a brief update as to whatever was going
15 on.

16 Q. Let me go down the Port's witness list and
17 get your input on some of these individuals, and tell
18 me whether you had any interactions with these
19 individuals.

20 Paul Agid?

21 A. Can you define what you mean by
22 "interaction"?

23 Q. Well, any communication, written, oral or
24 otherwise.

25 A. All right.

1 Q. Paul Agid?

2 A. Mr. Agid, he was someone I worked with only
3 very briefly in terms of the issue of our Preferred
4 Pathways Analysis. I did attend a meeting at the Port
5 offices where I met him. Ching Pi Wang and I went to
6 that meeting; we discussed the types of data that the
7 Port had available to them and the types of analyses
8 that they had available through their consultants to
9 help define that particular issue.

10 Q. Anything else with Paul Agid?

11 A. There may have been a phone call or two.

12 Q. On that particular issue, preferred pathways?

13 A. It would have been preferred pathways, I
14 believe.

15 Q. How about Barry Christopher, Ph.D., PE,
16 Roswell, Georgia?

17 A. I have never heard of him.

18 Q. James Kelley, Parametrix?

19 A. I am very familiar with Dr. Kelley. He is
20 the Port's lead wetlands specialist.

21 Q. Does he go by doctor?

22 A. He has a Ph.D. but he doesn't go by doctor.

23 Q. What is your involvement with Mr. Kelley?

24 A. Mr. Kelley attended a number of the
25 facilitated meetings that we had between -- those

1 meetings were ongoing when I started and concluded
2 about the end -- you know, near the end of December of
3 2000. He was in attendance at many of those meetings
4 because we were discussing the Natural Resource
5 Mitigation Plan.

6 Then throughout the process, that time frame,
7 there were several meetings that I attended with Eric
8 Stockdale and Katie Walter with Jim Kelley in
9 attendance where we discussed the Natural Resource
10 Mitigation Plan and our concerns about that plan. And
11 I have had a handful of conversations on the phone with
12 him about, you know, status of the NRMP, when we would
13 expect to receive revised -- you know, if we had asked
14 for revised work when could we expect to receive it.
15 He kept me informed on the status of their work.

16 Q. So no technical discussions with him; more
17 administrative in terms of when you expected work
18 product from him?

19 A. I did not enter into discussions with him
20 regarding the technical merits of the work.

21 Q. Dr. James Mitchell, Ph.D., PE, Geotechnical
22 Engineer, Blacksburg, Virginia?

23 A. Never heard of him.

24 Q. William Stubbelfield, ENSR Toxicology, Ft.
25 Collins, Colorado?

1 A. Never heard of him.

2 Q. Donald Weitkamp, Parametrix?

3 A. Mr. Weitkamp I am familiar with. He is a

4 fisheries biologist, I believe, for Parametrix who

5 attended one meeting that we had when we were

6 discussing the Port's impacts regarding low flow. He

7 provided some commentary and information on low flow

8 impacts to aquatic species.

9 Q. Paul Fendt, Parametrix?

10 A. I am familiar with Mr. Fendt. He is their

11 lead engineer for the stormwater plan, and I believe

12 coordinated the review of the low flow plan in concert

13 with a number of other subconsultants.

14 Q. What was your involvement with Mr. Fendt?

15 A. Mr. Fendt was at virtually every meeting I

16 ever attended with the Port of Seattle because every

17 meeting involved the stormwater plan where -- virtually

18 every meeting except for the separate meetings on

19 wetlands involved the stormwater plan or the low flow

20 plan.

21 Q. So throughout the time that you have been the

22 project coordinator for the Sea-Tac application, every

23 meeting you've attended there's been a discussion of

24 the stormwater plan or the low flow analysis?

25 A. Virtually every meeting. I can't recall

1 the sitting of the vaults, safety access issues.

2 I think that's how that sorted out. They did not come to

3 every meeting.

4 Q. And you think Al Black is with HNTB?

5 A. I'm not sure.

6 Q. Or one of the two, Hart Crowser?

7 A. One of the two. They were one of the

8 subconsultants to the Port providing technical input to

9 the Port on the stormwater plan.

10 Q. Keith Smith?

11 A. Keith Smith I'm familiar with. He is the

12 stormwater manager, I believe, out at the Port of

13 Seattle.

14 Q. What involvement did you have with him?

15 A. Keith was only limited -- he had limited

16 involvement up until the end of December. When we got

17 into the new year, 2001, and we started having another

18 round of facilitated meetings to resolve remaining

19 issues in the stormwater plan, Keith became the main

20 contact for the Port on that process as well as the

21 process to resolve remaining issues regarding the Low

22 Flow Analysis.

23 Q. Norm Crawford, Hydrocomp, Menlo Park?

24 A. Norm Crawford never came to any meetings that

25 I was at, as it's my understanding that Mr. Crawford

1 Q. How about Michael Bailey, Hart Crowser?

2 A. I'm familiar with Mr. Bailey. I believe he

3 was responsible for -- I think some aspect of the

4 geotechnical analysis, but I could be mistaken. He

5 didn't come to that many meetings.

6 Q. Did you rely on him in any way?

7 A. Well, I never relied on -- well, other than

8 just to listen to what he had to say. I don't

9 understand what you mean by "rely."

10 Q. Well, did Ecology rely upon any of his work

11 product to come to reasonable assurance?

12 A. I believe that -- would have to check back

13 through the file, but he -- you said it was HNTB or

14 Hart Crowser?

15 Q. Hart Crowser.

16 A. I'm getting confused which firm did which

17 work, but at some point in the stormwater review, I

18 believe that one or the other firms, because Allen

19 Black I know with one of those, maybe it was HNTB,

20 provided additional information on -- okay, I think

21 Bailey was more the hydrogeologic input. And they did

22 some extra work on I believe infiltration studies that

23 Kelly Whiting and Kevin Fitzpatrick wanted to see on

24 at the airport. And Allen Black I think did the

25 structural analysis that we had, the concerns we had on

1 the person who had invented the NSR model and that he

2 was used at some point by the Port to maybe provide

3 preliminary analysis to their modeling work. And I

4 know at the very end in the last couple months they've

5 called him back in to provide some technical review.

6 But I've never met him or spoken with him.

7 Q. Tom Hubbard?

8 A. H-u-b-b-a-r-d, I believe. Tom is I believe

9 involved in stormwater management out at the Port, and

10 I met him at a site visit that I did with John Drabek

11 and Ron Divitt of my office. And then I had maybe one

12 or two phone conversations with him.

13 Q. For what purpose?

14 A. It was in response to a telephone call with a

15 complaint from Chris Gower that there was erosion

16 problems out at the airport. And he called -- I

17 believe I called Keith Smith about that to find out

18 what was going on, and I had a call back from Tom

19 Hubbard with a status report on the situation.

20 Q. Elizabeth Leavitt?

21 A. Elizabeth Leavitt is the airport

22 environmental -- what is she called, the aviation

23 manager for environmental affairs. I don't have her

24 exact title.

25 Q. Sure.

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1 A. But she was the main management contact,
2 upper management contact that I had with the Port of
3 Seattle.

4 Q. How often did you deal with her?

5 A. She came to all of the meetings that were
6 held in the facilitated process between when I started
7 in the end of October to the end of December. There
8 were additional meetings that we had to kind of
9 coordinate management of the project, and then I had
10 phone conversations with her if I was trying to track
11 down information or who do I need to talk to about a
12 particular aspect of the project.

13 Q. No technical discussions with her where
14 technical decisions were being made?

15 A. No.

16 Q. Michael -- how do you say it?

17 A. Cheyne.

18 Q. Cheyne?

19 A. Cheyne.

20 Q. I'll never get it right.

21 A. Yeah, well, it's C-h-e-y-n-e, and it's
22 pronounced Shane, S-h-a-n-e.

23 Michael is -- was, I think he's got a new
24 position now. I believe he was their main person doing
25 contract management for coordinating all of the various

1 contracts that they have related to constructing
2 various elements of the Port's Master Plan Update
3 Improvement projects which include the third runway.

4 Q. Any involvement with him?

5 A. Yes. Mr. Cheyne again came to most of --
6 almost all of the meetings between October and the end
7 of December 2000. He came to a few of the early
8 meetings on low flow. He was also my contact for the
9 contracts that we had with the Port to pay for the
10 services of King County and Shannon and Wilson.

11 Q. Elizabeth Clark?

12 A. Beth Clark?

13 Q. Yes.

14 A. Beth Clark I have never had any personal
15 contact with. It's my understanding that she works
16 with Paul Agid and has some responsibility for the fill
17 that's being imported out to the airport site.

18 Q. And you say you've never worked with her?

19 A. I've never worked with her. I'm familiar
20 with her by name only.

21 Q. John Strunk, Associated Earth Sciences?

22 A. Could you pronounce that last name again?

23 Q. Sure. Strunk, S-t-r-u-n-k.

24 A. At that meeting that I mentioned with Paul
25 Agid, there were one or two gentlemen from Associated

1 Earth Sciences there. He may have been one of those
2 two, I just don't recall his name at the moment.

3 Q. Other than that, you've never had involvement
4 with him?

5 A. No, no direct contact.

6 Q. Joseph Brascher, Aqua Terra Consultants?

7 A. Joe Brascher. The Port brought him in as an
8 expert to resolve or to continue working on modeling
9 issues related to both the Low Flow Analysis and the
10 Stormwater Management Plan. B-r-a-s-c-h-e-r.

11 Q. And when did that happen?

12 A. Joe got involved in the process, oh, in -- I
13 can't remember exactly when we started the stormwater
14 meetings. The second round of meetings was late
15 January or February of 2001, he started coming to the
16 stormwater meetings.

17 Q. And is that your involvement with him,
18 through those stormwater meetings?

19 A. And low flow. I don't believe I've ever
20 spoken with him outside of that context.

21 Q. Pony Ellingson at Pacific Groundwater Group?

22 A. Pony Ellingson is a consultant for the Port.
23 His specialty is groundwater modeling.

24 Q. Have you had any involvement with him?

25 A. Not other than his attendance at these

1 meetings basically regarding the Low Flow Analysis.

2 Q. Jan Cassin, C-a-s-s-i-n, Parametrix?

3 A. I believe Jan is a wetlands specialist that
4 was working under Jim Kelley. I don't believe that I
5 ever had any direct contact with her, although I knew
6 that she was working on doing the legwork on preparing
7 the NRMPs, some of the NRMPs.

8 Q. Charles Wisdom, Parametrix?

9 A. That name doesn't have any familiarity.

10 Q. Mary Vigilante, Synergy Consultants?

11 A. I'm not sure who she is, but at some point I
12 was asked to forward public comments to her at the
13 Port's request.

14 Q. When was that request made?

15 A. Somewhere around the time of the public
16 comment period which was -- I don't know, last year
17 sometime. Earlier this year.

18 Q. No other involvement with her?

19 A. No, no direct involvement at all.

20 Q. William Dunlay, Lee Fisher Associates?

21 A. I haven't heard of him.

22 Q. San Francisco International Airport?

23 A. No, never any contact with him.

24 Q. Mike Riley, Papadopoulos and Associates?

25 A. No, that's not ringing any bells.

1 Q. Olympia?

2 A. No. I may have met him but it's not a name

3 that's --

4 Q. Steve Swinson, R. W. Beck?

5 A. No.

6 Q. All right, let's switch gears.

7 You mentioned that you had been on a site

8 visit with one of these witnesses we just talked about.

9 Do you remember which one? Well, let me ask this.

10 How many site visits have you been on for the

11 Sea-Tac Airport application?

12 A. I went on a site visit -- I can't remember

13 the exact date, but it would have been sometime after

14 we had Shannon and Wilson on contract, January or

15 February. I know it was before --

16 Q. Of 2001?

17 A. 2001, prior to the earthquake. Katie Walter

18 and Sam Casne with Shannon and Wilson and I went out

19 with Jim Kelley and Elizabeth Leavitt and Paul Fendt

20 and did a tour of all of the wetland areas on site at

21 the airport.

22 There was another site visit that I attended

23 down in Auburn with Katie Walter that was right after

24 the earthquake because I remember we were trying to

25 reschedule it or something. And so it was Katie

1 Walter, Elizabeth Leavitt, Jim Kelley, myself, I think

2 Sam Casne was there from Shannon and Wilson. And

3 that's all I recall at the moment. So we did a walking

4 tour of the site.

5 There was another site visit out at the

6 airport where I went out with John Drabek with Ecology

7 and Ron Divitt who is a water quality inspector.

8 Q. Debit?

9 A. D-i-v-i-t-t, maybe, I can't remember; Tom

10 Hubbard from the Port, and Keith Smith. I believe it

11 was Tom.

12 Q. When was this site visit?

13 A. Well, I don't recall exactly, but sometime in

14 the last -- you know, between maybe March or April.

15 Q. 2001?

16 A. 2001, correct. And what we did on that visit

17 was we looked at all of the stormwater management

18 facilities related to the airport and various outfalls,

19 looked at basically everything there was to see out

20 there.

21 Q. Any other site visits at the airport?

22 A. I went on another site visit in late June or

23 early July. There was a briefing meeting that the Port

24 held for their attorneys and our attorneys to be

25 briefed on the Low Flow Management Plan and Analysis,

1 when we did a site tour.

2 Q. Why were the attorneys involved in this site

3 visit?

4 A. I believe that our attorneys and the Port's

5 attorneys -- well, first they wanted to better

6 understand the technical issues involved with this very

7 complex analysis that was done for the low flow work.

8 And then our attorneys wanted some familiarity with the

9 layout of the site and locations for proposed

10 structures under the third runway application.

11 Q. Any other site visit?

12 A. No, not to my recollection.

13 Q. On any of these site visits did you need any

14 sort of security or clearance?

15 A. Access to these areas is limited. The

16 airport is fenced. There is security in place, and you

17 need to sign in and you're assigned a visitor ID pass

18 that must be visible. And there are various

19 checkpoints that you have to go through, and only

20 certain Port staff have the secret code.

21 Q. The magic card or whatever?

22 A. The code or the card to get past various

23 gates that have either staffed gates or locking gates

24 to get on site.

25 Q. But prior to going to the site visit you

1 didn't go through any sort of security clearance?

2 A. No, no.

3 Q. Or give your Social Security number or

4 anything like that?

5 A. I don't believe so.

6 Q. Were you required to do anything in advance

7 of these site visits?

8 A. No.

9 Q. Were you allowed to see whatever you wanted

10 to see?

11 A. Yes.

12 Q. Were you always escorted? **AR 001704**

13 A. Yes.

14 Q. By a Port person, I'm talking about?

15 A. Right. We went in Port vehicles and they

16 drove, primary consideration there being sure that you

17 don't cross the pathway of a jet that's taking off or

18 landing.

19 Q. Sure. Other than that, though, there weren't

20 any restrictions on where you could go or what you

21 could see?

22 A. No, it was whatever we wanted to go. We'd

23 stop, we'd get out, we'd look around. Whatever we

24 wanted to do was fine.

25 Q. So if you wanted to see a particular outfall,

~~1 you told them and you were taken there?~~

2 A. Yeah, we went, that's correct.

3 Recess taken.

~~4 Q. Hey Mr. STOCK How did you get involved after~~
5 the Sea-Tac Airport application?

6 A. I was asked to take on responsibility for the
7 401 certification.

8 Q. By whom?

9 A. By my supervisor.

10 Q. Who was that?

11 A. Jeannie Summerhays.

12 Q. What did she say?

13 A. She asked if I would be interested in doing
14 that, and I said yes.

15 Q. Did she explain why you were being asked?

16 A. She said that she had been asked by Paula
17 Ehlers if there was possibility in our capacity in our
18 region for that responsibility to be taken on.

19 Q. Did she tell you about her conversation with
20 Ms. Ehlers?

21 A. Indirectly -- well, she indicated that there
22 was the desire for Tom Luster to get back to some of
23 his other job responsibilities as the policy lead for
24 401.

25 Q. Did you have any conversations with Paula

1 Mr. Luster was not able to provide reasonable assurance
2 at that point in time?

3 A. No.

4 Q. You've never heard that?

5 A. No.

6 Q. From anyone?

7 A. No.

8 Q. Have you ever heard from anyone that the
9 reason Mr. Luster was taken off of the project was
10 because Ecology management thought Mr. Luster was
11 holding the Port to an unreasonable standard?

12 A. No.

13 Q. You haven't heard that from anyone ever?

14 A. No.

15 Q. Have you ever had any discussions with anyone
16 as to why Mr. Luster was moved off of the 401 project?

17 A. Yes.

18 Q. Who?

19 A. Ray Hellwig.

20 Q. And when did you have those conversations?

21 A. It would have been around the time that I
22 first started on the project.

23 Q. And what did Mr. Hellwig have to say in that
24 regard?

25 A. He voiced concerns that Tom perhaps had lost

1 Ehlers directly?

2 A. Yes, I did.

3 Q. Regarding whether you were going to take on
4 the task of coordinating the 401 application?

5 A. Yes.

6 Q. And did you have those conversations before
7 it was decided you would be assigned to the project?

8 A. There was a conference call that Jeannie
9 Summerhays and I participated in with Paula Ehlers and
10 Tom Luster to discuss the scope of the workload for the
11 Third Runway project to try to estimate the time that
12 would be involved. And at the end of that meeting I
13 believe that we all concurred that it would be possible
14 for me to take that workload on.

15 Q. In this telephone conversation did Tom Luster
16 give you his view on whether there was reasonable
17 assurance?

18 A. We didn't discuss the --

19 Q. Technical aspects?

20 A. -- technical aspects of the project.

21 Q. Did you have a conversation with Paula Ehlers
22 prior to this conference call?

23 A. I don't believe I did.

24 Q. Did you hear at any time that the reason that
25 Tom Luster had been taken off the project was because

1 his ability to be objective about the project.

2 Q. Did he say what the basis of that view was?

3 A. He stated that there were occasions where
4 various members of the team would come to consensus on
5 an approach for resolving an issue and Tom would
6 disagree.

7 Q. And for that reason Mr. Hellwig was of the
8 view that Mr. Luster had lost his ability to be
9 objective about the project?

10 A. I can't answer directly what Mr. Hellwig
11 thought.

12 Q. But that was your understanding as to why he
13 thought that?

14 A. That was my impression.

15 Q. Any other reason that you got that
16 impression?

17 A. The impression that?

18 Q. Well, you're right, let me ask the
19 question --

20 A. I can't remember.

21 Q. Mr. Hellwig voiced a concern that Tom Luster
22 had lost his ability to be objective about the project,
23 and you've now told me that he explained there were
24 occasion where members of the team would come to a
25 consensus and Mr. Luster would disagree.

1 And my question is, did Mr. Hellwig explain
2 further why he believed that Mr. Luster had lost his
3 objectivity about the project?

4 A. I believe I recall Mr. Hellwig telling me
5 that over the course of the time that Mr. Hellwig had
6 been involved in the project, that Tom seemed to have a
7 difficult time telling the Port what the standards for
8 review of the project would be, that he was continually
9 introducing new issues to the project, that he was
10 unable to tell the Port what the bottom line was in
11 terms of what Ecology was looking for.

12 Q. Did Mr. Hellwig tell you where he had heard
13 these criticisms of Mr. Luster?

14 A. Mr. Hellwig was very closely involved with
15 the process from sometime maybe the summer of 1999, and
16 he's continued in that role as the regional office's
17 management lead on the project. So you would have to
18 ask him, but it's I believe from his personal
19 experience in the process.

20 Q. Sure, we will ask Mr. Hellwig. But what I
21 want from you is what your memory is in terms of what
22 Mr. Hellwig has told you with respect to why Mr. Luster
23 was removed from the project.

24 Do you recall Mr. Hellwig telling you that
25 the Port was dissatisfied with Mr. Luster's review of

1 Tom was overreaching on our authority to regulate some
2 of the cumulative impacts that might be associated with
3 the project.

4 Q. Did you have this discussion with her before
5 you became the permit coordinator for the Port's
6 application?

7 A. No, I don't believe so.

8 Q. This was about the time that the transition
9 happened between Mr. Luster and you?

10 A. I believe that conversation happened well
11 after that -- well, a month after that transition, a
12 month, six weeks, eight weeks, but not immediately
13 around that time.

14 Q. Have you heard any other criticism of
15 Mr. Luster from anyone down in Olympia or Lacey?

16 A. Yes.

17 Q. Tell me about it.

18 A. In the time that I've worked on 401 issues
19 there have been several occasions where other 401 staff
20 have not agreed with Mr. Luster's approach to 401
21 management.

22 Q. What do you mean?

23 A. What I mean by that is that Tom would take a
24 position, and other experienced, knowledgeable,
25 competent 401 reviewers didn't agree with his approach

1 the application?

2 A. I believe I recall him indicating that he had
3 heard some concern from the Port that Mr. Luster was
4 not giving clear direction to them or consistent
5 direction as to what standards they needed to comply
6 with.

7 Q. And how were those concerns on the part of
8 the Port transmitted to Ecology?

9 A. I don't know.

10 Q. Did Mr. Hellwig tell you that Ecology upper
11 management was dissatisfied with Mr. Luster's
12 performance on the 401 review of the Port's
13 application?

14 A. What do you mean by upper management?

15 Q. Well, anyone above Mr. Hellwig at the
16 headquarters.

17 A. I don't believe so.

18 Q. Have you ever heard anyone from headquarters
19 criticize Mr. Luster's performance on his review of the
20 Port's application?

21 A. Yes, I have.

22 Q. What criticisms have you heard from
23 headquarters?

24 A. A specific criticism that I heard was from
25 Sandra Manning. She voiced concern that she felt that

1 Q. Okay, I need specifics.

2 A. All right.

3 Q. Who are you talking about and what did they
4 say?

5 A. I'm talking about Bonnie Shorin and Sandra
6 Manning and Rick Vining and Loree Randall who are all
7 or have been involved in 401 review for the Department
8 of Ecology.

9 Q. Were any of those individuals involved with
10 the review of the Port's application?

11 A. No, they were not.

12 Q. So these were more general criticisms about
13 Mr. Luster's approach to 401 review rather than a
14 specific criticism of his review of the 401 application
15 for the Port's project?

16 A. They were specific criticisms on projects
17 other than the third runway.

18 Q. Have you ever heard any criticism from anyone
19 about Mr. Luster's review of the Port's application
20 other than what you've already told me about from Ray
21 Hellwig?

22 A. I've heard concerns from Eric Stockdale.

23 Q. When and what did Mr. Stockdale say?

24 A. Several times in the last year Mr. Stockdale
25 has indicated that he believed that Tom was going

1 beyond the bounds of what was reasonable to require in
2 terms of mitigation for this project.

3 Q. Was he any more specific in what he meant?

4 A. I believe, again, it was in regards to the
5 situation or the circumstance where the parties
6 involved with the project would come to an
7 understanding about what was required based on what
8 Mr. Luster or Mr. Stockdale had told them, and the Port
9 would go off and do their work and then Mr. Luster
10 would come back with an additional piece of work that
11 he wanted them to do. So there was never a bottom line
12 or an end to the things that Mr. Luster was requiring
13 for the project.

14 Q. Did Mr. Stockdale give you any specifics
15 other than these general statements?

16 A. No, it was more general.

17 Q. Have you heard criticisms from anyone else
18 about Mr. Luster's performance on the Port's
19 application?

20 A. Yes, I have.

21 Q. Who and what did they say?

22 A. I have heard criticisms from Mr. Kevin
23 Fitzpatrick. And he said that Mr. Luster was unwilling
24 to listen to his input as a water quality expert
25 regarding the status or the sufficiency of the status

1 And there were a number of occasions where,
2 as I stated earlier, other competent, experienced,
3 well-informed people doing 401 review did not agree
4 with Mr. Luster's conclusion or approach in terms of
5 401.

~~6 Q. In terms of what the applicants may or may not
7 have needed to provide to the Department of Ecology?~~

~~8 A. That's correct.~~

9 Q. But in terms of his knowledge about 401
10 issues and his technical expertise on 401 issues, you
11 don't have any basis to disagree with the statement
12 that he's an expert in those areas?

13 A. I believe Mr. Luster has considerable
14 experience in the area of 401 management.

15 Q. And you don't believe that you are any more
16 of an expert than Mr. Luster is with respect to 401
17 issues?

18 A. No.

~~19 Q. You're not, are you?~~

~~20 MS. MARCHIORO: Asked and answered. She said
21 no.~~

~~22 Q. (BY MR. STOCK) Well, I just want to make
23 sure. Is that your answer?~~

~~24 A. Mr. Luster trained me.~~

25 Q. You had conversations with Mr. Luster, didn't

1 of the Port's application for purposes of water
2 quality.

3 Q. Did Mr. Fitzpatrick say anything more
4 specific than that with respect to Mr. Luster's
5 performance in his review of the Port's application?

6 A. I'm not recalling any specific details at
7 this point.

8 Q. Any other criticisms that you've heard?

9 A. Not at the moment. I don't recall any at the
10 moment.

11 Q. You don't have any basis to challenge
12 Mr. Luster's expertise with respect to 401 issues, do
13 you?

14 A. I do.

15 Q. Wasn't Mr. Luster held in high regard within
16 the Department of Ecology for his 401 expertise?

17 A. No.

18 Q. What basis do you have to challenge
19 Mr. Luster's expertise on 401 issues?

20 A. The basis that I have is my experience in
21 working with Mr. Luster and other members, we called it
22 the 401 team, review team. These were a combination of
23 headquarters people and ultimately regional 401
24 reviewers who had that responsibility in that same
25 role.

1 you, when the transition occurred from Mr. Luster to
2 you?

3 A. I did.

4 Q. And didn't Mr. Luster tell you at that time
5 that he had concerns with respect to reasonable
6 assurance on the Port's project?

7 A. He didn't put it in those terms.

8 Q. What did Mr. Luster tell you with respect to
9 the Port's project when the project was transitioned
10 over to you?

11 A. We sat down, we reviewed the history of the
12 project, we discussed various substantive areas where
13 at that time, the end of October 2000, he had concerns
14 about the project.

15 Q. What concerns did Mr. Luster express to you
16 that he had about the project when it was transitioned
17 over?

18 A. We talked about numerous areas of this very
19 large, complex project. And he explained where there
20 was work that still needed to be done, and we went
21 through basically every issue related to the airport.

22 Q. He had criticisms with respect to wetland
23 mitigation, did he not?

24 A. I don't recall that he had specific concerns
25 about the adequacy of the wetland mitigation package.

1 Q. You don't recall Mr. Luster telling you that
2 he had concerns about the adequacy of wetland
3 mitigation?

4 A. What I recall him telling me is that there
5 were some issues that were still being discussed as a
6 part of this facilitated process that had been
7 identified that were outstanding with the Natural
8 Resource Mitigation Plan. He didn't indicate to me
9 whether he felt that they were unresolvable issues.

10 Q. This was after the Port submitted its
11 application again on October 25, 2000?

12 A. Correct.

13 Q. In fact, that was the time when you got
14 assigned to the 401 project?

15 A. That's correct.

16 Q. Didn't Mr. Luster also express to you that
17 there were outstanding issues with respect to the
18 Stormwater Management Plan?

19 A. That's correct.

20 Q. And what did he say in that regard?

21 A. Well, he explained that the reason that
22 Ecology was in the position to deny the permit, the
23 second application of the permit, was due to
24 inadequacies in the Stormwater Management Plan near the
25 end of August of 2000.

1 status of the Port's compliance with their NPDES permit
2 at the Port, and was told that although there had been
3 some exceedances of the water quality criteria, that
4 itself did not constitute violation of the water
5 quality standards. And in Kevin's opinion there was --
6 you know, there was no direct evidence to say that all
7 of the BMPs in place out at the Port were inadequate.

8 Q. Just some of them?

9 A. He didn't say that.

10 Q. Is that what you took from the conversation?

11 A. No.

12 Q. You're not saying today that all of the BMPs
13 that are followed out at the airport with respect to
14 water quality management are adequate, are you?

15 MR. REAVIS: Objection; lack of foundation.

16 ~~A. I don't have the expertise to make that
17 determination.~~

18 Q. (BY MR. STOCK) Let's talk about leading up
19 to the issuance of the August 10 401 certification.
20 Was there any meeting or event that ultimately resulted
21 in you deciding that you had the opinion there was
22 reasonable assurance to go ahead and issue this August
23 10 certification?

24 ~~A. No specific meeting or event.~~

25 Q. Did you always assume that you could come to

1 Q. 1999, you mean? Oh, no, 2000 --

2 A. 2000, yeah.

3 Q. Right. And in fact, he told you that the
4 preponderance of the evidence was that the Port's plan
5 would result in a violation of the state water quality
6 standards?

7 A. He didn't put it in those terms.

8 Q. In general that is what he was saying?

9 A. What he told me was that Kevin Fitzpatrick in
10 his expertise as a water quality specialist and also
11 based on the review of King County in terms of where
12 the Stormwater Management Plan was at that time was
13 that that plan was not adequate at that time to give
14 the state reasonable assurance that water quality
15 standards would not be adversely affected.

16 Q. And one of the reasons that he discussed with
17 you that the plan wasn't adequate was because existing
18 BMPs out at the airport were inadequate?

19 A. That might have been an opinion of his that
20 he expressed. I don't recall.

21 Q. Well, did you do any sort of investigation
22 yourself to determine the adequacy of the existing BMPs
23 at the airport with respect to water quality
24 management?

25 A. I spoke with Kevin Fitzpatrick about the

1 a finding of reasonable assurance on the Port's
2 project?

3 A. No.

4 Q. Was coming to a no decision on the Port's
5 project an option in your mind?

6 A. Yes.

7 Q. The Department of Ecology had told the Port
8 in September 2000 that it was going to deny the second
9 application, isn't that right?

10 A. That's my understanding.

11 Q. And after that when you came on board, did
12 you receive any sort of instructions that you were to
13 come to a finding of reasonable assurance on the Port's
14 project?

15 A. No.

16 Q. That you had to do what it took to get to
17 reasonable assurance?

18 A. No.

19 Q. Nothing like that?

20 A. No.

21 Q. What did you rely upon to conclude that you
22 had reasonable assurance or you had enough informat
23 to make the recommendation of reasonable assurance 1
24 the August 10 certification?

25 A. The baseline for that were the issues that

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1 were outstanding and unresolved at the time Ecology
 2 made the determination that it could not recommend
 3 approval on the second application for this project.
 4 And so at that point in time, after I believe
 5 the Port withdrew rather than receive a denial,
 6 meetings were held at Ecology, which I was not a party
 7 to, that established a facilitated process to identify
 8 every issue remaining to be resolved to get to a point
 9 where Ecology could make a determination as to whether
 10 or not there was reasonable assurance in this project.

11 Q. What were those outstanding issues?
 12 A. Those outstanding issues are documented in
 13 notes prepared by Kate Snider of Floyd and Snider.
 14 There's a whole list, and they're broken down by the
 15 Stormwater Management Plan, by Low Flow, by the Natural
 16 Resource Mitigation Plan. There were numerous itemized
 17 issues that required resolution.

~~18 Q. Whose idea was it of these facilitated
 19 meetings?
 20 A. I'm not sure exactly.
 21 Q. The Port paid for the facilitator, did it
 22 not?
 23 A. The Port paid for the facilitator.
 24 Q. And once you became responsible for review of
 25 the Port's application, you participated in each of~~

1 Q. But it wasn't written down in the notes, was
 2 it?
 3 A. Sometimes it was. I believe it was. I
 4 believe they were.
 5 Q. Was the overriding goal at those meetings to
 6 reach consensus on the technical issue being discussed?
 7 A. No.
 8 Q. It wasn't?
 9 A. No.
 10 Q. It was to exchange information, wasn't it?
 11 A. That's correct.
 12 Q. And there was a discussion of minority views
 13 when they were raised?
 14 A. These were facilitated meetings, they were
 15 not negotiations. We did not -- we entered into that
 16 process, my understanding was, to facilitate clear
 17 communication. The role of Ecology was to clearly
 18 explain what it was looking for. The obligation of the
 19 Port was to provide us with information and come back
 20 with explanations of what they were doing.
 21 Ecology reserved final judgment on the
 22 adequacy of the technical presentations and verbal
 23 information that we were given us until we received a
 24 final work product. So we made the final call after we
 25 got the work product that had been discussed during

~~1 the facilitated meetings?
 2 A. I did.
 3 Q. Notes were taken at those meetings?
 4 A. Yes.
 5 Q. Who took the notes?
 6 A. The notes were taken by Kate Snider and to
 7 some extent I believe her assistant, Rachel McCrea.
 8 Q. What was the purpose of the facilitated
 9 meetings?
 10 A. The purpose was to facilitate clear
 11 communication between Ecology and the Port of Seattle
 12 regarding what it would take to resolve the remaining
 13 issues related to the project.
 14 Q. To come to a finding of reasonable assurance?
 15 A. To come to a point where a determination
 16 could be made as to whether there would be reasonable
 17 assurance or not.
 18 Q. Well, wait a minute. When technical issues
 19 were discussed at the facilitated meeting, wasn't the
 20 objective to find a way to get to reasonable assurance
 21 on that particular technical issue?
 22 A. Yes.
 23 Q. If a minority opinion was expressed at those
 24 facilitated meetings, what would happen?
 25 A. It was explored and discussed.~~

1 this process of what it should contain, the issues it
 2 should address --
 3 Q. But there were -- as issues were discussed in
 4 those facilitated meetings, technical issues were
 5 resolved at those facilitated meetings, wasn't it?
 6 That's why the notes say "Resolved"?
 7 A. They were resolved in terms of mutual
 8 agreement and understanding of the next steps of work
 9 that should take place after we came to a mutual
 10 understanding of the scope and the nature of the work.
 11 So --
 12 Q. So when the facilitated meeting notes say
 13 "Resolved," that means that that technical issue was
 14 resolved at that facilitated meeting, doesn't it?
 15 A. No.
 16 Q. Well, why does it say "Resolved" then?
 17 A. You have to go back to the introduction to
 18 those meeting notes and look at the purpose of the
 19 meeting. Ecology never gave over its final say on the
 20 adequacy of a technical issue -- the final say on
 21 whether the Port's approach to the issues that we had
 22 remained with Ecology. What we tried to agree to was a
 23 mutual approach.
 24 And the Port was given its assignments to go
 25 out and do the work and, you know, Okay, we don't know

1 what you want us to do, Ecology. So Ecology told them.
2 And they said, Okay, we'll do this, but -- so that was
3 what we meant for "Resolved," that they agreed they
4 understood what they were supposed to do and they
5 agreed to go out and do it.

6 Q. Well, as I read through those facilitated
7 meeting notes, you can track those notes, and over the
8 course of the history of the different meetings you see
9 a technical issue moving along where there's a back and
10 forth, Ecology saying provide us this information, the
11 Port says, yes, we will provide you that information,
12 and ultimately that technical issue comes to a
13 resolution and the notes say "Resolved."

14 And my question is, that issue of when it
15 says "Resolved," that was resolved in everyone's mind
16 there at those technical meetings in terms of
17 reasonable assurance, and that when you say it wasn't
18 resolved and you're saying that Ecology had the
19 ultimate decision, the ultimate decision you're talking
20 about is when Gordon White signs the 401 certification;
21 isn't that a fair assessment?

22 A. No.

23 Q. Where did I go wrong?

24 A. When we worked through a technical issue, the
25 first step was to come to a meeting of minds as to what

~~1 2001 and those facilitated meetings continued, Ecology
2 was continuing to review the Stormwater Management Plan
3 that was submitted by the Port in December 2000;
4 correct?~~

~~5 A. That's correct.~~

~~6 Q. And through that facilitated process over the
7 course of the eight months between the time that it was
8 submitted and the time that the 401 certification was
9 issued, Ecology would raise various issues related to
10 its review of the Stormwater Management Plan; correct?
11 Is that correct?~~

~~12 A. That's correct.~~

~~13 Q. And then that would be discussed at the
14 facilitated meeting and there would be a resolution
15 then ultimately of that issue that Ecology had raised?~~

~~16 MR. REAVIS: Let me just object to the
17 question first because I think it's vague covering a
18 number of meetings over a period of months. And the
19 use of --~~

~~20 MR. STOCK: All you have to say is it's
21 vague. That's a proper objection.~~

~~22 Q. (BY MR. STOCK) Go ahead and answer the
23 question.~~

~~24 A. I see that I need to make a distinction
25 between the meetings that were held between the end of~~

1 the question was, and then they talked about various
2 approaches to how it might be resolved which were of a
3 technical nature. And these were presented by the Port
4 as, okay, we can do A, B or C. And we would say, okay,
5 we'll do B and part of C, for example.

6 In those meetings between October and the end
7 of December, what it was was a work assignment for the
8 Port to go out and do the work that we had agreed to in
9 these meetings. But we didn't know until they went out
10 and they did the work or did the analysis and turned in
11 in mid December the revised Stormwater Plan, the
12 revised NRMP, the Low Flow Report, whether or not that
13 work had been adequately done. So there was an
14 agreement in concept to an approach.

15 When we got the materials in, they were
16 reviewed again and they were measured against the
17 understanding that we had about the approach that we
18 had -- this conceptual approach. This was the Port
19 saying, Well, this is what we could do. They hadn't
20 yet done the work or they were in the process of doing
21 the work or they hadn't compiled the work. So it was
22 when we actually got the final document in that we sat
23 down as Ecology to review the adequacy of that
24 material.

25 Q. Sure. And as the process moved forward into

~~1 October and the end of December, and the new round of
2 technical -- of meetings that were held -- a new round
3 of meetings that were held between January and very
4 late July.~~

~~5 The first round of meetings which I described
6 as arriving to a conceptual approach as to how to
7 resolve the issue, that was one approach. And then the
8 documents were submitted in December. Basically they
9 started arriving in December 19th of 2000 by the
10 truckload into my office.~~

~~11 And we parcelled them out to be reviewed by
12 the appropriate staff, and those staff came back with
13 comments. Primarily the comments were from our
14 consultant, Kelly Whiting, at King County. And we
15 identified areas where the Port had failed to live up
16 to the conceptual agreement and do the work that we had
17 identified in that first round of meetings.~~

~~18 So there was another round of technical
19 meetings more technical meetings to resolve these
20 issues. And then as we went through that process,
21 there was more of an effort to get an actual work
22 product in to review and sign off on and approve.~~

~~23 Q. Right, to reach resolution on the technical
24 issues?~~

~~25 A. To reach resolution on the technical issues.~~

~~1 Q. So that would ultimately be approved?~~
~~2 A. That's correct.~~
3 Q. All right, let's talk about the extent of the
4 information or knowledge that Ecology had when it
5 issued the 401 certification on August 10.
6 You had the Stormwater Management Plan,
7 December 2000; correct?
8 A. When we made the decision on August 10, we
9 had a version of the stormwater plan consisting of
10 replacement pages which reflected the resolution of the
11 technical issues that we had worked on during the
12 preceding months.
13 Q. You had a Natural Resources Mitigation Plan;
14 correct?
15 A. That's correct.
16 Q. And what version did you rely upon to issue
17 the 401 certification on August 10?
18 A. That would have been I believe the one that
19 came in in the end of December 2000 with some
20 additional changes that were made in the interim to the
21 Auburn Grading Plan. And there were some other
22 adjustments that were made during that process, but it
23 was primarily the December 2000 version of the NRMP.
24 Q. And you had a Low Flow Analysis?
25 A. And we had a revised Low Flow Analysis.

1 Q. So if the Port didn't submit any of the
2 plans, reports, changes, revisions that are laid out in
3 the 401 certification, you're telling me that Ecology
4 would have reasonable assurance?
5 A. Yes.
6 Q. So why ask for the reports then? Isn't your
7 job done?
8 A. The 401 process for issuing the certification
9 is one where we do not negotiate in advance with the
10 applicant or any other party what the terms and
11 conditions of the 401 are, so there may be areas where
12 we require additions to a particular report or
13 clarifications.
14 In the case of the Natural Resource
15 Mitigation Plan, there were numerous -- basically
16 non-substantive technical issues that needed to be
17 corrected. There were small errors on location of root
18 wads and how it was connected to the stream bank and a
19 lot of little things like that where we want to see a
20 final plan that incorporates those changes.
21 Q. Well, let's not focus on the little changes.
22 I'm talking about the significant changes, whether it's
23 in the Low Flow Analysis, Stormwater Management Plan,
24 details relating to plans to monitor contamination in
25 the fill. Isn't that information necessary for Ecology

1 Q. When you say "revised," you're talking about
2 the revisions at the end of July 2001; correct?
3 A. That's correct.
4 Q. Anything else that you relied upon to issue
5 the 401 certification?
6 A. We had the Preferred Pathways Analysis that
7 was prepared by the Port and reviewed by Ching Pi Wang.
8 We had completed our acceptable fill criteria. I
9 believe those were the major pieces in place at that
10 time.
11 Q. And based upon that body of knowledge from
12 those reports, revised or otherwise, you made the
13 recommendation that Ecology had reasonable assurance
14 that water quality standards would not be violated by
15 this project; is that right?
16 A. That's correct.
17 Q. Why, then, does the August 10 certification
18 ask for additional reports from the Port?
19 A. It's not uncommon in a 401 certification to
20 ask for revisions to reports to incorporate changes
21 that we've required in the 401.
22 Q. Are the reports, revisions, changes that
23 you've asked the Port to provide necessary for you to
24 come to reasonable assurance?
25 A. No.

1 to have reasonable assurance?
2 A. It's very common in 401 certifications to
3 require subsequent monitoring plans to be submitted.
4 Q. Ms. Kenny, I don't mean to interrupt you, but
5 my question is simple. Ecology needs that additional
6 information specified in the 401 certification to have
7 reasonable assurance, isn't that right?
8 MR. REAVIS: Objection; vague.
9 A. I don't believe so.
10 Q. (BY MR. STOCK) Well, then why is it included
11 in the 401 certification? Why isn't it included in a
12 letter from you to Ms. Leavitt or from anyone at the
13 Department of Ecology to the Port?
14 A. Because the 401 certification is the tool
15 that we normally use to ensure that we do eventually
16 close all of the gaps on any permit decision that we
17 make.
18 Q. That additional information is a critical
19 part of the 401 certification, isn't it?
20 A. Yes and no.
21 Q. There are statements in that 401
22 certification that says Ecology has the right to revoke
23 the certification if the Port doesn't provide the
24 additional information, isn't that right?
25 A. That's correct.

1 Q. And the reason those statements are in the
2 401 certification is because the information is needed
3 to get to reasonable assurance?

4 MR. REAVIS: Objection; vague.

5 A. The reason the additional information is
6 needed is to provide the complete and full picture of
7 what monitoring plans are required, additional
8 information that doesn't detract from our understanding
9 of the project or our ability to determine that those
10 impacts can be fully mitigated.

11 Q. (BY MR. STOCK) The reason why the Department
12 of Ecology has reserved its right to revoke the
13 certification if the Port doesn't provide the
14 additional information is because Ecology needs that
15 information to have reasonable assurance, isn't that
16 true?

17 A. It's a part of the picture of what
18 constitutes reasonable assurance.

19 Q. That's right, it's a part of the reasonable
20 assurance. Agreed?

21 A. I agree.

22 ~~MR. STOCK: Why don't we take our lunch
23 break.~~

24 ~~(Deposition recessed at 12 noon, to be
25 reconvened at 1:00 p.m.)~~

~~1 A. The first application?~~

~~2 Q. Right.~~

~~3 A. No.~~

~~4 Q. And you didn't review that at any time; is
5 that right?~~

~~6 A. No.~~

~~7 Q. You didn't review it?~~

~~8 A. I did not review that file.~~

~~9 Q. And you didn't receive the file relating to
10 the second application; is that right?~~

~~11 A. No, I did not.~~

~~12 Q. And you didn't review that file either?~~

~~13 A. No, I didn't.~~

~~14 Q. What you received from Mr. Luster was what
15 was on his desk and on his floor?~~

~~16 A. That's correct.~~

~~17 Q. Was there anything else that you received?~~

~~18 A. No.~~

~~19 Q. What was the general nature of the material
20 that was on his desk and floor?~~

~~21 A. There were reports, the August 2000 version
22 of the Natural Resource Mitigation Plan, earlier
23 versions of the stormwater plan, various reports
24 related to the project prepared by the Port, notes of
25 earlier meetings, e-mails.~~

~~AFTERNOON SESSION~~

~~1:00 P.M.~~

~~--000--~~

~~CONTINUING EXAMINATION~~

~~7 BY MR. STOCK:~~

~~8 Q. At the time that you became the permit
9 coordinator for the airport case and the file was
10 transferred over from Tom Luster, did you receive from
11 his office all of the files related to the project?~~

~~12 A. There are -- no.~~

~~13 Q. Did you receive any files from his office?~~

~~14 A. Yes.~~

~~15 Q. What did you receive and what didn't you
16 receive?~~

~~17 A. What I did not receive were the files
18 relating to the first application and to the second
19 application. The other material that I received was
20 the material that he had in his office piled on his
21 desk and on his floor, and he put it into two boxes and
22 brought that up here. So that was a combination of
23 reports and notes and various sundry items.~~

~~24 Q. So you didn't receive the file relating to
25 the Port's first application filed back in 1997 or 1998?~~

~~1 Q. Did it matter to you what was submitted by
2 the Port in support of its first application?~~

~~3 A. No.~~

~~4 Q. Did it matter to you what was submitted by
5 the Port in support of its second application?~~

~~6 A. No.~~

~~7 Q. If the Port referred to an analysis, plan or
8 report that it had submitted in support of its first or
9 second application, did you go back and review what the
10 Port was relying upon?~~

~~11 A. Sometimes.~~

~~12 Q. In what instances would you do that?~~

~~13 A. I don't recall.~~

~~14 (Deposition Exhibit No. 70 was marked for
15 identification.)~~

~~16 Q. (BY MR. STOCK) Ms. Kenny, do you recognize
17 Exhibit 70 as an e-mail exchange that you had with
18 Andrea Grad in this office in the late May/early June
19 time frame?~~

~~20 A. Let me take a moment to review it, please.
21 (Witness reading document). I recall this e-mail
22 exchange.~~

~~23 Q. And at the bottom of the first page, Ms. Gra-
24 ds asking for a copy of the 1999 report entitled Water
25 Effects Ratio Screening Study of Sea-Tac prepared by~~

1 Parametric, is that right?
 2 A. That's correct.
 3 Q. And at the end of May you're telling Ms. Grad
 4 that that may be in Mr. Luster's files in Lacey; is
 5 that right?
 6 A. That's what's written there.
 7 Q. And you told Ms. Grad in the meantime that
 8 she may wish to obtain the document from the Port; is
 9 that right?
 10 A. That's what the e-mail says.
 11 Q. And that's what you said to Ms. Grad;
 12 correct?
 13 A. That's correct.
 14 Q. And prior to this date, you had not reviewed
 15 that document; is that right?
 16 A. Yes.
 17 Q. Did you prior to issuing the August 10 401
 18 certification try to be as careful as you could in
 19 reviewing the information you thought you needed to
 20 review to recommend issuance of the August 10
 21 certification?
 22 A. Yes.
 23 Q. Did you try to be as complete as possible in
 24 drafting the August 10 certification?
 25 A. Yes.

1 draft copy of the certification. After the Port
 2 received their certification, they came back to us and
 3 had some areas where they had some concerns where the
 4 language in the certification would be operationally
 5 difficult for them to comply with.
 6 Q. What does it matter that there's language in
 7 a 401 certification that the applicant or the project
 8 proponent finds operationally difficult to comply with?
 9 A. Well, my training in conditions and my
 10 understanding of conditions is that there needs to be a
 11 nexus to the impact, and there also needs to be the
 12 ability of the applicant to be able to perform the
 13 condition or fulfill the terms of the condition.
 14 Q. And on August 10 when Ecology issued the 401
 15 certification, it believed that the conditions in the
 16 certification and how those conditions were to be
 17 implemented was necessary for reasonable assurance?
 18 A. That's correct.
 19 Q. How were you informed that the Port disagreed
 20 with some of the provisions in the August 10 401
 21 certification?
 22 A. About two weeks after the permit was issued
 23 after I had come back from a short vacation, the Port
 24 asked for a meeting with me to discuss the permit.
 25 Q. Didn't Gordon White call you at home and tell

1 Q. Did you try to be as accurate as possible in
 2 drafting the 401 certification?
 3 A. Yes.
 4 Q. It was important to you that that 401
 5 certification be complete and accurate when it was
 6 issued on August 10?
 7 A. That's correct.
 8 Q. Did you give it considered thought as to
 9 whether it was ready to be issued on August 10?
 10 A. Yes.
 11 Q. You ultimately, "you" being Ecology,
 12 ultimately issued that certification on August 10; is
 13 that right?
 14 A. That's correct.
 15 Q. You ultimately issued an amended
 16 certification on September 21; is that right?
 17 A. That's correct.
 18 Q. And you did that because there were changes
 19 that you decided needed to be made?
 20 A. That's correct.
 21 Q. What led up to your decision to issue an
 22 amended certification given the careful review you had
 23 given the August 10 certification?
 24 A. As I stated earlier in this deposition, it's
 25 not Ecology's practice to provide the applicant with a

1 you about the meeting?
 2 A. What meeting?
 3 Q. With the Port, that the Port was proposing to
 4 discuss the 401 certification?
 5 A. I don't recall that Gordon White had anything
 6 to do with setting up that meeting.
 7 Q. Well, maybe it was Ray Hellwig. You got a
 8 call at home about the proposed meeting that the Port
 9 was wanting to set up, didn't you?
 10 A. I don't recall getting a call at home.
 11 Q. How did you hear about the meeting that the
 12 Port wanted?
 13 A. It may have been through a voicemail or in
 14 person. I don't recall.
 15 Q. So what happened?
 16 A. We had a meeting.
 17 Q. Who was at the meeting?
 18 A. I believe that Elizabeth Leavitt was present
 19 at the meeting, Michael Cheyne, Joan Marchioro from the
 20 Attorney General's office. I believe that was all.
 21 Q. Who from Ecology?
 22 A. Myself.
 23 Q. Anyone else?
 24 A. I don't recall.
 25 Q. What happened at the meeting?

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1 A. We sat down and listened to the Port go
2 through the permit and provide us with their concerns
3 about various conditions in the permit.

4 Q. Who did the talking for the Port?

5 A. I believe both Elizabeth Leavitt and Michael
6 Cheyne spoke.

7 Q. Did either one of them take the lead?

8 A. I don't recall.

9 Q. So what did the Port tell you on the changes
10 that it wanted to make to the 401 certification?

11 A. We first went through various conditions, and
12 they asked questions about the meaning or the intent of
13 the condition, and I tried to provide them with my
14 understanding of what I intended in that condition.

15 The second area of concern were more specific
16 conditions where they expressed some concern that it
17 might be difficult or burdensome for them to comply
18 with the terms of the condition.

19 Q. If a term is needed for -- or a condition is
20 needed for reasonable assurance, does it matter whether
21 the project proponent is going to find it difficult to
22 comply with the provision?

23 A. No.

24 Q. That doesn't change the need for the
25 condition for purposes of reasonable assurance, does

1 applicant has come back and asked you to make
2 substantive changes to the 401 certification?

3 A. That's correct.

4 Q. So didn't it strike you as unusual that the
5 Port was coming back to you now and asking for these
6 changes to the certification?

7 A. Not at all.

8 Q. Were you expecting that?

9 A. I wasn't surprised.

10 Q. Were you expecting it?

11 A. I didn't know what to expect after I issued
12 the permit.

13 Q. Well, based upon your prior experience, were
14 you expecting the Port to call you and ask for changes?

15 A. As I said, I wasn't surprised by the request
16 because of the complexity and the length of the permit
17 and the fact that the applicant did not have an
18 opportunity to review or provide any input into that
19 permit.

20 Q. Wasn't that what the facilitated meetings
21 were for?

22 A. No.

23 Q. The Port through those facilitated meetings
24 had a good idea what the conditions were going to be in
25 the 401 certification before it was issued; isn't that

1 it?

2 A. No. There may be different ways that the
3 condition can be written to still provide reasonable
4 assurance while meeting the operational concerns of an
5 applicant.

6 Q. Did it concern you that the Port was asking
7 you to make changes to the certification that had just
8 been issued?

9 A. No.

10 Q. Had you on any other occasion after a
11 certification, a 401 certification that you had written
12 had been sent out by Ecology, met with the project
13 proponent and subsequently made changes to the
14 certification?

15 A. There were one or two times where I made
16 revisions to a certification in response to a phone
17 call from an applicant.

18 Q. And what was that regarding?

19 A. The changes were regarding time lines for
20 submittal of as-built reports as a part of the
21 mitigation plan requirements.

22 Q. So other than those telephone calls from an
23 applicant where they ask you to change the submittal
24 time line for as-built drawings, there's never been a
25 401 certification that you've written where an

1 a fair statement?

2 A. It is not.

3 Q. Are you saying that the Port didn't have any
4 idea what the conditions were going to be?

5 A. They had an idea what some of the conditions
6 would be. They did not have any idea about a large
7 number of the specifics of the conditions as they were
8 put into the 401 certification.

9 Q. Did you at any time share any draft of any
10 portion of the 401 certification that was ultimately
11 issued with anyone from the Port prior to issuance of
12 the 401 certification?

13 A. No.

14 Q. No section or sentence from the certification
15 was shared with the Port prior to issuance?

16 A. No.

17 Q. Did you personally discuss over the telephone
18 or in meetings with anyone from the Port what some of
19 the conditions were going to be prior to issuance of
20 the August 10 certification?

21 A. Early in the facilitated process there was
22 some discussion prior to my involvement of what some
23 conditions might be, and then at some point in the
24 facilitated process not long after I got involved, we
25 said, Wait a minute, we're not here negotiating

1 conditions. Anything that is discussed as a possible
2 condition is being discussed in a "what if" context
3 only. We're not making any promises or commitments
4 that we will or will not do anything.

5 And if you could repeat the question and I
6 can recall --

7 Q. Where you were going? Sure, that's fine.

8 (Reporter read back as requested.)

9 A. Absolutely not.

10 Q. (BY MR. STOCK) But it was discussed in these
11 facilitated meetings?

12 A. Once or twice.

13 Q. What conditions?

14 A. I don't recall specific conditions.

15 Q. Well, in general were they on wetlands,
16 stormwater, low flow, contamination?

17 A. Probably regarding any of the above.

18 Q. In general can you recall which ones?

19 A. No.

20 (Deposition Exhibit No. 71 was marked for
21 identification.)

22 Q. (BY MR. STOCK) You've been handed Exhibit
23 71. Please identify what it is.

24 A. This appears to be the first draft of the 401
25 certification that I prepared.

1 numerous facets to it, so there may have been times
2 where the Port gave us material that met part of our
3 needs but didn't meet the whole need, and we would have
4 to go back to them and ask for that missing or
5 additional piece of information.

6 Q. What stands out in your mind as to an area
7 where you had to go back to the Port and ask for
8 additional information?

9 A. One area that is well documented is the
10 stormwater plan that was submitted in December of 2000.

11 Q. Anything else?

12 A. The low flow plan that was an analysis that
13 was submitted in December of 2000.

14 Q. Anything else?

15 A. Not that I can think of at the moment.

16 Q. By the time that this July 29 draft
17 certification had been written by you, had the Port
18 provided you with all of the information that you had
19 requested?

20 A. I don't recall.

21 Q. Was there anything in this draft
22 certification that asked the Port to provide the
23 information that you had already asked the Port to
24 provide that information? And look through it if you
25 need to.

1 Q. Why are you sending it to the people that you
2 did?

3 A. For sending it to the people that I did
4 because they are people who were on the 401 review
5 team, and I wanted them to look at it and provide me
6 with any comments that they might have on the permit.

7 Q. At this point on July 29, had a consensus
8 been reached that Ecology had reasonable assurance to
9 go ahead and issue the certificate?

10 A. By and large.

11 Q. What do you mean?

12 A. There appeared to have been some work product
13 that was still outstanding from the Port that had not
14 come in, but it was expected to arrive.

15 Q. In general over the time that you reviewed
16 the application, how did you find the Port's
17 responsiveness to Ecology's request for additional
18 information?

19 A. I found that the Port tried very hard to
20 provide us with the information that we required.

21 Q. And do you believe the Port was as thorough
22 as possible in providing that information to you?

23 A. For the most part they were.

24 Q. What do you mean "for the most part"?

25 A. This is a very large and complex project with

1 A. There would have been nothing in this draft
2 certification that would have been a communication to
3 the Port.

4 Q. That's not my question. My question is, if
5 you read through that draft certification, is there any
6 information in that draft certification which you are
7 requiring the Port to provide down the road that you
8 had already asked the Port to provide you that
9 information?

10 A. There may have been some components where the
11 Port had not completely provided us with the
12 information that we had requested where I put in a
13 condition that would require or compel the submittal of
14 the final pieces of that information.

15 Q. Right, that's my understanding. And what I'm
16 wanting to know is, what components, what information
17 did you need from the Port?

18 MR. REAVIS: This is as of the date of this
19 document?

20 MR. STOCK: Sure. Or actually, it doesn't
21 matter whether it's this document or the August 10
22 certification that was ultimately signed.

23 Q. (BY MR. STOCK) What information had you
24 asked the Port to provide to you before the
25 certification was issued that that request is included

1 in the certification?

2 **A.** That's best addressed by looking directly at

3 the August 10 certification, because there were

4 probably -- there was a long time in terms of time line

5 between whatever date this is, July 29th, and the time

6 it actually went out the door on August 10th.

7 **Q.** Do you recall receiving information from the

8 Port between July 29 and August 10?

9 **A.** I may have.

10 **Q.** Do you recall receiving it?

11 **A.** Not specifically.

12 **Q.** Okay, you've got the August 10 certification

13 in front of you which is Exhibit 2. Is there

14 information that you had requested from the Port that

15 you had not received and so you included it in the

16 August 10 certification, the request?

17 **A.** I can go through this item by item.

18 **Q.** If that's what you need to do, go ahead.

19 **A.** On Page 2.

20 **Q.** Of the cover letter?

21 **A.** No, of the body of the certification. And

22 this is going to be kind of maybe confusing, but of

23 Item A2, Instream/Shoreline Work Monitoring Plan, that

24 is something where we had not requested information but

25 we were requiring it as a condition of the

1 ~~they had requested that we didn't agree with or~~

2 ~~believe was adequate and we didn't accept it and~~

3 ~~required a different set of information or a different~~

4 ~~approach to be submitted to us.~~

5 **Q.** Okay, go back to Exhibit 71, your draft

6 certification. Your e-mail to the 401 reviewers, your

7 second sentence says, "It is still very rough but given

8 the time constraints ahead of us I want to get this to

9 you so that you can start looking it over and provide

10 me with feedback."

11 What time constraints are you referring to in

12 that sentence?

13 **A.** This was the commitment that had been passed

14 on or the estimate of time that had been passed on

15 through the upper management to the governor's office

16 that the certification would be ready for release

17 sometime in early August.

18 **Q.** Did you consider that to be a time

19 constraint?

20 **A.** It was a target that we were shooting for.

21 **Q.** But you used the words "time constraint"

22 here. You viewed it as a time constraint.

23 **A.** I viewed that as a goal that I was committed

24 to trying to reach.

25 **Q.** That was a goal that was established by upper

1 certification.

2 That's a very broad question. Maybe if you

3 broke it down into smaller segments.

4 **Q.** Well, I really can't. What I need from you

5 is an answer to my question, whether there was any

6 information that you had asked the Port for prior to

7 the 401 certification on August 10 that you had not

8 received from the Port.

9 **A.** (Witness reviewing document) No.

10 **Q.** It's your belief that all of the information

11 that you had requested from the Port you received

12 before you issued the certification on August 10?

13 **A.** That's correct.

14 **Q.** Having now looked through the certification,

15 is that still your answer?

16 **A.** There are parts of the certification where I

17 required additional information that related to various

18 parts of the project that we had not discussed in

19 advance with the Port, so there was no failure on their

20 part to submit us that information. For example, we

21 required additional wetland mitigation for temporary

22 impacts, and they were required to submit a conceptual

23 plan for that mitigation within a certain amount of

24 time after issuance of the permit.

25 There were some things about information that

1 management given direction from the governor's office:

2 **MS. MARCHIORO:** Objection. Mischaracterizes

3 testimony of the witness.

4 **A.** It was a goal that I felt I could meet. If I

5 worked long and hard and rigorously to get the job

6 done, it could be met.

7 **Q.** (BY MR. STOCK) So on that basis you viewed

8 that as a time constraint?

9 **A.** Yes.

10 **Q.** Because of the time constraint, did that

11 affect the quality of your work?

12 **A.** I don't believe so.

13 **Q.** Again, you tried to be as accurate as

14 possible when you issued that August 10 certification;

15 is that right?

16 **A.** I did.

17 **Q.** All right, let's look at the September 21

18 certification which is Exhibit 1.

19 Prior to issuing the September 21

20 certification, was there discussion within Ecology as

21 to the implications for issuing an amendment to the

22 certification that was issued on August 10th?

23 **A.** What do you mean by "implications"?

24 **Q.** Well, whether it could be done.

25 **A.** Yes.

1 Q. Tell me about those discussions.
 2 A. There were discussions about the best
 3 approach to use for making any subsequent changes that
 4 we wanted to make to the certification after issuance
 5 of the original certification on August 10th.
 6 Q. Was there discussion about the impact to the
 7 reasonable assurance finding?
 8 A. Yes.
 9 Q. And what was said in that regard?
 10 A. The determination was that the changes would
 11 not have an impact on our assessment that there was
 12 reasonable assurance regarding this certification.
 13 Q. Who made that determination?
 14 A. I made that determination in consultation
 15 with the team members that were involved in the
 16 project.
 17 Q. Did you discuss with anyone whether there
 18 would be a question as to whether Ecology had
 19 reasonable assurance on August 10 if you proceeded to
 20 issue an amended certification on September 21?
 21 A. Not that I recall.
 22 Q. Did that thought cross your mind?
 23 A. No.
 24 Q. Take a look at the cover letter for the
 25 September 21 certification. Did you write the cover

1 projects identified in the Port's Master Plan Update
 2 Improvements. Some of those projects directly impact
 3 wetlands and have implications for water quality,
 4 others of those projects have no direct correlation to
 5 anything that Ecology would be regulating directly as a
 6 result of this application.
 7 Q. Well, that answer doesn't help me. I need
 8 your understanding of what "related projects" is, and
 9 what I hear from you, and tell me if I'm wrong, but
 10 you're telling me that "related projects" means any
 11 related project in the Master Plan Update that directly
 12 impacts wetlands or affects water quality?
 13 A. That's my interpretation of that.
 14 Q. Couldn't that be said about any construction
 15 project under the Master Plan Update?
 16 A. No. Not all projects impact, directly impact
 17 wetlands. All projects, if they are built, will have
 18 potential for stormwater, and the stormwater plan was
 19 comprehensive to the entire airport facility.
 20 Q. It covers all of the Master Plan Update?
 21 A. I believe so.
 22 Q. The reference in the "Re" line and also under
 23 the Order refers to Miller, Walker and Des Moines
 24 Creek. What is the reason that it refers to those
 25 creeks?

1 letter?
 2 A. This cover letter is basically boilerplate
 3 cover letter that I adapted to reflect that a revised
 4 certification was being issued and that we were
 5 rescinding the original certification and replacing it
 6 with this amended certification. So I did author it.
 7 Q. That's what your initials mean on the second
 8 page above the enclosure line, "GW:AK"?
 9 A. That's correct.
 10 Q. You were drafting this for Gordon White's
 11 signature; is that right?
 12 A. That's correct.
 13 Q. In the "Re" line on the first page of the
 14 cover letter and also in the descriptive language of
 15 the Order itself in the upper right-hand corner, it
 16 refers to "Construction of a Third Runway and related
 17 projects."
 18 What does "related projects" mean?
 19 A. Those are projects associated with -- strike
 20 that.
 21 It refers to the projects identified in the
 22 Port's JARPA where Ecology has jurisdiction.
 23 Q. Doesn't Ecology have jurisdiction over all of
 24 the projects identified in the JARPA?
 25 A. The JARPA referenced a whole suite of

1 A. Those were the water bodies that were
 2 identified where there was likely to be impact from the
 3 project.
 4 Q. Gilliam Creek is also impacted by the
 5 project, isn't it?
 6 A. We looked at Gilliam Creek in review of the
 7 stormwater plan and determined that there weren't any
 8 direct impacts or likelihood of impact to that stream
 9 from the one project I believe that was located in that
 10 area adjacent to Gilliam Creek.
 11 Q. And what project was that?
 12 A. I'm not certain, but I believe it was
 13 relocation of a water tower.
 14 Q. So other than that project, Ecology made the
 15 determination that there was no impact to Gilliam Creek
 16 from any Master Plan Update project?
 17 A. Yes, for the purposes of the 401 water
 18 quality certification.
 19 Q. In the second to the last paragraph on the
 20 first page of your cover letter you state the work
 21 authorized by this certification is limited to the work
 22 described in the JARPA, the Corps' Public Notice, and
 23 the plans submitted by the Port to Ecology for review
 24 and written approval.
 25 What did you mean when you said the plans

1 submitted by the Port to Ecology for review and written
2 approval?

3 A. It would be the whole suite of plans that we
4 had received prior to issuance of the permit, which
5 included the completed and approved stormwater plan,
6 the low flow plan, the Natural Resource Mitigation
7 Plan, and then any plans that we identified in this
8 certification for later submittal and approval.

9 Q. Does that phrase expand the scope beyond the
10 JARPA or the Corps' public notice?

11 A. No.

12 Q. So is that phrase redundant?

13 A. It may be redundant, but it, again, states
14 the scope of the certification.

15 Q. That's what I need to know, whether those
16 plans submitted expanded the work authorized other than
17 what's in the JARPA or the public notice.

18 A. No. Those plans were all directly related to
19 work specifically identified in the JARPA.

20 Q. The last paragraph on that page you say that
21 the certification shall be withdrawn "if the project is
22 revised in such a manner or purpose that the Corps or
23 Ecology determines the revised project must obtain new
24 authorization and public notice."

25 You wrote that sentence?

~~1 more different use than originally scoped in the
2 original EIS and the mitigation we had already
3 designed, we would have to -- that and see if it
4 still fit within the original scope and purpose of the
5 project.~~

6 Q. (BY MR. STOCK) So that's an example of a
7 change in purpose; right?

8 A. That's an example.

9 Q. That would result in a revocation of the 401
10 certificate?

11 A. If that were to come before me as a proposal
12 by the Port, they wanted to convert that new third
13 runway into a golf course, then we would revoke this
14 permit.

15 Q. So why are you smiling about that?

16 A. I don't think that it's likely that the Port
17 is going to turn a facility that hasn't even been built
18 yet into a golf course.

19 Q. I don't either.

20 A. It's an absurd example.

21 Q. So can you give me a less absurd example of
22 what change in manner or purpose would result in a
23 revocation of the 401 certification?

24 A. I can't say at this point in time.

25 Q. You don't know?

1 A. I believe that's part of the boilerplate
2 that's in most of our permits.

3 Q. And why did you include it in this permit?

4 A. Seems reasonable.

5 Q. Why did you include it?

6 A. There was no reason not to include it.

7 Q. What does it mean?

8 A. It means that if there is a substantial
9 revision in Ecology's determination or the Corps'
10 determination from the original scope and purpose of
11 the project, that this permit would not be valid if we
12 make that determination.

13 Q. What manner or purpose -- strike that.

14 In what way would the project need to be
15 revised in its manner or purpose for Ecology to revoke
16 the certification and require the Port to obtain new
17 authorization?

18 MS. MARCHIORO: Objection; calls for
19 speculation.

20 A. That is my answer. That would be
21 speculative. I will give you an example.

22 If the Port wanted to turn the third runway
23 into a golf course and were to -- yeah, let's say a
24 golf course, and that new impervious surface was to
25 become full and they were to be applying pesticides and

1 A. I don't know.

2 Q. But Ecology reserves that right?

3 A. That's correct.

4 Q. What if the Stormwater Management Plan
5 changes?

6 A. We have established in this certification
7 that the Stormwater Management Plan as it's approved
8 now will serve as the basis. There may be changes made
9 to the Stormwater Management Plan in the future as a
10 result of changes to the NPDES permit, but it's our
11 intent that it serve as a baseline.

12 Q. What type of change in the Stormwater
13 Management Plan would result in Ecology requiring the
14 Port to seek new authorization?

15 A. I can't speculate on that at this point in
16 time.

17 Q. What about a change to a regional detention
18 facility?

19 A. There are provisions in this certification
20 that would allow for a regional detention facility.

21 Q. Really? Point it out to me. Page 26?

22 A. Page 26, small letter D. "Nothing in this
23 Order shall be deemed to prohibit continued
24 participation by the Port in planning efforts to
25 establish regional detention facilities for Des Moines

1 or Miller Creek."

2 Q. You agree this doesn't allow the Port to
3 change the Stormwater Management Plan to a regional
4 detention facility-based Stormwater Management Plan
5 without seeking authorization? That would take an
6 amendment to this Order, wouldn't it?

7 A. That's correct.

8 Q. And so if the Port is proposing to proceed
9 with a regional detention facility concept for
10 stormwater management, Ecology is going to have to
11 pursue an amendment of this Order, isn't it?

12 A. Yes.

13 Q. And that would require new public notice?

14 A. It would likely require new public notice.

15 Q. It would, wouldn't it?

16 A. I would put it out for new public notice,
17 yes.

18 MR. STOCK: Let's take a quick five-minute
19 break.

20 (Recess taken.)

21 Q. (BY MR. STOCK) Let's go back to the
22 September 21 certification, Exhibit 1. If you look at
23 the first page of the Order itself --

24 A. The Order itself.

25 Q. -- and compare it to the first page of the

1 short-term water quality modification would be
2 appropriate.

3 Q. What did you take him to mean by that?

4 A. What I took him to mean by that was what he
5 told me, was that the water quality regulations are
6 written in such a manner where they should be able to
7 construct their project without requiring a suspension
8 of the -- a short-term suspension of the water quality
9 standards.

10 Q. So it's your belief that the Miller Creek
11 channel can be switched without a violation of any
12 water quality standards?

13 A. That's correct.

14 Q. And that's one of the bases upon which you
15 determined reasonable assurance?

16 A. Yes.

17 Q. Do you have an understanding of how that
18 channel switch is going to be made?

19 A. I know it's described in the Natural Resource
20 Mitigation Plan. In general for projects like this
21 where a channel is relocated, the new channel is
22 constructed and all of the habitat features that are a
23 part of the channel such as root wads, vegetation that
24 might be planted, all of that's installed.

25 And then at some point the existing channel

1 August 10 Order, I noticed in the title that the
2 September 21 Order does not include the language "In
3 The Matter of Granting a Water Quality Certification,"
4 and the language it doesn't include "And Short-Term
5 Water Quality Modification."

6 What was the reason that was dropped from the
7 August 10 order?

8 A. That was a mistake. That should not have
9 been in the August 10th version of the certification.
10 There was no short-term water quality modification
11 granted as a part of the certification.

12 Q. Didn't the Port tell Ecology that a
13 short-term water quality modification would be needed
14 with respect to the Miller Creek channel being
15 switched?

16 A. What they told me was that they didn't
17 believe one would be needed because they felt that
18 their BMPs would be adequate to prevent any problem,
19 but that it wouldn't hurt to have one in the
20 certification.

21 Q. So why did you drop it?

22 A. I dropped it because after it was reviewed by
23 -- I think it was forwarded for review to Ron Divitt in
24 the Water Quality Program. He came up and spoke to me
25 and told me that this was not a situation where a

1 is basically rerouted and opened into that new channel,
2 and then the old channel is -- I don't know how they do
3 it, they drain it or something, and then the water is
4 rerouted into that new channel.

5 Q. Isn't the initial wash-through of the new
6 channel going to result in water quality standards
7 being violated downstream?

8 A. No.

9 Q. What's the basis for your saying that?

10 A. The basis for saying that is with the BMPs
11 that the Port has proposed.

12 Q. For switching Miller Creek?

13 A. For switching Miller Creek.

14 Q. Did you review those BMPs for switching
15 Miller Creek?

16 A. Not personally.

17 Q. So you relied upon somebody else's review of
18 that?

19 A. Yes.

20 Q. Who?

21 A. Katie Walter looked at those plans. I also
22 spoke with Jim Kelley about what was planned for that
23 particular switch.

24 Q. But sitting here, you can't tell me what
25 those BMPs are?

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1 A. I know that one of the actions, one of the
2 preventative measures was ensuring that the kind of
3 gravel that they import for lining the channel with
4 after the installation of the fabric underlay is that
5 it be very clean gravel with a minimum of fines so that
6 there's just not going to be the sediment in there to
7 get carried away. They probably also will have as a
8 part of their Hydraulic Project Approval, which is
9 normal for these kind of projects, some kind of silt
10 curtain in place downstream of the new channel when
11 that water goes through.

12 Q. Would that be a prudent BMP?

13 A. That would be a prudent BMP.

14 Q. And do you have any knowledge whether that is
15 a BMP proposed in the Natural Resource Mitigation Plan
16 for the channel switch?

17 A. I don't recall.

18 Q. If it's not in there, would you disagree with
19 that?

20 A. I'm not sure what you're asking.

21 Q. Well, what I'm asking is, you're telling me
22 that an appropriate BMP for a channel switch is to have
23 a silt screen downstream; correct?

24 A. That is one appropriate BMP.

25 Q. It would be a prudent thing to do?

1 A. If the silt curtain was the only BMP that
2 they were proposing and they were not going to use it,
3 then that would raise some concerns.

4 Q. But right now you don't have an opinion on
5 whether the absence of that silt screen would be
6 something you disagree with?

7 A. No, I do not have an opinion.

8 Q. What's the status of the Port's application
9 for an HPA from Fish and Wildlife?

10 A. I don't know.

11 Q. Is that something you care about?

12 A. Yes.

13 Q. Is it needed for reasonable assurance?

14 A. No.

15 Q. Are you requiring it as part of reasonable
16 assurance?

17 A. It's a part of the packet. We can't compel
18 the applicant to obtain a Hydraulic Project Approval
19 nor can we compel the Department of Fish and Wildlife
20 to issue that approval. However, they can't construct
21 without it.

22 Q. In other words, on Page 2 of your cover
23 letter you're telling the Port, You've got to get this
24 HPA or you can't move forward with this certification?

25 A. No.

1 A. That's correct.

2 Q. And if that silt screen BMP is not proposed
3 to be used in the NRMP, then you would disagree with
4 that?

5 A. I can't say without reviewing the entirety of
6 the BMPs that they have in place for that particular
7 activity. Usually more than one BMP is in place for
8 that kind of activity.

9 Q. Well, based upon your current knowledge of
10 the BMPs the Port's proposing for that channel switch,
11 if the silt screen isn't part of that, would you
12 disagree with not including that BMP in there?

13 A. That calls for me to speculate on something
14 I'm not sure on. I know that the Port is still in the
15 process of obtaining their Hydraulic Project Approval
16 from the Department of Fish and Wildlife, and often for
17 instream work, Ecology relies on the Department of Fish
18 and Wildlife to set suitable standards for instream
19 work.

20 We also have instream monitoring plans that
21 we are requiring. I know that there are BMPs that they
22 have proposed. I just would have to review the NRMP
23 and consult with Katie Walter to recall what they are.

24 Q. So sitting here, you don't want to disagree
25 with that, I take it?

1 Q. What if the Port doesn't obtain the HPA?

2 A. Well, then they can't -- they'll be in
3 violation of the hydraulic code. And I know that they
4 were in discussions with Fish and Wildlife to pursue
5 that HPA.

6 Q. The certification that Ecology issued on
7 September 21 is subject to the conditions contained in
8 the HPA, isn't that right? That's what you say in your
9 cover letter.

10 A. That's what it says in the cover letter.

11 Q. And if it's subject to the conditions in the
12 HPA and the Port doesn't obtain an HPA, then don't you
13 agree that that destroys reasonable assurance?

14 A. If the Port fails to obtain a Hydraulic
15 Project Approval prior to commencing construction in
16 water construction, then that would be a problem.

17 Q. Right. Well, it's not only a problem, it
18 destroys reasonable assurance?

19 A. No. Well, I disagree.

20 Q. Well, you're saying here, aren't you, that
21 yes, we have reasonable assurance with this
22 certification being subject to the conditions in th
23 HPA?

24 A. The conditions of the HPA are complementary
25 to the conditions that are in the water quality

1 certification, but the water quality certification can
2 stand independently and does stand independently from
3 the Hydraulic Project Approval for purposes of
4 reasonable assurance.

5 Q. Well, I don't mean to talk around you or the
6 issue, but the reality is, you're relying upon the
7 conditions that you believe Fish and Wildlife will put
8 in the HPA to come to a reasonable assurance finding?

9 A. That is not correct.

10 Q. You don't care what the conditions are in the
11 HPA?

12 A. They're complementary to the conditions that
13 are in the 401 certification.

14 Q. That's not my question. My question is, you
15 don't care about the conditions in the HPA?

16 A. The conditions of the HPA will be what's
17 required by the Department of Fish and Wildlife. We
18 have numerous construction-related conditions in this
19 permit that address water quality concerns that aren't
20 necessarily directly related to fish, but they are
21 usually complementary and not contradictory.

22 So our consultant, Katie Walter, with Shannon
23 and Wilson, thoroughly reviewed the Natural Resource
24 Mitigation Plan and the plans for relocating Miller
25 Creek. She had identified some areas that were of

1 continue under the 401 certification if it does not get
2 its HPA?

3 A. If the Port is denied an HPA by Fish and
4 Wildlife, then that would be -- well, that would just
5 stop the project right there.

6 Q. It would stop it because Ecology would not
7 have reasonable assurance at that point?

8 A. It would stop it because they'd be in
9 violation of the state hydraulic code.

10 Q. Only for work in the stream?

11 A. Yeah, for work in the stream.

12 Q. And Ecology would not let the Port go forward
13 under the 401 certification without that HPA, isn't
14 that right?

15 A. Well, we couldn't let an applicant do work
16 that was illegal. They would have to have that
17 Hydraulic Project Approval to do that instream work.

18 Q. I'm not talking about instream work, I'm
19 talking about other work under the 401 certification.

20 MR. REAVIS: I'm just going to, for the
21 record, object to the question because it misinterprets
22 the legal meaning of the 401.

23 A. Ecology would have to look at the work that
24 the Port wanted to do, presuming they get their 404
25 permit from the Corps of Engineers that allows

1 concern to her in terms of how that would be managed,
2 and those issues were resolved. And we do have
3 reasonable assurance that as long as these conditions
4 are followed, we have reasonable assurance that water
5 quality standards will be met. We do not address
6 compliance with the hydraulic code.

7 Q. So the certification isn't subject to the
8 conditions in the HPA?

9 A. Once the Hydraulic Project Approval is
10 issued, it is our intent that the applicant should
11 comply with that permit.

12 Q. Right. The certification is subject to the
13 conditions in the HPA? That's what you said there,
14 isn't it, Mrs. Kenny?

15 A. That's correct.

16 Q. And you had to say that because in order to
17 have reasonable assurance, you had to have those
18 conditions in the HPA?

19 MS. MARCHIORO: Objection; vague.

20 A. As I have already stated, the conditions in
21 the Hydraulic Project Approval are complementary to the
22 conditions in the water quality certification that we
23 have for terms of assuring compliance with the water
24 quality standards.

25 Q. (BY MR. STOCK. Are you going to let the Port

1 discharge to wetlands. We'd have to look at the work
2 that they were proposing to do and the proximity of
3 that work to any work instreams. That work, we may
4 determine, could legally or rightfully proceed under
5 the 401 certification absent a Hydraulic Project
6 Approval.

7 Q. (BY MR. STOCK) So what is the reason that
8 you are conditioning this certification on the HPA?

9 A. Because that's the way it's always been done
10 by 401 reviewers. It's standard for us to incorporate
11 by reference other permits that have aquatic-related
12 conditions.

13 Q. And that's the only reason you did it,
14 because that's what you've always done?

15 A. Because the Hydraulic Project Approval
16 addresses impacts to aquatic resources. It's another
17 area where the applicant needs to comply.

18 Q. And if the applicant doesn't comply with the
19 HPA, it will be in violation of this 401 certificate,
20 isn't that correct?

21 A. Well, I think that's probably a legal issue,
22 because this is a cover letter. I don't believe
23 anywhere in the Order we refer to the Hydraulic Project
24 Approval.

25 Q. So it's not a part of the certificate?

1 A. It's not a -- I don't believe it's a part of
2 the Order itself. This is a separate administrative
3 Order. This is a cover letter.

4 Q. Is it a part of the certificate, the need to
5 obtain an HPA?

6 A. Not that I recall, that we put it in the
7 actual certificate. Unless it was somewhere in the
8 back, I don't believe that it is actually a part of the
9 Order itself.

10 Q. Okay, take a look at the first page of the
11 certificate of September 21. The last sentence on that
12 page says, "Work authorized by this Order is limited to
13 the work described in the JARPA, as amended, unless
14 modified by this Order or by conditions contained in
15 other permits sought for the Master Plan Update
16 Improvement projects."

17 Can this certificate be modified by other
18 permits?

19 A. Yes.

20 Q. What other permits can modify this
21 certificate?

22 A. We had made provisions to allow the next
23 round of the NPDES permit to make revisions to this
24 permit.

25 Q. So this certificate and the requirements of

1 authorized delegated state for purposes of the Clean
2 Water Act, so we would have to look to state law as
3 well as the Clean Water Act to determine if there was
4 violation.

5 Q. And once you determine there was a violation,
6 that would destroy reasonable assurance, would it not?

7 MR. REAVIS: Objection; vague.

8 A. I'm confused as to whether you're asking
9 about how Ecology would respond prior to issuance of
10 this permit or the basis of our decision, or what we
11 would do after issuance of the permit if we determined
12 there was a violation of the Clean Water Act.

13 Q. (BY MR. STOCK) Well, your determination that
14 there was reasonable assurance on August 10 was a
15 determination that the project would not result in a
16 violation of state water quality law?

17 A. That's correct.

18 Q. And your determination of reasonable
19 assurance on August 10 was that this project -- strike
20 that.

21 Your determination on August 10 that you had
22 reasonable assurance was also based upon your belief
23 that this project would not result in a violation of
24 the Clean Water Act?

25 A. That's correct.

1 the certificate can be modified by a subsequent NPDES
2 permit?

3 A. Yes.

4 Q. Turn to Page 2 of the certificate. At the
5 top of the page you identify various authorities. If a
6 component of this project is not in conformance with
7 the Clean Water Act, then is it fair to say that
8 Ecology would not have reasonable assurance?

9 A. That's a very broad statement, and any
10 determination that this project is not in compliance
11 with the Clean Water Act would have to be made under
12 specific circumstances.

13 Q. So you believe there are situations where
14 there can be violations of the Clean Water Act and
15 Ecology could still have reasonable assurance?

16 A. I didn't say that.

17 Q. Well, that's my question.

18 A. We have reasonable assurance, as we've issued
19 this permit. We don't believe that this permit
20 violates the Clean Water Act.

21 Q. If it does violate the Clean Water Act, you'd
22 agree that there wouldn't be reasonable assurance?

23 A. The Clean Water Act is certainly part of it.
24 There's also the State Water Pollution Control Law and
25 the regulations under that. And we are an EPA-

1 Q. And on August 10 when you determined that you
2 had reasonable assurance to issue the certificate, you
3 also believed that the project was in conformance with
4 the requirements to use all known available and
5 reasonable methods to prevent a controlled pollution of
6 state waters?

7 A. That's correct.

8 Q. So if a component of the project is not in
9 accordance with ACART, then you wouldn't have
10 reasonable assurance?

11 A. It depends on the project and the specifics
12 of the project and how one defines ACART.

13 Q. Sure. But at the time you issued the
14 certificate, you had concluded that the project was in
15 conformance with ACART, and on that basis and on the
16 basis that you had decided that it was in conformance
17 with the state water quality laws and the Clean Water
18 Act, you had reasonable assurance?

19 A. I did not make a personal determination as to
20 whether or not this project would meet that standard of
21 ACART.

22 Q. You didn't?

23 A. Those recommendations were made to me by the
24 Water Quality Program.

25 Q. And they told you that the project was in

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1 conformance with ACART?

2 A. I don't recall that we discussed it in those
3 specific terms.

4 Q. But that was part of your decision and that's
5 why you've included it here in the Order?

6 A. That's a part of our -- again, our standard
7 boilerplate.

8 Q. Well, what does that say, it's a part of your
9 standard boilerplate? It's a part of your standard
10 boilerplate because the project has to be in
11 conformance with ACART in order for you to have
12 reasonable assurance.

13 A. That's what this condition or this statement
14 here appears to say.

15 Q. Do the groundwater quality standards in WAC
16 173, I think it's 200, apply? Strike that, let me ask
17 this question.

18 In coming to your conclusion that this
19 project conformed with the water quality standards of
20 the state, did you consider the groundwater quality
21 standards set forth in the Washington Administrative
22 Code?

23 A. We certainly considered impacts to
24 groundwater on -- I'm not seeing the specific
25 reference, up front here where we talk about water

1 A. Yes.

2 Q. In your review of the application, did you
3 conclude that there would be mixing zones?

4 A. WAC 173-201A allows for mixing zones for
5 short-term disruption of water quality standards, the
6 way I understand it. There is a boundary, and I don't
7 have a copy with me of 201, whatever it is --

8 Q. 060.

9 A. -- 201A to point you to it, but there are
10 certain distance limitations where beyond that if
11 there's an exceedance of the criteria, that would be
12 considered a violation. And Ecology used to issue
13 short-term water quality modifications for any activity
14 where there would be an exceedance of the criteria.
15 And the way I understand it, the rule was amended to
16 allow for small mixing zones for temporary
17 construction-related impacts.

18 Q. Well, my question is a simple one. Looking
19 at Sub (d) and Sub (g), I take it there are components
20 of this project where there are going to be mixing
21 zones?

22 A. "Mixing zone" is something that has a very
23 technical regulatory definition. There is the
24 potential, not the likelihood, that some of these
25 instream projects may result in a short-term exceedance

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1 quality standards to groundwater standards, but I know
2 that we did consider impacts to groundwater.

3 Q. There is a reference later on in the
4 certificate to groundwater standards, and that's my
5 question here. You agree that the groundwater
6 standards in the WAC are a part of the state water
7 quality standards?

8 A. That's my understanding.

9 Q. And in coming to a reasonable assurance
10 determination on August 10, you took those groundwater
11 quality standards into consideration?

12 A. They were certainly considered I believe by
13 the Water Quality program staff who were working on
14 this.

15 Q. You wouldn't have given reasonable assurance,
16 would you, if you thought that the groundwater quality
17 standards were going to be violated by this project?

18 A. No.

19 Q. Turn to Page 3. Item (d), "In the monitoring
20 plan, the Port shall demonstrate to Ecology that any
21 mixing zone is minimized in conformance with WAC 173."
22 Do you see that?

23 A. I do.

24 Q. And then also in Subitem (g), it again refers
25 to the boundary of mixing zones. Do you see that?

1 in some area in some point of the project. There's the
2 potential but not a proven fact that exceedance will
3 occur.

4 Q. So in that case don't you grant a short-term
5 water quality modification?

6 A. We no longer grant short-term water quality
7 modifications because the rule was amended to allow for
8 a certain small mixing zone to allow for that
9 exceedance.

10 Q. So Ecology is expecting that there will be
11 mixing zones from construction of this project, and
12 that's why Ecology put in Subparagraph (d) and (g) on
13 Page 3?

14 A. The applicant is required to do everything
15 within their ability through best management practices
16 to prohibit or to prevent the situation where the water
17 quality standards will be exceeded. However, when
18 you're going into a stream and you're doing work and
19 you're pulling out bulkheads or, say, old timbers or
20 something from the side of a bank, there might be some
21 turbidity and sedimentation from that activity. It's
22 not uncommon for there to be some exceedance in a very
23 small area. And I can't speak to the Water Quality
24 Programs' rationale for how they changed their rule,
25 but there was some allowance for that.

1 However, beyond this particular distance,
2 depending on the stream and the size of water body,
3 that would be considered a violation. And if that
4 happens, then the project applicant or the -- you know,
5 whoever is doing work needs to stop that work, they
6 need to slow it down, they need to do whatever they
7 need to do to prevent that exceedance. And that's why
8 we required instream/shoreline monitoring plans to
9 ensure that they would have adequate procedures in
10 place to address any problems that occurred during
11 construction.

12 Q. So if I can cut through all of that, what I
13 understood you to say is that, yes, based upon the
14 Water Quality Program's experience, mixing zones are
15 expected to occur during the construction of this
16 project?

17 A. There's a likelihood that they may occur.

18 Q. Well, there's a substantial likelihood that
19 they will occur, isn't there, given the scope of this
20 project?

21 A. Given the nature of the work that they're
22 doing, it would not be surprising if there was some
23 turbidity created by the activities that they're
24 proposing.

25 Q. Right. There's a substantial likelihood that

1 minimize that mixing zone.

2 Q. Don't Ecology's own regulations with respect
3 to mixing zones require review and approval of mixing
4 zones?

5 A. Mixing zones are discussed in another area of
6 WAC 173-201A, but I believe that that's under a
7 separate intent.

8 Q. You agree that the regulations require review
9 and approval by Ecology of mixing zones under the WAC?

10 A. I am not an expert in the water quality
11 standards per se. These conditions were worked out
12 with the Water Quality Program, they're consistent with
13 what we have done in the past, and these are very
14 specific to these temporary construction projects.

15 Q. Take a look at 173-201A-100, 1 through 16.
16 You've seen that before, haven't you?

17 A. Yes.

18 Q. You've reviewed the water quality standards
19 set out in the WACs; correct?

20 A. Yes.

21 Q. And that review has included the WAC relating
22 to mixing zones?

23 A. This mixing zone is with regard to discharge
24 permits, general permits or orders as appropriate.

25 Q. Are you telling me that WAC 173-201A-100

1 there will be mixing zones on this project given the
2 scope of the construction?

3 A. There's a likelihood.

4 Q. It's a substantial likelihood, isn't it?

5 MS. MARCHIORO: Asked and answered.
6 Objection.

7 A. "Substantial" is a term with a value to it
8 that I can't measure until the Port gets out there and
9 starts constructing and we see how effective their BMPs
10 are.

11 Q. (BY MR. STOCK) Let me see if I can get this
12 agreement out of you. You agree that there's a greater
13 than 50 percent chance or probability that mixing zones
14 are going to occur on this project; that's a fair
15 assumption, isn't it?

16 A. I can't say.

17 Q. Well, that's why (d) and (g) is in there.

18 A. We expect that there will be some need for
19 mixing zones, and (d) and (g) are in there to say that
20 that mixing zone needs to be minimized to the smallest
21 mixing zone possible, that if there's -- and I describe
22 this in my Declaration -- that if there's X amount
23 given for the mixing zone but they can meet the
24 standard within 10 feet instead of 100 feet, they need
25 to do it within 10. So we've done everything we can to

1 doesn't apply to this 401 certificate? It does apply,
2 doesn't it?

3 A. I don't believe that's entirely correct.

4 Q. You're telling me that this WAC on mixing
5 zones doesn't apply to the 401 certification review
6 process here?

7 A. I'm saying that we adopted part of that
8 language, but that language I believe is more
9 appropriately directed to discharges related to point
10 source discharges of pollution versus a temporary
11 exceedance of the water quality standards related to
12 temporary construction activities.

13 Q. In your reasonable assurance review, did you
14 require any sort of review and approval of mixing zones
15 that were expected to occur through construction of
16 this project?

17 A. It's not required for temporary construction
18 activities. That's not required.

19 Q. Ms. Kenny, that's not my question. Please
20 listen to my question.

21 My question is, as part of your reasonable
22 assurance review, did you require any review and
23 approval of mixing zones?

24 A. No, because it was not required.

25 Q. Turn to Page 4 of the certification. The

1 very first sentence on Page 4, "This Order shall be
2 valid during construction of the project."

3 Do you see that?

4 A. I do.

5 Q. Is it your understanding that the Clean Water
6 Act also applies to long-term operation of the
7 facility?

8 A. I believe that's what's stated directly in
9 the Act.

10 Q. That's also true with respect to state water
11 quality standards, that state water quality standards
12 apply to long-term operation of the facility?

13 A. Any facility anywhere needs to comply with
14 the water quality standards that are in place at the
15 time.

16 Q. What do you mean "at the time"?

17 A. The water quality standards can be changed
18 and amended if there are new provisions, that the
19 facility needs to comply with what's current at that
20 particular point in time.

21 Q. Sure, I think we're saying the same thing.
22 You agree that the state water quality standards apply
23 to a long-term operation of the facility, whatever
24 those water quality standards are at the time?

25 A. Yes.

1 or disagree. If you want to ask a question, please
2 continue with the deposition.

3 MR. STOCK: Well, I don't think your
4 objection would be sustained so please watch your
5 objections.

6 MS. MARCHIORO: Can we take a break?

7 MR. STOCK: Sure.

8 (Recess taken.)

9 (Reporter read back as requested.)

10 Q. (BY MR. STOCK) I guess I didn't get an
11 answer to that question.

12 The reason you included in the August 10
13 certification the language that the "Order shall be
14 valid during construction and long-term operation and
15 maintenance of the project" was because that is
16 required by the Clean Water Act and the state water
17 quality standards?

18 MS. MARCHIORO: Object to the extent that it
19 calls for a legal conclusion.

20 A. This is language, again, that was a part of
21 the boilerplate created by Tom Luster. I believe that
22 language is in the Clean Water Act, but I would have to
23 go back and look to be sure.

24 Q. (BY MR. STOCK) What made you decide to
25 delete the phrase "long-term operation and

1 Q. And that's the reason why you included in
2 your August 10 certification in that first sentence
3 under Item 1 that the "Order shall be valid during
4 construction and long-term operation and maintenance of
5 the project"?

6 MR. REAVIS: Object to misreading the
7 document.

8 A. The August 10th version of the certification
9 states, "This order shall be valid during construction
10 and long-term operation and maintenance of the
11 project."

12 Q. (BY MR. STOCK) And I didn't misread it, did
13 I?

14 A. You read it appropriately.

15 Q. So you agree that Mr. Reavis's objection was
16 a needless objection?

17 A. I'm not qualified to determine whether a
18 counsel's objection is needless or not.

19 Q. Didn't make any sense to you, did it?

20 A. I am not going to answer that.

21 MR. REAVIS: Why don't we just move on with
22 the question instead of talking about it.

23 MR. STOCK: You agree your objection was
24 needless?

25 MR. REAVIS: I don't have any need to agree

1 maintenance"?

2 A. The changes that were made in the September
3 21st version of the certification were made to clarify
4 that language, to put some definition to what that
5 means.

6 Q. You deleted that phrase from the first
7 sentence of Paragraph 1 under Section B because the
8 Port asked you to delete it?

9 A. The changes that were made to the September
10 21st certification were the changes that were agreed to
11 during settlement discussions with the Port.

12 Q. Right. The Port asked you to delete that
13 phrase out of the first sentence of Section B1?

14 A. They asked and we agreed that that was
15 reasonable.

16 Q. Even though the Clean Water Act requires that
17 the certification apply to long-term operation and
18 maintenance?

19 MR. REAVIS: Objection; legal conclusion.

20 A. The September 21st version of the
21 certification still has that language in there, "This
22 Order shall be valid during long-term operation and
23 maintenance of the project."

24 Q. (BY MR. STOCK) But that language is now
25 modified, isn't it?

1 A. It is slightly modified.
 2 Q. It is modified, isn't it?
 3 A. It is modified.
 4 Q. So it's less of a standard than what was
 5 contained in the August 10 certification, isn't it?
 6 A. I don't believe so.
 7 Q. Well, how is it not?
 8 A. "This Order shall be valid during
 9 construction." The subparagraphs in the September
 10 21st certification then go on to define exactly what
 11 "construction" means. So in items -- go through those
 12 subparagraphs, we've defined, given clarity to what
 13 "construction" means. And then in this Condition F, we
 14 have -- well, we've defined that some of the conditions
 15 for wetland mitigation are in effect in perpetuity, and
 16 then we define how this long-term maintenance and
 17 operation applies as it relates to the NPDES permit.
 18 Q. Ms. Kenny, you have to agree with me that by
 19 agreeing to the Port's modifications to this Paragraph
 20 B1 where you have modified, to use your words, the
 21 phrase "long-term operation and maintenance," that this
 22 is a lesser time than what is required under the August
 23 10 certification?
 24 A. I don't agree.
 25 Q. Look at 1(c), look at 1(d). There's an

1 A. That's correct.
 2 Q. (BY MR. STOCK) It's not a construction
 3 activity, is it?
 4 A. It's related to construction activity and
 5 monitoring the impacts of that construction.
 6 Q. It's also related to long-term operation and
 7 maintenance subsurface utility lines?
 8 A. It says the plan shall remain in effect as
 9 specified, but in no event for a duration less than
 10 eight years.
 11 Q. Right. And so in Year 8 plus one day, under
 12 that provision the Port has the right to stop the
 13 monitoring, doesn't it?
 14 A. It could if it chose to.
 15 Q. That's right. And so that is less of a
 16 standard in terms of applying this certification to
 17 long-term operation and maintenance than what was
 18 contained in the August 10 certificate, isn't that
 19 right?
 20 A. It's certainly different.
 21 Q. It's a lesser standard, isn't it?
 22 A. I believe it provides more clarity.
 23 Q. Well, I'm going to stay on this until I can
 24 get an agreement out of you, because I think it's
 25 absolute.

1 eight-year time frame on those, isn't there?
 2 A. These are provisions that relate to
 3 activities that are directly related to construction
 4 activities, and those activities are not expected to
 5 continue indefinitely.
 6 Q. Potential contaminant transport to soil and
 7 groundwater via subsurface utility lines is a
 8 construction activity? Is that your testimony?
 9 A. What this condition --
 10 Q. Is that your testimony?
 11 A. If you'll repeat what your statement of my
 12 testimony is, I'll be glad to tell you if that's my
 13 testimony or not.
 14 Q. Is it your testimony that contaminant
 15 transport to soil and groundwater via subsurface
 16 utility lines is a construction activity?
 17 MR. REAVIS: Let me object to the fact that
 18 you're not reading the entirety of that provision.
 19 MR. STOCK: Would you like to read it,
 20 Mr. Reavis?
 21 MR. REAVIS: Yes. You read starting with
 22 "contaminant transport." But the full provision says,
 23 "The plan to monitor potential contaminant transport"
 24 shall be contained as specified, not contaminant
 25 transport.

1 You told me that under the September 21
 2 certification the Port of Seattle has the right to stop
 3 monitoring potential contaminant transport to soil and
 4 groundwater via subsurface utility lines in Year 8 plus
 5 one day. Do you recall that testimony?
 6 A. I do.
 7 Q. The Port of Seattle did not have that option
 8 under the August 10 certificate, did it?
 9 A. I'll have to refresh my memory of what the
 10 August 10 certification says.
 11 A. (Witness reviewing document). The September
 12 21st certification puts an eight-year parameter on that
 13 monitoring.
 14 Q. That's not an answer to my question.
 15 A. Would you repeat the question, please?
 16 (Reporter read back as requested.)
 17 A. That's correct.
 18 Q. (BY MR. STOCK) So it's a lesser standard in
 19 the September 21 certificate than the August 10
 20 certificate, isn't that right?
 21 A. Yes.
 22 Q. And that's also true with respect to 1(c),
 23 "the Surface Water and Ground Water Monitoring plan
 24 shall remain in effect as specified in that plan but in
 25 no event for a duration less than eight years."

1 Under that provision, the Port has the
2 option, in fact, it has the right in Year 8 plus one
3 day to stop that surface water and ground water
4 monitoring; correct?

5 A. Yes.

6 Q. And they didn't have that right, the Port
7 didn't have that right under the August 10 certificate;
8 correct?

9 A. Correct.

10 Q. And as a result of that provision, the
11 September 21 certificate is a lesser standard than the
12 August 10 certificate; correct?

13 MS. MARCHIORO: Can I ask you, I'm sorry,
14 which conditions you're referring to?

15 MR. STOCK: C.

16 MS. MARCHIORO: Thank you.

17 A. Yes.

18 Q. (BY MR. STOCK) Looking at Condition B1(f) on
19 the same page, am I to understand -- is it a correct
20 interpretation of that condition that this current 401
21 certificate can be amended by a future NPDES permit?

22 A. That is correct.

23 Q. And given that, can't the conditions of the
24 401 certificate be lessened because it can be modified
25 by a future NPDES permit?

1 a change to what we've approved.

2 Q. What sort of change?

3 A. A substantive major change to the project.

4 Q. Would switching over to a regional detention
5 facility for a storm water management at the site be a
6 substantive change in your mind?

7 A. I believe we already discussed the regional
8 detention facility in that light.

9 Q. Right. And you agreed that it would be?

10 A. Yes.

11 Q. And how about changes in the Low Flow
12 Analysis; do you agree that changes in the Low Flow
13 Analysis would also trigger this provision?

14 A. No.

15 Q. If the Low Flow Analysis is changed to where
16 there is a greater impact on low flow than what the
17 July 2001 Low Flow Analyses showed, don't you agree
18 that that is a sufficient enough change to require an
19 updated application to Ecology under this provision?

20 A. We have received the revised local plan on --
21 I have not reviewed it thoroughly nor has our
22 consultant, but it's my understanding that the impacts
23 have not increased.

24 Q. If impacts have increased, do you agree that
25 that requires a resubmittal of the application for 401

1 A. They could be, but that's not likely.

2 Q. You agree that the potential exists for the
3 conditions in the 401 certificate to be modified to
4 result in lesser protection of water quality because it
5 can be modified by a future NPDES permit?

6 A. In theory, the conditions could be modified
7 to a lesser standard.

8 Q. And that's because the standards for
9 reviewing and approving NPDES permits are different
10 than the standards for reviewing and approving 401
11 certifications?

12 A. I can't speak to the exact standards used for
13 reviewing 402 --

14 Q. Sure. At a minimum you know you don't need
15 reasonable assurance to issue a 402 permit?

16 A. That's my understanding.

17 Q. Item No. B3 on that page requires the Port to
18 submit an updated application to Ecology if the
19 information contained in the JARPA is altered by
20 subsequent submittals to the federal agencies and/or
21 state agencies.

22 What types of subsequent submittals are you
23 referring to there?

24 A. Without knowing what those submittals are, it
25 would be something along the lines that would result in

1 certification?

2 A. If, understanding that's a subjective if, not
3 a certainty, impacts had increased, we would evaluate
4 whether the Port had proposed adequate mitigation to
5 offset those impacts along with this revised low flow
6 plan.

7 Q. And require the Port to submit a new
8 application for 401 certification?

9 A. Not necessarily.

10 Q. You're saying no change in a Low Flow
11 Analysis would cause you to require the Port to
12 resubmit an application?

13 MS. MARCHIORO: Objection; mischaracterizes
14 the witness's testimony.

15 A. It depends on the order of magnitude of the
16 change and whether or not the Port has sufficiently
17 mitigated for those changes.

18 Q. (BY MR. STOCK) You received the revised low
19 flow plan when?

20 A. December 12th.

21 Q. You're sure about that date?

22 A. Pretty sure.

23 Q. That was a week ago today; correct?

24 A. That's correct.

25 Q. So last Thursday, Department of Ecology got a

1 copy of the low flow revised plan?

2 A. If that was last Thursday. Frankly I don't
3 remember without a calendar.

4 Q. Well, today is a Thursday, so if it was a
5 week ago it was a Thursday.

6 A. Whatever. It was December 12th, I remember
7 that. I don't remember the date.

8 Q. Have you opened it up to review it?

9 A. I cracked the cover enough to look at the
10 impacts to see that in Miller Creek the net impact was
11 zero. And because it arrived late in the day, I saw
12 that there were numbers for Des Moines Creek and Miller
13 Creek -- or I'm sorry, Walker Creek, but I didn't have
14 the opportunity to go back and compare that with the
15 previous numbers that we had.

16 I had been informed by the Port that those
17 numbers were expected -- the impact number was expected
18 to decrease or be less impact shown from the fill than
19 had been priorly calculated.

20 Q. Are changes to mitigation planned as a result
21 of that?

22 A. I don't know. I haven't looked at it.

23 Q. Do you agree that if there are changes to
24 mitigation, then that will require reapplication and
25 public notice?

1 new public notice to issue an amended 401 after it
2 issued the August 10 certification?

3 A. We may have -- I may have discussed it with
4 someone, but I honestly don't recall the specifics of
5 any discussion.

6 Q. You don't see that as an option now, do you?

7 A. Could you define what you mean by -- see what
8 as an option?

9 Q. Going out with new public notice on any
10 changes to the certification.

11 A. I don't see need for new public notice.

12 Q. Well, you haven't had enough time to review
13 the low flow plan to make that decision, have you?

14 A. No.

15 Q. But yet you don't see a need for public
16 notice? The bottom line I'm trying to get at is,
17 you're not even willing to consider whether public
18 notice is needed for a change to the low flow plan, are
19 you? That's not an option to you?

20 A. It's certainly an option that I'm willing to
21 consider.

22 Q. But you know it'll be shot down, don't you?

23 A. I don't see a need for, unless there's a
24 substantial major change in the scope of the project or
25 the impacts of an adverse nature that would warrant a

1 A. No.

2 Q. So if the Port is proposing less mitigation
3 now because impact to low flow has gone down, you're
4 not going to go out with new public notice?

5 A. I don't believe that would be warranted.

6 Q. So you're going to let the Port reduce the
7 amount of mitigation without going to public notice?

8 A. We haven't determined what we're going to do
9 because we haven't reviewed it. That review needs to
10 happen, and when it's complete we will know how we will
11 respond to those changes.

12 Q. There would be great resistance at Ecology,
13 wouldn't there, to go out with new public notice on a
14 change to this certification?

15 A. No.

16 Q. Well, there was resistance prior to September
17 21, wasn't there, in issuing the amended certification?

18 A. I don't recall that we ever discussed going
19 out on public notice.

20 Q. There were discussions within Ecology as to
21 whether public notice was needed to amend the August 10
22 certification, wasn't there?

23 A. Not that I recall.

24 Q. You don't recall participating in any
25 discussions on whether Ecology would have to provide

1 new public notice.

2 Q. Turn to Page 6. The first full paragraph
3 there, "No document, report or plan required by this
4 Order shall be deemed approved until the Port receives
5 written verification of approval from Ecology." What's
6 that in there for?

7 A. That was put in there to be very clear that
8 verbal approval of some report or word of mouth
9 approval was not sufficient. There actually had to be
10 a letter from Ecology stating in writing that a plan
11 had been approved.

12 Q. So is this in reference to the plans and
13 reports that the certification is requiring the Port to
14 submit?

15 A. That's correct.

16 Q. After the certification was issued?

17 A. That's correct.

18 Q. Why does the Port need to retain its right to
19 approve these plans and reports?

20 A. The Port isn't retaining any right to --

21 Q. I'm sorry, I misspoke. Why does Ecology
22 retain the right to approve these plans, reports th
23 the certification requires the Port to submit?

24 A. In some cases we said for very specific
25 conditions and technical requirements in our conditions

1 that we need to be assured have been fulfilled
2 adequately by the Port.

3 Q. Right. You retained control over those plans
4 that are being submitted after the certification
5 because you know there are technical requirements
6 required by Ecology in order to have assurance?

7 A. That's correct.

8 Q. In order to have reasonable assurance?

9 A. Yes.

10 Q. And you didn't have these reports obviously
11 on August 10 or September 21 when you issued the
12 certifications?

13 A. We didn't have the reports that we -- the
14 additional reports that we required or plans in the
15 certification at that time.

16 Q. Look under the Wetland, Stream and Riparian
17 Mitigation conditions, at the very bottom, 1(e).
18 Is there a requirement that the Port provide a map of
19 the location for the shade cloth in the revised NRMP?

20 A. Yes.

21 Q. And what's the importance of requiring the
22 Port to provide that map of the shade cloth?

23 A. There was a concern that in planting plants
24 for the new channel, if shading was not provided for
25 certain of the coniferous species, the fir and the

1 Q. It's a critical factor, isn't it?

2 A. Yes.

3 Q. And for that reason you are telling the Port
4 you need to revise your NRMP to show us where shade
5 cloth is going to be placed?

6 A. That's correct.

7 Q. And without that, your ability to come to a
8 conclusion on reasonable assurance with respect to the
9 temperature of the water in the relocated channel just
10 isn't there, is it?

11 A. I disagree.

12 Q. You've told me this is a critical component
13 of maintaining water temperature, and that is one of
14 the criteria for -- in the water quality standards;
15 correct?

16 A. You are trying to oversimplify or
17 overemphasize the importance of this one condition.

18 Q. All I'm trying to do, Ms. Kenny, is get to
19 the facts. And as I understand it, you need to know
20 where the Port is going to place that shade cloth in
21 order to know whether those plants, coniferous species
22 along the replaced channel, are going to survive.
23 That's what your testimony is; correct? It's a simple
24 question.

25 A. Well, the NRMP already identified that shade

1 cedar, that those small plants could be burned and
2 killed by the sun absent some shading to protect those
3 plants.

4 Q. What is the significance of those coniferous
5 species dying?

6 A. The mitigation plan sets out certain goals
7 for restoring riparian habitat along the Miller Creek
8 channel where it's relocated. That includes a mix of
9 both coniferous trees and willows and other types of
10 vegetation for a healthy mix of plant species.

11 Q. But why is that important to Ecology in terms
12 of water quality standards?

13 A. In trying to establish a healthy riparian
14 corridor that includes a healthy balance of plants,
15 when those plant species are fully grown, they will
16 provide shading which helps control temperature in the
17 water bodies in Miller Creek, Des Moines Creek, in
18 those areas. So when you've got tall plants adjacent
19 to the water, that provides shading which provides
20 cooling which is one of the criteria for the water
21 quality standards.

22 Q. So the plant life along the streams is
23 critical to maintaining the water quality standard with
24 respect to temperature?

25 A. That's one of the factors.

1 cloth would be placed over the new channel. What we
2 were asking for was more detail on the location of that
3 cloth and detail on how it would be installed and how
4 it would be maintained and removed so that our experts
5 who are reviewing this plan could review that and use
6 their expertise and their knowledge to determine
7 whether that plan was adequate.

8 Q. Right. We're getting too deep in to this.
9 This is shade cloth, and the bottom line is, your
10 experts needed to know where the shade cloth was going
11 to be placed in order to decide whether these baby
12 plants were going to make it?

13 A. Right.

14 Q. It's as simple as that?

15 A. That's correct.

16 Q. And you need those baby plants to grow up
17 into big plants to protect the water temperature in the
18 stream?

19 A. That's correct.

20 Q. And unless you know that those baby plants
21 are going to grow into big plants, you don't know
22 whether that temperature is going to be affected --
23 well, you know it is going to be affected; it's going
24 to rise, isn't it, if there isn't any plant life to
25 shade the stream?

1 A. If there's no vegetation to shade the stream,
2 there's likely to be an increase in temperature. The
3 absence of one plant species or another is not the only
4 reason why temperatures might rise in a stream, it's
5 one component of it.

6 Q. Right. And you needed the details on that
7 component to have reasonable assurance that the
8 temperature in that part of the stream wasn't going to
9 rise and violate state water quality standards, isn't
10 that right?

11 A. Yes.

12 Q. Turn over to Page 7, 1(g). You also required
13 as part of the revised NRMP that, "The Port shall
14 monitor hydrologic conditions of all wetlands downslope
15 of the Third Runway embankment in the Miller, Walker
16 and Des Moines Creek sub-basins;" is that right?

17 A. That's correct.

18 Q. And why is it important that the Port monitor
19 that the Natural Resources Mitigation Plan be revised
20 to provide that the Port shall monitor those hydrologic
21 conditions?

22 A. Let me reread the condition in its entirety.
23 (Witness reading document).

24 The importance for the monitoring is to
25 ensure that there's sufficient hydrology to allow

1 Q. And Ecology wants that information in order
2 to have reasonable assurance?

3 A. We want as complete a picture as we can get.

4 Q. Ecology wanted that information on the
5 hydrology of the wetlands downslope of the embankment
6 in the Miller, Walker and Des Moines Creeks in order to
7 come to reasonable assurance that water quality
8 standards wouldn't be violated in those wetlands, isn't
9 that right?

10 A. That's correct.

11 Q. And when did Ecology receive the revised
12 NRMP?

13 A. It was last month. It was in November around
14 November 19, I believe.

15 Q. How much monitoring of the wetlands downslope
16 of where the embankment is going to be with respect to
17 Miller, Walker and Des Moines Creek sub-basins has
18 there been in the past?

19 A. My understanding is that there's been
20 substantial monitoring, and that information was
21 provided to us and reviewed by Eric Stockdale.

22 Q. Is there a baseline already in place?

23 A. There's a substantial data bank or a
24 substantial amount of data in place to assess current
25 hydrology on the site.

1 wetland plants and wetland soil conditions to continue
2 after construction of the project.

3 Q. And why did the Department of Ecology want
4 the NRMP modified to require that?

5 A. I believe it was the determination of our
6 consultant, Katie Walter, that the Port did not have
7 sufficient plans in place for such hydrologic
8 monitoring.

9 Q. And you need that information to determine
10 whether there's sufficient hydrology to support the
11 vegetation in the wetlands; correct?

12 A. That's correct.

13 Q. And without that information, you can't make
14 a determination whether there is sufficient hydrology
15 in the wetlands to support the vegetation?

16 A. You can make a determination by going out and
17 actually looking at the wetland and comparing over time
18 the area of the wetland as it was prior to impact
19 versus post impact, and if there is insufficient
20 hydrology it's going to dry up and that wetland will
21 shrink. So you can actually measure it on the ground,
22 but the use of piezometers and shallow hand dug soil
23 pits is one more tool that helps provide clarity to the
24 natural processes that are actually occurring out
25 there.

1 Q. Has the Port started complying with this
2 provision?

3 A. It's my understanding that they were already
4 doing at least monthly, if not twice monthly
5 monitoring.

6 Q. This requires twice a month. Is the Port
7 doing that now?

8 A. I believe they are.

9 Q. Have you seen recent monitoring reports
10 relating to hydrologic conditions of the wetlands
11 downslope?

12 A. No, not to my knowledge.

13 Q. Aren't those reports to be sent to you under
14 the certification?

15 A. Well, it appears that they are to be
16 submitted to us on a monthly basis during that
17 monitoring period which would be November through May.

18 Q. Have you received any monitoring report under
19 this provision yet as of December 19?

20 A. I haven't received a monitoring report that's
21 come to me identified specifically as a monitoring
22 report. If anything was included in the revised
23 version of the NRMP regarding monitoring, I can't say
24 because I haven't looked at that document.

25 Q. Well, these monitoring reports would be

1 separate from the revisions to the NRMP. And my
2 question is, have you received the monitoring reports
3 for November?

4 A. Not to my knowledge.

5 Q. Do you have any knowledge that those
6 monitoring -- the monitoring has even occurred?

7 A. I haven't personally verified whether they're
8 doing that monitoring or not.

9 Q. So you don't know?

10 A. I don't know.

11 Q. Who should I ask?

12 A. You should ask the Port.

13 Q. What about if we send you a PDA request?

14 A. I don't have any documents in my hand that
15 are pertinent to this issue and I don't believe that
16 anyone else has received anything pertinent to this
17 issue.

18 Q. That's my question. You don't know?

19 A. I don't know.

20 Q. 1(h) requires the NRMP to be revised to
21 provide that wetland boundaries will be delineated at
22 years 5, 10 and 15; is that right?

23 A. That's correct.

24 Q. And that's both for the runway site and the
25 Auburn mitigation site; correct?

1 Q. Not a wetlands scientist?

2 A. That's correct.

3 Q. You're not an engineer?

4 A. I'm not an engineer.

5 Q. You're not a hydrologist?

6 A. No.

7 Q. You're not a hydrogeologist?

8 A. No.

9 Q. You're not a geologist?

10 A. No.

11 Q. You're not a botanist?

12 A. No.

13 Q. And you're not a fish biologist?

14 A. No.

15 Q. And you're not a chemist; is that right?

16 A. No.

17 Q. In that provision 1(h), it says that, "If the
18 delineation shows the wetland boundaries have decreased
19 then additional in-basin mitigation may be required by
20 Ecology." Shouldn't that provision say "shall" be
21 required by Ecology?

22 A. No, because there may be other things that
23 the Port could do to restore hydrology to a particular
24 wetland.

25 Q. Well, that's mitigation, isn't it, to restore

1 A. That's correct.

2 Q. What will cause a wetland boundary to
3 decrease?

4 A. It is my understanding as a person who is not
5 a specialist in wetland ecology that boundaries in
6 wetlands will decrease or increase based on the amount
7 of water gutting to the site.

8 Q. Is it your understanding that there is an
9 expectation on the part of Ecology that the wetlands
10 that will remain after the third runway is constructed
11 will decrease in size?

12 A. No.

13 Q. Why is there a requirement that those wetland
14 boundaries be delineated on a five-year basis?

15 A. The Port and Ecology have done their best to
16 review potential impacts related to the importation of
17 fill and the construction of new impervious surface.
18 Without monitoring in place, we can't verify whether
19 our assumptions are correct or not, and it's through
20 that monitoring that we can tell whether our
21 assumptions have been correct or not. And if they have
22 not been correct, then we can take some kind of
23 remedial action to correct any problem that we find.

24 Q. You're not a wetlands biologist, are you?

25 A. No.

1 hydrology to a wetland?

2 A. You could call it mitigation.

3 Q. Well, it is mitigation; agreed?

4 A. Yes.

5 Q. And if the delineation shows the wetland
6 boundaries have decreased then additional in-basin
7 mitigation should be required in order to have
8 reasonable assurance that water quality standards will
9 be met?

10 A. Yes.

11 Q. And that provision doesn't provide that, does
12 it?

13 A. That provision allows Ecology the discretion
14 to work with the Port to determine an appropriate
15 action.

16 Q. Right. It says it may be required; agreed?

17 A. That's what it says, "may."

18 Q. And that's a lesser standard than "shall."
19 You agree with that, don't you?

20 A. Yes.

~~21 Q. Turn over to Page 8, please. Under the
22 revision specified in Paragraph (j), midway down it
23 says, "The Port shall amend the monitoring condition in
24 Table 5.2-12 to read: 'Wetland indicator status of the
25 dominant noninvasive plant species shall not differ~~

1 from pre-project conditions during or at the end of the
2 monitoring period." Do you see that?

3 A. I do.

4 Q. And what is the reason that Ecology wanted
5 that change made?

6 A. That is a question of a technical nature that
7 I don't believe I can answer.

8 Q. You authored this, didn't you?

9 A. I did not author this particular condition.

10 Q. Who authored this condition?

11 A. I believe this condition came from Katie
12 Walter at Shannon and Wilson.

13 Q. I thought you said you took the Shannon and
14 Wilson recommendations and revised them to be included
15 in the 401 certification.

16 A. I may have done some manipulating of the
17 wording, but I don't understand wetland indicator
18 status or I didn't play with the technical provisions
19 of what was there. So I would have -- I can't say
20 exactly what changes I might have made to this.

21 Q. So you have no idea what that's referring to?

22 A. Only in a general sense.

23 Q. Well, do you have any sense as to why that's
24 important to make that change for purposes of
25 reasonable assurance?

1 wetlands to establish a baseline on wetland indicator
2 status of plant species prior to the start of
3 stockpiling?

4 A. I can't address -- I have no knowledge of
5 that.

6 Q. Who would?

7 A. Probably Eric Stockdale. Certainly Jim
8 Kelley with the Port, or Parametrix.

9 MS. MARCHIORO: Kevin, can you give me an
10 idea of the duration?

11 MR. STOCK: Well, I thought you said she
12 wants to get out of here at 4:30.

13 MS. MARCHIORO: I'm just trying to get an
14 indication if we're going to return, because I'd like
15 not to burden her time unduly.

16 MR. STOCK: There is no question that I will
17 not finish today. I am on Page 6 of a 15-page outline
18 that should give you some indication that we won't
19 finish today at 4:30. So we can find a mutually
20 convenient time for all of us to come back and finish
21 you up.

22 MS. MARCHIORO: I'm curious about that second
23 day, though. The expectation would be --

24 MR. STOCK: Geez, you know, Joan, you want
25 more.

1 A. Yes, I do. There are certain species of
2 plants that are found only in wetlands, and those are
3 called obligate species, I believe. And there are
4 certain plants that are found only outside of wetlands,
5 if they are in wetlands they will die, and they are
6 called upland species. And then there's a range of
7 plants in between, and they have particular names,
8 which is that wetland indicator status. So it's a
9 probability of whether or not this plant can grow in
10 wetlands or not.

11 So the "Wetland indicator status of the
12 dominant noninvasive plant species shall not differ
13 from pre-project conditions during or at the end of the
14 monitoring period. Each vegetative strata (trees,
15 shrubs and emergents) shall be assessed separately, and
16 have separate conclusions."

17 So one would look at, say, if in the
18 da-da-da, but it's not called emergent. In the
19 emergent strata, which is more of your low growing
20 vegetations like skunk cabbage, if they were to look at
21 the number of skunk cabbage and to see that they had
22 declined or they had been replaced by plants that were
23 only upland plants, then that would indicate that
24 there's a problem.

25 Q. Are you aware of any monitoring of the

1 MS. MARCHIORO: Like you want out of Ann.

2 MR. STOCK: Right. It will be between a half
3 day and a day, and that's the best I can give you guys
4 right now. So we'll find a mutually convenient time.

5 THE WITNESS: Yeah. Basically not until
6 after the first of the year would be a time that would
7 work for everyone involved.

8 Q. (BY MR. STOCK) Let's try to get through as
9 much as we can, though.

10 A. Yes.

11 Q. Look at Condition (k) on Page 8.

12 A. Uh-huh.

13 Q. What is this provision that needs to be
14 changed in the Natural Resources Mitigation Plan?

15 A. This is an indicator status, one of the
16 indicators that wetland biologists use to determine
17 hydrology. And this is actually an instance where we
18 had made a mistake in the original certification, and
19 we caught that mistake and made the condition more
20 stringent.

21 Q. Okay, that's where I was going to go. This
22 is a change from the August 10 certification?

23 A. That's correct.

24 Q. The August 10 certification says what?

25 A. Sixteen inches.

1 Q. That groundwater shall be within the upper 16
 2 inches?
 3 A. Right. Let me read -- the August 10th
 4 certification says, and I'll read the part that is in
 5 quotes, "Other wetlands with predominantly mineral
 6 soils shall have soils saturated within the upper 16
 7 inches to mid-April in years of normal rainfall."
 8 Q. And it was changed in the September 21
 9 certification to say within the upper 10 inches?
 10 A. That's correct.
 11 Q. And actually, that is a lesser standard?
 12 A. No.
 13 Q. If there's -- explain to me why it's not.
 14 A. You measure in a hole in the ground. Picture
 15 a hole. You're measuring down. So 16 inches is 16
 16 inches down from the surface of the hole. That means
 17 your water is down 16 inches in the hole. If it's 10
 18 inches, it's only 10 inches from the hole.
 19 Q. So there's more water --
 20 A. There has to be a higher level of water.
 21 Q. More water there, that's why you're saying
 22 it's a stricter standard here?
 23 A. That's what I'm saying. There's more water
 24 there.
 25 Q. So what was the reason for changing it from

1 Q. And there was a concern on the part of
 2 Ecology that that channel was -- or could go dry based
 3 upon comments by NHC?
 4 A. I don't recall if -- if you mean NHC,
 5 Northwest Hydraulics --
 6 Q. Yes.
 7 A. -- had that comment specifically. I think
 8 that was a comment raised by Diane Sheldon. I don't
 9 recall specifically who made that comment, but that was
 10 in response to those concerns along those lines.
 11 Q. And it's self-evident, but I need for you to
 12 say it on the record. If the relocated channel goes
 13 dry, that will result in a violation of state water
 14 quality standards; correct?
 15 MS. MARCHIORO: Objection. Could you state a
 16 reason for why it would go dry? I'd have a better way
 17 to state the objection.
 18 MR. STOCK: Just state your objection. Vague
 19 or whatever you want to say.
 20 MS. MARCHIORO: I'm sorry. Vague, crazy.
 21 MR. STOCK: But it's so self-evident, Joan, I
 22 don't know why you're objecting.
 23 Q. (BY MR. STOCK) But in any event, Ms. Kenny,
 24 do you agree that it would be a violation of state
 25 water quality standards for that relocated channel of

1 the August 10 certification to the September 21
 2 certification?
 3 A. That was strictly to correct an error that we
 4 had made.
 5 Q. How was that error made?
 6 A. It may have been a typo.
 7 Q. Was it?
 8 A. I don't know. It was something caught after
 9 the certification was issued.
 10 Q. The last reference on that Page 8 regarding
 11 the Vacca Farm Mitigation Site requires the NRMF to be
 12 revised to state that the "Observable surface flow must
 13 be present in the created channel at all times."
 14 What's that in reference to?
 15 A. That was another performance standard added
 16 to ensure that if there -- there would be observable
 17 flow of water in the channel at all times to verify
 18 that that channel was functioning well enough to
 19 support a stream.
 20 Q. Right. That's Miller Creek; right?
 21 A. That's correct.
 22 Q. And that's the newly-created channel for
 23 Miller Creek?
 24 A. That's the newly-created relocated channel,
 25 right.

1 Miller Creek to go dry?
 2 A. Only if it went dry through some fault in
 3 design of the creek, not if it was a year or ten years
 4 in a row where there was no rain and the creek
 5 naturally dried up itself.
 6 Q. Well, the relocated channel is a part of the
 7 mitigation, is it not?
 8 A. It is.
 9 Q. And as part of the mitigation, in order to
 10 have reasonable assurance, you want to make sure that
 11 that channel doesn't go dry?
 12 A. We want to ensure that that channel will
 13 function as a natural creek bed to support whatever
 14 water is there.
 15 Q. Has Miller Creek ever gone dry, as far as you
 16 know?
 17 A. Not to my knowledge. I couldn't say with
 18 certainty.
 19 Q. And so an appropriate mitigation plan that
 20 calls for relocating a channel of Miller Creek will
 21 provide that that relocated channel will not go dry,
 22 and that's why you've got this Condition (o)?
 23 A. As long as there's water in the creek to be
 24 conveyed through that channel, that channel should
 25 allow that water to go through and not just sink into

1 the subterranean ground and disappear.

2 Q. Right. There has to be an observable surface
3 flow present in the created channel at all times in
4 order for Ecology to have reasonable assurance, isn't
5 that right?

6 A. That's correct.

7 Q. And the Natural Resources Mitigation Plan
8 that the Port submitted in which Ecology relied upon to
9 issue the certification didn't have that requirement in
10 it, did it?

11 A. I don't recall specifically if it did or not.
12 It must not have had it in there if that was a
13 condition that was recommended by our wetlands
14 specialist to be a part of the certification.

15 Q. Right. It wasn't in the plan when you issued
16 the certification, and that requirement is needed for
17 reasonable assurance, isn't that right?

18 A. It's one of the factors that's needed for
19 reasonable assurance.

20 Q. Without it you don't have reasonable
21 assurance with respect to the relocated channel of
22 Miller Creek; is that right?

23 A. That's correct.

24 Q. Turn to Page 9. The certification requires a
25 submittal of a Revised Mitigation Plan; is that right?

1 that an applicant intends to irrigate, then we want to
2 see that irrigation system shown on the plan sheet and
3 then discussed as well in the Natural Resource
4 Mitigation Plan so that we can know -- our wetland
5 experts can assess whether that proposal to irrigate
6 looks reasonable or not.

7 Q. Sure. Without that information you agree
8 that there's no way that Ecology's wetland experts can
9 decide whether the irrigation system is appropriate or
10 not?

11 A. That's correct.

12 Q. You can't decide without that information on
13 the irrigation system whether that irrigation system is
14 sufficient to support the mitigation plan; correct?

15 A. That's correct.

16 Q. And the irrigation system for the mitigation
17 plan is a key component for having reasonable
18 assurance?

19 A. It's one component of having reasonable
20 assurance.

21 Q. Without the information on the irrigation
22 plan, there's no way that you can say that that
23 irrigation system is sufficient to support the
24 mitigation plan, and if you can't say that the
25 irrigation system is sufficient to support the

1 A. That's correct.

2 Q. And the Port had to submit that revised NRMP
3 by December 31 under the certification; correct?

4 A. They did.

5 Q. And they have submitted that plan?

6 A. They have.

7 Q. And the revised plan sheets are to address
8 the corrections required in Attachment B to the
9 certification; is that right?

10 A. That's correct.

11 Q. Let's turn to Attachment B. The first
12 revision to the NRMP Plan Set on Sheet 3 requires that
13 the Plan B revised showing design of irrigation system
14 and discuss irrigation plan in NRMP; is that right?

15 A. That's what it says.

16 Q. Why was it important to Ecology to have the
17 revised sheet show the design of the irrigation system
18 and to discuss the irrigation plan?

19 A. First let me say about this Attachment B,
20 these were all comments provided by our consultant,
21 Katie Walter, of Shannon and Wilson, and I am not
22 familiar with the reason behind each one of these
23 separate requirements in here, or concerns.

24 In general, if there's some indication on a
25 plan sheet or some verbal indication that we've had

1 mitigation plan, there's no way you can have reasonable
2 assurance, isn't that right?

3 A. In a general sense.

4 Q. Well, and specifically here with respect to
5 this irrigation system?

6 A. With respect to a particular irrigation
7 system identified for a particular section of a very
8 large, complex mitigation project.

9 Q. Right. And in particular, this was for the
10 Miller Creek Relocation and Floodplain Enhancement?

11 A. That's correct.

12 Q. And without the information on that
13 irrigation system, you couldn't have reasonable
14 assurance that that irrigation system was appropriate
15 to support the mitigation for the Miller Creek
16 relocation and floodplain?

17 A. That's correct.

18 Q. Take a look at the requirement that the Sheet
19 TEI be changed to note how the ditches will be blocked
20 to prevent sediment migration. Tell me what that's
21 about.

22 A. Once again, I was not responsible for
23 preparing this language or reviewing these sheets, but
24 TEI believe stands for temporary erosion, and that
25 would be Sheet 1 of that packet of sheets. And there

1 was apparently a concern that the sheet did not show
2 adequately what the plans were to prevent sediment
3 migration.

4 Q. Right. And that's a critical component of
5 water quality standards, is it not?

6 A. Yes.

7 Q. The sediment control standards?

8 A. Yes.

9 Q. You're familiar with those?

10 A. Yes.

11 Q. And so until Ecology's experts saw how the
12 ditches will be blocked to prevent sediment migration,
13 there was no way that Ecology's experts could have
14 reasonable assurance that the sediment control
15 standards in the WAC would not be violated?

16 A. Yes. I think maybe she should reread the
17 question. It was a long question.

18 (Reporter read back as requested.)

19 A. Yes, or I agree.

20 Q. (BY MR. STOCK) Let's look down to the
21 changes that were required under Appendix B of the plan
22 sheets, Miller Creek - Instream and Buffer
23 Enhancements.

24 What is the revision to Sheet C3 that is
25 being required, and Sheet C7 also?

1 stream diversion structure and flow dispersion
2 structure."

3 So these were I guess conditions and
4 information to give additional detail on exactly how
5 the stream would be diverted -- I presume, and I don't
6 know without looking at it -- would be diverted from
7 the old channel of the creek into the new channel.

8 Q. You can look at it if you want because I have
9 the sheets here, but --

10 A. I don't want to.

11 Q. I know, it's 4:15, isn't it? But the sheets
12 are here if you need to look at them, and you may be
13 able to answer my question without looking at them.

14 My question is, you agree that without the
15 details for the stream diversion structure and flow
16 dispersion structure, there's no way to determine from
17 a reasonable assurance standpoint that that stream
18 diversion won't result in a violation of state water
19 quality standards?

20 A. I agree in the absence of details it's
21 difficult to make an assessment as to whether or not
22 there would be potential impact to water quality.

23 Q. Right. To put it more simply, you need the
24 details of the stream diversion structure and flow
25 dispersion structure to have reasonable assurance that

1 A. I recall that issue, discussing that issue
2 with both Katie and with Jim Kelley. It wasn't clear
3 from these plan sheets how the Port or the Port's
4 consultants would actually access the stream area to do
5 the work because along portions of Miller Creek the
6 stream is abutted by wetlands. So we wanted to know,
7 how are you going to get heavy equipment into this area
8 to do the instream work that you have proposed to do,
9 and we asked them in these sheets to provide that
10 detail.

11 Q. And you agree that in the absence of that
12 detail given that Miller Creek in this area is abutted
13 by wetlands, there's no way for you to have reasonable
14 assurance that water quality standards won't be
15 violated in regard to this Miller Creek instream and
16 buffer enhancements?

17 A. I agree.

18 Q. Sheet C4, tell me what the revision is about
19 there.

20 A. Well, I'm not sure what Sheet C --

21 Q. I've got them here if you need to take a
22 look.

23 A. The reference is Sheet C4 refers to Sheet TEE
24 which is a part of the Appendix B. And the comment
25 there is, "Provide revised sheet showing details for

1 state water quality standards won't be violated?

2 A. We need those details.

3 Q. For that purpose?

4 A. For that purpose.

5 Q. Okay, turn over to Page 2 of Attachment B,
6 and let's focus on Sheet L3.

7 A. Uh-huh.

8 Q. What is the revision needed to L3?

9 A. I remember -- L3? Okay, L3 says, "It is
10 unclear how much of this area will be cleared. Provide
11 revised sheet with correct cross-hatching in wetland."

12 So there must have been a problem with the
13 type of cross-hatching or marking used on that plan
14 sheet that showed what action was occurring in the
15 wetland area.

16 Q. Let me show you Sheet L3 from the December
17 NRMF. What is the area we're talking about?

18 A. I can't say.

19 Q. By looking at L3 you can't say?

20 A. Not without consulting with Katie Walter to
21 figure out which area she was concerned about. That
22 was her comment. There's some area in there that she
23 felt was not correctly marked.

24 Q. Well, how did the Port know what to do with
25 respect to L3 then?

1 A. I believe that that was discussed in a
2 meeting with Jim Kelley. We went through the various
3 sheets and pointed out areas where we had concern, and
4 he agreed that it was unclear and it would be
5 corrected.

6 Q. Well, it's talking about the area, the
7 wetland and riparian buffer around wetland R8, isn't
8 it?

9 A. Kevin, I don't know with certainty exactly
10 which area. That was a comment provided by Katie
11 Walter.

12 Q. All right, turn over to Page 3 of Attachment
13 B and let's talk about Appendix D to the NRMP Plan
14 Sets, Replacement Drainage Channels and Restoration of
15 Temporarily Impacted Wetlands. What is the revision
16 that is necessary to Sheet C3?

17 A. I believe that the sheet did not clearly
18 indicate how water would be channeled to Wetlands 11
19 and 9 after construction was completed.

20 Q. And you agree that without that information
21 clarifying how Wetlands 11 and 9 would be
22 hydrologically supported after construction, there's no
23 way that you could have reasonable assurance that state
24 water quality standards would not be violated with
25 respect to wetland 11 and Wetland 9?

1 Q. And that's why you put it in the 401
2 certification?

3 A. That's why we put it in the 401, was to close
4 that loop between those verbal assurances from
5 Mr. Kelley and our discussions with Mr. Kelley and to
6 ensure that gap was closed between what we had been
7 told versus what actually appears in the plan sheets
8 that are used for construction purposes.

9 Q. How about the revision needed on Sheet C8 in
10 Appendix D? What's that about?

11 A. There apparently is a discharge to a wetland
12 through a drainage channel. And the language there
13 states, "Address how often these structures will be
14 monitored and how modifications will be made if a
15 problem is identified. Provide information in note on
16 revised sheet."

17 The goal there, again, is make sure hydrology
18 is maintained to those wetlands and that those channels
19 are -- and any structures are appropriately monitored
20 and maintained.

21 Q. And that's in reference to the wetlands
22 depicted on Sheet C8?

23 A. Well, I would believe that is the case.
24 Right. It would be this detail in the upper right-hand
25 corner that shows this flow dispersal trench. This is

1 A. Yes.

2 Q. What's the revision needed on Sheet C7? Is
3 it the same type of issue?

4 A. It's the same issue of whether or not -- if
5 the temporary erosion and sedimentation controlled
6 channel is removed after the whole project is complete.
7 It apparently currently drains to Wetland 44a, so the
8 question is how will the hydrology be maintained to
9 that wetland.

10 Q. Right. What's going to support Wetland 44a
11 if that TESC channel is removed after construction;
12 that's the issue?

13 A. That's correct.

14 Q. And unless Ecology knows the answer to that
15 question, Ecology can't have reasonable assurance that
16 state water quality standards won't be violated with
17 respect to Wetland 44a after completion of
18 construction; correct?

19 A. That's correct. I would like to add that
20 almost all of these points that are in this appendix
21 were discussed with the Port, and they did provide us
22 with verbal answers as to how these issues were
23 resolved or would be resolved or what their plan was.
24 And they agreed that there were instances where their
25 plan sheets were not specific enough, but they did --

1 more of a generic detail.

2 Q. Right. And the issue was, how was that
3 discharge structure going to control the flow to the
4 wetland; correct?

5 A. Well, how the structure would be monitored
6 and how modifications would be made if a problem is
7 identified.

8 Q. I'm referring to the first sentence, "Clarify
9 how the drainage channel discharge structure controls
10 flow to the wetland."

11 You're telling the Port you need more
12 information to see how this drainage channel discharge
13 structure is going to control the flow to the wetland;
14 correct?

15 A. I believe that was Katie Walter's concern.
16 She didn't understand exactly what this drawing meant
17 here and wanted more detail.

18 Q. Right. Without that detail, you and she
19 couldn't come to a determination of how that wetland
20 was going to be supported hydrologically?

21 A. I agree.

22 Q. And you needed that information to have
23 reasonable assurance that the wetland would be
24 supported hydrologically and that state water quality
25 standards wouldn't be violated; correct?

1 A. That's correct.
 2 Q. What did you do to prepare for the deposition
 3 today?
 4 A. I met with my attorney, Joan Marchioro, for a
 5 short while. I attended a training that Ms. Marchioro
 6 did at our office for Ecology staff that are involved
 7 in the third runway, and I reviewed my Declaration and
 8 Tom Luster's Declaration.
 9 Q. Did you meet with any Port attorney?
 10 A. No.
 11 Q. Have you talked to anyone about your
 12 deposition today other than Ms. Marchioro?
 13 A. Only in passing.
 14 Q. What did you say and to whom?
 15 A. Oh, my deposition's on Thursday. I can't
 16 wait.
 17 (Discussion off the record.)
 18 (Deposition adjourned at 4:30 p.m.)
 19 (Signature reserved)

1 REPORTER'S CERTIFICATE
 2
 3 I, DIANE MILLS, the undersigned Certified Court
 4 Reporter and Notary Public, do hereby certify:
 5 That the testimony and/or proceedings, a transcript
 6 of which is attached, was given before me at the time
 7 and place stated therein; that any and/or all
 8 witnesses were by me duly sworn to tell the truth;
 9 that the sworn testimony and/or proceedings were by me
 10 stenographically recorded and transcribed under my
 11 supervision, to the best of my ability; that the
 12 foregoing transcript contains a full, true, and
 13 accurate record of all the sworn testimony and/or
 14 proceedings given and occurring at the time and place
 15 stated in the transcript; that I am in no way related
 16 to any party to the matter, nor to any counsel, nor do
 17 I have any financial interest in the event of the
 18 cause.
 19 WITNESS MY HAND AND SEAL this 26th day of
 20 December 2001.

21
 22 DIANE MILLS, CSR# MI-DE-SD-M380N3
 23 Notary Public in and for the State
 24 of Washington, residing in King
 25 County. Commission expires 10/10/02.

CORRECTION & SIGNATURE PAGE

1
 2 RE: AIRPORT COMMUNITIES COALITION VS. STATE OF
 3 WASHINGTON, et al.
 4 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
 5 DEPOSITION OF: ANN KENNY; DECEMBER 20, 2001

6 I, ANN KENNY, have read the
 7 within transcript taken DECEMBER 20, 2001, and the same
 8 is true and accurate except for any changes and/or
 9 corrections, if any, as follows:

10 PAGE LINE CORRECTION
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 14
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 16
 17
 18
 19
 20
 21

22 Signed at _____, Washington,
 23 on the ____ day of _____, 2001.

ANN KENNY

AR 001737

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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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3
4 AIRPORT COMMUNITIES COALITION,)
5 Plaintiff(s),)
6 vs.) PCHB No. 01-160
7 STATE OF WASHINGTON,)
8 DEPARTMENT OF ECOLOGY; and)
9 THE PORT OF SEATTLE,)
10 Defendant(s).)
11
12

DEPOSITION UPON ORAL EXAMINATION

OF
ANN E. KENNY

Volume 2

10:00 A.M.

FEBRUARY 20, 2002

1325 FOURTH AVENUE, SUITE 1500

SEATTLE, WASHINGTON

25 KATHY HAUCK, HA-UC-KK-L4210H

AR 001739

FEB 20 2002

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1
2
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25 ALSO PRESENT: NONE

FEB 27 2002

SEATTLE, WASHINGTON; FEBRUARY 20, 2002
10:00 A.M.

Qo--
ANN E. KENNY,
sworn as a witness by the Notary Public,
testified as follows:

EXAMINATION

11 Q. Good morning, Ms. Kenny.
12 A. Good morning.
13 Q. You understand that this is a continuation of
14 the deposition started on December 20th?
15 A. I do.
16 Q. And you also understand that you continue to
17 be under oath?
18 A. I do.
19 Q. Tell me what you have done with respect to
20 the Port's Third Runway Project since your last
21 deposition.
22 MS. MARCHIORO: Objection, vague.
23 MR. STOCK: How is it vague?
24 MS. MARCHIORO: What you have done, I guess
25 can you be a little more specific?

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1 MR. STOCK: I can't be.
2 Q. (BY MR. STOCK) Go ahead and answer the
3 question.
4 A. Well, there are maybe several areas that I
5 can break it down to. There are administrative
6 functions that I continue to perform on the project,
7 such as public records management, responding to public
8 disclosure requests. I have been involved in assisting
9 Ray Hellwig in preparing the interlocal agreement that
10 we've signed with the Port.
11 There have been technical issues that I have
12 been tracking that are related to the Port's compliance
13 with various conditions of the 401 that we issued and
14 then reissued on September 21st, so various documents
15 have come in in compliance with conditions of the 401
16 and I have been responsible for parcelling out those
17 documents to the appropriate technical staff for
18 review.
19 Q. Have you done anything else with respect to
20 the Port's Third Runway Project since your last
21 deposition?
22 A. I have attended one or two, three meetings
23 with Port staff on various technical issues.
24 Q. Anything else?
25 A. Not that I can think of at the moment, but I

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2 (Pages 193 to 196)

1 may as we go along here.
 2 Q. Have you had a site visit since our last
 3 deposition?
 4 A. I don't think so. I have been out to the
 5 Port's West Side office for a meeting, but I'm not
 6 sure. There was a site visit that I did with Ed Abbasi
 7 and Rod Thompson, but that may have been in December, I
 8 just can't recall right now.
 9 Q. Your December deposition was taken on
 10 December 20, and I believe that your site visit with
 11 Mr. Abbasi and Mr. Thompson occurred on December 24.
 12 Does that refresh your recollection?
 13 A. No.
 14 Q. It wasn't the day before Christmas?
 15 A. I don't remember the day before Christmas.
 16 Q. What was the purpose of the site visit that
 17 you had with Mr. Abbasi?
 18 A. And Mr. Thompson?
 19 Q. Yes.
 20 A. The purpose of that visit was to discuss the
 21 fill criteria and familiarize Mr. Abbasi and
 22 Mr. Thompson with the airport site and the areas where
 23 the fill would be placed, assuming that the Port
 24 received their 404 and all the legal issues are
 25 resolved.

1 Q. Which Mr. Thompson are you referring to?
 2 A. Rod.
 3 Q. And why is Rod Thompson involved at this
 4 point?
 5 A. Rod is a hydrogeologist with Ecology, and he
 6 is reviewing the Port's embankment seepage monitoring
 7 plan that looks at surface water and groundwater.
 8 Q. Is this seepage and monitoring plan that
 9 Mr. Thompson is reviewing the plan that the Port was
 10 required to submit under the September 21 401
 11 Certification?
 12 A. It's the plan that they were required to
 13 submit in Section E under the fill criteria in the
 14 September 21st 401.
 15 Q. Was anyone else on this site visit with
 16 Mr. Abbasi, Mr. Thompson and yourself?
 17 A. There was -- I believe it was Paul Agid, with
 18 the Port, Beth Clark, and Robin Kordik.
 19 Q. Where did you go and what did you see?
 20 A. We did a general drive-through of the Port's
 21 facility focusing primarily on the west side where the
 22 embankment would be placed, and then we went down to
 23 the golf course, Tyee Golf Course, and looked around
 24 down there.
 25 Q. Anywhere else?

1 A. We went to the southwest -- well, just an
 2 area southwest of the terminal where they are doing
 3 some construction and looked at piles of dirt and their
 4 construction management practices for how they manage
 5 soils that they are excavating on site.
 6 Q. Was this part of the South Terminal Expansion
 7 Project?
 8 A. I believe so, I'm not sure.
 9 Q. And you were examining piles of excavated
 10 soil?
 11 A. Correct.
 12 Q. And what was the reason you were examining
 13 these piles of excavated soil in the area of the South
 14 Terminal Expansion Project?
 15 A. Well, it was a visual examination only from
 16 the van, and just looking at their best management
 17 practices for how they had the soil stockpiled on site.
 18 Q. Was that stockpiled soil going to be moved
 19 over to the embankment for the Third Runway Project?
 20 A. I don't believe so. I'm not sure that they
 21 had made that determination, but I can't say what their
 22 plan was for it.
 23 Q. Was there any discussion in that regard?
 24 A. No.
 25 Q. What observations did you make of these

1 stockpiled soils in the area of the South Terminal
 2 Expansion Project?
 3 A. Well, they were there on the ground, the
 4 construction area was contained by construction or
 5 chain-link fencing, and that's about all I recall right
 6 now.
 7 Q. Did you observe any best management practices
 8 with respect to these piles of excavated soil?
 9 A. I don't recall.
 10 Q. You don't recall any best management
 11 practices that were in use with respect to these
 12 excavated piles of soil?
 13 A. I don't recall any specific BMPs, but I don't
 14 recall anything coming to mind in my recollection now
 15 that struck me as being out of order or inappropriate.
 16 Q. Why were you inspecting the Tyee Golf Course
 17 area on the site visit?
 18 A. Oh, simply to familiarize both Mr. Thompson
 19 and Mr. Abbasi with the layout of the site and to look
 20 at the area where the SASA, S-A-S-A, facility would be
 21 constructed to familiarize them with the location of
 22 Tyee Pond and Northwest Pond, the east and west branch
 23 of Des Moines Creek.
 24 Q. Why did you consider it important to show
 25 Mr. Abbasi and Mr. Thompson Tyee Pond?

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1 A. They have seen various site drawings of the
2 facility. I'm not sure how -- I know Mr. Thompson
3 probably had never been out on the site prior to that
4 visit, and Mr. Abbasi may have been out there, but Tyee
5 Pond is a landmark on the ground that's referred to
6 relative to -- and also there is a weir at the base of
7 the pond, you know, a meter that allows the water
8 through that pond, that controls -- there is a control
9 structure at that pond that they can shut off if there
10 is a spill upstream and then it's piped into Des Moines
11 Creek.

12 Q. What is Mr. Abbasi's involvement?

13 A. He is an engineer with the Department of
14 Ecology, and he is now the permit manager for the
15 Port's NPDES industrial stormwater permit.

16 Q. What were the meetings about that you
17 attended with the Port since your last deposition?

18 A. There was one meeting to discuss the terms of
19 the interlocal agreement with the Port to discuss basic
20 accounting -- the accounting practices that we would
21 use and the codes that we would use to charge work to.

22 Q. Any other discussion at that meeting?

23 A. No, it was pretty much limited to simply the
24 interlocal agreement.

25 Q. Who was at that meeting?

1 A. No.

2 Q. Is this matrix for the entire -- what is this
3 matrix regarding?

4 A. The matrix takes the terms of the 401
5 Certification and we go through -- it goes through
6 section by section and identifies the deliverables or
7 the items that are due to Ecology, they have identified
8 the staff people working on them, the due dates, when
9 it was delivered, and I think there is a comment
10 section, something like that.

11 Q. Is there any other information on the matrix
12 other than what you've just described?

13 A. I can't recall.

14 Q. Have you had any other meetings with Port
15 staff other than the two you've just now told me about
16 since your last deposition?

17 A. I have met with the Port staff twice
18 concerning the revised Low Flow Analysis and Plan.

19 Q. When were those meetings?

20 A. One meeting was yesterday, the 19th, and then
21 the first meeting was a week ago last Tuesday, so I
22 guess that would have been the 12th of February.

23 Q. What was the purpose of these -- well, let's
24 take them one at a time. What was the purpose of the
25 meeting on February 12th?

1 A. Elizabeth Leavitt, Robin Kordik, and a woman
2 from their accounting department, and I don't recall
3 her name.

4 Q. Did you have any other meetings with Port of
5 Seattle staff since your last deposition?

6 A. I have met twice with Robin Kordik in her
7 role as kind of the project manager for implementation
8 of the 401 Certification to discuss and review a draft
9 matrix that the Port is developing with time lines for
10 tracking the project.

11 Q. Have you seen a draft of that matrix?

12 A. I have.

13 Q. Have you produced that in response to one of
14 ACC's Public Disclosure Act requests?

15 A. I have not, because they have not provided it
16 to me. It was simply shown to me at a meeting and then
17 discussed and then taken back, so I have not
18 received --

19 Q. You don't have a copy in your possession?

20 A. -- a hard copy that I could give to you or
21 even an electronic copy, no.

22 Q. Who was at this meeting where the matrix with
23 the time line on the project was discussed?

24 A. Robin Kordik and myself.

25 Q. Anyone else?

1 A. The purpose of that meeting was to provide
2 Keith Smith at the Port with some preliminary findings
3 that Kelly Whiting has drawn regarding the plan.

4 Q. Who was at the meeting?

5 A. It was myself, Kelly Whiting and Keith Smith.

6 Q. Did Mr. Whiting provide a memo to you and
7 Keith Smith at this meeting regarding his preliminary
8 findings with respect to the revised Low Flow Plan.

9 (Discussion off the record.)

10 A. He provided a working draft for discussion
11 purposes only at the meeting.

12 Q. (BY MR. STOCK) And did you retain a copy of
13 that memo?

14 A. No. We returned the memo.

15 Q. To Mr. Whiting?

16 A. To Mr. Whiting.

17 Q. He showed this memo to Keith Smith; is that
18 right?

19 A. He did.

20 Q. What were Mr. Whiting's preliminary findings
21 that were discussed at this meeting on February 12th?

22 A. There were a number of items that were
23 discussed of a fairly technical nature, and I could
24 lump them into one area would be concerns regarding
25 changes or adjustments to the 1994 preproject model

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4 (Pages 201 to 204)

1 that the Port had made. There were changes in land use
2 assumptions; there were some discrepancies, minor
3 discrepancies, in the acreages between the 1994 model
4 that Kelly had previously reviewed and the model that
5 appeared in the December 2001 revised version; there
6 were general concerns about the design of some of the
7 proposed facilities and how the design might lead to
8 some potential problems with water quality; there were
9 concerns that there were mistakes made in the Miller
10 Creek modeling in terms of the portions of groundwater
11 from Perland 80, something like that, P-E-R-L-A-N-D 80.
12 That's an HSPF category for tracking water.

13 Want me to keep going?

14 Q. I do.

15 A. There were concerns in Walker Creek with the
16 amount of time being proposed to fill the low flow
17 vault.

18 Q. Any particular low flow vault or all of them?

19 A. The vault that would be used to offset
20 impacts in Walker Creek. There is only one vault
21 there, I believe.

22 Q. What other concerns did Mr. Whiting express
23 to Mr. Smith at this meeting regarding the revised Low
24 Flow Plan?

25 A. We looked at some charts and some hydrographs

1 bottom layer of water coming out was much more rolling
2 or level. So we discussed that as an area, that it
3 just didn't seem to make intuitive sense.

4 Q. Any other hydrographs that appeared erroneous
5 to Mr. Whiting and that were discussed at that meeting?

6 A. Not that I recall.

7 Q. You said that Mr. Whiting expressed a concern
8 about the design of proposed facilities and how the
9 designs might lead to problems with water quality.
10 What proposed facilities were discussed at this meeting
11 in terms of problems with the design?

12 A. Well, those would be the facilities that are
13 proposed in the low flow report and the facilities
14 specifically identified to provide reserve low flow
15 storage which they intend to place at the bottom of
16 planned stormwater facilities or in tandem to planned
17 stormwater facilities.

18 Q. And what was Mr. Whiting's concerns in that
19 regard?

20 A. One concern was that the design of the inflow
21 pipes to the low flow facility and the pipes for the
22 stormwater detention facility might result in -- I'll
23 have to back up a little to try to explain how these
24 things work given that I'm not a structural engineer.
25 The way I understand they are designed to work is that

1 that looked like they were erroneous, there were errors
2 in them that didn't seem to make sense, so we
3 discussed -- well, Kelly and Keith discussed what might
4 have led to the results in the hydrograph that didn't
5 appear to make sense to Kelly's trained eye.

6 Q. Are you saying there were inconsistencies
7 between the charts and the hydrographs?

8 A. What I'm trying to say is that there were
9 some hydrographs that didn't make sense.

10 Q. Do you recall which hydrographs didn't make
11 sense?

12 A. I recall specifically one hydrograph that
13 shows there was work done by Pony Ellingson that shows
14 the water coming through the embankment, and it was for
15 the slice model -- slice area 1, which is the thickest
16 portion of the embankment at the pinch point of Miller
17 Creek, and it appeared to be very flashy.

18 So what that means is that -- the hydrograph
19 shows precipitation raining on the embankment and then
20 water coming -- predicted to come out of the base of
21 the embankment. And there seemed to be -- you know,
22 rain is very spiky, you know, it rains and then there
23 is no rain, and so the corresponding hydrograph for
24 water coming out the bottom was equally flashy, where
25 in other areas of the embankment the curve for the

1 water will come in during normal rain flow events, it
2 will go into the low flow portion of the vault, which
3 is -- has now been redesigned in response to our
4 comments and concerns conditions in the September 21st
5 401 to provide, it's kind of a baffled system where the
6 water goes in and then it courses back and forth, it's
7 kind of a baffling system that allows for settling of
8 sediments and then the water moves into the detention
9 part of the facility for stormwater and so there is
10 always water moving in and out.

11 But in a storm event there may be water
12 that -- okay, yeah, would flush -- would move that
13 water through the low flow vault more rapidly, and then
14 that outflow for the detention vault discharges
15 directly to stream. The plan to release water for the
16 low flow, there is a separate outfall for that. So
17 there is two outfalls, one for the detention and one
18 for the low flow. And it's the low flow outfall where
19 they would be doing their proposed monitoring for
20 dissolved oxygen, sediments, whatever the criteria that
21 they propose to monitor to ensure -- temperature is one
22 -- for water quality compliance.

23 So during storm events there might be the
24 potential that that water could flush through, the
25 stormwater would flush through and go through the

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1 stormwater outfall, thereby releasing water that had
2 been stored for some length of time in the low flow
3 facility that might have a problem. No to say that it
4 will, but that it might because it might have been
5 sitting there longer. So that was one thing that we
6 discussed in terms of the design.

7 The other area of concern was that by virtue
8 of sitting in this vault for the low flow portion of
9 the vault in this baffled system which has a lot of
10 area of exposed concrete, that that might, although not
11 necessarily, raise the pH of the water in that portion
12 of the vault. So we have discussed various ways that
13 pH could be prevented, either lining or painting the
14 vault or various treatment options for treating pH as
15 it comes out of the vault, either through adding acid
16 in some kind of a treatment facility, or I guess there
17 is another process called CO2 sparging that will adjust
18 the pH.

19 Q. Any other design aspects that were discussed
20 at this February 12 meeting where Mr. Whiting expressed
21 a concern?

22 A. I don't believe so.

23 Q. Were any conclusions reached at this February
24 12th meeting?

25 A. No.

1 assumptions for the modeling in all three basins, I
2 believe, so using GIS data and other mapping
3 technologies they are verifying the acreages of the
4 basins.

5 Q. Why was Ray Hellwig at this meeting?

6 A. He was at the meeting simply to observe and
7 listen to some of the technical discussions that were
8 occurring.

9 Q. Why?

10 A. Because he wanted to, I believe.

11 Q. Well, did he have anything to say?

12 A. He welcomed people to the meeting and just
13 expressed his appreciation for everyone's willingness
14 to come together.

15 Q. Did he say anything else at the meeting?

16 A. No.

17 Q. How long did he stay?

18 A. Oh, about an hour, hour and 15 minutes,
19 something.

20 Q. How long did the meeting last?

21 A. We started at around 9:00 and left about
22 quarter of one.

23 Q. What was the purpose of this meeting on
24 February 19th?

25 A. The purpose of the meeting was to provide the

1 Q. What was the upshot of the February 12
2 meeting?

3 A. The February 12th meeting lead to the meeting
4 that we had yesterday with the Port.

5 Q. Who was at this February 19 meeting?

6 A. Keith Smith, Paul Fendt, Joe Brascher, Pony
7 Ellingson, Felix Kristanovich, Nick Stackelberg, Kelly
8 Whiting, Ed Abbasi, myself, and Ray Hellwig was there
9 for a portion of it, and John Drabek was there for a
10 portion of it.

11 Q. Geez, quite a crowd.

12 A. It was all of the technical experts from the
13 Port that were involved in the low flow.

14 Q. There are a couple of names that I haven't
15 heard of before. The first one was Felix --

16 A. Kristanovich. I think he must be Russian.

17 Q. Who is Mr. Kristanovich?

18 A. He is a modeler with Foster Wheeler, an
19 engineering consulting firm, and he has been doing the
20 HSPF modeling work for Des Moines Creek.

21 Q. Who is Nick --

22 A. Stackelberg.

23 Q. -- Stackelberg?

24 A. He is employed by Parametrix, and he has been
25 doing a quality check and review on the land use cover

1 Port and their consultants the opportunity to meet with
2 Kelly and hear his concerns directly from him rather
3 than mediated through Keith Smith's interpretation of
4 what his concerns were, and for there to be a
5 discussion of the technical issues and the opportunity
6 for the Port to provide Kelly with additional
7 information or clarification that might not have been
8 readily available or necessarily understandable from
9 what was provided to us in the written document.

10 Q. Was there an agenda for the meeting prepared?

11 A. Yes, there was.

12 Q. Who prepared the agenda?

13 A. Keith Smith did.

14 Q. And you were given a copy of that agenda?

15 A. Right.

16 Q. And you have a copy?

17 A. Right, yes.

18 Q. Was anything else prepared for the meeting in
19 terms of documentation or memos or reports?

20 A. Paul Fendt provided us with a map that
21 showed -- shows changes in the groundwater and surface
22 water basins between the 1994 predeveloped conditions
23 and the 2006 postdeveloped conditions that we had not
24 seen before and then there was a chart that accompanied
25 that document.

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6 (Pages 209 to 212)

1 Q. What was the chart?
 2 A. It was a table summarizing acreage changes, I
 3 believe. I didn't look at it, actually.
 4 Q. Did you keep a copy?
 5 A. Yes.
 6 Q. What other documentation was prepared?
 7 A. That was it.
 8 Q. Did Kelly Whiting prepare a memo from the
 9 meeting?
 10 A. He was working from his own draft working
 11 notes.
 12 Q. Did he hand out any memo or notes?
 13 A. No.
 14 Q. What was discussed at the February 19
 15 meeting?
 16 A. The items of discussion were the items that
 17 we had outlined on February 12th, so they included for
 18 all three basins, that being Miller, Walker and Des
 19 Moines Creek, reviewing the land cover issues,
 20 addressing calibration issues, talking about some of
 21 the areas where there might have been errors introduced
 22 into the modeling and how that was resolved or would be
 23 resolved. We talked about the design issues relevant
 24 to water quality.
 25 Q. What was discussed with respect to the errors

1 this factor of 24 in the way that the precipitation was
 2 handed off between the Slice and Hydrus models to the
 3 HSPF model.
 4 At that meeting we had discussed a few
 5 changes in Des Moines Creek to some of the groundwater
 6 and surface water basins to correct errors at that time
 7 that misrouted water to various -- there was some
 8 misrouting, we discussed that. What we received in
 9 December was a model that made a lot more changes, and
 10 we were able, through discussing this issue yesterday
 11 with Nick Stackelberg and Paul Fendt, to understand the
 12 basis for those changes, and they provided us with the
 13 map that shows on the ground where the surface water
 14 and groundwater changes were occurring and were able
 15 to, I believe, satisfy Kelly as to the basis for those
 16 changes.
 17 What he requested and Ecology concurred with
 18 was that the Port provide a validation report of the
 19 modeling that is some tool to verify that the -- it
 20 would be a tool to verify the assumptions of the
 21 modeling.
 22 Q. So this validation report has become a
 23 deliverable?
 24 A. Yes.
 25 Q. And when is this validation report due?

1 introduced into the modeling?
 2 A. Port staff and their consultants agreed with,
 3 oh, a good portion of the comments that Kelly had
 4 raised and had gone in and looked at them and agreed
 5 that there were errors and they have already taken
 6 steps to correct those errors. So it was explained how
 7 that occurred, and the steps that they were taking to
 8 correct those errors was also discussed and explained.
 9 Q. What errors did Mr. Whiting identify in the
 10 modeling?
 11 A. Well, specifically to Miller Creek there was
 12 a problem with double counting of precipitation. That
 13 might have been related to the Perland 80 problem, but
 14 I am not a modeler and I don't understand that fully.
 15 Q. You too, huh.
 16 A. It's quite a science.
 17 Q. What other errors did Mr. Whiting express a
 18 concern about with respect to the modeling?
 19 A. I wouldn't classify this particular issue as
 20 an error, but we discussed the modeling in Miller Creek
 21 and the fact that they had -- the Port had made changes
 22 that went beyond the changes that Ecology had expected
 23 in the meeting that we held with the Port on October
 24 30th of 2001, which is the meeting where the Port
 25 identified an error in accounting for precipitation,

1 A. We didn't establish an immediate time line at
 2 that meeting for submittal. The Port indicated that
 3 they would begin working on it immediately. We are --
 4 Kelly was able at this meeting to have several of his
 5 questions regarding the modeling and the changes
 6 that -- the things that he had questions about were
 7 able to be resolved, and we need for him to put his
 8 final conclusions into writing.
 9 Q. Is there a date by which he is to put his
 10 final conclusions in writing?
 11 A. I had hoped to be able to establish that
 12 yesterday, but when he came into the meeting in the
 13 morning he advised me that a very close personal friend
 14 of his had been killed over the weekend and that this
 15 week he would be involved in funeral preparations, so I
 16 am not sure when I'm going to be able to get that
 17 letter from him.
 18 Q. How long do you anticipate Mr. Whiting will
 19 take to complete his final conclusions and put them in
 20 writing?
 21 A. I don't know. I had the feeling yesterday
 22 that the only thing that was on his mind was this
 23 personal loss of his, and I will try calling him
 24 Thursday or Friday to discuss that with him.
 25 Q. What was discussed at this February 19

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7 (Pages 213 to 216)

meeting regarding calibration issues?
2 A. I'm not sure if this is -- well, it's
3 somewhat related to calibration. We discussed in the
4 Miller Creek basin where the point of compliance should
5 be.

6 Q. And what was discussed in that regard?
7 A. We discussed moving the point of compliance
8 to a lower point in the basin to capture more
9 appropriately several drainage areas that had not been
10 represented. We also discussed that moving this point
11 of compliance would go some distance in meeting the
12 concerns raised by Northwest Hydraulics about the point
13 of compliance in the Miller Creek basin.

14 Q. Where is the point of compliance going to be
15 moved to?

16 A. I'm not exactly sure. I believe it is
17 somewhere just south of 509. The modelers understood
18 the map that they were pointing at and we'll have that
19 information back to us from the Port.

20 Q. When?

21 A. When we agree to a time line for submittal of
22 that information.

23 Q. Well, what was said at the meeting in that
24 regard?

25 A. As I've already explained, we hope to get the

1 precipitation that falls is going through that very
2 quickly, so that explains why those hydrographs are
3 showing a corresponding flashiness to the
4 precipitation, and that satisfied Kelly in terms of
5 that question that he had.

6 I believe that what Kelly said regarding the
7 calibration for Des Moines and Walker was that the
8 calibration looked reasonable. The calibration for Des
9 Moines Creek we discussed with Joe Brascher, and
10 although there is, quote, not a very good match, end of
11 quote --

12 Q. Who said that?

13 A. According to Kelly.

14 Q. Kelly said that?

15 A. Kelly said that, and Joe Brascher echoed that
16 -- the discrepancies would be very likely due to the
17 inadequacy of the gauging system in place by King
18 County to really accurately measure low flow changes.
19 That gauge system is in place to measure changes in
20 peak flow, not low flow, and so some of the readings
21 from the actual gauge data, according to Mr. Brascher,
22 simply don't make any sense. They have got to be
23 errors, in his opinion, in, you know, the gauge was not
24 functioning or it simply wasn't able to do what it was
25 supposed to do.

1 letter from Kelly. There is some uncertainty about
2 when that letter is going to come, and that it will
3 be -- it's our expectation that the Port intends to
4 turn around their comments or their response or
5 revision in a very short order of time, maybe a week,
6 maybe less, to the comments. They are already
7 underway.

8 They have already begun some of the modeling
9 work in response to the verbal things that we have
10 discussed, so they are already running -- they have
11 already rerun from the models from Miller Creek
12 correcting the changes and concerns that Kelly had
13 addressed. And their preliminary run, which we have
14 not verified through receipt of the models, is that
15 they are still showing that the water from the
16 embankment will offset any impacts to low flow.

17 Q. In Miller Creek?

18 A. In Miller Creek.

19 With regard to these hydrographs concerning
20 the Slice for the thickest portion of the embankment,
21 Pony Eningson was able to explain why it was flashy.
22 That is based on the way that he had done his model
23 using cells for this portion of the area that he was
24 looking at, and the first three cells which are closest
25 to the MSE wall are very porous, and so the

1 He said there is a discrepancy between the
2 upper gauges and the kind of data that they were
3 getting out of the lower gauges at the mouth, and you
4 would have to ask him about what all that means, but
5 Kelly seemed to agree that that would make a logical
6 reason for why there would be not a good match between
7 the gauge data and the predicted outcome of the model
8 for calibration purposes, but both Kelly and Joe
9 Brascher were of the opinion that the basic calibration
10 for all three basins is very solid.

11 Q. What was said at the February 19th meeting
12 with respect to reviewing land cover issues?

13 A. That was discussed in all three basins using
14 numbers that Kelly had pulled from the revised December
15 2001 low flow report and comparing that to numbers that
16 Paul Fendt had generated using this map that I've
17 discussed, and the chart, and comparing those numbers.
18 And after we went through that process, Kelly seemed to
19 be satisfied that those numbers in the December plan
20 seemed reasonable, I believe.

21 Q. You believe what, that Mr. Whiting --

22 A. Right, I believe he was satisfied. But I
23 didn't get a chance to talk with him after the meeting.
24 You'll have to ask him that. But he seemed to --
25 didn't have any more questions after we went through

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8 (Pages 217 to 220)

1
2 Q. Other than the agenda and the map and chart
3 that Mr. Fendt provided, was there any other
4 documentation reviewed at this meeting on February
5 19th?
6 A. Well, what both Kelly referred to and
7 Mr. Fendt and the other technical people was the
8 December 2001 report and the appendixes that went with
9 that.
10 Q. Any other documentation?
11 A. No.
12 Q. Was any other documentation provided at this
13 February 19 meeting other than the agenda and the map
14 and the chart that Mr. Fendt provided?
15 A. No.
16 Q. Why was Mr. Abbasi at the meeting?
17 A. Mr. Abbasi attended the meeting because I had
18 requested him to as the permit manager for the NPDES
19 stormwater permit. He was very interested in
20 knowing -- well, I can't say what he was interested in
21 knowing because I can't read his mind, but he will be
22 responsible for the revised NPDES permit that will be
23 issued this summer that I believe does include the new
24 and proposed stormwater facilities for the third runway
25 and that would be incorporated into the industrial

1 have reasonable assurance?
2 A. I would say not, because what we approved in
3 August and September we are still looking at impacts
4 that are within that range of total impact, and we are
5 merely working now and fine-tuning some very fine
6 technical details, but the overall modeling work that
7 the Port has done continues to be consistent and is
8 supporting that earlier work.
9 Q. So let's see if I understand you correctly.
10 You're saying, Ms. Kenny, that -- well, first of all,
11 you made a recommendation of reasonable assurance --
12 A. That's correct.
13 Q. -- on August 10, 2001, correct?
14 A. (Witness nods head.)
15 Q. Is that correct?
16 A. That's correct.
17 Q. And on that basis a 401 Certification was
18 issued?
19 A. That's correct.
20 Q. You're now telling the Port that the Port has
21 to provide a validation report for the revised Low Flow
22 Plan that was submitted to the Department of Ecology in
23 December of 2001; is that correct?
24 A. That's correct, if I understood exactly what
25 was meant by the term validation report.

1 stormwater permit. He was also there to provide
2 technical support to me when we discussed some of the
3 design issues regarding those stormwater facilities
4 because he is an engineer.
5 Q. Was there any discussion at yesterday's
6 meeting regarding the March hearing before the PCHB?
7 A. Not particularly, no.
8 Q. In general?
9 A. Well, only in general.
10 Q. In what way?
11 A. I think just everybody expressed their wish
12 that we could have this revised work from the Port
13 completed before the hearing.
14 Q. Why?
15 A. So that we could reference it if we need to.
16 Q. Why do you think there is going to be a need
17 to reference it at the March hearing?
18 A. Well, I think that's a legal issue and it's a
19 speculative issue. My personal belief is that we
20 issued a valid 401 with conditions and the Port is
21 complying with those conditions. They are submitting
22 the reports required by that 401 and Ecology is in the
23 process of reviewing those reports.
24 Q. Does the validation report that the Port is
25 now to provide, is that report necessary for Ecology to

1 Q. Well, that's a term you used. What did you
2 mean by that?
3 A. That's a term that Kelly used, and I believe
4 I know what he expects but I'm not an engineer. That's
5 one of those issues I will be working out with Kelly
6 when I get to talk to him again about, okay, what
7 exactly is required in this report, because that's my
8 job is to put the parameters on what we're requiring
9 from the Port.
10 Q. Sure. And I just want your testimony to be
11 clear.
12 Your testimony is that you do not need this
13 validation report for the December 2001 revised Low
14 Flow Plan in order to have reasonable assurance for the
15 401 Certification issued to the Port; is that right?
16 A. No.
17 Q. So you do need this validation report to have
18 reasonable assurance; is that your testimony?
19 A. We need the validation report to give us a
20 final level of comfort over and above the level of
21 comfort that we've already reached that the modeling
22 approach and the impact numbers that the Port provided
23 us in August as supplemented by -- as required by the
24 401 Certification with the additional information that
25 we requested --

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9 (Pages 221 to 224)

1 THE WITNESS: Would you read that back? This
 2 is getting too complex here.
 3 Q. (BY MR. STOCK) Why are you avoiding the term
 4 reasonable assurance in your answer?
 5 A. I'm not avoiding the term. It's simply a
 6 term that I believe that your clients have a different
 7 opinion as to the meaning of reasonable assurance.
 8 Reasonable assurance is not absolute certainty.
 9 Reasonable assurance stems from our understanding of a
 10 project and the impacts of the project based on
 11 scientific analysis that the project is not likely to
 12 adversely impact water quality.
 13 Now, there are -- so that is a big picture,
 14 but there may be areas of some uncertainty or some
 15 areas that need further clarification and that is why a
 16 401 Certification is drafted or written the way it is,
 17 to require supplemental submittal of information. We
 18 have received nothing to date that shatters that
 19 overall confidence that the modeling performed by the
 20 Port and the impact numbers that they have provided
 21 with us are reasonable.
 22 Q. It's a simple question, Ms. Kenny. Do you
 23 need the validation report that you are now requiring
 24 the Port to submit for the December 2001 revised Low
 25 Flow Plan to have reasonable assurance with respect to

1 the 401 Certification issued to the Port of Seattle,
 2 yes or no?
 3 A. Yes.
 4 Q. With respect to the December 2001 revised Low
 5 Flow Plan, is there any other deliverable, other than
 6 this validation report, that Ecology is now requiring
 7 the Port to provide?
 8 A. We will be requiring the Port to submit to us
 9 revisions or corrections to that December report that
 10 correct the errors in that report.
 11 Q. And those revisions will be in response to
 12 Mr. Whiting's final conclusions as he sets out in this
 13 memorandum that he's going to provide to you; is that
 14 right?
 15 A. What we require the Port to do will be based
 16 on Mr. Whiting's letter. It will also be based on our
 17 own technical analysis of the report, the designs, and
 18 the water quality issues surrounding the project.
 19 Q. Well, other than what Mr. Whiting has done to
 20 review that December 2001 Low Flow Plan, has the
 21 Department of Ecology conducted any review independent
 22 of what Mr. Whiting has done?
 23 A. I have Mr. Garland, Dave Garland, reviewing
 24 the low flow portion -- I'm sorry, the modeling for the
 25 embankment, I have Mr. Abbasi reviewing the

1 technical -- I'm sorry, the design details for the low
 2 flow facilities. The information that Kelly gives to
 3 us is coming in the form of recommendations, and those
 4 recommendations will be utilized by Mr. Abbasi and
 5 Mr. Garland to make recommendations to me that I will
 6 incorporate in a final letter to the Port.
 7 Q. And just so I've got this, you're going to
 8 take what Mr. Whiting recommends to you and what
 9 Mr. Abbasi recommends to you and what Mr. Garland
 10 recommends to you, combine it all in one letter and
 11 send that letter to the Port saying that these are the
 12 revisions that you need to make to the December 2001
 13 Low Flow Plan; is that correct?
 14 A. That is my intent.
 15 Q. And when do you expect to send that letter to
 16 the Port?
 17 A. As soon as I can get the letter from Kelly,
 18 which as I explained, is uncertain, and then I can get
 19 the feedback from Mr. Abbasi and Mr. Garland.
 20 Q. What's your best estimate as to when you're
 21 going to send that letter?
 22 A. Two weeks, maybe, if I'm lucky.
 23 Q. Well, that puts it awfully close to the March
 24 18th hearing date, doesn't it?
 25 A. It will just happen when it happens.

1 Q. And then Ecology expects the Port to revise
 2 the December 2001 Low Flow Plan as required by your
 3 letter to the Port; is that right?
 4 A. That would be correct.
 5 Q. And what is Department of Ecology expecting
 6 from the Port? Is it going to be a report in response
 7 to the letter? What should I call it so that you and I
 8 can communicate here?
 9 A. Their response. It will be a response to our
 10 letter and it may -- I need to give it some thought to
 11 figure out what the best format would be.
 12 Q. It will be yet another revision to the Port's
 13 Low Flow Plan, will it not?
 14 A. It will be corrections to their revised
 15 December 2001 Low Flow Plan.
 16 Q. And my question is this: Do you need those
 17 corrections to the revised December 2001 Low Flow Plan
 18 in order to have reasonable assurance for purposes of
 19 the 401 Certification that has been issued to the Port
 20 of Seattle --
 21 A. Yes.
 22 Q. -- yes or no? And your answer is yes?
 23 A. Yes.
 24 Q. All right.
 25 MR. STOCK: Why don't we take a short break.

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10 (Pages 225 to 228)

1 (Recess taken.)
 2 MR. STOCK: Let's go back on the record.
 3 Q. (BY MR. STOCK) Let me hand you a copy of the
 4 September 21, 2001 401 Certification, which is
 5 Exhibit 1, and have you turn to Page 6 of the
 6 certification. The first full paragraph in the 401
 7 Certification states, No document, report or plan
 8 required by this order shall be deemed approved until
 9 the Port receives written verification of approval from
 10 Ecology. Do you see that?
 11 A. Yes.
 12 Q. Did you write that?
 13 A. Yes.
 14 Q. With respect to this validation report of the
 15 modeling for the revised December 2001 Low Flow Plan,
 16 is that sentence applicable?
 17 A. Yes.
 18 Q. With respect to the corrections to the
 19 revisions to the December 2001 Low Flow Plan, does the
 20 401 Certification require Department of Ecology to
 21 approve of those corrections in writing per this
 22 provision of the 401 Certification?
 23 A. Under this September 21st certification, we
 24 required the Port to submit a revised Low Flow Plan
 25 within 45 days of submittal.

1 Q. And they didn't do that, did they?
 2 A. Yes, they did.
 3 Q. It wasn't within 45 days, was it?
 4 A. Well, they requested an extension, which they
 5 are allowed to do under C(4).
 6 Q. So in any event, they submitted it in
 7 December?
 8 A. They did submit it. We have not yet approved
 9 that document.
 10 Q. Right. And my question is, pursuant to this
 11 provision of the 401 Certification on Page 6, doesn't
 12 the Department of Ecology have to provide written
 13 verification of approval for the December 2001 revised
 14 Low Flow Plan?
 15 A. Yes.
 16 Q. What is the status of the revised Natural
 17 Resources Mitigation Plan that was submitted to the
 18 Department of Ecology in November?
 19 A. That is still under review.
 20 Q. Who is doing the review?
 21 A. Katie Walter.
 22 Q. And what is the status of her review of the
 23 revised NRMP?
 24 A. I haven't spoken with her about that
 25 recently.

1 Q. When was the last time you spoke to her?
 2 A. Probably a month ago.
 3 Q. So Ms. Walter on behalf of Department of
 4 Ecology is still in the process of reviewing the
 5 revised NRMP, correct?
 6 A. I believe that's correct.
 7 Q. But other than that, you don't know what the
 8 status of her review is?
 9 A. Not today.
 10 Q. When was the last time you spoke with her, a
 11 month and a half ago?
 12 A. A month.
 13 Q. And what was the status of her review at that
 14 point?
 15 A. I believe she said she was working her way
 16 through that.
 17 Q. Do you expect to receive written comments
 18 from her with respect to the revised NRMP?
 19 A. Eventually.
 20 Q. And what will you do with those written
 21 comments?
 22 A. First I will read them, and -- well, probably
 23 before I read them we will discuss whether there are
 24 any issues or concerns that we need to go back to the
 25 Port and request clarification on.

1 Q. And then what will you do?
 2 A. Then we'll transmit those concerns back to
 3 the Port or a letter of written approval if that's the
 4 conclusion that we draw based on her review.
 5 Q. And you just anticipated my next question,
 6 and that is, with respect to this revised Natural
 7 Resources Mitigation Plan that the Port submitted in
 8 November 2001, pursuant to the provision of the 401
 9 Certification on Page 6, does Ecology have to provide
 10 written verification of approval of that revised NRMP?
 11 A. Yes.
 12 Q. And Ecology hasn't done that yet; is that
 13 right?
 14 A. No, we have not yet provided written approval
 15 of that document.
 16 Q. And that's because Katie Walter's review is
 17 not complete?
 18 A. That is correct.
 19 ~~Q. Is the Department of Ecology performing any
 20 other review of the revised NRMP that you will rely
 21 upon in deciding whether to write a letter of approval
 22 of the revised NRMP or write a letter asking the Port
 23 for further clarification?
 24 A. I know that Erik Stockdale has been spending
 25 a lot of time reviewing the NRMP in preparation for the~~

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11 (Pages 229 to 232)

1 hearing.

2 Q. Well, you mean the revised NRMP?

3 A. I'm not certain.

4 Q. Well, that's my question. Other than looking
5 to Katie Walter for review of the revised NRMP, is the
6 Department of Ecology conducting any other review of
7 the revised NRMP that you will rely upon to determine
8 whether to write a letter of approval to the Port or a
9 letter seeking further clarification?

10 A. No.

11 Q. So it's only Katie Walter that the Department
12 of Ecology is relying upon with respect to reviewing
13 the revised NRMP that was submitted in November 2001;
14 is that correct?

15 A. Katie Walter is the primary reviewer. She
16 will make her recommendations to Ecology.

17 Q. To who at Ecology?

18 A. To me and to Erik Stockdale. I'm the
19 contract manager for her contract, so she has been
20 submitting things to me, but then I would forward those
21 comments to Erik. And then he and I would discuss with
22 Katie any concerns or unresolved issues, and with
23 Erik's direction as the technical expert on wetlands we
24 would make a determination as to what we would require
25 or whether we can approve the NRMP as submitted.

1 vation report for the modeling for the revised Low
2 Flow Plan?

3 A. With regards to the Natural Resource
4 Mitigation Plan we had a greater degree of completeness
5 in the information provided to us by the Port.

6 Q. How can you say that, Ms. Kenny, given the
7 Attachment B to the September 21 401 Certification?

8 A. Because -

9 Q. Isn't Attachment B four pages of revisions to
10 the NRMP?

11 A. As I explained in my deposition on December
12 20th, these sheet changes, plan sheet changes, required
13 in Attachment B were minor, nonsubstantive corrections
14 to their plan sheets that we had already discussed and
15 agreed to with the Port. The purpose of listing them
16 here is so that when we receive the revised NRMP we can
17 verify that those changes were made.

18 Q. So until you received the revisions and
19 verify that they have been made, you don't know that
20 they have been made, correct?

21 A. That's correct.

22 Q. And until you know that they have been made,
23 as you said at your December 20 deposition, you don't
24 have reasonable assurance; isn't that right?

25 A. I don't have the five percent of the 95

1 Q. Have you had any discussions with Erik
2 Stockdale about the revised NRMP?

3 A. No.

4 Q. I gather you anticipate having discussions
5 with Mr. Stockdale after you receive input from Katie
6 Walter?

7 A. Yes.

8 Q. Why does the Department of Ecology require
9 that the revised Natural Resources Mitigation Plan is
10 not approved until the Port receives written
11 verification of approval of that revised NRMP from
12 Ecology?

13 A. That is an administrative mechanism to
14 guaranty that there is a document in writing providing
15 that approval for every deliverable required under the
16 401, so to prevent any misunderstanding on the Port's
17 part or our part that we have given verbal approval
18 when in fact that did not happen.

19 Q. And I take it that Department of Ecology
20 needs an approved revised Natural Resources Mitigation
21 Plan in order to have reasonable assurance with respect
22 to the 401 Certification issued to the Port; is that
23 right?

24 A. No.

25 Q. Well, how is that different from the

1 percent that I need to get to a hundred percent assurance
2 that these changes have been made.

3 Q. Why did you use 95 percent?

4 A. I'm picking a number out of the air. I feel
5 very confident that the Port will make these changes
6 and they are relatively minor changes. Our review by
7 Katie Walter was very very detailed. It's more
8 detailed than I have seen for any of the other wetland
9 mitigation projects that I have been involved with.
10 She was extremely detail-oriented, and these questions
11 about where something was located, a piece of woody
12 debris in a particular section along Miller Creek, were
13 all things that we went through in discussing with the
14 Port, and I believe that those changes will be made.
15 The bulk of the NRMP that they submitted December of
16 2000 was very solid.

17 Q. But you're not going to provide the Port of
18 Seattle with written approval of that revised NRMP
19 until Katie Walter has provided input to you; is that
20 right?

21 A. That's correct.

22 Q. And sitting here today you don't know when
23 Katie Walter is going to be providing that input to
24 you; is that right?

25 A. That's correct.

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12 (Pages 233 to 236)

1 Q. Turn to the cover letter that was sent to the
2 Port of Seattle on September 21. The second paragraph
3 of the September 21 cover letter states that Ecology
4 concurs with the Port's certification that the project
5 is consistent with the approved Washington State
6 Coastal Zone Management Program; is that correct?

7 A. That's correct.

8 Q. What is your understanding of the Port's
9 certification that the project was consistent with the
10 Coastal Zone Management Program?

11 A. Could you be more specific?

12 Q. Well, let me back up and lay a foundation.
13 Who at the Department of Ecology was responsible for
14 concurring with the Port's certification that the
15 project was consistent with the Washington State
16 Coastal Zone Management Program?

17 A. I reviewed that issue and made a
18 recommendation to Gordon White, the program manager for
19 the Shorelands and Environmental Assistance Program.

20 Q. And when you reviewed the Port's
21 certification of compliance with the Coastal Zone
22 Management Program, what did you understand to be the
23 Port's obligations in that regard?

24 A. Procedurally the Port is required to submit a
25 statement to Ecology of consistency with the state's

1 submit?

2 A. One of the enforceable policies under CZM --
3 Coastal Zone Management Act, we call it shorthand CZM
4 -- is compliance with the state's Environmental Policy
5 Act. And we already had on file the Port's
6 documentation for SEPA, so we considered SEPA to be
7 complete. Another enforceable policy is the Shoreline
8 Management Act, and in the case of the airport site no
9 Shoreline Management Act permit is required because
10 none of those water bodies are within jurisdiction of
11 the state.

12 At the Auburn site for the mitigation a
13 shoreline permit is required because of its proximity
14 to the Green River. And in that case the Port received
15 an exemption from the City of Auburn to construct that
16 mitigation site and I have a copy of that letter on
17 file. We also require compliance with the state's
18 water quality laws and we issued an NPDES general
19 stormwater permit for the Auburn site, and the issuance
20 of the 401 for the airport site construction activities
21 was evidence of compliance with state water quality
22 law.

23 Q. What about air quality? Isn't there an
24 obligation under Washington's Coastal Zone Management
25 Program to comply with the Clean Air Act?

1 Coastal Zone Management Program, and it comes in the
2 format of a form that they check off various elements
3 that are applicable to the state's Coastal Zone
4 Program. Ecology then reviews that form and any
5 supporting documentation submitted with that form and
6 makes a determination that it can either concur with
7 that statement --

8 Q. Or deny it?

9 A. Well, it's -- the technical term isn't
10 denied. It's like kind of a nonconcurrence.

11 Object, that's the word. We object to the
12 concurrence consistency statement. Oh, boy.

13 Q. A lot of Cs, huh?

14 A. Yeah.

15 Q. So I take it the Port submitted this form to
16 you; is that right?

17 A. They did.

18 Q. And you reviewed that form?

19 A. I did.

20 Q. And did the Port also submit supporting
21 documentation with the form that it submitted to you
22 where the Port certified that the project complied with
23 Washington State's Coastal Zone Management Program?

24 A. They did.

25 Q. What supporting documentation did the Port

1 A. Yes. The Port submitted documentation of a
2 permit that they have from Puget Sound Clean Air
3 Agency, and that's for emissions related to their
4 activities. And then I checked with Doug Brown, who is
5 the section manager of our regional Air Quality
6 Program, and discussed the situation and the scope of
7 the project, and he had advised me that sometime in the
8 past the Air Quality Program had looked at this project
9 and had made a determination that air quality would not
10 be adversely affected.

11 Q. Are there any other obligations under
12 Washington's Coastal Zone Management Act other than an
13 obligation to comply with the state's Environmental
14 Policy Act, Shoreline Management Act, water quality
15 laws and air quality laws, or another way to put it,
16 did you --

17 A. Oh, there are several other enforceable
18 policies, but they are not relevant to this project;
19 for example, they are not an EFSEC project related to
20 energy. There are several others which I'm not
21 recalling, but they are not applicable to this project.

~~22 Q. With respect to the Port's obligation to
23 comply with SEPA, you said that the Department of
24 Ecology already had on file the Port's documentation
25 for SEPA; is that right?~~

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1 ~~That's correct.~~
2 ~~Q. What are you referring to?~~
3 ~~A. The Environmental Impact Statement, the~~
4 ~~supplemental EIS, I believe there was one, and an~~
5 ~~addendum.~~
6 ~~Q. Is there any other documentation for the~~
7 ~~Port's obligation to comply with SEPA under the Coastal~~
8 ~~Zone Management Program that you relied upon?~~
9 ~~A. No.~~
10 ~~Q. When did you conduct this review to determine~~
11 ~~whether Department of Ecology was going to concur in~~
12 ~~the Port's certification that the project is consistent~~
13 ~~with CZMP?~~
14 ~~A. It was conducted between December 27th, 2000,~~
15 ~~and for Coastal Zone Management consistency we have six~~
16 ~~months to do a review. We normally try to complete~~
17 ~~that review concurrent with our issuance of the 401.~~
18 ~~We knew by the end of June or mid June 2001 that we~~
19 ~~weren't going to meet the six-month deadline, so we~~
20 ~~checked the regulations and checked with the Corps and~~
21 ~~determined that under the federal provisions and the~~
22 ~~rules that the Corps was following we would be able to~~
23 ~~-- Ecology and the Port would be able to mutually agree~~
24 ~~to an extension of the Coastal Zone Management deadline~~
25 ~~and we agreed to mutually extend that deadline until~~

1 ~~Q. Is that correct?~~
2 ~~THE WITNESS: Could you repeat the question?~~
3 ~~Q. (BY MR. STOCK) Let me reask it. The~~
4 ~~Department of Ecology didn't rely upon any other~~
5 ~~documentation other than the EIS, the supplemental EIS,~~
6 ~~and the addendum for its determination that the Port~~
7 ~~had complied with SEPA for purposes of concurrency~~
8 ~~under CZMP?~~
9 ~~A. The answer is no, we did not rely on any of~~
10 ~~that additional -- any of that documentation other than~~
11 ~~the documents you just listed.~~
12 ~~MR. STOCK: Off the record~~
13 ~~(Discussion off the record.)~~
14 ~~Q. (BY MR. STOCK) With respect to the Port's~~
15 ~~obligations under the CZMP to comply with the Clean Air~~
16 ~~Act and other applicable air quality laws, did you rely~~
17 ~~upon any documentation other than the document from the~~
18 ~~Puget Sound Clean Air Agency that the Port provided to~~
19 ~~you?~~
20 ~~A. No.~~
21 ~~Q. Did you perform any independent review of~~
22 ~~whether the Port's project would comply with clean air~~
23 ~~laws?~~
24 ~~A. What I did was I spoke with Doug Brown, the~~
25 ~~air program manager for our Regional office, and he had~~

1 ~~December -- I believe December 27th of 2001.~~
2 ~~Q. Who at the Department of Ecology performed~~
3 ~~the review of the Port's documentation for compliance~~
4 ~~with SEPA?~~
5 ~~A. That would have been me.~~
6 ~~Q. When did you do that?~~
7 ~~A. During this time frame.~~
8 ~~Q. When?~~
9 ~~A. I don't recall. Just verifying that those~~
10 ~~SEPA documents had been issued by the Port as lead~~
11 ~~agency for the project.~~
12 ~~Q. Did you perform any review of the EIS, the~~
13 ~~supplemental EIS or the addendum other than to verify~~
14 ~~that the Department of Ecology had those documents?~~
15 ~~A. No.~~
16 ~~Q. So your conclusion of concurrence that the~~
17 ~~Port's certification that the project is consistent~~
18 ~~with SEPA was based only upon your verification that~~
19 ~~the Department of Ecology had the EIS, the supplemental~~
20 ~~EIS, and the addendum; is that correct?~~
21 ~~A. That's correct.~~
22 ~~Q. And the Department of Ecology didn't rely~~
23 ~~upon any other documentation to come to that~~
24 ~~Concurrency decision with respect to SEPA?~~
25 ~~A. No.~~

1 ~~advised me that sometime prior to my involvement in the~~
2 ~~project that air quality issues at the airport relevant~~
3 ~~to the third runway had been looked at and that a~~
4 ~~determination had been made that there wasn't a problem~~
5 ~~with air quality.~~
6 ~~Q. Did Doug Brown provide you with any~~
7 ~~documentation in that regard?~~
8 ~~A. He may have sent an e-mail. I may have taken~~
9 ~~some notes, I don't recall at this point.~~
10 ~~Q. But sitting here you can't recall anything~~
11 ~~other than a discussion with Doug Brown; is that right?~~
12 ~~A. That's correct.~~
13 ~~(Deposition Exhibit Nos. 444-445 were marked~~
14 ~~for identification.)~~
15 ~~Q. (BY MR. STOCK) Ms. Kenny, you've been handed~~
16 ~~Exhibit 444. Identify what Exhibit 444 is, please.~~
17 ~~A. Exhibit 444 is an e-mail sent by me on March~~
18 ~~20th, 2001, to Elizabeth Leavitt. The subject is~~
19 ~~concerning CZM documentation.~~
20 ~~Q. And what are you asking Ms. Leavitt to do in~~
21 ~~this e-mail?~~
22 ~~A. I am gathering information for a letter that~~
23 ~~is required to be submitted three months into this CZM~~
24 ~~review process and I'm asking the Port to submit some~~
25 ~~additional documentation.~~

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14 (Pages 241 to 244)

1 Q. And is the shoreline exemption letter issued
 2 by the City of Auburn what you were referring to
 3 earlier with respect to the Auburn mitigation site in
 4 terms of the Port requiring a shoreline management
 5 permit?
 6 A. Yes.
 7 Q. And the certification issued by the Governor
 8 on June 30, 1997, why were you asking for a copy of
 9 that?
 10 A. I don't remember specifically. It must have
 11 said something about air quality compliance.
 12 Q. And is the permit issued by SPCAA on
 13 September 21, 1999, the permit from the Puget Sound
 14 Clean Air Agency that you referred to earlier?
 15 A. You transposed those letters. It's PSCAA.
 16 Yes, it is.
 17 Q. Thank you for the correction.
 18 And looking at Exhibit 445, is that the
 19 certification from the PSCAA that you relied upon to
 20 concur with the Port that it had complied with its
 21 clean air obligations under the Coastal Zone Management
 22 Program?
 23 A. It was one piece of evidence that the Port
 24 was in compliance with air quality regulations in this
 25 state.

1 Q. And the other piece of evidence was your
 2 conversations with Doug Brown?
 3 A. Yes.
 4 Q. Did it concern you that you were relying upon
 5 a September 1999 order from the Puget Sound Clean Air
 6 Agency to concur that the Port was complying with its
 7 clean air obligations when you issued the concurrency
 8 on September 21, 2001?
 9 A. No.
 10 Q. Why not?
 11 A. I want to take a moment to review this
 12 document.
 13 Q. Take all the time you need.
 14 A. (Witness reviewing document.)
 15 My review of this document issued by Puget
 16 Sound Clean Air Agency indicated that this was still an
 17 active, valid permit that the Port was operating under
 18 with ongoing monitoring and reporting requirements to
 19 that agency.
 20 Q. Did you rely upon the March 21, 2001, letter
 21 from Maggie Corbin at the Port to you to determine
 22 whether the Port was in compliance with its air quality
 23 obligations?
 24 A. Yes.
 25 Q. Did you make any independent review of

1 monthly air emission records?
 2 A. No.
 3 Q. Did you have any discussion with Doug Brown
 4 regarding monthly air emission records for Sea-Tac
 5 Airport?
 6 A. No, not that I recall.
 7 (Discussion off the record.)
 8 Q. (BY MR. STOCK) Do you have any knowledge
 9 whether Doug Brown reviewed monthly air emission
 10 records prior to your conversation with him?
 11 A. I have no knowledge.
 12 MR. STOCK: Why don't we go ahead and take
 13 our lunch break.
 14 (Deposition recessed at 12:02 p.m., to be
 15 reconvened at 1:00 p.m.)
 16
 17
 18
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 25

1 AFTERNOON SESSION
 2 1:00 p.m.
 3 --oOo--
 4
 5 CONTINUING EXAMINATION
 6 BY MR. STOCK:
 7 Q. With respect to the December 2001 revised Low
 8 Flow Plan, what SEPA documentation did you review to
 9 determine consistency with the Coastal Zone Management
 10 Program?
 11 A. Your question doesn't make any sense to me,
 12 and I could explain why if you want.
 13 Q. All right. Why don't you think that question
 14 makes senses?
 15 A. Because the Coastal Zone Management
 16 consistency determination was made on September 21st,
 17 2001 with the documents that we had in place at that
 18 time, so the document that we were reviewing was the
 19 December -- well, let me back up. We don't really
 20 review individual -- no, that's not right.
 21 Okay. Well, for the 401, which was issued as
 22 a 401 Certification and an administrative order under
 23 RCW 90.48, when we issued that, that was our
 24 determination that this project was in compliance with
 25 state water quality laws and so that was issued

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15 (Pages 245 to 248)

1 **simultaneously with the Coastal Zone Management**
2 **consistency concurrent statement. And so for purposes**
3 **of the 401 we were relying on the December 2000 low**
4 **flow report and the revisions to that work or the**
5 **supplemental information to that work submitted in, oh,**
6 **the end of July of 2001, I think that's when that was.**

7 Q. You're talking about Ecology's obligation
8 under the Coastal Zone Management Program to concur
9 with the Port's certification that the project will
10 comply with water quality standards when you refer to
11 the 401 Certification, are you not?

12 A. **When we issue the consistency concurrent**
13 **statement, yes.**

14 Q. And my question is for those parts of the
15 project that were submitted to Ecology after September
16 21, 2001, what SEPA documentation did you rely upon to
17 concur with any certification by the Port that those
18 parts of the project comply with SEPA?

19 MR. REAVIS: Object to the form of the
20 question.

21 A. **Are you still asking that question with**
22 **regards to Coastal Zone consistency?**

23 Q. (BY MR. STOCK) Yes.

24 A. **My answer to that question is that, no, we**
25 **didn't rely on any subsequent documents because our**

1 **decision on CZM was made on September 21st -- first**
2 **October 10th and then on September 21st, and it's a**
3 **one-time decision. It's not a -- I mean, they applied,**
4 **we issued our decision, there was no further work**
5 **necessary on Coastal Zone Management.**

6 Q. I see what you're saying. So, for example,
7 with respect to the Port's revised December 2001 Low
8 Flow Analysis and the structures contained within that
9 analysis, the Department of Ecology has not made any
10 concurrency determination that those structures comply
11 with any obligation under SEPA?

12 MR. REAVIS: Excuse me. Can you read that
13 question back, please.

14 (The reporter read back as requested.)

15 Q. (BY MR. STOCK) Is that right?

16 A. **I don't know that I can answer the question**
17 **the way you've phrased it.**

18 Q. Is it true that Ecology has not made any
19 determination that the structures set forth in the
20 December 2001 revised Low Flow Plan are consistent with
21 the Washington State Coastal Zone Management Program?

22 A. **I would say they are -- yes, they are**
23 **consistent with Washington's Coastal Zone Management**
24 **Program.**

25 Q. Did you just make that determination sitting

1 here?

2 A. No, because at the end of July we had asked
3 the Port to provide us with preliminary designs of
4 their low flow facilities, so we had that in hand prior
5 to making our decision. The designs that are in the
6 December 2001 revised low flow report are a refinement
7 of those designs.

8 Q. Well, the designs in the revised December
9 2001 Low Flow Plan are different from the designs in
10 the July Low Flow Plan, are they not?

11 A. **They are not identical.**

12 Q. They are different, aren't they?

13 A. **They are different.**

14 Q. And my question is with respect to the design
15 of the structures as they are set forth in the December
16 2001 revised Low Flow Plan. Isn't it true that Ecology
17 has not made any determination that those revised
18 designs are consistent with the Washington State
19 Coastal Zone Management Program?

20 THE WITNESS: Would you read that back again,
21 please.

22 (The reporter read back as requested.)

23 A. **The only way I can answer that question is to**
24 **say that I don't believe that those facilities are**
25 **required to be reviewed by us.**

1 Q. (BY MR. STOCK) But that's not an answer to
2 my question, Ms. Kenny. You need to answer my
3 question, and it's a simple question; it's a yes or no
4 question.

5 Isn't it true that Ecology has not made any
6 determination that the revised designs for the
7 structures set out in the December 2001 revised Low
8 Flow Plan are not consistent with the Washington State
9 Coastal Zone Management Program?

10 MR. REAVIS: Let me just object. And I think
11 that question was answered, and I object to the
12 question to the extent it requires the witness to
13 answer yes or no when she doesn't feel that that's an
14 appropriate choice.

15 MR. STOCK: Could you reread my question.

16 Q. (BY MR. STOCK) And then please answer my
17 question.

18 (The reporter read back as requested.)

19 A. **Could you restate that as a positive**
20 **statement rather than a negative. I think I'm getting**
21 **hung up on too many negatives and whether they are**
22 **double negatives meaning a positive.**

23 MR. STOCK: Could you mark that question so
24 we can come back to it.

25 Q. (BY MR. STOCK) All I want to know is has

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16 (Pages 249 to 252)

1 Ecology made any determination with respect to the
 2 revised designs for the structures in the December 2001
 3 revised Low Flow Plan that those structures are
 4 consistent with the Washington State Coastal Zone
 5 Management Program.
 6 **A. No, we have not made any such determination.**
 7 Q. And the same is true, isn't it, with respect
 8 to the revised design for the structures contained in
 9 the November Natural Resources Mitigation Plan, Ecology
 10 has not made any determination whether those revised
 11 designs are consistent with the Washington State
 12 Coastal Zone Management Program?
 13 **A. Yes, we have not made any determination that**
 14 **they are consistent with the Coastal Zone Management**
 15 **Program.**
 16 Q. And so with respect to any structure where
 17 the design has been revised since September 21, 2001,
 18 when the Port issued the 401 Certification, Ecology
 19 hasn't made any review of those revised structures to
 20 determine compliance with SEPA?
 21 **A. No.**
 22 Q. What review has Ecology made in that regard
 23 since September 21, 2001, to determine whether revised
 24 structures since that date are compliant with SEPA?
 25 **A. We haven't made any, but I don't believe it's**

1 **necessary for us to make that determination because**
 2 **those facilities have not changed in a manner**
 3 **substantive enough to invalidate any prior**
 4 **determination that SEPA was appropriately complied**
 5 **with.**
 6 Q. So you're changing your answer to my previous
 7 question?
 8 **A. Your previous question was with regard to**
 9 **Coastal Zone Management. This question, as I recall or**
 10 **interpreted it, was with regard to SEPA.**
 11 **(Pause in proceedings.)**
 12 Q. (BY MR. STOCK) I am a little confused,
 13 Ms. Kenny, with respect to your answers. What I'm
 14 trying to figure out, and I understand that you may
 15 think that no review is necessary, but what I'm trying
 16 to figure out is whether Ecology has made any review to
 17 determine whether the revised structures submitted by
 18 the Port since Ecology issued the 401 Certification are
 19 in compliance with SEPA.
 20 **A. No.**
 21 Q. Has Ecology required the Port to prepare any
 22 SEPA documentation for any revisions made to the
 23 structures under the revised Low Flow Plan since
 24 Ecology issued the September 401 Certification?
 25 **A. No.**

1 Q. Has Ecology performed any review of any
 2 additional structures proposed by the Port for the
 3 project since it issued the 401 Certification?
 4 **A. Yes.**
 5 Q. What review has Ecology made?
 6 **A. As I described this morning, we have Kelly**
 7 **Whiting reviewing the revised Low Flow Plan and the**
 8 **accompanying designs that came with that December 2001**
 9 **Low Flow Plan.**
 10 Q. So you agree that there are additional
 11 structures proposed by the Port since the issuance of
 12 the September 401 Certification?
 13 **A. No.**
 14 Q. Well, that was my question, and maybe it
 15 wasn't clear.
 16 My question is, has Ecology engaged in any
 17 review of any new structures that the Port is proposing
 18 to make a part of its project since issuance of the 401
 19 Certification?
 20 MR. REAVIS: Objection, lack of foundation.
 21 **A. I don't believe that we are reviewing any new**
 22 **structures. These are structures that were already**
 23 **identified, at least in concept, in the earlier**
 24 **versions of -- well, the versions that we had in hand**
 25 **before we issued the decision in August and then**

1 **reissued it on September 21.**
 2 Q. (BY MR. STOCK) When you say that these
 3 structures were identified in concept and that you
 4 aren't reviewing any new structures, what do you mean
 5 by that?
 6 **A. For example, with the low flow facilities,**
 7 **the Port has already identified where those facilities**
 8 **will be located. They have identified that they will**
 9 **be added to proposed stormwater vaults which we've**
 10 **already reviewed and approved under the stormwater**
 11 **plan, so we know their location, we know their number,**
 12 **we know their general design and the purpose they were**
 13 **to serve when we approved this project on September**
 14 **21st. What the certification asked for was more**
 15 **detail.**
 16 Q. The size of the vaults have changed, haven't
 17 they, in some cases?
 18 **A. Of the low flow vaults?**
 19 Q. Yes.
 20 **A. The size has changed. We, however, have not**
 21 **approved the December 2001 revised Low Flow Plan.**
 22 Q. Let's move to another topic. Turn to page 10
 23 of the September 21 401 Certification. Has the Port
 24 submitted the conceptual plan with respect to the
 25 mitigation for this 2.05 acres of wetlands referred to

AR 001755

17 (Pages 253 to 256)

1 on Page 10?

2 **A. Yes, they have.**

3 **Q.** And what is that conceptual plan called,
4 what's the document?

5 **A. I don't recall the exact title, but it came**
6 **as a separate document, Wetland A17 Mitigation Plan. I**
7 **don't recall the exact title.**

8 **Q.** What's the status of the review of that
9 conceptual plan for Wetland A17?

10 **A. Well, we've actually received that plan**
11 **twice. We received it as a separate document and it**
12 **was incorporated into the revised Natural Resource**
13 **Mitigation Plan that we received late November of 2001,**
14 **so that revised NRMP is, as I explained this morning,**
15 **in the process of being reviewed.**

16 **Q.** So the Department of Ecology has not provided
17 written approval yet of this conceptual mitigation plan
18 for the 2.05 acres identified on Page 10 of the
19 certification; is that correct?

20 **A. That's correct.**

21 **Q.** And do you agree that Ecology needs the
22 conceptual mitigation plan for the 2.05 acres to have
23 reasonable assurance?

24 **A. Yes.**

25 **Q.** Why is the 401 Certification requiring that

1 **So there is a real time loss in that wetland's ability**
2 **to filter water, store water; it can't function as a**
3 **wetland when it's all torn up. So by requiring this**
4 **additional area be set aside we are attempting to**
5 **offset that temporary impact and provide those**
6 **additional, as it says, wetland water quality and**
7 **general habitat functions.**

8 **Q.** Turn to Page 13 of the 401 Certification.
9 With respect to the Barrow Site 3 on the increased
10 buffer area -- I'm looking at Subparagraph F on Page 13
11 -- with respect to the increased buffer area for Barrow
12 Site 3, why was that the certificate amended to apply
13 the buffer only to property owned by the Port?

14 **A. If you'll look at Attachment D of that**
15 **certification, our wetland scientist Katie Walter, in**
16 **developing the August 10th version of this map, had**
17 **drawn a buffer around what looks like Wetland B5, or**
18 **maybe it's 85, I can't quite read this.**

19 **Q.** I suspect it's B5, given the language on F.

20 **A. And to get the appropriate buffer, which I**
21 **believe was 25 feet, she went down into this corner of**
22 **this property down here (indicating). I don't know**
23 **what direction it is. The Port doesn't own that**
24 **property. And as I recall in our discussions with the**
25 **Port, that's -- I'm fuzzy on this -- it was approaching**

1 the additional mitigation be in-basin?

2 **A. That was in response to comments that we have**
3 **received from the ACC, from Amanda Azous, in writing,**
4 **and then there was also -- I took note of those**
5 **comments in person when we met with the ACC down in**
6 **Burien or wherever it was that we had that meeting and**
7 **listened to Amanda talk about the need for additional**
8 **in-basin mitigation.**

9 **Q.** She will be pleased to hear that she had an
10 impact.

11 **A. We have actually listened to some of the**
12 **comments. We've reviewed them all and we've accepted a**
13 **number of them.**

14 **Q.** What does the term "temporal lift" mean on
15 Page 10 of the certification?

16 **A. Let me, please, review this. (Witness**
17 **reviewing document.)**

18 **This language was provided to me by Erik**
19 **Stockdale, so it's best to ask him about the technical**
20 **meaning of that term. We are concerned about temporary**
21 **impacts to wetlands in that in general if a wetland is**
22 **excavated or otherwise impacted and then restored,**
23 **there is a real time loss in the function of that**
24 **wetland while it's being excavated for, say a pipeline**
25 **trench, something like that, that wetland is not there.**

1 **right-of-way of some road or something and they didn't**
2 **feel that they would be able to condemn that property**
3 **to put a buffer on that particular wetland.**

4 **Q.** Isn't that additional property needed for an
5 appropriate upland buffer for that Wetland B5?

6 **A. I can't answer that question. That would be**
7 **a technical issue for Katie Walter or Erik Stockdale to**
8 **address.**

9 **Q.** Do you agree at least that it is a --
10 provides less protection for that Wetland B5 than what
11 the August 10 certification provided?

12 **A. Yes.**

13 **Q.** All right. Turn to Page 14 of the
14 certification. We're looking at the September 21
15 certification. Let's talk about the conditions for the
16 acceptance of fill to be used in the construction of
17 the third runway and associated Master Plan
18 improvements.

19 **Why did Ecology include conditions relating**
20 **to the conditions for fill acceptance?**

21 **A. Why did we include this section that**
22 **established fill criteria?**

23 **Q.** Right, why did Ecology include conditions for
24 fill acceptance in its 401 Certification?

25 **A. Right. Well, there is a history to this.**

AR 001756

18 (Pages 257 to 260)

1 This is work that Tom Luster actually started three or
2 four or five years, I'm not sure how long, ago with
3 Roger Nye in our Northwest Regional Office Toxic
4 Cleanup Program in an attempt to provide some
5 parameters to the Corps' restriction on fill, which is
6 very simply, quote, no toxic materials in toxic
7 amounts, end quote, shall be placed in waters of the
8 US. So what finally ended up in this certification is
9 the culmination of work that Ecology has undertaken
10 over a several year period to develop criteria that
11 will be applied to fill used -- well, fill used in
12 filling wetlands of the state -- which are waters of
13 the state.

14 Q. Why did Ecology believe there was a need to
15 put parameters on the Corps' language that there would
16 be no toxic materials in toxic amounts into waters of
17 the state?

18 A. My understanding was that the concern was, on
19 Mr. Luster's part and others, that that's very vague,
20 that's broad. There are no numeric or qualitative
21 criteria attached to that, so we wanted to establish a
22 clear set of standards that were understood by the Port
23 and us and that could be clearly shown whether or not
24 the Port was in compliance with those standards.

25 Q. So is the purpose of the conditions in

1 water and groundwater quality would be protected.

2 Q. So how does someone that's not familiar with
3 the project determine whether one of the projects
4 that's going to be undertaken out at the airport is an
5 other appropriate Master Plan improvement to which
6 these conditions apply?

7 A. Well, the first criteria that we are using is
8 whether or not this is fill that will be placed in
9 waters of the state, so if there are projects that
10 involve wetland fill, which is direct discharge of
11 material into waters of the state, then that is clearly
12 an area where Port -- I'm sorry, where these fill
13 criteria apply.

14 We are also in the process of reviewing the
15 list of Master Plan update improvements against another
16 set of criteria that we are still in the process of
17 defining, which include looking at proximity of a
18 project to surface water and the proximity or the depth
19 to groundwater, so proximity to surface or groundwater
20 and trying to, you know, see if there is a likelihood
21 that the placement of fill, should the fill criteria
22 for some reason not work -- I mean, the whole
23 assumption is that the fill criteria do provide us with
24 a level of assurance that water quality standards will
25 not be violated or water quality will not be

1 Section E of the certification to minimize the impact
2 to wetlands or other waters of the state from
3 contaminants within the fill?

4 A. The purpose of these criteria is to go beyond
5 minimizing the effect of any potential contaminants but
6 to reach an order where we believe that those -- any
7 contaminants that do possibly make it into the fill
8 will not have an adverse impact on water quality.

9 Q. And when you use the term water quality, are
10 you including groundwater?

11 A. Yes.

12 Q. What is your understanding with respect to
13 the language on Page 14 at the bottom where it says,
14 The conditions will apply to other appropriate Master
15 Plan updated improvements as determined by Ecology?

16 A. By way of some background, we determined that
17 there was more clarity needed in exactly which projects
18 the fill criteria should apply to out at the airport
19 given that there are numerous projects going on on
20 airport facilities that have no relationship to the
21 Third Runway Projects at all. They are not Master Plan
22 update projects, they are other types of projects going
23 on. So to define more narrowly exactly which of these
24 projects we wanted the fill criteria to apply to so
25 that we would be ensured that water quality -- surface

1 degraded.

2 But if on the off chance, then we want to be
3 sure that we've required fill in locations where there
4 is a likelihood to be an impact there has to be a nexus
5 to impact to surface or groundwater before we believe
6 that we have the jurisdiction to require these fill
7 requirements.

8 Q. And you are determining that nexus to surface
9 water or groundwater spacially?

10 A. That's one of the set of criteria we are
11 using.

12 Q. Are there any other criteria you are using?

13 A. We haven't worked out these criteria in
14 complete detail yet. We are involved or we have
15 been -- we've met with the Port once or twice to
16 discuss fill criteria, to identify some of these
17 projects. We know that if the Port passes the hurdle
18 of the 404 and the legal hurdles, then they have a
19 phased approach to their development, and the first
20 area of their impact would be in the Miller Creek area
21 and also the 154th Street location. We have determined
22 that those two projects are clearly projects where the
23 fill criteria would apply.

24 Q. Are these criteria written down anywhere --

25 A. No.

AR 001757

1 Q. -- that you're applying? Who is applying
 2 them?
 3 A. **It's under discussion between Ecology and the**
 4 **Port.**
 5 Q. Who at Ecology?
 6 A. **Me, Rod Thompson, and Ed Abbasi.**
 7 **(Discussion off the record.)**
 8 Q. (BY MR. STOCK) Is the TRACON facility a Port
 9 404 project?
 10 A. **I'm having a hard time right now remembering**
 11 **where the TRACON facility is or where it fits on their**
 12 **master list of projects.**
 13 Q. North of the existing air field up in the
 14 Lake Reba area?
 15 A. **It hasn't been built, though, right?**
 16 Q. No, it hasn't.
 17 A. **No, I don't believe that it is because that's**
 18 **an FAA project.**
 19 Q. Have you, Ed Abbasi or Rod Thompson applied
 20 these criteria that you are using to determine whether
 21 the TRACON facility is going to be subject to the fill
 22 criteria in Condition E of the 401 Certification?
 23 A. **No, we haven't. We don't even have an**
 24 **application before us for a 401, to my knowledge, for**
 25 **that facility.**

1 provide documentation to Ecology certifying that the
 2 fill source meets the criteria of the 401
 3 Certification?
 4 A. **Well, what the document says is that prior to**
 5 **accepting any fill materials for use on Port 404**
 6 **projects the Port shall submit to Ecology's Federal**
 7 **Permit Manager Sea-Tac Third Runway documentation**
 8 **certifying that the proposed fill source meets the**
 9 **criteria of this order.**
 10 Q. Has the Port done that with respect to any
 11 fill source or proposed fill source?
 12 A. **The Port is not presently filling in an area**
 13 **that would trigger these particular fill criteria.**
 14 Q. So the fill criteria set out in Condition E
 15 of the September 21 401 Certification have yet to be
 16 applied; is that what you're saying?
 17 A. **That's correct.**
 18 Q. And that's because the Port isn't presently
 19 filling in the area that would trigger these fill
 20 criteria?
 21 A. **That's correct.**
 22 Q. What will trigger these fill criteria in
 23 Condition E of the 401 Certification?
 24 A. **The trigger will be when they get their 404**
 25 **and the legal issues under litigation are resolved such**

1 Q. Have you ever heard of the TRACON facility?
 2 A. **I've certainly heard the name.**
 3 Q. In what context?
 4 A. **In the context that that facility is adjacent**
 5 **to this Wetland A17 complex where we are requiring the**
 6 **additional mitigation, the two properties, they abut**
 7 **each other.**
 8 Q. Other than the development in the Miller
 9 Creek area and the 154th Street location, have you
 10 performed a review of any other Port project to
 11 determine whether these fill criteria will apply?
 12 A. No.
 13 Q. Why not?
 14 A. **Simply time constraints involved in managing**
 15 **this project. We know that if, like I said, all the**
 16 **hurdles are passed, that will be the first area that**
 17 **they are constructing, we anticipate that this will be**
 18 **an iterative process that we can identify areas -- the**
 19 **Port already knows their construction schedule. I**
 20 **haven't seen their complete construction schedule, but**
 21 **as we go along we can make that determination whether**
 22 **the fill criteria are required or not.**
 23 Q. Turn over to Page 15 of the certification.
 24 Is it true that for each of the sites from which the
 25 Port is going to obtain fill material the Port must

1 **that they have their administrative order reinstated,**
 2 **which are currently in limbo because of the stay**
 3 **decision by the Pollution Control Hearings Board.**
 4 Q. Well, that suggests the question to me, what
 5 fill criteria are currently being applied, then, to the
 6 fill that is being imported out to the third runway
 7 site every day currently?
 8 A. **It's my understanding that there is a**
 9 **memorandum of agreement that was based on the original**
 10 **work done by Tom Luster and Roger Nye that set forth**
 11 **certain criteria that the Port is complying with and is**
 12 **submitting documentation to Ecology in support of.**
 13 Q. And what is this memorandum of agreement?
 14 A. **I don't have that readily in mind. It is a**
 15 **precursor of what actually ended up into this**
 16 **certification, but what it actually says I haven't**
 17 **seen.**
 18 Q. Is this a written memorandum of agreement?
 19 A. **I believe so.**
 20 Q. Who is reviewing whether the Port is
 21 complying with this memorandum of agreement regarding
 22 the fill that's currently being imported to the third
 23 runway site?
 24 A. **The Northwest Regional Water Quality Program.**
 25 Q. Who within that program?

AR 001758

20 (Pages 265 to 268)

1 **A. John Drabek was receiving those reports while**
2 **he was the NPDES permit manager for the industrial**
3 **waste permits and Ed Abbasi is now receiving those**
4 **reports.**

5 Q. What are those reports called?

6 **A. I'm not sure.**

7 Q. You're not involved in the review of those
8 reports?

9 **A. No, I'm not.**

10 Q. How can I get a copy of this memorandum of
11 agreement?

12 **A. Include it in your next public disclosure**
13 **request.**

14 Q. Well, I suppose we will specifically ask for
15 that document, but as you know, ACC has a continuing
16 public disclosure request.

17 **A. Have Andrea send me an e-mail. She's very**
18 **good at that.**

19 MR. REAVIS: I think they are actually marked
20 as exhibits in other depositions. I'm not sure if they
21 are the same documents she is talking about.

22 Q. (BY MR. STOCK) Are you referring to the 1999
23 fill acceptance criteria agreement?

24 **A. I don't know. The only way I could tell you**
25 **exactly what is being operated under would be to go**

1 **A. That's correct.**

2 Q. So for a site where the Port is proposing to
3 import a million cubic yards of fill the Port can
4 present six samples for that fill source to the
5 Department of Ecology under the 401 Certification; is
6 that correct?

7 **A. That's something where it is going to really**
8 **depend on the source of the fill. If the fill is**
9 **coming from an area with suspected contamination, and**
10 **I'm quoting from the certification, identified by the**
11 **Phase I environmental site assessment or with complex**
12 **site conditions -- this is Page 17, the first whatever**
13 **right before Section B -- or with complex site**
14 **conditions, please consult with Ecology's Federal**
15 **Permit Manager Sea-Tac Third Runway for appropriate**
16 **sampling requirements.**

17 Q. And you are the Federal Permit Manager for
18 Sea-Tac Third Runway, correct?

19 **A. That's correct.**

20 Q. So the Port, when it wants to import a
21 million cubic yards from a fill source, will be
22 consulting with you; is that right?

23 **A. They will bring this issue to my attention**
24 **and I will delegate that review to appropriate staff.**

25 Q. You agree that the 401 Certification as it is

1 **back to the Water Quality Program and ask them to**
2 **provide me a copy of exactly the document that they are**
3 **using. It may be the same document, if that's**
4 **information you got from Kevin Fitzpatrick or John**
5 **Drabek or someone.**

6 Q. Under the fill criteria in the 401
7 Certification, how many samples is the Department of
8 Ecology going to require the Port to obtain for a
9 borrow source where they will import one million cubic
10 yards of fill?

11 MR. REAVIS: Object to the extent the
12 document speaks for itself.

13 **A. On Page 16 there is a table at the bottom of**
14 **the page that specifies a minimum sampling schedule,**
15 **and it appears that for sources that involve more than**
16 **100,000 cubic yards of soil we would require a minimum**
17 **of six samples.**

18 Q. (BY MR. STOCK) So my question is, for a
19 borrow source where the Port is going to import one
20 million cubic yards how many samples will the
21 Department of Ecology require under the September 401
22 Certification?

23 **A. A minimum of six.**

24 Q. From your answer I gather you can't tell me
25 how many samples other than a minimum of six?

1 currently written allows the Port to submit six samples
2 for that fill source where it's going to import a
3 million cubic yards?

4 MR. REAVIS: Objection, the document speaks
5 for itself, mischaracterizes the witness's testimony.

6 Q. (BY MR. STOCK) I'm neither attempting to
7 speak for the 401 Certification, what you meant when
8 you wrote it, Ms. Kenny, or trying to mischaracterize
9 your testimony. What I need to find out from you as
10 the author of this 401 Certification is whether under
11 this 401 Certification it allows the Port to submit six
12 samples for a fill source from where it's going to
13 import one million cubic yards?

14 **A. I would say that if it's one source and it's**
15 **a million cubic yards, that might well fall under a**
16 **site with complex site conditions. It's really going**
17 **to be site specific. They can submit us six samples,**
18 **but this latter paragraph that I've been quoting from**
19 **gives us the authority to ask questions and not -- and**
20 **to say six is not enough, given whatever.**

21 **Now, I did not write this section. This**
22 **section was given to me by Chung Yee and Kevin**
23 **Fitzpatrick. In talking with them, it's my**
24 **understanding that the intent was that we always had**
25 **the ability to question the number of samples; that's**

AR 001759

21 (Pages 269 to 272)

1 why the certification says minimum. And this is a very
2 general, I mean, there may be a source of fill out
3 there where we know that there is complete uniformity
4 of that fill, it's a huge gravel pit that was left over
5 from the last glaciers that went through and it's all
6 the same materials, so six samples may be totally
7 adequate.

8 Q. So you agree that in the absence of Ecology
9 guidance to the Port, that the Port can submit six
10 samples for a site from which it's going to import one
11 million cubic yards?

12 A. Yes.

13 Q. At your last deposition I marked a copy of
14 your July 29 e-mail to various people attaching a draft
15 of the 401 Certification, and it was marked as Exhibit
16 71. When we go back and look at the exhibits that were
17 actually marked, this is marked as Exhibit 71. So I
18 need to clear up on the record that Exhibit 71 is your
19 July 29th, 2001 e-mail with a time of 2:43 p.m., and I
20 guess to do that and to make sure that that July 29
21 e-mail is in the record I need to mark it as another
22 deposition exhibit.

23 MS. MARCHIORO: Okay. Before we go too far
24 along, I'm trying to understand, was there a mistake on
25 somebody's part and this is not an exhibit to her

1 MS. MARCHIORO: When you say Page 10 --
2 Q. (BY MR. STOCK) What's labeled as Page 10.

3 A. Yeah.

4 Q. At the top of Page 10 of the draft 401 is a
5 paragraph in bold. Did you write that paragraph?

6 A. No, I did not.

7 Q. Who wrote that paragraph?

8 A. I believe it was Chung Yee.

9 Q. And is it true that the Toxics Cleanup
10 Program had recommended to you that the guidance for
11 the sampling of petroleum-contaminated fill should be
12 governed by Ecology Publication No. 91-30?

13 MR. REAVIS: Objection, lack of foundation.

14 A. I can't say. I didn't author this paragraph.

15 Q. (BY MR. STOCK) What was your understanding
16 as to the Toxic Cleanup Program's position with respect
17 to the level of sampling of petroleum-contaminated
18 fill?

19 A. I had no understanding of what their
20 recommendation was. I wasn't involved with the
21 development of these criteria.

22 Q. Who did you rely upon to conclude that these
23 criteria were sufficient to protect water quality
24 standards? And when I say these criteria, I'm talking
25 about the criteria set forth in Condition E of the

1 deposition?

2 MR. STOCK: That is. What you've got now
3 with the No. 71 on it is the physical exhibit. But in
4 the transcript, if you go back to the point where
5 Exhibit 71 was marked, we were discussing and Ms. Kenny
6 identified her July 29 e-mail as Exhibit 71.

7 MR. REAVIS: Do you know where that is in the
8 transcript? I've got a copy here.

9 MS. MARCHIORO: Do you want to go off the
10 record and talk about this?

11 MR. STOCK: Sure.

12 (Discussion off the record.)

13 (Deposition Exhibit No. 446 was marked for
14 identification.)

15 Q. (BY MR. STOCK) Ms. Kenny, you've been handed
16 Exhibit 446. Can you identify Exhibit 446?

17 A. This is an e-mail I sent on July 29, 2001, to
18 various recipients with a preliminary draft of the 401
19 Water Quality Certification for review and feedback.

20 Q. And just so the record is clear, this may
21 also have been marked as Exhibit 71 at your prior
22 deposition. Do you recall talking about this?

23 A. I do recall discussing this particular
24 document.

25 Q. Look at Page 10 of Exhibit 446.

1 September 21 401 Certification.

2 A. These criteria were forwarded to me by Kevin
3 Fitzpatrick and the Water Quality Program as the
4 criteria that should go into the 401 Water Quality
5 Certification.

6 Q. So you relied upon Kevin Fitzpatrick?

7 A. I did.

8 Q. Did you rely upon anyone else to make the
9 recommendation that the criteria set forth in
10 Condition E of the 401 Certification were sufficient to
11 provide reasonable assurance that state water quality
12 standards would not be violated?

13 A. No.

14 Q. You didn't make any independent assessment or
15 review in that regard; is that correct?

16 A. That's beyond my area of expertise.

17 Q. I take it you don't have any opinion with
18 respect to whether six samples or 226 samples for a
19 200,000 cubic yard stockpile would be appropriate in
20 terms of determining whether that stockpile was an
21 appropriate fill source for the third runway site?

22 A. I don't have an opinion about the number of
23 samples. I do believe that the fill criteria are very
24 clear in prohibiting the use of any soils that are
25 determined to be contaminated following a Phase I or

AR 001760

1 **Phase II site assessment, which would capture**
 2 **petroleum-contaminated soils.**
 3 Q. I just want to make sure. You don't have any
 4 opinion --
 5 A. No.
 6 Q. -- whether for a 200,000 cubic yard stockpile
 7 it would be appropriate to make an assessment based
 8 upon six samples or 226 samples?
 9 A. **No, I don't have the expertise to do that.**
 10 Q. When you said that it's your understanding
 11 that these fill acceptance criteria in the 401
 12 Certification prohibit the importation of any fill
 13 found to be contaminated after a Phase I or Phase II
 14 site assessment, what did you mean by that?
 15 A. **It's very plain within the meaning -- within**
 16 **the plain language of the certification on Page 18,**
 17 **Subsection D, Prohibited Fill Sources. The following**
 18 **fill sources are prohibited for use on Port 404**
 19 **projects, first bullet, fill which consists in whole or**
 20 **in part of soils or materials that are determined to be**
 21 **contaminated following a Phase I or Phase II site**
 22 **assessment.**
 23 Q. How are you as Ecology's Federal Permit
 24 Manager going to make the determination whether the
 25 fill is contaminated following a Phase I or Phase II

1 site assessment?
 2 A. **Well, the way I envision this working is that**
 3 **Ecology would probably never hear about those fill**
 4 **sources because the Port would reject them out of hand**
 5 **for use as fill for Port 404 projects.**
 6 Q. What do you understand or what does it mean
 7 when the 401 Certification on Page 18 says determined
 8 to be contaminated following a Phase I or Phase II site
 9 assessment?
 10 A. **Phase I or Phase II is terminology I believe**
 11 **that derives from our model Toxics Control Act or it's**
 12 **certainly terminology that our Toxics Cleanup people**
 13 **are familiar with and the Port's technical people are**
 14 **familiar with. I had asked that when we were reviewing**
 15 **this what does that mean, and I was assured that that's**
 16 **a commonly understood technical phrase with very**
 17 **specific links to statutory or guidance requirements.**
 18 Q. But you as the Ecology's Federal Permit
 19 Manager don't know what it means; is that right?
 20 A. **That's correct. I believe that Phase I is**
 21 **more of a general review of the record for a property.**
 22 **Phase II probably involves more site specific**
 23 **investigation and actual analysis of soil samples.**
 24 Q. Does the 401 Certification require the
 25 comparison of any contaminants found at a fill source

1 pursuant to a Phase II site assessment to be compared
 2 against the fill criteria on Page 17 of the 401
 3 Certification?
 4 A. **Well, no, because if it's found to be**
 5 **contaminated under Phase II it's prohibited from use.**
 6 Q. So if that's the case, why are the fill
 7 criteria set out on Page 17 needed?
 8 A. **That's a relic of I believe this earlier**
 9 **version that was provided to me by Chung Yee, and after**
 10 **I got this version and incorporated it into this draft**
 11 **I had comments back from Kevin -- oh, no, no, no,**
 12 **that's not where we left it. What he had intended and**
 13 **what he later submitted to me was a version that very**
 14 **clearly prohibited the use of that material. Now, if**
 15 **you look back to this July 29th e-mail, there is all**
 16 **these bases for the criteria and then it talks about**
 17 **heavy oils and all of that.**
 18 **It had been left that for hazardous**
 19 **substances -- this is the very bottom of Page 12 of**
 20 **that draft -- for hazardous substances other than those**
 21 **identified in the above fill criteria table that have**
 22 **been identified in the Phase II environmental site**
 23 **assessment please consult with the Department of**
 24 **Ecology Northwest Regional Offices Water Quality**
 25 **Program for applicable fill criteria, and we didn't**

1 **want that. We said if it's been contaminated and it's**
 2 **found to be contaminated from Phase II, it's**
 3 **prohibited, period.**
 4 **So I can't exactly explain why these**
 5 **parameters for diesel and heavy oils are there, but I**
 6 **believe it was an oversight or a remnant from this**
 7 **earlier version that didn't get taken out. Because**
 8 **it's my understanding, the way it's been explained to**
 9 **me by Kevin and others, that, you know, if it fails**
 10 **Phase II, which addresses primarily heavy oils,**
 11 **contaminated petroleum products, then that simply is**
 12 **not going to be allowed as fill, and even if it's been**
 13 **remediated it will not be allowed to be used as fill.**
 14 **So we're very stringent on what we require.**
 15 **If it's even suspected or if it's determined to be**
 16 **contaminated and it's been treated or remediated, that**
 17 **material is prohibited, so I suspect that we're not**
 18 **going to find fill that has diesel or heavy oils in it.**
 19 Q. So is it Ecology's position that under the
 20 401 Certification no fill from a source where a
 21 Phase II site assessment finds total petroleum
 22 hydrocarbons will be allowed to be imported to the
 23 third runway site?
 24 MR. REAVIS: Object to the extent that the
 25 document speaks for itself.

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1 **A. That's true to the extent that my**
2 **understanding of what that Phase II assessment is**
3 **correct. I don't know exactly what that looks like**
4 **without going to look at the procedures themselves, but**
5 **that's my belief at this point.**

6 Q. (BY MR. STOCK) Wait a minute. I thought you
7 just told me that the Department of Ecology's intent is
8 not to allow any contaminated fill following a Phase II
9 site assessment to be imported to the third runway
10 site; is that right?

11 **A. That's correct.**

12 Q. That's what Ecology means under the 401
13 Certification; is that right?

14 **A. That's correct.**

15 Q. And if a Phase II site assessment finds TPH
16 contamination -- you know what TPH is, don't you?

17 **A. Total petroleum hydrocarbon.**

18 Q. If a Phase II site assessment finds TPH
19 contamination at a fill source, is it Ecology's
20 position that fill from that source cannot be imported
21 to the third runway site under the 401 Certification?

22 MR. REAVIS: Object to the extent that the
23 401 Certification states Ecology's position and speaks
24 for itself.

25 **A. That's correct.**

1 Q. (BY MR. STOCK) So why doesn't Ecology issue
2 a revised certification taking out the fill criteria on
3 Page 17 of the September 401 Certification?

4 **A. We could.**

5 Q. Is Ecology going to do that?

6 **A. It hasn't even been requested of us by the**
7 **Port.**

8 Q. Is that what will be determinative of whether
9 Ecology takes out that fill criteria set out on Page 17
10 of the 401 Certification?

11 **A. No, it will be Ecology's determination what's**
12 **in the 401.**

13 Q. Ms. Kenny, what does Ecology mean on Page 17
14 of the 401 Certification under Subparagraph B when it
15 states, The results of the Phase II site assessment
16 sampling and testing shall be compared to the fill
17 criteria to determine the suitability of the fill
18 source for Port 404 projects?

19 **A. If there is a source that the Port is**
20 **considering using, and I would say regardless of the**
21 **source, whether it's gone through a Phase II**
22 **environmental site assessment or it's from Port owned**
23 **borrow sites or state certified pits, then they need to**
24 **demonstrate that the soils do not exceed the criteria**
25 **set forth in the certification, which is another odd**

1 remnant here.

2 **These criteria on Page 17 are not the**
3 **final -- are not the criteria that are being applied to**
4 **some of the fill. Those criteria are found -- the**
5 **definitive list of criteria that is found -- that**
6 **applies to fill for Port 404 projects is found on the**
7 **last page of Attachment E to the September 21st, 2001**
8 **certification.**

9 Q. So Ecology's position is that the last page
10 of Attachment E contains the fill acceptance criteria
11 that is to be applied?

12 **A. That is correct.**

13 Q. And how did you come to that understanding?

14 **A. That's the understanding that we had when we**
15 **issued this permit on September 21st.**

16 Q. Why does the list that's the last page of
17 Attachment E contain criteria for gasoline, diesel and
18 heavy oils?

19 **A. Again, that's a remnant of what was in this**
20 **table in the -- would have been the August 10th version**
21 **of the permit.**

22 Q. So I just want to make sure what Ecology's
23 position is, and it's Ecology's position that the fill
24 criteria for gasoline, diesel and heavy oils in Table 1
25 of Attachment E are no longer applicable because

1 Ecology is not going to allow any fill to be imported
2 to the third runway site from borrow sources where
3 there is TPH contamination present?

4 MR. REAVIS: Object to the extent the
5 document speaks for itself as to Ecology's position.

6 **A. That's correct. In looking at this**
7 **Section E, if I had written it myself or if I had had**
8 **more time, I would have put this -- and this was our**
9 **intent, that the foundational condition to all the**
10 **other conditions is this Sub D, Prohibited Fill**
11 **Sources, so that would have made a whole lot more sense**
12 **to have put it right up front. So that's the baseline,**
13 **that's clearly material that's prohibited, and then if,**
14 **you know, if it's not prohibited, then it needs to meet**
15 **the fill criteria that are outlined in this Table 1 of**
16 **Attachment E.**

17 MR. STOCK: Let's mark this as the next
18 exhibit.

19 (Deposition Exhibit No. 447 was marked for
20 identification.)

21 Q. (BY MR. STOCK) You've been handed Exhibit
22 447. There is a reference to KCS on the top that
23 wasn't on the original document. Obviously, those are
24 my initials.

25 Identify Exhibit 447 for me, please.

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1 **A. Exhibit 447 is an e-mail from Joan Marchioro**
2 **with the State's Attorney General's office to Tom**
3 **Walsh, Tom Newlon, Jay Manning, with a copy to Ray**
4 **Hellwig and myself, regarding draft settlement**
5 **agreement and SPLP work plan.**

6 Q. And what involvement did you have with
7 respect to this draft settlement agreement and SPLP
8 work plan?

9 **A. If I could take a moment to refresh my**
10 **memory. (Witness reviewing document.)**

11 **I was involved in the settlement discussions**
12 **with the Port prior to their filing their appeal and**
13 **simultaneous settlement in early September, or whenever**
14 **that was.**

15 Q. The appeal of the August 10 401
16 Certification, correct?

17 **A. That's correct.**

18 Q. And this proposed settlement agreement is the
19 document where Ecology and the Port were negotiating
20 over revisions to the August 10 401 Certification; is
21 that right?

22 **A. This sets forth our understanding at -- no,**
23 **actually -- I remember.**

24 **This was our attorney Joan Marchioro's**
25 **attempt to write down the understandings that we had**

1 Q. Did you have any discussions with Kevin
2 Fitzpatrick concerning revising the 401 Certification
3 to allow for SPLP testing of fill sources?

4 **A. Yes.**

5 Q. And when did those conversations occur?

6 **A. Somewhere around this time frame of the end**
7 **of September -- the end of August, early September.**

8 Q. And tell me about those discussions that you
9 had with Mr. Fitzpatrick regarding the revision of the
10 401 Certification fill criteria.

11 **A. I explained to him that we had heard concerns**
12 **from the Port that the fill criteria that we had put in**
13 **our August 10th certification were inconsistent with**
14 **the fill criteria being required by the US Fish and**
15 **Wildlife Service and that those inconsistencies were a**
16 **problem for the Port in maintaining their concurrency**
17 **with the service's ESA review.**

18 Q. So what did Mr. Fitzpatrick say?

19 **A. Well, after I told him that the Port was --**
20 **what the Port was proposing to resolve this difficulty**
21 **would be to bring the two sets of conditions into**
22 **conformity with each other and that that would include**
23 **allowing the Port to apply SPLP testing to proposed**
24 **fill that failed the numeric criteria of the**
25 **certification and also that the Port proposed that they**

1 **reached through a series of a day or two meetings and**
2 **phone conversations where we had reached tentative**
3 **agreement regarding what the settlement agreement would**
4 **contain, so this was a draft that she was sending out**
5 **to various parties involved in the negotiations for**
6 **comment.**

7 Q. Turn over to Page 3 of the draft settlement
8 agreement, and let's focus for a minute on the proposed
9 revisions to the fill acceptance criteria Condition E
10 of the 401 Certification. Who proposed revising the
11 fill acceptance conditions to include the SPLP?

12 **A. The Port did.**

13 Q. Who on behalf of Ecology reviewed the Port's
14 proposal to revise the fill acceptance criteria of the
15 401 Certification to include a provision for SPLP?

16 **A. I was aware of this -- certainly aware of**
17 **this proposal. It was approved by Kevin Fitzpatrick.**

18 Q. Kevin Fitzpatrick?

19 **A. Of the water quality -- Northwest Regional**
20 **Offices Water Quality Program.**

21 Q. Did Kevin Fitzpatrick negotiate directly with
22 Tom Walsh, Tom Newlon or Jay Manning?

23 **A. I don't know if he did -- I don't believe**
24 **that he did. I believe that all of those discussions**
25 **were mediated through our attorneys.**

1 **would adopt the most stringent of the 401 fill criteria**
2 **and the US Fish and Wildlife Service criteria as their**
3 **baseline, so what he said to that was, Sounds good.**

4 Q. Was this just one conversation you had with
5 Mr. Fitzpatrick?

6 **A. It may have been one or two.**

7 Q. And did Mr. Fitzpatrick have in front of him
8 when you talked to him the proposed revisions to the
9 fill acceptance criteria?

10 **A. I believe that those were faxed to him.**

11 MR. STOCK: Let's go off the record.

12 (Discussion off the record.)

13 MR. STOCK: Let's go back on the record.

14 Q. (BY MR. STOCK) Did you discuss with
15 Mr. Fitzpatrick the Port's proposed revisions?

16 **A. Yes.**

17 Q. And did he tell you he had them in front of
18 him?

19 **A. I don't think he had them in front of him**
20 **perhaps at the time we were -- the first time we**
21 **discussed them. I do recall later, near the time when**
22 **we were wrapping up the settlement agreement, that he**
23 **did have them in front of him.**

24 Q. Did Mr. Fitzpatrick have anything to say with
25 respect to revising the 401 Certification to include an

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25 (Pages 285 to 288)

1 SPLP testing procedure?
 2 A. He thought it was reasonable.
 3 Q. You recall Mr. Fitzpatrick saying that?
 4 A. Uh-huh.
 5 Q. You need to answer audibly for the court
 6 reporter.
 7 A. Yes, he said that.
 8 Q. What else did he say with respect to
 9 including an SPLP testing procedure in the 401
 10 Certification?
 11 A. I don't recall much else.
 12 Q. Did he tell you how including an SPLP testing
 13 procedure was consistent with the language contained in
 14 Section E(d), Prohibited Fill Sources?
 15 A. We discussed -- I do recall discussing the
 16 use of the Synthetic Precipitation Leaching Procedure
 17 with him, and we discussed the use of that test and its
 18 similarity to another test that I am familiar with used
 19 for hazardous waste designation purposes called the
 20 Toxics Characteristic Leaching Procedure, which is
 21 another EPA test protocol for determining if a
 22 constituent will leach a harmful constituent -- a
 23 material will leach harmful constituents under acid
 24 conditions.
 25 And these two tests apparently are equivalent

1 in their accuracy and their usefulness, and what this
 2 test tells you is that when you expose soil for the
 3 SPLP test to acid conditions it will tell you whether
 4 constituents that are bound up in the material such as
 5 lead, whatever, will break down -- the acid will cause
 6 that compound to break down and leach lead, for
 7 example.
 8 Q. I don't mean to interrupt you, Ms. Kenny, but
 9 you're getting far afield from my question.
 10 A. Well, we had that technical discussion of
 11 what the test does and what it shows you and that if it
 12 passes the SPLP test then we know that whatever
 13 chemical process occurred it's not going to be harmful
 14 to the environment, because the lead, for example,
 15 would not be in a format that would be readily movable
 16 or absorbable by a biological organism.
 17 Q. My question is, did you and Mr. Fitzpatrick
 18 discuss why Ecology should allow an SPLP testing
 19 procedure as a part of the 401 Certification given that
 20 the 401 Certification prohibits the use of fill which
 21 consists in whole or in part of soils or material that
 22 are determined to be contaminated following a Phase I
 23 or Phase II site assessment.
 24 A. Yes.
 25 Q. And what was said in that regard?

1 A. I asked him if this was something that he had
 2 considered, and he said no. I asked why not, he said
 3 we simply don't have the resources to review any more
 4 additional testing information from the Port. And I
 5 said, Well, Kevin, you're aware that the Port has
 6 agreed to fund positions at Ecology, three to five
 7 FTEs, to do technical review if we dedicate part of
 8 that allocation to reviewing these tests. Do you feel
 9 that this testing procedure is reasonable, he said yes.
 10 Q. That doesn't answer my question as to why
 11 Ecology allowed the SPLP procedure to be included in
 12 the revised 401 Certification if Ecology under the 401
 13 Certification is going to prohibit the use of fill
 14 which consists in whole or in part of soils or material
 15 that are determined to be contaminated following a
 16 Phase I or Phase II site assessment.
 17 A. Petroleum contaminated soils are not the only
 18 contaminated soils that might cause -- or the only
 19 contaminant sources that might be a problem for
 20 imported fill. Other constituents which are found in
 21 natural -- are found naturally in soil such as arsenic
 22 or lead or zinc may exist at levels that are above
 23 background in the soil that may pose a problem for
 24 water quality purposes. So the SPLP test allows us to
 25 look at those other constituents and determine if there

1 is any real threat or harm by having elevated levels in
 2 a particular batch of fill -- I've lost my thought.
 3 MR. STOCK: Why don't you go ahead and read
 4 the question and go ahead and read her answer.
 5 (The reporter read back as requested.)
 6 Q. (BY MR. STOCK) Do you want to start over,
 7 Ms. Kenny?
 8 A. No. I got halfway through my thought and
 9 then I just lost it.
 10 MR. STOCK: Do you mind reading it back,
 11 Kathy.
 12 (The reporter read back as requested.)
 13 A. -- with those constituents, end of sentence.
 14 Q. (BY MR. STOCK) So is it Ecology's position
 15 that under the 401 Certification the SPLP procedure can
 16 only be used to assess naturally occurring substances?
 17 MR. REAVIS: Objection, the document speaks
 18 for itself.
 19 A. I would like to look through Attachment E to
 20 Exhibit 1. (Witness reviewing document.)
 21 The SPLP test can be used for any soils
 22 proposed to be imported or used by the Port for Port
 23 404 projects that are not specifically prohibited by
 24 the 401. And so we have various fill sources that are
 25 prohibited, and then we limited the remainder of the

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1 sources to state certified borrow pits, contractor
2 certified construction sites, and Port of Seattle owned
3 properties. That's Subsection C on Page 18. So any
4 source that's not prohibited that comes from these
5 three sources, if those fill materials are showing
6 levels of a constituent that exceed the levels
7 identified in Table 1 of Attachment E, then the Port
8 can apply SPLP testing to determine the suitability of
9 that fill.

10 Q. (BY MR. STOCK) So is it Ecology's position
11 that the SPLP procedure may only be used to determine
12 the suitability of fill from state certified borrow
13 pits, contractor certified construction sites, or Port
14 of Seattle owned properties?

15 A. Yes, because those are the only sources of
16 fill that will be allowed to be imported or used for
17 fill.

18 Q. What is Ecology's position with respect to
19 contractor certified construction sites where TPH
20 contamination is present?

21 A. Well, if a contractor is going to have to
22 certify that they have done Phase I or Phase II testing
23 and if that material -- that soil doesn't pass the
24 Phase I or Phase II assessment, it's prohibited; they
25 can't certify that it would meet our fill criteria.

1 regional sampling for arsenic coming from the Tacoma
2 smelter plume. I'm not sure if any of those sampling
3 points specifically include the third runway area,
4 although I know that some of those samples include the
5 surrounding communities.

6 MR. STOCK: Go ahead and mark this as the
7 next exhibit.

8 (Deposition Exhibit No. 448 was marked for
9 identification.)

10 Q. (BY MR. STOCK) Identify 448 for the record,
11 please.

12 A. Exhibit 448 is an e-mail sent by Ray Hellwig
13 to me dated January 10th, 2002, forwarding an e-mail
14 message from Norm Peck sent January 10th to Steve
15 Alexander and Ray Hellwig concerning the third runway
16 and arsenic in the Tacoma smelter plume.

17 Q. What is your understanding as to why
18 Mr. Hellwig was sending you a copy of this e-mail from
19 Norm Peck?

20 A. He sent it to me so that I could follow up
21 with Mr. Peck regarding his concerns.

22 Q. And who is Mr. Peck?

23 A. Mr. Peck is an environmental specialist
24 employed by the Northwest Regional Office's Toxics
25 Cleanup Program, and he is working on arsenic

1 Q. So what is the standard under a Phase II site
2 assessment to determine whether it passes a Phase II
3 site assessment?

4 A. I can't answer that.

5 Q. You can't tell me as Ecology's Federal Permit
6 Manager what it means when that Condition E
7 Subparagraph D says that fill from sources where
8 materials are determined to be contaminated following a
9 Phase I or Phase II site assessment, what that means?

10 A. Today sitting here I could tell you only in
11 very general terms as I described earlier. To give you
12 or anyone else an absolutely clear understanding of
13 what that is I would have to go back to Kevin
14 Fitzpatrick and Chung Yee and look at exactly the
15 documents that spell out what is involved in a Phase I
16 or Phase II site assessment.

17 Q. Did Kevin Fitzpatrick approve provisions
18 regarding the fill acceptance criteria from the August
19 10 certification to the September 21 certification?

20 A. Yes.

21 Q. Has Ecology made any assessment of areawide
22 arsenic contamination within the Port's Third Runway
23 Project site?

24 A. There may -- Ecology is -- well, not Ecology.
25 The King County Health Department has undergone some

1 contamination issues related to the Tacoma smelter
2 plume.

3 Q. And what was Mr. Peck's concern that
4 Mr. Hellwig wanted you to follow up on?

5 A. Well, in this e-mail from Mr. Peck he says,
6 quote, Hi Steve and Ray. I think we in the TSP project
7 need to understand the rationale for allowing elevated
8 levels of metals, especially lead and arsenic, in the
9 fill for the third runway at Sea-Tac Airport. This was
10 raised by the City of Burien as a sensitive issue in
11 that community that is likely to be raised as we begin
12 the education process about the wide-area contamination
13 in the Southwest King County mainland.

14 There is a little more language, but
15 basically he and other cleanup program staff have been
16 having meetings with the community about the Tacoma
17 smelter plume, and when they met with the City of
18 Burien concerns were raised by participants in that
19 meeting about the fill and the fill criteria for the
20 Third Runway Project.

21 Q. So what did you do in response to this e-mail
22 from Ray Hellwig?

23 A. I went and I talked to Norm and I gave him a
24 copy of the 401 Certification fill requirements. And
25 actually what I gave him was what is attached -- is the

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1 document attached to I believe Exhibit 446, because it
2 was the earlier version of the fill criteria, and I
3 think I gave him the final fill criteria that included
4 Chung Yee's basis analysis for the fill criteria, so
5 that was the language that's in bold in Section E of
6 the draft, to explain the scientific basis for why
7 those fill criteria were being applied.

8 Q. Where does it explain in that draft, which is
9 Exhibit 446, Ecology's rationale for allowing elevated
10 levels of metals, especially lead and arsenic, in the
11 fill for the third runway site?

12 A. That's only a partial -- this is only a
13 partial piece of information. I have a meeting
14 scheduled on February 28th, next week, with Norm and
15 some other folks that are involved in this Tacoma
16 smelter plume project to explain that the fill criteria
17 do not allow elevated levels of metals, especially lead
18 and arsenic, because as you can very clearly see on
19 Table 1 of Attachment E to the September 21st 401, the
20 levels of lead and arsenic that are allowed for the
21 final drainage layer cover, which is that 40-foot wedge
22 above the drainage layer that descends at a two percent
23 grade to the east, contain levels for lead and arsenic
24 that are at Puget Sound background within the 90th
25 percentile.

1 program people about what the conditions of the 401
2 require.

3 Q. So if Mr. Peck understood it, why is there
4 this meeting scheduled for February 28th with the
5 Toxics Cleanup Program?

6 A. Because there are other staff in the cleanup
7 program who are involved in this Tacoma smelter plume.
8 One is located in our Southwest Regional office which
9 covers Tacoma, and she -- her name is Molly Gibbs --
10 she is a public outreach person and she is the person
11 responsible for scheduling a lot of these public
12 meetings, and she wants to be able to understand the
13 issues so that she can clearly communicate to those
14 people that she meets with what is really being
15 required at the third runway site versus what the
16 public might think is being required.

17 Q. What is required under the 401 Certification
18 with respect to any fill source where there is a
19 determination by sampling that arsenic levels are at 15
20 milligrams per kilogram?

21 A. Well, I would refer to Table 1, looking at
22 Columns 4 and 5, which Column 4 is the final drainage
23 layer cover criteria, parens, most conservative of Fish
24 and Wildlife Service and Ecology values, end parens.
25 Column 5 is Ecology criteria for remainder of

1 Q. What about the rest of the fill embankment,
2 Ms. Kenny?

3 A. These criteria were based on -- I believe on
4 MTCA Level A upper bound limits, and the upper bound
5 limits and those technical references are discussed in
6 the biological opinion.

7 Q. What did you tell Mr. Peck was the rationale
8 for allowing elevated metals in the remainder of the
9 embankment other than the drainage layer of cover?

10 MR. REAVIS: Object to the question as vague
11 to the extent you used the term elevated.

12 A. What I told Mr. Peck was that the levels
13 developed in the 401 condition for the fill above the
14 drainage layer cover were, in my understanding,
15 designed to be protective of water quality for both
16 surface water and groundwater purposes.

17 Q. (BY MR. STOCK) What did Mr. Peck say in
18 response?

19 A. I asked him if he had a problem with the
20 information that I had given him, and he said, no, that
21 explained it.

22 Q. Have you had any further conversations with
23 Mr. Peck?

24 A. No. As I indicated, we have a meeting
25 scheduled for next week to further educate the cleanup

1 embankment and other Port 404 projects. So if your
2 question is arsenic at 15 milligrams per kilogram, the
3 initial reading of that would be that it would not be
4 allowed for use in the final drainage layer cover.

5 Q. But it would be allowed --

6 A. But it could be used for the remainder of the
7 embankment.

8 Q. What is Ecology's position if a Phase II site
9 assessment determines that the level of contamination
10 of arsenic in the fill source is greater than 20
11 milligrams per kilogram?

12 A. The way I understand this works, because in
13 Attachment E we essentially incorporated the
14 conclusions of the US Fish and Wildlife biological
15 opinion by reference into the 401 -- where is this
16 described -- the upper bound limits are described as
17 the upper limit from MTCA -- which I believe in this
18 case is 20, if it's above 20 -- in no case can fill be
19 imported that exceeds 20 milligrams per kilogram.

20 Q. Under the 401 Certification can the Port use
21 the SPLP to try to pass the fill source where that fill
22 source contains greater than 20 milligrams per kilogram
23 of arsenic as determined by a Phase II site assessment?

24 A. No. And the basis for that is found on Page
25 2 of Attachment E, the second paragraph, which states,

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1 In accordance with the BO, upper bounds are established
2 for constituent concentrations that cannot be accepted
3 even following a successful SPLP test, parens, referred
4 to in this document as, quote, upper bound limits, end
5 quote, end parens, period.

6 Q. Let's run through another example so I'm sure
7 I understand Ecology's position on this. What is
8 Ecology's position where a Phase II site assessment
9 determines that the level of lead in a fill source is
10 greater than 250 milligrams per kilogram, can that fill
11 source be used under the 401 Certification?

12 A. No.

13 Q. Can the Port under the 401 Certification use
14 the SPLP to try to pass that fill source where a
15 Phase II site assessment shows lead contamination
16 greater than 250 milligrams per kilogram?

17 A. No.

18 MR. STOCK: Let's mark this as the next
19 exhibit.
20 (Deposition Exhibit No. 449 was marked for
21 identification.)

22 Q. (BY MR. STOCK) Identify Exhibit 449, please.

23 A. Exhibit 449 is an e-mail from Ed Abbasi dated
24 November 1, 2001, to me.

25 Q. And what is it regarding?

1 criteria.

2 Rod Thompson, our hydrogeologist in the Water
3 Quality Program, had a differing opinion, and we
4 determined that we needed more information before we
5 could say -- more information from the Port before we
6 could say that the fill criteria were not appropriate
7 to apply to processed materials.

8 There are certain grades of gravel which are
9 going to be very, very uniform in their nature. Some
10 topsoils might come from various sources and there is a
11 lot of variability in the quality of the topsoil, so we
12 asked the Port to give us an idea of the volume of
13 material that would be imported as processed material
14 and where it would be placed, under what circumstance,
15 you know, how, where, when, why it would be placed, so
16 we have not approved or made any final decisions as to
17 whether or not the fill criteria should apply to these
18 materials.

19 Q. What's the time line on that?

20 A. It's ongoing. We had a meeting to discuss it
21 a little further and it got canceled and we're trying
22 to reschedule that.

23 Q. Turn to Page 19 of the 401 Certification,
24 please. The 401 Certification requires the Port to
25 submit a surface water and groundwater monitoring plan;

1 A. It's regarding Ed's preliminary conclusions
2 regarding information forwarded to us by the Port for
3 review concerning criteria for processed materials to
4 be used at the Port -- or at the third runway site.

5 Q. Why is the issue being raised as to whether
6 the fill criteria in the 401 Certification apply to
7 topsoil?

8 A. It's being raised to clarify exactly what
9 type of material being used for the Third Runway
10 Project the fill criteria apply to, given that there is
11 a variety of fill being used for different purposes in
12 construction of the facilities that relate to this
13 project.

14 Q. What's the status of Ecology's review of the
15 Port's proposal to not apply the fill criteria to
16 topsoil and other processed material?

17 A. We met with the Port subsequent to this
18 e-mail discussion, in fact, Mr. Abbasi's e-mail
19 references a meeting -- well, yeah, we had a meeting
20 subsequent to that, I can't remember the exact time,
21 where we went out and we went through the issue with
22 the Port. And basically we did not accept their
23 proposal at that point because Ed had certain opinions
24 on the suitability of the fill -- of these processed
25 materials and the necessity for requiring the fill

1 is that right?

2 A. That's correct.

3 Q. Is that surface water and groundwater
4 monitoring plan needed for reasonable assurance under
5 the 401 Certification?

6 A. Yes.

7 MR. STOCK: And let's mark this as the next
8 exhibit.

9 (Deposition Exhibit No. 450 was marked for
10 identification.)

11 Q. (BY MR. STOCK) You've been handed Exhibit
12 450, Ms. Kenny. Identify it for the record, please.

13 A. This is an e-mail from me to Jeannie
14 Summerhays with an attached request for review.

15 Q. A review of what and by who?

16 A. Okay, this is a request for review by
17 Ching-Pi Wang, and he is in the Toxics Cleanup Program.
18 I am requesting through my supervisor to Ching-Pi's
19 supervisor, Steve Alexander, that Ching-Pi provide the
20 Third Runway Project review team with assistance in
21 reviewing the Port's third runway embankment seepage
22 and groundwater monitoring plan submitted by the Port
23 of Seattle on November 16th, 2001.

24 Q. What's the status of that review?

25 A. Ching-Pi has completed his review. The

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1 results of that review were forwarded to Rod Thompson
2 in the Water Quality Program. Rod is reviewing
3 Ching-Pi's comments and the report itself and so we are
4 still underway and that process is still ongoing to
5 determine the suitability of that.

6 Q. Have you had any conversations with Mr. Wang
7 or Mr. Thompson regarding the suitability of the Port's
8 seepage and groundwater monitoring plan?

9 A. Yes, I have.

10 Q. And what have they said in that regard?

11 A. Mr. Wang issued a memo to me, which hopefully
12 you'll get this week, it's in the most recent set of
13 public disclosure documents, with some recommendations
14 for how that monitoring plan could be improved.

15 Q. And do you plan on getting a similar memo
16 from Mr. Thompson?

17 A. Yes.

18 Q. Do you know when that's going to happen?

19 A. I talked to him about a week ago, maybe two
20 weeks ago, and he's still working on it. His intent is
21 to set up a site visit where he is going to review the
22 location for the proposed monitoring wells that they
23 have proposed under this plan and do some actual field
24 work to assess the validity of those proposed wells.

25 Q. So is your plan similar to what you're going

1 been regarding?

2 A. There was the one meeting that we held or we
3 had out at the Port's West Side office where Beth Clark
4 and Paul Agid and Robin Kordik, myself, Ed Abbasi and
5 Rod Thompson discussed the fill criteria.

6 Q. For what reason?

7 A. To determine which projects the criteria
8 apply to.

9 Q. Oh, the Miller Creek development and the
10 154th Street?

11 A. And the other Master Plan update improvement
12 projects.

13 Q. How about Lynn Gould, have you had any
14 discussion with Lynn Gould about the implementation of
15 the fill criteria in the 401 Certification?

16 A. No.

17 Q. Have you had any discussions with Paul Agid
18 concerning implementation of the fill criteria in the
19 401 Certification?

20 A. Yes.

21 Q. When?

22 A. At that same meeting.

23 Q. Other than that meeting, any other meetings
24 or discussions with Paul Agid concerning the
25 implementation of the fill criteria?

1 to do under the review of the revised Low Flow Plan
2 where you're going to take Mr. Wang's memo and
3 Mr. Thompson's memo and prepare a letter to the Port
4 telling the Port what revisions need to be made in this
5 seepage and groundwater monitoring plan?

6 A. That's correct.

7 Q. And then the plan is for the Port to make
8 those revisions, and that will be submitted back to
9 Ecology for their review and at some point Ecology will
10 provide written approval under the 401 Certification;
11 is that right?

12 MR. REAVIS: Objection to the extent it calls
13 for speculation.

14 A. We will direct the Port as to what they need
15 to do to satisfy our concerns, they will submit a
16 submittal back to us, and when we have determined that
17 that submittal is adequate we will submit written
18 approval, but only when we've made the determination
19 that it's adequate.

20 Q. (BY MR. STOCK) Have you had any
21 conversations with Beth Clark concerning the
22 implementation of the fill criteria in the 401
23 Certification since September 21 --

24 A. Yes.

25 Q. -- 2001? And what have those conversations

1 A. No.

2 Q. Does the 401 Certification require compliance
3 with the May 1999 agreed order?

4 A. No.

5 Q. How does the certification address the
6 requirements of the water quality regulations regarding
7 activities that generate nonpoint source pollution?

8 A. Could you repeat the question again, please.

9 Q. Sure.

10 MR. STOCK: Can you read it back.
11 (The reporter read back as requested.)

12 A. Could you define what you mean by nonpoint
13 source pollution?

14 Q. (BY MR. STOCK) What is your understanding of
15 what nonpoint source pollution is as that term is used
16 in water quality regulations?

17 A. There are certain facilities and activities
18 where you generate a pollutant that has a specific
19 outfall where you can regulate the effluent that
20 discharges from that outflow. There are other
21 activities that have no specific discharge point.

22 Q. And given that understanding of nonpoint
23 source pollution, how does Ecology address activities
24 that generate nonpoint source pollution in the 401
25 Certification?

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1 MR. REAVIS: Object to the extent the
2 document speaks for itself and the question is vague.

3 MR. STOCK: What's vague about it?

4 MR. REAVIS: Well, regulating nonpoint source
5 could mean a number of things. That's a very broad
6 question.

7 Q. (BY MR. STOCK) You can go ahead and answer
8 the question.

9 A. That's a very broad question, but one thing
10 that we've done is approve a Comprehensive Stormwater
11 Management Program that collects water from virtually
12 the entire airport and routes it through stormwater
13 ponds that are designed to provide certain levels of
14 treatment for sedimentation and other constituents such
15 that sediment that might be generated by cars driving
16 around or -- I believe all of the runoff -- I believe
17 the runoff from the runway surfaces is being routed to
18 the -- maybe I'm wrong on that, but there is the
19 Comprehensive Stormwater Management Plan, there are
20 BMPs that are required under the Port's NPDES permit
21 for their industrial stormwater permit that attach to
22 temporary construction activities, so the placement of
23 construction sediment fencing and basic erosion control
24 management issues are addressed.

25 There is monitoring required for the

1 stormwater effluent. Vehicle track-out, if they are
2 construction vehicles, they need to be cleaned of mud
3 and rock and other material before entering paved
4 public highways so that sediment isn't tracked onto the
5 highway.

6 Q. Is runoff from the embankment a nonpoint
7 pollution source?

8 A. It might be a potential sort of pollution.

9 Q. What does 401 Certification require with
10 respect to managing that potential nonpoint source of
11 pollution?

12 A. Well, the first mechanism is the preventive
13 mechanism to prevent contaminants from entering the
14 fill by application of the fill criteria. The second
15 mechanism is the requirement in Section E for the Port
16 to develop this embankment seepage flow monitoring
17 plan. So there will be testing procedures that will
18 sample the water -- there will be sampling procedures
19 where they can test the water for constituents of
20 concern and a protocol for determining whether or not
21 there is actually a violation of the water quality
22 standards. And we have -- so we've required
23 monitoring, the development of a monitoring protocol,
24 and we have retained the ability to revise our fill
25 criteria if that monitoring is showing a problem,

1 **exceedance of the water quality criteria, and to**
2 **require corrective action such as treatment of the**
3 **water before it's discharged to surface waters.**

4 MR. STOCK: Let's mark this as the next
5 exhibit.

6 (Deposition Exhibit No. 451 was marked for
7 identification.)

8 Q. (BY MR. STOCK) You've been handed Exhibit
9 451. Please identify it.

10 A. This is a fax sent to me on August 3rd, 2001,
11 by the King County reviewer. It says KCR. That would
12 be Kelly Whiting.

13 Q. Is that Kelly Whiting's handwriting, if you
14 know, on the fax label?

15 A. I'm not sure.

16 Q. Whose handwriting is in the left-hand margin,
17 if you know?

18 A. Actually, I don't know. It's not my
19 handwriting.

20 Q. Is that your handwriting in the right-hand
21 margin where it says "keep"?

22 A. I don't believe any of this is my
23 handwriting.

24 Q. What did you do with this memo when you
25 received it from Mr. Whiting on August 3, 2001?

1 A. I probably distributed it to either Kevin
2 Fitzpatrick or John Drabek or perhaps both since it was
3 referring to the Stormwater Management Plan.

4 Q. Did you send this language to Mr. Whiting for
5 his review?

6 A. I believe this language was generated by
7 Mr. Whiting in response to one of the e-mails that I
8 sent out containing a draft 401 Certification.

9 Q. Is this Mr. Whiting's response to your July
10 29 e-mail which is Exhibit 446 where you sent a draft
11 of the 401 Certification?

12 A. I can't say for sure without checking my own
13 e-mail records because I sent out several e-mails with
14 ongoing revisions to the 401 as I made them.

15 Q. So I understand, are you saying that this is
16 Kelly Whiting's response to your sending him some draft
17 of the 401 Certification?

18 A. I believe so.

19 Q. I see you're looking at the second page. The
20 first underlined text where it says CSMP could easily
21 be challenged -- it's on the second page.

22 A. I know. I'm just looking at what precedes
23 that particular sentence.

24 Q. On the second page where it states CSMP could
25 easily be challenged as not being AKART, SWDM is not

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1 AKART, is that what Kelly Whiting wrote to you?
 2 MR. REAVIS: Objection, lack of foundation.
 3 A. Well, I believe Kelly wrote this sentence
 4 that is underlined that you are referring to.
 5 Q. (BY MR. STOCK) And what do you understand
 6 him to mean when he says CSMP could easily be
 7 challenged as not being AKART, SWDM is not AKART?
 8 A. AKART is a term that means all known and
 9 reasonable treatment something or other, maybe that's
 10 it. This is a term that's used in engineering and in
 11 regulatory circles, water quality circles. It has a
 12 specific standard to it.
 13 Q. So what is your understanding when he means
 14 the Comprehensive Stormwater Management Plan could
 15 easily be challenged as not being AKART?
 16 A. I believe that speaks for itself.
 17 Q. You understand he's telling you that the King
 18 County Surface Water Design Manual is not AKART; is
 19 that correct?
 20 A. That's what it says, SWDM is not AKART.
 21 Q. And you understood that to be the King County
 22 Surface Water Design Manual, correct?
 23 A. That's what I understood.
 24 Q. Did that give you any concern that the
 25 individual who was reviewing the Comprehensive

1 Stormwater Plan for the Department of Ecology in
 2 accordance with the King County Surface Water Design
 3 Manual was telling you that the manual is not AKART?
 4 A. No.
 5 Q. Why not?
 6 A. Because of the way we've designed the 401 and
 7 how the 401 works in tandem with the 402 issued to the
 8 Port. We require monitoring for water quality purposes
 9 and we have established a baseline which we believe
 10 does protect water quality and will allow the Port to
 11 protect water quality. Through the monitoring that
 12 we've required we can verify whether the BMPs that are
 13 called for in the Comprehensive Stormwater Management
 14 Plan are being effective, and if they are not being
 15 effective, then we have the ability to require further
 16 treatment.
 17 Q. So is Ecology relying upon future compliance
 18 of future NPDES permits to have reasonable assurance
 19 that this project isn't going to violate state water
 20 quality standards?
 21 A. Yes and no. The yes part is that the
 22 baseline -- we have established a baseline with the
 23 Stormwater Management Plan that we believe is
 24 protective of water quality. But once those facilities
 25 are up and operating they are covered under the Port's

1 industrial stormwater permit, and that permit is where
 2 the monitoring and the adaptive management will be
 3 applied, if necessary. Now, where I get reasonable
 4 assurance is that I, in my certification, specifically
 5 prohibited any discharge of operational stormwater
 6 coming from the third runway improvements until a site
 7 specific study has been done and approved by Ecology
 8 that will establish appropriate effluent limits in the
 9 NPDES permit.
 10 Q. Where is that required under the 401
 11 Certification? Look at page 27.
 12 A. Thank you. I don't have my tabbed version
 13 with me here.
 14 Yes, it's identified on Page 27, No. 2,
 15 Subsection a). No stormwater generated by operation of
 16 new pollution generating impervious surfaces of
 17 projects for which the Section 404 permit was sought
 18 shall be discharged to state receiving waters until a
 19 site specific study, e.g., a Water Effects Ratio Study,
 20 has been completed and approved by Ecology and
 21 appropriate limitations and monitoring requirements
 22 have been established in the Port's NPDES permit.
 23 Q. What is the purpose of this Water Effects
 24 Ratio Study?
 25 A. As I understand it, it is a very technical

1 study that looks at stormwater discharges being
 2 produced by the airport facilities and the effects of
 3 those stormwaters on the receiving waters to which that
 4 stormwater is discharged.
 5 Q. Is the Port undertaking a Water Effects Ratio
 6 Study?
 7 A. They are undertaking a site specific study.
 8 As I understand it, a Water Effects Ratio Study refers
 9 to a specific type of study, but our staff have already
 10 met several times with the Port to determine what this
 11 site specific study will include.
 12 Q. Who from Ecology?
 13 A. The prime -- there are two people at
 14 headquarters who are doing it, and then Ed Abbasi is
 15 the lead in the region.
 16 Q. Who at headquarters?
 17 A. I can't recall their names right now.
 18 Q. And who have they met with at the Port and
 19 when?
 20 A. I don't know. I haven't been involved in
 21 those meetings. I think they are working with Scott
 22 Tobiason and perhaps Keith Smith.
 23 Q. Does Ecology need a site specific study under
 24 Condition J(2)(a) of the 401 Certification in order to
 25 have reasonable assurance?

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1 A. Yes.

2 Q. I'm sorry, I'm just not getting this. Tell
3 me what this site specific study is supposed to
4 accomplish.

5 A. There are allegations right now from various
6 parties that the Port is not in compliance with the
7 terms and conditions of their existing industrial
8 stormwater permit, and that is very difficult to
9 determine, as I understand it, because there are no
10 specific effluent limitations established in that
11 permit. You can't establish effluent limits, as I
12 understand it, until you do a site specific study, so
13 this condition is an attempt to get those effluent
14 limits established so that we know whether the Port is
15 in compliance with their NPDES permit or not.

16 Q. How does a site specific study determine the
17 effluent limits?

18 A. You would have to ask that specifically of
19 the Water Quality Program. That's not an area where I
20 have specific expertise, but my understanding is that
21 it looks at the type of stormwater being generated at
22 the airport, looks at the chemical composition of that,
23 the perhaps the volume of that stormwater, and then it
24 looks at the receiving water. So it looks at things
25 like the alkalinity of the water, the buffering

1 capacity. Say the stormwater has high pH, and if it's
2 of low alkalinity it would neutralize the pH coming
3 from the stormwater, so it's a very interactive,
4 dynamic, complex modeling situation.

5 Q. And why does Ecology need the site specific
6 study under this condition of the 401 Certification to
7 have reasonable assurance?

8 A. We put this in there to address concerns
9 raised by various of the airport community's
10 consultants that there were possibly high metal
11 concentrations in the stormwater that were in violation
12 of the Port's NPDES permit, and so that when there is
13 discharge from the new pollution generating impervious
14 surfaces that will involve the Third Runway Project we
15 can be assured that effluent limits have been
16 established that would address metal contaminants and
17 then those waste or those contaminants would be
18 appropriately regulated by the NPDES permit.

19 Q. Have you had any dealings with Dr. William
20 Stubblefield?

21 A. I have never heard of him.

22 Q. He's one of the Port's paid experts in this
23 case.

24 A. No.

25 Q. Have you seen any draft data spreadsheet

1 printouts containing in-stream data?

2 A. I haven't seen any of that. That work is
3 being overseen by Ed Abbasi, so I couldn't answer that
4 question.

5 Q. What have you heard about it?

6 A. I've heard from Ed that he's meeting with the
7 Port, he is consulting with our experts at
8 headquarters, they have had one or two site visits, and
9 they are moving forward trying to define exactly what
10 will be a part of this site specific study.

11 MR. STOCK: Let's take a break.

12 THE WITNESS: I'm ready for a break.

13 (Recess taken.)

14 Q. (BY MR. STOCK) With respect to this site
15 specific study, do you understand that to be something
16 that Ecology is asking the Port to prepare and that
17 Ecology will ultimately review and approve that
18 report --

19 A. Yes.

20 Q. -- under the 401 Certification?

21 A. The Condition J(2)(a) says the study may use
22 existing impervious surfaces, et cetera, and it shall
23 be submitted to Ecology for review and written
24 approval.

25 Q. And the "it" is the report on the site

1 specific study?

2 A. Yes.

3 Q. When is this report supposed to be submitted
4 to Ecology, is there any time line?

5 A. I'm not aware that they have set a specific
6 time line.

7 Q. Are you aware of whether there is a draft
8 report?

9 A. I don't believe there is a draft because they
10 are still, from what Ed told me, they are still working
11 out the modeling that they will use for the study.

12 Q. What involvement will you have in a review of
13 this report relating to the site specific study?

14 A. I will not be involved in reviewing the
15 technical aspects of that study. I will simply be kept
16 apprised of the progress and ultimately the final
17 inclusion of the results of that study into a revised
18 NPDES permit.

19 Q. Will you get a copy of the report?

20 A. I believe I will.

21 Q. And will you review that report?

22 A. I will certainly look at it, but I'm not
23 qualified to provide any technical review of the
24 report. I'm relying on the Water Quality Program to
25 provide that.

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33 (Pages 317 to 320)

1 Q. Will you as the Federal Permit Manager for
 2 the Sea-Tac Third Runway be the individual sending the
 3 letter for written approval of the report?
 4 A. No.
 5 Q. Who will be?
 6 A. **The written approval of that report or study**
 7 **would come to the Port's NPDES permit manager, who is**
 8 **Ed Abbasi.**
 9 Q. And you're not aware of what the time line is
 10 for issuance of this report?
 11 A. No.
 12 Q. Mr. Abbasi works in the Bellevue office?
 13 A. **He does.**
 14 Q. Turn to Page 28 of the 401 Certification,
 15 please, under Condition J(2)(f), does the certification
 16 require the Port to submit a Stormwater Facilities
 17 Operations and Maintenance Plan?
 18 A. Yes.
 19 Q. Has the Port submitted that Stormwater
 20 Facilities Operation and Maintenance Plan to Ecology?
 21 A. No.
 22 Q. What is the status of that deliverable?
 23 A. **We've essentially deferred that deliverable**
 24 **until we're closer to final design on those facilities.**
 25 Q. And is this Stormwater Facilities Operation

1 determined to be contaminated following a Phase I or
 2 Phase II site assessment, that even if the fill source
 3 passes an SPLP procedure, the 401 Certification still
 4 bars the Port from using that fill source?
 5 A. Yes.
 6 Q. What language is Ecology relying upon for
 7 that position?
 8 A. **It's Condition E(1)(d), Prohibited Fill**
 9 **Sources.**
 10 Q. What was the last time that you had a
 11 conversation with Kevin Fitzpatrick concerning how the
 12 fill criteria conditions in the 401 Certification are
 13 to be applied?
 14 A. **I haven't spoken with him in a very long time**
 15 **about that.**
 16 Q. Have you had any discussions with Ray Hellwig
 17 about that?
 18 A. No.
 19 Q. How about Gordon White?
 20 A. No.
 21 MR. STOCK: I don't have any further
 22 questions.
 23 (Deposition concluded at 4:25 p.m.)
 24 (Signature reserved.)
 25

1 and Maintenance Plan that the Port must submit subject
 2 to Ecology review?
 3 A. **We have required that it be submitted for**
 4 **review and written approval.**
 5 Q. And does Ecology need this Stormwater
 6 Facilities Operation and Maintenance Plan for
 7 reasonable assurance?
 8 A. Yes.
 9 Q. Does the 401 Certification set limitations on
 10 turbidity?
 11 A. **Section K of the certification on Page 28**
 12 **lays out some provisions regarding turbidity, that's**
 13 **K(3)(a). Let's see, that's monitoring, actually.**
 14 **Well, what we required in K(2) is that**
 15 **stormwater discharges shall not cause a visible change**
 16 **in turbidity, so the standard is a visual check. And**
 17 **they do that, also, so we've also required monitoring**
 18 **by use of a portable turbidimeter and grab samples.**
 19 **(Discussion off the record.)**
 20 Q. (BY MR. STOCK) I want to go back to this
 21 fill acceptance criteria just for a second so I make
 22 sure I understand what you're saying. If you'll refer
 23 again to Page 18 of the 401 Certification, at the very
 24 bottom where it says Prohibited Fill Sources, it is
 25 Ecology's position that if the fill source is

1 CORRECTION & SIGNATURE PAGE
 2
 3 RE: ACC vs. STATE OF WASHINGTON, ET AL
 4 PCHB No. 01-16
 5 ANN E. KENNY; TAKEN FEBRUARY 20, 2002
 6
 7 I, ANN E. KENNY, have read the
 8 within transcript taken FEBRUARY 20, 2002, and the same
 9 is true and accurate except for any changes and/or
 10 corrections, if any, as follows:
 11 PAGE LINE CORRECTION
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21 Signed at _____, Washington,
 22 on the _____ day of _____, 2002.
 23
 24 ANN E. KENNY
 25

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34 (Pages 321 to 324)

REPORTER'S CERTIFICATE

1
2
3 I, KATHY HAUCK, the undersigned Certified Court
4 Reporter and Notary Public, do hereby certify:
5 That the testimony and/or proceedings, a transcript
6 of which is attached, was given before me at the time
7 and place stated therein; that any and/or all
8 witness(es) were by me duly sworn to tell the truth;
9 that the sworn testimony and/or proceedings were by me
10 stenographically recorded and transcribed under my
11 supervision, to the best of my ability; that the
12 foregoing transcript contains a full, true, and
13 accurate record of all the sworn testimony and/or
14 proceedings given and occurring at the time and place
15 stated in the transcript; that I am in no way related
16 to any party to the matter, nor to any counsel, nor do
17 I have any financial interest in the event of the
18 cause.
19 WITNESS MY HAND AND SEAL this day of
20 , 2002.
21
22 KATHY HAUCK, HA-UC-KK-L4210H
23 Notary Public in and for the State
24 of Washington, residing in King
25 County, Commission expires March 6, 2006.

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A				
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DEPOSITION UPON ORAL EXAMINATION OF

PETER KMET, P.E.

DECEMBER 19, 2001

ACC V. STATE OF WASHINGTON, ET AL.

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JAN 02 2002

AR 001775

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,
Appellant,)
vs.) PCHB No. 01-160
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY; and)
THE PORT OF SEATTLE,)
Respondents)

DEPOSITION OR SPONORAL EXAMINATION

OF
PETER KMET, P.E.

1:12 P.M.
DECEMBER 19, 2001
2425 BRISTOL COURT SW
SECOND FLOOR
OLYMPIA, WASHINGTON

CARLA R. WALLAT, CCR, RPR, CRR #WALLACR346BE

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ALSO PRESENT: GREG WINGARD

OLYMPIA, WASHINGTON, DECEMBER 19, 2001

1:12 P.M.

--oOo--

PETER KMET, P.E.,
sworn as a witness by the Notary
Public, testified as follows:

EXAMINATION

BY MR. WITEK:

Q. Good afternoon. My name is Mike Witek. I'm one of the attorneys for the Airport Communities Coalition and I'm going to ask you some questions today about the 401 Certification that the Airport Communities Coalition is appealing and the fill criteria. If you don't understand a question that I put to you, please let me know and I'll try to rephrase it. And you need to respond verbally so that your answers can be recorded by the court reporter.

Do you understand those instructions?

A. Yes.

Q. Are you Peter Kmet?

A. Yes, I am.

Q. Thank you.

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1 ~~Have you ever had your deposition taken~~
 2 ~~before?~~
 3 ~~A. Yes, I have.~~
 4 ~~Q. Approximately how many times?~~
 5 ~~A. At least -- at least three times.~~
 6 ~~Q. Do you remember what types of cases they~~
 7 ~~were?~~
 8 ~~A. Once -- at least once in Wisconsin when I~~
 9 ~~worked for the Wisconsin DNR there. It had to do with~~
 10 ~~a landfill. Here in Washington, I was deposed~~
 11 ~~regarding the Well 12A Superfund site in Tacoma.~~
 12 ~~Alexander Farms site.~~
 13 ~~Q. Can you tell me a little bit more about the~~
 14 ~~Alexander Farms site?~~
 15 ~~A. It's a site with pesticide contamination in~~
 16 ~~central Washington.~~
 17 ~~Q. And was that a MTCA cleanup action case or --~~
 18 ~~A. How should I put it? It's a case where~~
 19 ~~the -- they dumped pesticide on the ground and spilled~~
 20 ~~it and contaminated the ground and the groundwater and~~
 21 ~~they were appealing their status as a potentially~~
 22 ~~liable person.~~
 23 ~~Q. How long ago did you give your deposition in~~
 24 ~~that case?~~
 25 ~~A. Within the last few months. I can't remember~~

1 ~~Q. Have you had any conversations with Mr. Yee~~
 2 ~~since Monday?~~
 3 ~~A. Not that I remember, no.~~
 4 ~~Q. Can you tell me what your responsibilities~~
 5 ~~are at the Department of Ecology?~~
 6 ~~A. Well, I work on a variety of things. I'm in~~
 7 ~~what's called the policy and technical support unit~~
 8 ~~within the headquarters part of our program. In that~~
 9 ~~capacity I do a variety of things including writing~~
 10 ~~regulations, preparing guidance and policy documents to~~
 11 ~~implement those regulations. I also work on~~
 12 ~~legislative issues on behalf of the program, and will~~
 13 ~~on occasion provide site specific technical assistance~~
 14 ~~to site managers or other employees within ecology.~~
 15 ~~Also, of course, answer the phone and provide technical~~
 16 ~~assistance to folks that call the agency about cleanup~~
 17 ~~related issues.~~
 18 ~~Q. So do you sit on committees that work to~~
 19 ~~revise regulations and policies that the department~~
 20 ~~implements?~~
 21 ~~A. Well, we don't currently have any such~~
 22 ~~committees now. But in -- leading up to this last~~
 23 ~~revision which was adopted earlier this year, there~~
 24 ~~were a number of committees that were involved, and~~
 25 ~~yes, I was -- I did participate in those committees.~~

1 ~~exactly.~~
 2 ~~Q. Can you tell me what your current position is~~
 3 ~~with the Department of Ecology?~~
 4 ~~A. I'm an environmental engineer in the Toxics~~
 5 ~~Cleanup Program.~~
 6 ~~Q. How long have you been in this position?~~
 7 ~~A. Well, I've been an environmental engineer for~~
 8 ~~ecology since I joined the agency in 1984. And I've~~
 9 ~~worked in the cleanup program as an environmental~~
 10 ~~engineer since that time.~~
 11 ~~Q. Who do you answer to within the department?~~
 12 ~~A. My immediate supervisor is Curtis Dahlgren,~~
 13 ~~D-A-H-L-G-R-E-N.~~
 14 ~~Q. Other than conversations you may have had~~
 15 ~~with your attorney, who within the Department of~~
 16 ~~Ecology have you spoken with in preparation for being~~
 17 ~~deposed today?~~
 18 ~~A. Only just my supervisor letting him know that~~
 19 ~~I was being deposed.~~
 20 ~~Q. Do you know Chung Yee?~~
 21 ~~A. Yes.~~
 22 ~~Q. And are you aware that he gave deposition~~
 23 ~~testimony on Monday?~~
 24 ~~A. I wasn't aware when. I knew he was going to~~
 25 ~~get deposed.~~

1 ~~Q. What laws or regulations were amended?~~
 2 ~~A. The cleanup regulation, the MTCA, the Model~~
 3 ~~Toxics Control Act cleanup regulation, WAC 173-340.~~
 4 ~~Q. Do you know Greg Wingard?~~
 5 ~~A. Yes.~~
 6 ~~Q. How long have you known Mr. Wingard?~~
 7 ~~A. For a long time. I don't remember~~
 8 ~~specifically, but for a long time.~~
 9 ~~Q. And have you had occasion to speak with him~~
 10 ~~in the performance of your duties at the Department of~~
 11 ~~Ecology?~~
 12 ~~A. Sure.~~
 13 ~~Q. And what sorts of conversations have you had~~
 14 ~~with Mr. Wingard, generally speaking?~~
 15 ~~A. Greg will sometimes call me about a variety~~
 16 ~~of issues related to the MTCA Toxics Act.~~
 17 ~~Q. Did Mr. Wingard serve on any past committees~~
 18 ~~that worked on the development of MTCA policies or~~
 19 ~~regulations?~~
 20 ~~A. He was involved in this latest rule making.~~
 21 ~~You know, I can't remember exactly which committees or~~
 22 ~~how active a role, but he did participate, comment on~~
 23 ~~the regulation and attend some of the meetings, yes.~~
 24 ~~Q. Based on your experience do you think that~~
 25 ~~Mr. Wingard is knowledgeable of MTCA and its~~

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1 implementing regulations?
 2 MR. KRAY: Objection. I'm not sure that this
 3 witness can qualify Mr. Wingard as an expert.
 4 MR. WITEK: He can answer the question.
 5 A. Could you repeat the question?
 6 MR. WITEK: Could you read the question back,
 7 please?
 8 (Reporter read back as requested.)
 9 MR. KRAY: Objection calls for this witness
 10 to testify on a legal conclusion.
 11 THE WITNESS: Do I have to respond to that?
 12 Q. (BY MR. WITEK) Please answer the question.
 13 A. Well, I can't look into Greg's mind. I don't
 14 know him that well to know what his knowledge is. He's
 15 participated in these committees, so obviously he has
 16 some knowledge. How detailed his knowledge is, I don't
 17 know. You'd have to ask him.
 18 Q. Are you familiar with the Port's proposed
 19 third runway project?
 20 A. Only generally.
 21 Q. When did you first become aware of the Port's
 22 proposed third runway project?
 23 A. Probably read about it in the newspaper or
 24 saw a news coverage about it, and I don't remember
 25 when, but it's been quite some time.

1 couple years.
 2 Q. Can you tell me who within the Department of
 3 Ecology you've discussed fill criteria with?
 4 A. Kevin Fitzpatrick and Chung Yee. Probably
 5 others, but those two principally that I can remember.
 6 Q. Were you ever asked to do any work on the
 7 development of fill criteria for the third runway
 8 project?
 9 A. I was asked to comment on some of the draft
 10 documents that were prepared leading up to the permit.
 11 Q. And who asked you to review draft comments?
 12 A. Probably Kevin or Chung. I'm not sure.
 13 Q. What position does Mr. Fitzpatrick hold in
 14 the department?
 15 A. He works in our northwest regional office.
 16 I'm not sure exactly what his position is there.
 17 Q. So Mr. Fitzpatrick is not in the toxics
 18 control program?
 19 A. The cleanup program? Not that I'm aware of.
 20 Q. What position did Mr. Yee hold?
 21 A. Chung has moved around several times. I
 22 think he's working now in the headquarters part of
 23 Toxics Cleanup Program in a different unit.

24 (Deposition Exhibit No. 30 was marked for
 25 identification.)

1 Q. Are you aware that the Department of Ecology
 2 has issued a Clean Water Act, Section 401 Certification
 3 for the third runway project?
 4 A. Yes.
 5 Q. Have you seen the August 10th or September 21
 6 certifications that were issued by the department?
 7 A. I've seen one of them. I don't frankly
 8 remember the date on the one that I saw. I don't
 9 remember. I saw a document provided to me by our
 10 Attorney General's office. I don't know which one that
 11 was.
 12 Q. Do you remember when it was that you first
 13 discussed fill criteria or inclusion in the 401
 14 Certification?
 15 MR. KRAY: Objection, lack of foundation.
 16 A. Well, I don't remember a specific date when I
 17 became aware of the permit and had discussions on it.
 18 Q. (BY MR. WITEK) Have you had discussions with
 19 other people within the department about the fill
 20 criteria that should be included within the 401
 21 Certification?
 22 A. Yes.
 23 Q. Can you remember approximately how long ago
 24 that was?
 25 A. Not specifically. Probably within the last

1 Q. (BY MR. WITEK) Mr. Kmet, does the document
 2 labeled Exhibit 30 look familiar to you?
 3 A. Yes.
 4 Q. Can you tell me what this document is?
 5 A. This is an e-mail from me to or it looks like
 6 from Chung -- that's a good question. From Chung K.
 7 Yee to me. That can't be right.
 8 Q. Take your time.
 9 MR. WITEK: Off the record for a second.
 10 (Discussion off the record.)
 11 MR. WITEK: Let's go ahead and go back on.
 12 A. What's not clear to me, if this is a
 13 document I originated or as being sent to me. It is an
 14 e-mail -- copy of an e-mail to Kevin Fitzpatrick from
 15 Chung K. Yee and it's been sent to me, but I don't know
 16 if I'm the person who's writing on this or not. Let me
 17 look at it a bit more here.
 18 No. This is a copy of an e-mail that was
 19 sent to me, a copy.
 20 Q. (BY MR. WITEK) Is it your understanding that
 21 the underlined words were additions or comments by
 22 Mr. Yee?
 23 A. I'm not sure who originated those, but those
 24 are not my comments.
 25 Q. And Mr. Kmet, the date on that e-mail is

~~1 August 24th, 2000, is that correct?
 2 A. Yes.
 3 Q. And do you believe this is your earliest
 4 e-mail regarding the third runway project?
 5 A. I'm not sure, but I think this is about the
 6 time that I started to have a bunch of e-mails back and
 7 forth regarding the project.
 8 Q. Thank you.
 9 (Deposition Exhibit No. 31 was marked for
 10 identification.)~~

11 Q. (BY MR. WITEK) Mr. Kmet, is Exhibit 31 an
 12 e-mail from you to Kevin Fitzpatrick dated September
 13 11th, 2000?
 14 A. Yes. It's a copy of it, Ann Kenny's copy.
 15 Q. Is the underlined language on Exhibit 31 your
 16 comments?
 17 A. Yes, I believe they are my comments. The
 18 headers are underlined in the attachment. I don't
 19 think I created that part of it, but the comments
 20 within the body are mine. I recognize them.
 21 MR. KRAY: To clarify the record, are you
 22 referring to the e-mail or the attachment underlining
 23 in your question, Mr. Witek?
 24 MR. WITEK: I was referring to both.
 25 A. And my response is to include both the e-mail

1 established with reference to the number of samples per
 2 area?
 3 A. I'm not sure I understand your question.
 4 You determine the over 95th percentile
 5 confidence limit using the data from the samples that
 6 are obtained, the test results that are obtained. In
 7 this case it's referring to a site, data from a site.
 8 Q. What number of samples are required to reach
 9 a 95 percent confidence limit?
 10 A. We don't specify a minimum number of samples
 11 in the rule. I suppose the technically correct answer
 12 is more than one.
 13 Q. So your comment here was that the sampling
 14 frequency is insufficient to determine compliance with
 15 the MTCA standards; that to comply with the standards a
 16 site must meet three requirements and the first is a 95
 17 percent confidence limit on test results?
 18 A. The first criteria is the upper 95th
 19 confidence limit on the test results must meet the
 20 standard.
 21 Q. And the sampling frequency that you are
 22 commenting on is the sampling -- the first sampling
 23 schedule in the boxes underneath the text on Page 23;
 24 is that correct?
 25 A. No. I believe I was commenting on the third

1 and the attachment. It's the attachment has some
 2 underlined headers that I believe were part of the
 3 original document that was sent to me, and from what I
 4 can recall I didn't add those.
 5 Q. (BY MR. WITEK) Mr. Kmet, you can see there's
 6 some numbering in the lower right-hand corner of the
 7 pages.
 8 A. Yes.
 9 Q. Can you turn to Page 23 of Exhibit 31.
 10 A. Yes.
 11 Q. So this is your comment in the third
 12 paragraph that's underlined discussing sampling
 13 frequency?
 14 A. That's correct.
 15 Q. Can you explain to me the reference to a 95
 16 percent confidence limit?
 17 A. What I'm referencing here are the
 18 requirements for determining compliance with the MTCA
 19 cleanup standards that are in WAC 173-340-740.
 20 Q. How do you establish what a confidence limit
 21 is?
 22 A. It's a statistical test. You take samples
 23 and run the statistical test to determine the upper
 24 95th confidence limit on the test results.
 25 Q. Is the 95 percent confidence limit

1 set of boxes on Page 24. These first two boxes are
 2 part of my comment.
 3 Q. Thank you.
 4 So looking at Exhibit 31, Page 24, the
 5 sampling schedule that you reviewed, how is it, looking
 6 at this sampling schedule, that you reached the opinion
 7 the sampling frequency was insufficient?
 8 A. Well, again, this comment is in the context
 9 of the MTCA standards and it may or may not be
 10 sufficient, depends on how scattered the data is,
 11 whether or not that will be enough samples to
 12 demonstrate that your upper 95th confidence limit on
 13 your test results is meeting the standard.
 14 Q. How does the sampling schedule that you were
 15 asked to review compare to the sampling schedule that
 16 you included in your comments?
 17 A. Well, the first set of sampling schedule that
 18 I had suggested as an alternative is the one that's in
 19 our petroleum contaminated soil guidance and that has a
 20 lot higher sampling frequency than what was provided to
 21 me as proposed. The second block is -- was my
 22 recommendation for native soil borrow pits, basically
 23 clean areas.
 24 Q. And with respect to your recommendation for
 25 native soil borrow pits, how did you select the number

1 10 as the minimum number of samples?
 2 A. You know, I don't remember, but probably
 3 based on my experience with looking at data sets and
 4 trying to figure out approximately how many samples
 5 you'd need to try to demonstrate compliance with the
 6 MTCA cleanup standards. Again, it depends greatly on
 7 the variability of the data as to the number of samples
 8 you'd need.

9 Q. Going back to Page 23, in the third
 10 paragraph, this is on Exhibit 31, what was your second
 11 principal recommendation?

12 A. The second point is again just a reiteration
 13 of something that's in the rules which is that "No more
 14 than 10 percent of the samples can be above the
 15 standard."

16 Q. And what was your third principal
 17 recommendation?

18 A. Again, the third requirement is a reiteration
 19 of a requirement that's in the rule that no one soil
 20 sample can be more than twice the standard.

21 Q. So these comments were delivered from you to
 22 Mr. Fitzpatrick; is that correct?

23 A. That's what it appears from this e-mail that
 24 I sent these comments -- this e-mail to Kevin
 25 Fitzpatrick on September 8th, 2000.

1 A. It looks like it's the same schedule that I
 2 commented on as part of this e-mail, and it wasn't
 3 changed.

4 (Deposition Exhibit No. 32 was marked for
 5 identification.)

6 Q. (BY MR. WITEK) Mr. Kmet, does Exhibit 32
 7 look familiar?

8 A. Yes. It's a copy of an e-mail.

9 Q. Did you express concern to Mr. Yee about the
 10 arsenic limits that were proposed for the fill criteria
 11 in the 401 Certification?

12 A. According to this I did.

13 Q. Do you remember having discussions with
 14 Mr. Yee about arsenic?

15 A. I don't remember if it was to Chung Yee or
 16 someone, but I think in an earlier e-mail or one of
 17 these e-mails I did make a comment about that. And I
 18 don't remember if I had a conversation with him in
 19 addition to those e-mails or what. I did mention it to
 20 either Kevin or Chung. This says I was talking to him,
 21 so I'll assume it's correct.

22 Q. This e-mail says, "He think," and I think
 23 thinks was intended, "20 is too high and it should be
 24 set to background. Background in Western Washington is
 25 7 to 8." Is this description consistent with your

1 Q. Did Mr. Fitzpatrick respond to your comments
 2 and suggestions?

3 A. No, I don't remember. If he did and I had an
 4 e-mail, I would have provided that to you.

5 Q. Do you know whether your recommendations with
 6 regard to sampling frequency were incorporated into the
 7 401 Certification?

8 A. I'm not sure which document you're referring
 9 to. Maybe we should start there.

10 Q. It's the one that has the September 21, 2001
 11 date on it, and it's also labeled Exhibit 1 in the
 12 lower right-hand corner, and discussion of the fill
 13 criteria begins on Page 13 of 33.

14 MR. KRAY: Which -- Exhibit No. 1?

15 MR. WITEK: Sorry, it's Exhibit 1.

16 A. And your question again is.

17 Q. (BY MR. WITEK) I'll just ask a new question
 18 and we'll move forward.

19 Is there a sampling schedule in the September
 20 21, 401 Certification which is Exhibit 1?

21 A. I see a sampling schedule on Page 16 of that
 22 document.

23 Q. And can you tell me how that sampling
 24 schedule compares to the schedule you recommended in
 25 the document that we're referring to as Exhibit 31?

1 memory of the discussions you had about arsenic?

2 A. Yes.

3 Q. And is that still your opinion today?

4 A. I'm not sure what -- in relation to what?

5 Q. Is it still your opinion that the fill
 6 criteria should be set to Western Washington background
 7 as opposed to 20 milligrams per kilogram?

8 A. I'm not sure I can answer that question. In
 9 the context of the current certification, I haven't
 10 done any evaluation of that. My recollection to this
 11 conversation was in relation to the Method A cleanup
 12 level, and at the time that standard was originally
 13 promulgated in 1991, we believed 20 was natural
 14 background for arsenic. Since then we've done sampling
 15 throughout the state and learned that in Western
 16 Washington, background is more on the order of 7 to 8
 17 parts per million or milligrams per kilogram. And so
 18 if I recall this discussion, the context of, if you're
 19 going to set a standard based on natural background,
 20 then you should be using 7 or 8, not 20, is the essence
 21 of the conversation.

22 Q. Do you know what the limit is for arsenic .
 23 the September 21 401 Certification?

24 A. If it's the one on Page 17, it's 20
 25 milligrams per kilogram.

1 Q. Did anyone ever respond to your comments or
2 suggestions regarding arsenic?

3 A. Again, I don't remember. There may have been
4 an e-mail. Again, if I printed a copy out of it, I
5 would have provided it to you.

6 (Deposition Exhibit No. 33 was marked for
7 identification.)

8 Q. (BY MR. WITEK) Mr. Kmet, does Exhibit 33
9 appear to be a copy of an e-mail from yourself to Chung
10 Yee sent on September 11th, 2000?

11 A. Yes.

12 Q. Does this look familiar?

13 A. Yes.

14 Q. Did you raise concerns about arsenic in this
15 e-mail?

16 A. Yes.

17 Q. This e-mail states, "I think you need to look
18 carefully at that value as the calculations indicate
19 the current Method A arsenic soil cleanup level may not
20 always be protective." Can you tell me what the
21 current Method A arsenic soil cleanup level was at the
22 time you wrote this e-mail?

23 A. 20 milligrams per kilogram or parts per
24 million.

25 Q. Did you express concerns about diesel, heavy

1 A. Yes. It is Table 749-3.

2 Q. And can you tell me what page number that's
3 on in the lower right-hand or left-hand corner?

4 A. Of Exhibit 28?

5 Q. That's correct.

6 A. Page 243, at least part of it's there. Part
7 of it's on Page 244 also.

8 MR. WITEK: Does anybody mind if we take a
9 five-minute break.

10 (Recess taken.)

11 Q. (BY MR. WITEK) Mr. Kmet, in Exhibit 33, did
12 you recommend the use of the values for terrestrial
13 ecological protection?

14 A. I'd suggested that Chung look at those
15 values.

16 Q. And those values are the ones in the table
17 that you've identified in Exhibit 28, Page 243 and 244?

18 A. That's correct.

19 Q. Can you turn to also -- if you have enough
20 desk space, table space -- to Exhibit 1, it's the
21 September 21 certification, Page 17 of 33. Can you
22 tell me how the fill criteria limitation for antimony
23 in the 401 Certification compares to the levels in
24 Table 749-3?

25 A. The level in the certification is 16

1 oil and mineral oil?

2 A. Yes.

3 Q. In the second paragraph from the bottom, you
4 stated, "Also, all of these values are based on human
5 health exposure pathways and do not take into account
6 ecological concerns." Can you explain to me what you
7 meant by "ecological concerns"?

8 A. Well, in the context of the soil cleanup
9 levels, these standards in the Method A tables at that
10 time were largely considering leaching and -- leaching
11 and the potential for contamination of groundwater and
12 direct human contact with the soil. Ecological
13 concerns are not directly taken into account and those
14 values. By ecological concerns I mean potential
15 impacts on plants, animals, wildlife, surface water
16 impacts.

17 Q. What were the ecological indicator
18 concentrations you were referring to in this e-mail?

19 A. I'm referring to specific Table 2 which I
20 believe is the now tables in the final adopted rule
21 Table 749-3, I think.

22 Q. Is the exhibit you're referring to now
23 Exhibit 28?

24 A. Yes.

25 Q. Have you identified the appropriate table?

1 milligrams per kilogram and the value in Table 749-3 is
2 5 milligrams per kilogram.

3 Q. Do you remember whether you had any
4 discussions or further e-mail exchanges with Chung Yee
5 or Kevin Fitzpatrick following your e-mail that's
6 Exhibit 33 regarding the issues you raised in the
7 e-mail?

8 A. There may have been some. I don't remember
9 if they were before or after this particular e-mail.
10 There was a series of e-mails that went back and forth
11 right about this time and, again, the ones that I had
12 printed out copies of I provided to my counsel anyway.
13 I assume you've received those.

14 (Deposition Exhibit No. 34 was marked for
15 identification.)

16 Q. (BY MR. WITEK) Mr. Kmet, does Exhibit 34
17 look familiar?

18 A. Yes, it's an e-mail I received from Craig
19 Thompson, June 7th.

20 Q. This e-mail states in part, the second
21 sentence, "Chung Yee and I would like to sit down with
22 you this coming Monday, 6/11/01, and talk (up to an
23 hour -- maybe less) about the concerns you expressed as
24 outlined below." Do you recall whether or not any such
25 sit down occurred?

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1 A. You know, I think we briefly met, but I don't
2 remember going into any details about this -- these
3 concerns. I don't even remember what we talked about,
4 but I know that we -- I know that at some point I
5 didn't -- we were going to meet and we had a brief
6 conversation and we didn't end up going into any
7 detailed conversation about this project.

8 (Deposition Exhibit No. 35 was marked for
9 identification.)

10 Q. (BY MR. WITEK) Mr. Kmet, does Exhibit 35
11 look familiar?

12 A. I don't know as if I've ever seen this
13 particular e-mail. I may have.

14 Q. This e-mail states in part that, "On Monday,
15 June 11, Mr. Craig Thompson had a limited discussion
16 with Mr. Pete Kmet of the HQ/TCP on this project.
17 Mr. Kmet recommended MTCA should not be used for the
18 establishment of clean fill criteria for the
19 Seattle-Tacoma International Airport Third Runway
20 project. However, if MTCA is to be used for this
21 purpose, Mr. Kmet further recommended all other
22 requirements of the MTCA should be applied for the
23 establishment of a clean fill criteria."

24 Do you think this is an accurate
25 characterization of a conversation you had?

1 A. I think in another e-mail I expounded on
2 that. But basically -- in fact, I think we may have
3 talked about it earlier in one of these earlier
4 e-mails. But it had to do with the testing
5 requirements, making sure that all of the various
6 requirements, not just the Method A standards, are
7 complied with if they're going to use MTCA in that
8 manner.

9 Q. Do you still have the document labeled
10 Exhibit 31?

11 A. Yes.

12 Q. Is your comment about sampling frequency on
13 Page 23 of Exhibit 31 one of the other requirements of
14 the MTCA referred to in Exhibit 35?

15 A. Yes, I believe so.

~~16 Q. On Exhibit 35 which is the e-mail from Chung
17 Yee to Kevin Fitzpatrick, Mr. Yee states or wrote,
18 "Since his recommendations are considered as the
19 department policy with respect to this project,
20 therefore it would be inappropriate for me to comment
21 on his recommendations."~~

~~22 Who do you take it Mr. Yee is referring to in
23 this e-mail?~~

~~24 MS. BARNETT: Objection, calls for
25 speculation~~

1 A. Yeah. Now that I see this, I think this is
2 referring to this earlier meeting that was referred to
3 in that e-mail, and I think it is an accurate
4 description of what I remember the discussion. We
5 didn't get into detail about the criteria. It was more
6 a conceptual level discussion which I think this
7 captures.

8 Q. So conceptually on June 11th, 2001, you
9 disagreed with using MTCA for the establishment of
10 clean fill criteria for the airport third runway
11 project?

12 A. That's what this is saying that I said at
13 that time.

14 Q. And what was your conceptual objection?

15 A. To what?

16 Q. To the use of MTCA for the establishment of
17 clean fill criteria for the SeaTac Airport third runway
18 project.

19 A. Well, I think the essence of my concern was
20 that the MTCA cleanup criteria are developed for the --
21 to set standards for the cleanup of contaminated sites
22 and that's what they're supposed to be used for, not
23 for establishing what is or isn't clean fill.

24 Q. Do you know what the other requirements of
25 MTCA are that are referred to in this e-mail?

~~1 A. I think he's referring to me. I guess you
2 have to ask him.~~

~~3 Q. (BY MR. WITEK) Mr. Kmet, is there anyone
4 else from your unit at the Toxics Cleanup Program that
5 provided clean fill policy advice to the Northwest
6 Region office?~~

~~7 MR. KRAY: Objection to the form of the
8 question.~~

~~9 Q. (BY MR. WITEK) Is there anyone else from
10 your office that provided comments, suggestions or
11 recommendations to the Northwest Region office
12 regarding clean fill criteria?~~

~~13 A. Well, I don't know. One of these e-mails
14 shows that Craig Thompson was involved in the
15 discussions and he's in our office. Beyond that I
16 don't know who's had conversations about clean fill
17 criteria.~~

~~18 (Deposition Exhibit No. 36 was marked for
19 identification.)~~

~~20 Q. (BY MR. WITEK) Mr. Kmet, is Exhibit 36 an
21 e-mail from yourself to Kevin Fitzpatrick on June --
22 2001?~~

~~23 A. That's correct, yes. It's a copy of it, Ann
24 Kenny's copy.~~

~~25 Q. In the second paragraph in the e-mail, copy~~

1 of the e-mail that is Exhibit 36, it states, "Note that
2 this does not address potential human health exposure
3 pathways or protection of aquatic organisms, which will
4 need to be addressed with other language." Do you
5 remember if anyone ever responded to this comment?

6 A. I don't remember. There may have been other
7 e-mails. I don't remember anybody specifically
8 responding.

9 Q. Do you know if any language was included in
10 the 401 Certification to address these concerns?

11 A. My understanding is that these criteria that
12 when they were developed by Chung Yee, he did look at
13 these pathways.

14 Q. What is meant by a human health exposure
15 pathway?

16 A. It would be -- in the context of this e-mail,
17 I was probably thinking of the direct pathway -- person
18 coming in direct contact with the soil, either
19 ingesting it or dermally being exposed to it or
20 drinking water that may have been contaminated by
21 leaching of contaminants from the soil.

22 Q. So this e-mail lists several recommendations
23 from you; is that correct?

24 A. Yes.

25 Q. And what was your second principal

1 Q. (BY MR. WITEK) And was it your
2 recommendation that the most restrictive value in Table
3 749-3 should be used?

4 A. Yes.

5 Q. And that table is Exhibit 28 on the Page
6 marked 233 through 244?

7 A. Yes.

8 Q. Can you compare for me the most restrictive
9 value in 749-3 to the fill criteria listed in the 401
10 Certification, Exhibit 1 on Page 17?

11 A. Yes.

12 Q. Is the certification criteria for antimony
13 lower or higher than the most restrictive value in
14 Table 749-3?

15 A. Antimony is listed as 16 in the certification
16 and in Table 749-3 it's 5, so it's higher.

17 Q. How about with respect to arsenic?

18 A. Arsenic is 20 in the certification and most
19 stringent value in -- well, it depends on what type of
20 arsenic you're referring to, but Table 749-3, the value
21 for arsenic III is 7. Arsenic V, the most stringent is
22 10.

23 Q. What's the difference between arsenic III and
24 arsenic V?

25 A. The valent state of the arsenic.

1 recommendation?

2 A. I said, "Second, I am recommending we require
3 the fill material to meet the most stringent value in
4 Table 749-3 unless bioassay testing is conducted that
5 demonstrates the fill is not toxic to plants and
6 animals."

7 Q. Do you know whether bioassay testing is
8 incorporated into the 401 Certification?

9 A. I don't know.

10 Q. Would you like to take a couple minutes to
11 look at it?

12 A. I would have to review the whole thing here
13 in order to answer that question. Do you really want
14 me to do that?

15 Q. Mr. Kmet, can you answer the question with
16 respect to the portion of the 401 Certification that's
17 listed as Condition E which begins on Page 14 of 33 in
18 Exhibit 1 and continues through to Page 19 of 33?

19 A. I can review those pages right now.

20 MR. KRAY: While he does that, why don't we
21 take a short break.

22 MR. WITEK: That's fine.

23 (Recess taken.)

24 A. Yes. I don't see any specific reference to
25 bioassays in that part of the permit or certification.

1 Q. In layman's terms, what's a valent state?

2 A. The form that the arsenic is in. In any
3 event, 20 is higher than the most stringent value for
4 both of those forms of arsenic in Table 749-3.

5 Q. How does the fill criteria limit for chromium
6 in the 401 Certification compare to the most
7 restrictive value listed on Table 749-3?

8 MR. KRAY: Go off the record for just a
9 second.

10 MR. WITEK: Sure.

11 (Discussion off the record.)

12 A. Well, the total chrome value in the
13 certification looks like it's 42, and the most
14 stringent total chrome value in Table 749-3 is 42. So
15 they're the same number. And then it goes on to say
16 total chrome of 2000 in the certification -- fill with
17 total chrome concentrations greater than 42 and less
18 than 2000 may be placed to within six feet of the
19 ground surface. No fill with a total chrome
20 concentrations greater than 42 may be placed within the
21 first six feet of the embankment.

22 Q. (BY MR. WITEK) Do you take that to mean that
23 42 milligrams per kilogram is the certification limit
24 applicable to the first six feet and that 2000
25 milligrams per kilogram is the 401 Certification limit

1 for chromium applicable to everything outside of the
2 upper six feet?

3 A. I'm not sure what the first six feet means.
4 Is it the bottom first six feet or the upper first six
5 feet? It's not clear to me what that refers to. But
6 anyway, there are two limits in the certification, to
7 answer your question, for total chrome, 42 and 2000,
8 and the Table 749-3 uses 42 as the most stringent
9 number. For chrome VI, 19 as specified in the footnote
10 to the Water Quality Certification table, and I don't
11 see a chrome VI number in --

12 Q. That's okay.

13 A. -- this table.

14 Q. I won't ask you to continue with chromium any
15 more.

16 I would ask you to make the comparison
17 between the -- I am asking you to make the comparison
18 between the fill criteria in the 401 Certification and
19 the most restrictive value on Table 749-3 with respect
20 to both selenium and silver.

21 A. For selenium the Water Quality Certification
22 requires -- uses 5. And the most stringent value in
23 Table 749-3 is .3.

24 For silver the value in the Water Quality
25 Certification is 5 and the most stringent value in

1 antimony?

2 A. There are a variety of them.

3 Q. Why are there a variety of them?

4 A. Probably reflecting the responses that we
5 received from various labs when we put this table
6 together.

7 Q. How many PQLs are there for antimony?

8 A. Well, there's a column labeled as PQL that
9 lists 1.5 and 16 as PQL, but it also provides a range
10 depending on the laboratory method anywhere from .00025
11 to 10 milligrams per kilogram.

12 Q. How does the or how do the two PQLs for
13 antimony compare to the most restrictive value on Table
14 749-3 for antimony?

15 A. Well, Table 749-3 uses 5 as the most
16 stringent value. As I mentioned before, PQLs in this
17 table that are part of implementation Memo No. 3 range
18 from .00025 to as high as 16.

19 Q. You stated earlier that this memo was dated.
20 Do you know whether additional PQLs have been
21 established since this memo was drafted?

22 A. I don't know, but we are intending eventually
23 to update this memo now that the new regulation has
24 been put in place.

25 Q. In the first listed test method for antimony

1 Table 749-3 is 2.

2 Q. Mr. Kmet, are you familiar with the term
3 practical quantitation limit?

4 A. Yes.

5 Q. Can you refer to the exhibit that's already
6 been marked as 26?

7 A. Yes.

8 Q. What is a practical quantitation limit in
9 layman's terms?

10 A. My understanding of the term is that's a
11 concentration that the lab can quantify. That's the
12 lowest concentration that a lab can quantify using that
13 particular analytical method.

14 Q. Does Exhibit 26 contain a table?

15 A. Yes.

16 Q. Does this table look familiar to you?

17 A. Yes.

18 Q. Can you just generally tell us what it is?

19 A. It's a summary of the practical quantitation
20 limits that we provided as part of this implementation
21 Memo No. 3. It's a summary of the PQLs that we
22 obtained from a variety of labs throughout the state
23 for various analytical methods. I might add this memo
24 is pretty dated, written in '93.

25 Q. Is there a PQL expressed in this table for

1 which has the No. 16 in the PQL column, there's a
2 thumb's up in the following column. Do you know what
3 that indicates?

4 A. I don't remember.

5 (Deposition Exhibit No. 37 was marked for
6 identification.)

7 A. I've seen another version of this that
8 defines those flags that are in here. I don't remember
9 what they are. One means it passes, the other means it
10 fails in comparison to the cleanup standards, I
11 believe.

12 Q. (BY MR. WITEK) Mr. Kmet, I'm handing you a
13 document, it's identified as Exhibit 37. Can you take
14 a few minutes to familiarize yourself with that.

15 On Exhibit 37, on the Page No. 3 of 4 in the
16 upper right-hand corner, does the second to the last
17 paragraph on the page explain what the thumb's up
18 means?

19 A. Yes. It indicates in some instances
20 indicated by a thumb's up icon in the tables, the labs
21 were able to attain a PQL lower than the federal PQL.
22 For example, Table II for soil indicates antimony
23 Method 6010 attains a PQL range of 1.5 to 10 milligrams
24 per kilogram with a PQL of 16 milligrams per kilogram.

25 I'm sorry, I don't -- it's been a long time

1 since I looked at this particular guidance document. I
2 did not develop this particular guidance.

3 Q. So with respect to Exhibit 26 and the two
4 listed testing methods for antimony, do you have any
5 reason to believe that Method 6010 is any more reliable
6 than Method 7041?

7 A. I don't -- no, I don't know.

8 Q. If antimony levels of 5 milligrams per
9 kilogram is a concern, would you use Method 6010 or
10 Method 7041 for measuring antimony levels?

11 A. I think it would depend on the circumstances
12 at the site and how easy or difficult it is to use
13 these various analytical methods.

14 Q. Can you turn to the page marked Page 7 in the
15 bottom of the middle of Exhibit 26?

16 MS. BARNETT: I'm sorry, would you repeat
17 that?

18 MR. WITEK: It's the page marked Page 7 in
19 the bottom middle of Exhibit 26 which is the attached
20 PQL chart.

21 Q. (BY MR. WITEK) Are there multiple PQLs or
22 testing methodologies for both selenium and silver?

23 A. Yes, there are several indicated here.

24 Q. So it's true that there are
25 some -- well, what are the various ranges for the PQLs

1 A. It looks like it's .125 for selenium in
2 implementation memo --

3 Q. I'm sorry, I was referring to Table 749-3,
4 Exhibit 28.

5 A. I'm sorry. Your question again?

6 Q. Isn't it true that the most restrictive value
7 in Table 749-3 for selenium is 1?

8 A. No, it's .3.

9 Q. And what's the lowest PQL for selenium
10 identified in Exhibit 26?

11 A. .125.

12 Q. And what's the most restrictive value in
13 Table 749-3 for silver?

14 A. 2 milligrams per kilogram.

15 Q. Is there a PQL in Exhibit 26 for silver
16 that's capable of detecting silver at concentrations of
17 2 milligrams per kilogram?

18 A. It appears there are labs that said they
19 could achieve or quantify a concentration of silver
20 below 2 milligrams per kilogram based on the
21 information in this memo.

22 Q. Referring you now back to Exhibit 36.

23 A. Maybe I should -- I'm not an expert in
24 chemistry, but the range of PQLs that's provided here
25 is again a summary of what we receive back from labs

1 for selenium and silver?

2 A. For selenium it looks like the methods vary
3 anywhere from .125 milligrams per kilogram to 20
4 milligrams per kilogram. For silver they vary from it
5 looks like .05 to 5 milligrams per kilogram.

6 Q. And how does that compare with the most
7 restrictive value in Table 749-3 for selenium and
8 silver?

9 MR. KRAY: Objection. Mr. Witek, these
10 tables speak for themselves and I think it's an
11 unnecessary consumption of time to walk through them.
12 Either the table has the number or it does not have the
13 number.

14 MR. WITEK: I'm going to do it and it's my
15 deposition so I'll try to move along, but please bear
16 with me.

17 A. The value of 5 milligrams per kilogram for
18 silver is within the range of PQLs provided in
19 implementation Memo No. 3. And the value of 5 for
20 silver is within -- it looks like it's above the range
21 or -- no, it's within the range of values that's
22 provided for PQLs in implementation Memo No. 3.

23 Q. (BY MR. WITEK) So isn't it true that the
24 most protective value in the three columns in Table
25 749-3 for selenium is 1?

1 and -- my understanding depends heavily on the
2 background, the matrix background, what other
3 contaminants are in that material, clearly the
4 analytical method makes a difference, whether they even
5 have the equipment to run these tests, and again some
6 of these methods may have changed since 1993. So I'm
7 not sure where you're going with all of this, but I
8 wouldn't take this Memo Implementation No. 3 to
9 characterize the state of the art in analytical methods
10 today.

11 Q. So is it possible that the PQLs are higher
12 now?

13 A. They may very well be or they could be lower.
14 That would take some checking with labs to see what
15 they can do under the circumstances that you're -- type
16 of soil you're trying to analyze, what other
17 contaminants are in it, what method you're using to
18 analyze the soil or prepare the soil. There's a
19 variety of factors that come into play that establish
20 PQLs.

21 Q. Do you think it's more likely if the values
22 have changed that they're higher or lower?

23 A. You know, I'm not sure. It all depends on --
24 well, I don't know, you know. Generally speaking,
25 technology gets better and you can detect things lower,

1 but it all depends on what kind of interferences they
2 have and how they're analyzing the soil sample. There
3 are also some of these methods I think are probably
4 pretty specific and kind of unique methods that not
5 everybody could do or very few labs or maybe one lab
6 can do so there might be some really low PQLs here, but
7 from a practical point of view it would be very
8 difficult to achieve those on a routine basis. So it
9 really would take a look at -- you'd have to talk to
10 the labs and figure out practically what they can or
11 can't do.

12 Q. Do you know whether any of these factors were
13 considered in the establishment of the fill criteria
14 that were adopted in the 401 Certification?

15 A. I don't know.

16 Q. With reference to Exhibit 36 which is your
17 e-mail to Mr. Fitzpatrick, what was your fourth
18 recommendation?

19 A. "Fourth, because there can be considerable
20 variability in soil concentrations and it is not
21 possible to test every cubic inch of soil, I am
22 recommending that the statistical test methods
23 specified for soils in WAC 173-340-740 be used to
24 analyze any test data and demonstrate compliance with
25 these requirements."

1 Q. Should the certification include conditions
2 to address statistical testing methods?

3 A. Well, my recommendation was that statistical
4 methods be added to the certification. Should it,
5 think that's up to the person preparing the
6 certification and what was their intent.

7 MR. WITEK: Why don't we take a short break.

8 (Recess taken.)

9 Q. (BY MR. WITEK) Mr. Kmet, on Exhibit 36, you
10 made a recommendation regarding statistical test
11 methods; is that correct?

12 A. Yes.

13 Q. And you recommended the test methods
14 specified for soils in WAC 173-340-740?

15 A. That's correct.

16 (Deposition Exhibit No. 38 was marked for
17 identification.)

18 Q. (BY MR. WITEK) Is Exhibit 38 the regulations
19 that you were referring to for statistical testing
20 methods?

21 A. It includes them, yes.

22 Q. Can you direct me to the portions of Exhibit
23 38 that contain statistical test methods for specified
24 soils?

25 A. Yes. It's subsection 7 starting on Page 173

1 Q. Do you know if you got a response to this
2 comment in your e-mail?

3 A. I don't remember a specific response to that
4 comment. There may have been one.

5 Q. Do you know whether or not any changes were
6 made to the sampling schedule based upon these comments
7 that were ultimately incorporated into the 401
8 Certification?

9 A. I don't know.

10 Q. Can you look at Exhibit 1, Page 16 of 33. Is
11 that sampling schedule consistent with your fourth
12 recommendation in Exhibit 36?

13 A. Well, the sampling schedule really doesn't
14 relate to this recommendation. This recommendation is
15 referring to how you analyze the data you get once you
16 sample. So from what I can tell, there's no -- the
17 certification doesn't speak to how the data is to be
18 analyzed, just my reading of this part of the
19 certification.

20 Q. And you're referring to pages -- well, what
21 part of the certification are you referring to?

22 A. 14 through 19. I mean the implication is
23 it's a direct comparison, but there's no -- it doesn't
24 really say, so I guess you'll have to ask people who
25 wrote the certification on that.

1 Q. Is it possible to describe in layman's terms
2 what the testing protocols are that are called out for
3 in the section beginning on Page 173 of Exhibit 38 that
4 you referenced?

5 A. I'm sure it is.

6 Q. Take your time.

7 A. Are you asking me to do that?

8 Q. Yes, please.

9 MR. KRAY: For the record, I'm going to
10 object. The WAC speaks for itself. Mr. Kmet's
11 interpretation of the law may differ from what the law
12 says. So if you're asking him to give a legal
13 conclusion, I object.

14 A. Well, again, as I mentioned in my e-mail, in
15 general what this section is saying is is that there
16 are three parts to soil compliance criteria in the
17 rule. There's -- you've got to meet three parts to
18 this test. One is is that the upper 95th confidence
19 limit on the mean has to be less than the cleanup, soil
20 cleanup level, that no single sample concentration
21 shall be greater than two times the soil cleanup level,
22 and less than 10 percent of the sample concentration
23 shall exceed the soil cleanup level. Those are sort of
24 the three key elements of this. We do allow direct
25 comparison under certain limited circumstances as

1 specified in the rule. But if you're using statistical
2 methods, those are sort of the three key criteria that
3 have to be met under this rule.

4 Q. (BY MR. WITEK) For purposes of establishing
5 compliance with MTCA, why is it important that this
6 regulation be followed?

7 MR. KRAY: Objection, calls for a legal
8 conclusion. May call for a legal conclusion.

9 A. Well, these are the requirements in the
10 regulation. So if you're using MTCA on a cleanup site,
11 these are the requirements you have to comply with.

12 Q. (BY MR. WITEK) You mentioned earlier today
13 that the MTCA regulations had recently been revised; is
14 that correct?

15 A. Yes.

16 Q. Did that include parts of Exhibit 38?

17 A. This appears to be a -- the part of the
18 regulation that we adopted earlier this year, which was
19 the amendments to the cleanup regulation that were
20 adopted -- this is dated February 12th, 2001. I
21 believe that's the correct -- latest copy of the rule.

22 Q. Can you turn to Exhibit 1, Page 14 of 33 --
23 I'm sorry, Page 15 of 33. Are you familiar with the
24 environmental assessment that's called for in the third
25 full paragraph on Page 15 of 33?

1 A. Yes.

2 Q. The first section under that heading states,
3 "Toxic substances shall not be introduced above natural
4 background levels in waters of the state which have the
5 potential either singularly or cumulatively to
6 adversely affect characteristic uses, cause acute or
7 chronic toxicity to the most sensitive biota dependent
8 upon those waters, or adversely affect public health,
9 as determined by the department."

10 A. I see that.

11 Q. With reference to Exhibit 36, your June 27,
12 2001 comments, do you believe the fill criteria that
13 you were reviewing in this e-mail would assure
14 compliance with the standard in the first section of
15 173-201A-040?

16 MR. KRAY: Objection, calls for a legal
17 conclusion, lack of foundation.

18 A. Well, I don't -- there are no criteria in
19 this particular set of e-mails. What criteria are you
20 referring to?

21 Q. (BY MR. WITEK) The fill criteria as they
22 existed on June 27, 2001, do you have an opinion as to
23 whether they would be effective to prevent toxic
24 substances being introduced above natural background
25 levels in waters of the state at the SeaTac Airport?

1 A. I'm familiar with them. I haven't looked at
2 those particular standards for quite some time. I
3 assume you're referring to the ASTM procedures in the
4 third paragraph here, E 1527-00 and E 1903-97. I've
5 seen those, I read them, but it's been quite a while
6 since I've looked at them.

7 Q. Do you know whether a Phase I requires soil
8 sampling?

9 A. You know, I can't remember. I would have to
10 review those documents again.

11 Q. Mr. Kmet, do you have a copy of Exhibit 5?

12 A. Yes.

13 MR. KRAY: Off the record for a moment.
14 (Discussion off the record.)

15 MR. WITEK: Take a short break.
16 (Discussion off the record.)

17 (Deposition Exhibit No. 39 was marked for
18 identification.)

19 Q. (BY MR. WITEK) Mr. Kmet, do you have a copy
20 now of the document which has been labeled Exhibit 39?

21 A. Yes.

22 Q. Can you turn to what's labeled as Page 7 in
23 the bottom right-hand corner?

24 A. Yes.

25 Q. Do you see WAC 173-201A-040?

1 MR. KRAY: Objection, calls for a legal
2 conclusion, lack of foundation.

3 A. Could you tell me which criteria specifically
4 you're referring to? I mean the substance of this
5 e-mail is me providing comments about a very specific
6 issue, series of issues. I do say that what I'm
7 addressing in this e-mail doesn't address protection of
8 aquatic organisms. My e-mail is not addressing WAC
9 173-201A-040.

10 MR. WITEK: Thank you, Mr. Kmet. I don't
11 have any more questions for you.

12 MR. KRAY: Nothing.
13 (Deposition concluded at 3:54 P.M.)
14 (Signature reserved.)

AR 001787

CORRECTION & SIGNATURE PAGE

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RPR AIRPORTS COMMUNITY COMBITION V. STATE
OF WASHINGTON, ET AL.
POLLUTION CONTROL HEARINGS BOARD, PCHB No. 01-160
DEPOSITION OF: PETER KMET, P.E., DECEMBER 19, 2001

I, PETER KMET, P.E., have read the
within transcript taken DECEMBER 19, 2001, and the same
is true and accurate except for any changes and/or
corrections, if any, as follows:

PAGE LINE CORRECTION

Signed at _____,
on the _____ day _____, 2002.

PETER KMET, P.E.

REPORTER'S CERTIFICATE

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I, CARLA R. WALLAT, the undersigned Certified Court
Reporter and Notary Public, do hereby certify:

That the testimony and/or proceedings, a transcript
of which is attached, was given before me at the time
and place stated therein; that any and/or all
witness(es) were by me duly sworn to tell the truth;
that the sworn testimony and/or proceedings were by me
stenographically recorded and transcribed under my
supervision, to the best of my ability; that the
foregoing transcript contains a full, true, and
accurate record of all the sworn testimony and/or
proceedings given and occurring at the time and place
stated in the transcript; that I am in no way related
to any party to the matter, nor to any counsel, nor do
I have any financial interest in the event of the
cause.

WITNESS MY HAND AND SEAL this 28th day of
December 2001.

CARLA R. WALLAT, RPR, CRR, CCR #WALLCR346BE
Notary Public in and for the State
of Washington, residing in King
County. Commission expires 1/17/02.

AR 001788

Erik Stockdale

January 23, 2002

ACC v. DOE

01-160

CONDENSED TRANSCRIPT AND CONCORDANCE
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AR 001789

JAN 30 2002

POLLUTION CONTROL HEARING BOARD
STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
Appellant,)
PCHB No. 01-160

DEPARTMENT OF ECOLOGY and the)
PORT OF SEATTLE,)
Respondent.)

DEPOSITION UPON ORAL EXAMINATION
OF
ERIK STOCKDALE

10:00 A.M.
JANUARY 23, 2002
1325 FOURTH AVENUE, SUITE 1500
SEATTLE, WASHINGTON

MARY L. GREEN, CCR, RPR
CCR NO. GREENML497RZ

JAN 30 2002

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1 SEATTLE, WASHINGTON; WEDNESDAY, JANUARY 23, 2002
 2 10:02 A.M.
 3 --oOo--
 4
 5 ERIK STOCKDALE
 6 sworn as a witness by the Notary Public,
 7 testified as follows:
 8
 9 EXAMINATION

10 BY MR. EGLICK:
 11 Q. Could you state your full name and your
 12 address for the record, please.
 13 A. My name is Erik Stockdale. I work for the
 14 Department of Ecology at 3190 - 160th Avenue Southeast
 15 in Bellevue, and the zip is 98008.
 16 Q. Mr. Stockdale, I'm Peter Eglick. I'm one of
 17 the attorneys for the Airport Communities Coalition,
 18 and I'm going to be taking your deposition this
 19 morning. Have you ever had your deposition taken
 20 before?
 21 A. Yes.
 22 Q. In connection with the third runway, have you
 23 ever had your deposition taken before?
 24 A. No.
 25 Q. And you understand that I'll be asking

1 questions and you'll be answering them under oath?
 2 A. Yes.
 3 Q. And if you don't understand a question, let
 4 me know so that I can make it more understandable to
 5 you?
 6 A. Yes.
 7 Q. When was the last time you had your
 8 deposition taken?
 9 A. I think it's been a couple of years, two and
 10 a half years perhaps.
 11 Q. And in what case?
 12 A. I was a tort claim against ecology and the
 13 State of Washington.
 14 Q. Involving wetlands?
 15 A. Yes.
 16 Q. And who brought the claim?
 17 A. It was brought against H. A. Bredberg and
 18 Dick Harman. They were the plaintiffs.
 19 Q. And what was the subject of the claim?
 20 A. The subject was their claim that ecology had
 21 damaged their reputation, I believe.
 22 Q. In what way?
 23 A. I would have to read their claim again to
 24 fully answer that. Essentially they felt that a letter
 25 that the regional director of ecology wrote to them

1 complaining about their physical aggression in the
 2 field constituted a damage to their reputation.
 3 Q. And who was the regional director?
 4 A. Mike Rundlett.
 5 Q. And had you been a witness to physical
 6 aggression in the field?
 7 A. I was the subject of the physical aggression,
 8 yes.
 9 Q. Have you ever testified in any case, whether
 10 by deposition or at trial concerning the third runway?
 11 A. No.
 12 Q. Have you ever testified concerning any
 13 property which the port has or will acquire in
 14 connection with the third runway?
 15 A. Can you clarify what you mean by testifying?
 16 Q. Provide testimony under oath in any form.
 17 A. No.
 18 Q. Have you ever consulted in any case
 19 concerning property which the port has or will acquire
 20 for the third runway?
 21 A. I guess I'd have to ask you what you mean by
 22 consult.
 23 Q. Provide comments.
 24 A. I was asked by Kevin Featherston to write a
 25 letter to it was either him or his client regarding

1 piece of property adjacent to the vacca farm that
 2 being condemned by the port.
 3 Q. And who was Kevin Featherston representing?
 4 A. I believe he was representing Novadyne
 5 Engineering, who I believe was his client in the case.
 6 Q. Novadyne Engineering owned the property in
 7 question?
 8 A. No. I don't believe so.
 9 Q. Who owned the property in question?
 10 A. I'm not sure.
 11 Q. Was Novadyne Engineering retained by a law
 12 firm in the case to which you're referring?
 13 A. I imagine they were.
 14 Q. Do you know?
 15 A. No, I don't.
 16 Q. Did you ever consult with anyone affiliated
 17 with the port concerning the condemnation case that
 18 you've just referred to?
 19 A. No. I don't believe so.
 20 Q. No advice or comments to anyone concerning
 21 port condemnation of Vacca Farm or adjacent property?
 22 A. Other than that letter, I don't believe so,
 23 no.
 24 Q. No conversations?
 25 A. I suppose that I believe I spoke with

1 Mr. Kelley about that property at one point in time
2 but I believe that's the limit.

3 Q. Mr. Kelley you haven't mentioned before, so
4 maybe you can explain who Mr. Kelley is.

5 A. Mr. Jim Kelley is the port's wetland
6 biologist.

7 Q. Now, why were you speaking to the port's
8 wetland biologist concerning that property?

9 A. I was asked by Mr. Featherston to -- I'm
10 trying to recall the issue, but it had to do with the
11 status of wetlands on the property. There was some
12 question about whether or not a delineation had been
13 done on the property, and if I recall correctly, I
14 asked Mr. Kelley if he had conducted a delineation on
15 the property.

16 Q. Did you discuss information which would
17 assist the port in reducing the valuation of the
18 property for condemnation purposes?

19 A. I don't know how that information was used.
20 The question that was raised or asked of me -- and I
21 believe the letter summarizes what my analysis was, but
22 it had to do with the question of the extent of
23 wetlands on that property.

24 Q. You weren't concerned with the issue of
25 valuation?

1 A. No.

2 Q. And you didn't have any information on the
3 issue of valuation?

4 A. No.

5 Q. And you weren't aware that valuation was what
6 the port was concerned about?

7 A. I imagine that that's what the condemnation
8 issue was about.

9 Q. I'm asking whether you were aware that
10 valuation was what the port was concerned about.

11 A. Yes.

12 Q. Did you provide information that would assist
13 the port in reducing the valuation of the property in
14 question?

15 A. I provided information that addressed the
16 regulatory status of the wetlands on the property.

17 Q. And was that part of your third runway
18 project activities?

19 A. It was related to the third runway project,
20 but it wasn't a task that was directly related to the
21 401.

22 Q. Did someone give you instructions to consult
23 with port representatives concerning matters relating
24 to their condemnation case?

25 MR. FEARCE: Objection: mischaracterizes

1 earlier testimony.

2 A. Did somebody -- what do you mean by somebody?

3 Q. (BY MR. EGLICK) Anyone.

4 A. I was asked by Mr. Featherston to respond to
5 the questions that he asked me.

6 Q. And you said to write a letter; is that
7 right?

8 A. That's correct.

9 Q. Did you follow the condemnation case in
10 question in terms of its outcome?

11 A. I believe I was contacted by an attorney -- I
12 don't know who she worked for, though -- and she sent
13 me -- I did receive a transcript of some hearings, but
14 I don't recall. But did I follow it? I don't
15 understand what you mean by follow it.

16 Q. Did you try to keep abreast of the outcome of
17 the case?

18 A. I don't believe so.

19 Q. So that wasn't a matter of any comment by
20 you; the outcome of the case, that is?

21 A. I don't recall, no.

22 Q. How many times have you been on the third
23 runway site?

24 A. Several dozen times.

25 Q. When was the last time?

1 A. I believe it was last summer.

2 Q. June?

3 A. I don't recall which month.

4 Q. When you say last summer, you mean the summer
5 of 2001?

6 A. Yes.

7 Q. Well, was it before the first 401 decision
8 came out?

9 A. It was before the first 401 -- I don't
10 actually remember when the 401 decision came out.

11 Q. August 10.

12 A. August 10. Yes. I believe so.

13 Q. Was it in August?

14 A. I don't recall which month.

15 Q. How did you happen to be out there?

16 A. We had a site visit with the assistant -- the
17 new assistant director for ecology.

18 Q. And who was that? You don't know who the new
19 assistant director of ecology is?

20 A. I do, but I'm trying to remember her name.

21 Q. I guess it wasn't a very memorable meeting,
22 huh?

23 A. I didn't say that.

24 Q. Well, can you remember her name?

25 A. Linda Hoffman.

1 Q. And who else was at the site visit?
 2 A. Ray Hellwig, Kevin Fitzpatrick. There were
 3 several other people. I don't recall who they were.
 4 There were a couple of people from the port.
 5 Q. Ann Kenny?
 6 A. I'm not sure if Ann was there or not.
 7 Q. Katie Walter?
 8 A. No. I don't believe Katie was there.
 9 Q. What was the purpose of the visit?
 10 A. The purpose of the visit was to familiarize
 11 Ms. Hoffman with the project.
 12 Q. Where did you go?
 13 A. We went to the -- there's a port trailer that
 14 -- office trailer that is on the west side. There's a
 15 new area that they've prepared a large trailer complex.
 16 We started there. We drove down, drove through the
 17 buy-out area. I believe we also drove down to the golf
 18 course area.
 19 Q. Anywhere else?
 20 A. I don't think so.
 21 Q. Now, you mentioned a port trailer area. What
 22 do you mean by trailer?
 23 A. Well, there is a mobile structure that is
 24 being used for office space. It's like a construction
 25 one-trip type building. It's not a permanent

1 structure.
 2 Q. And there's this one trailer in this area
 3 that you saw?
 4 A. I don't know if there are a couple of
 5 trailers that were hooked together or not. I don't
 6 remember.
 7 Q. Is there a parking area?
 8 A. Yes.
 9 Q. And where is it again?
 10 A. It's in the buy-out area on a slope above
 11 Miller Creek.
 12 Q. Are there any other places that you visited
 13 on your site visit other than what you just described?
 14 A. Well, I described the Miller Creek area, the
 15 buy-out area, and the golf course area.
 16 Q. Anything else?
 17 A. I don't believe so, no.
 18 Q. Did you see any signs of activity related to
 19 construction on that site visit?
 20 A. Yes.
 21 Q. What did you see?
 22 A. We looked at one of the stormwater management
 23 treatment ponds that was installed and in place.
 24 Q. Do you know which one?
 25 A. No, I don't.

1 Q. And when you say was installed, do you mean
 2 it had recently been installed?
 3 A. No. It's been there. I don't know when it
 4 was installed.
 5 Q. I asked whether you saw any signs of
 6 construction activity, and your response referred to
 7 this pond, so I'm wondering what the connection is.
 8 A. Well, the stormwater pond, the treatment
 9 system that is in place is being used to treat the
 10 run-off from the embankment construction that is being
 11 carried out on the port property.
 12 Q. And you saw embankment construction underway?
 13 A. Yes.
 14 Q. What did you see?
 15 A. Well, there's heavy equipment moving dirt and
 16 depositing dirt.
 17 Q. When you say heavy equipment, what do you
 18 mean?
 19 A. Tractor trailers.
 20 Q. More than one?
 21 A. A couple. I don't remember how many.
 22 Q. And you say they're used for embankment
 23 construction. How could you tell it was being used for
 24 embankment construction?
 25 A. Because you can see where they're depositing

1 material and laying it down.
 2 Q. By material, you mean fill dirt?
 3 A. Correct.
 4 Q. And where are they getting the fill dirt from
 5 if you saw?
 6 A. I did not see where they were getting the
 7 fill dirt from.
 8 Q. But you saw it being deposited; is that
 9 correct?
 10 A. I believe so, yeah.
 11 Q. What areas did you see it being deposited in?
 12 A. In one of -- there's an area that is east of
 13 the 12th Avenue or I believe a couple of areas where
 14 material is being laid down.
 15 Q. What are they?
 16 MS. MARCHIORO: objection; vague.
 17 A. Can you be more specific?
 18 Q. (BY MR. EGLICK) Yes. What are the couple of
 19 areas that you testified were where material was being
 20 laid down? Can you name them?
 21 A. No. I cannot name them.
 22 Q. Can you identify them geographically?
 23 A. Probably.
 24 Q. Go ahead.
 25 A. I would need some more information or I would

1 need a map to be able to do that.
 2 Q. You can't describe them verbally? East or
 3 west, north or south of some particular point?
 4 A. I said east and upslope of the 12th Avenue.
 5 Q. What other signs of construction activity did
 6 you see?
 7 A. We noted that some of the homes in the
 8 buy-out area had been removed, driveways removed,
 9 garbage removed, foundations removed. There was orange
 10 netting erected. Some of the area -- well, much of the
 11 area is fenced off.
 12 Q. Any other signs of construction activity that
 13 you saw?
 14 A. I don't recall anything else at this point.
 15 Q. Now, did you sign any document releases,
 16 anything of that sort in order to get access to the
 17 site?
 18 A. I don't believe so.
 19 Q. Were there any areas you wanted to see that
 20 you weren't allowed to look at?
 21 A. No.
 22 Q. Do you know Tom Luster?
 23 A. Yes.
 24 Q. How do you know him?
 25 A. I used to work with Tom at the Department of

1 Ecology.
 2 Q. And what was his position?
 3 A. Tom was a federal permit coordinator.
 4 Q. And how did you work with him?
 5 A. I worked on -- I worked on various projects
 6 with Tom that required a 401 certification.
 7 Q. What were they?
 8 A. Well, I don't recall all the projects, but I
 9 worked on the third runway project, the Willows Run
 10 golf course, several road projects in the King County
 11 area. Those are the ones that come to mind right now.
 12 Q. Did you work with him on the -- are you
 13 familiar with the Battle Mountain Gold application?
 14 A. No, I did not.
 15 Q. You're familiar with what it is, though?
 16 A. Yes.
 17 Q. And why is it that you didn't work with him
 18 on that?
 19 A. That's in eastern Washington.
 20 Q. Well, why would he be working on a project in
 21 eastern Washington and you're making it sound as if you
 22 wouldn't be? Why is that?
 23 A. The geographic area that I'm assigned to
 24 includes King, Kitsap, Snohomish, Skagit, San Juan
 25 Island, and Whatcom County. It's the seven counties in

1 the northwest region.
 2 Q. And what was his assignment? Wasn't it the
 3 same?
 4 A. No.
 5 Q. How so?
 6 A. Tom's assignments were not geographically
 7 based as far as I know the way mine are.
 8 Q. In other words, he had statewide
 9 responsibilities?
 10 A. When he became the lead 401 coordinator, his
 11 responsibilities, I think, were more statewide.
 12 Q. What does the lead 401 coordinator mean? Is
 13 that a DCE term? Why don't you explain to me what you
 14 mean by lead 401 coordinator.
 15 A. I believe Tom -- when Tom left ecology, he
 16 was the senior 401 coordinator at ecology.
 17 Q. For the whole state?
 18 A. For the state.
 19 Q. Now, are you a member of the Society of
 20 Wetland Scientists?
 21 A. I am.
 22 Q. And do you know whether Mr. Luster is?
 23 A. I believe he was.
 24 Q. Well, you say was. Do you have any reason to
 25 believe he isn't anymore?

1 A. No.
 2 Q. And what does that entail in terms of getting
 3 in?
 4 A. Paying \$50 a year.
 5 Q. That's it?
 6 A. Uh-huh.
 7 Q. So anyone can join? I could join the Society
 8 of Wetland Scientists if I paid \$50 a year?
 9 A. You could.
 10 Q. And there are no requirements for training or
 11 credentials?
 12 A. Not to become a member of the society. There
 13 are to become certified.
 14 Q. What's necessary to become certified?
 15 A. I would have to look at the application to
 16 answer that accurately.
 17 Q. Well, you were on the board of the society a
 18 number of years, weren't you?
 19 A. I was.
 20 Q. Do you have a general idea of what's
 21 necessary to become certified?
 22 A. You need a background in one of the
 23 biological or physical sciences that are listed in the
 24 application. There's, I believe, a minimum of five
 25 years of working experience as a wetland professional

1 in the field to be certified.
 2 Q. Now, what did you understand Tom Luster's
 3 role was with regard to the -- I believe you said you
 4 worked with him on the airport 401; is that right?
 5 A. That's correct.
 6 Q. What did you understand his role was?
 7 A. Tom's role in the airport project or any
 8 other project that requires an individual 401 is to
 9 work with the wetlands specialist and the other
 10 technical staff that are working on that project.
 11 Q. And do what?
 12 A. Well, it depends on which project, but
 13 generally speaking, Tom's responsibility is to write
 14 the permit decision that is based on the assessment
 15 made by the technical staff who are involved in the
 16 project.
 17 Q. And was it your understanding that Tom's role
 18 involved exercising some professional judgment himself?
 19 A. Yes. That fall within the scope of his
 20 responsibilities, sure.
 21 Q. What would be within the scope of his
 22 responsibilities to your understanding?
 23 A. Well, Tom's role in terms of administering
 24 the state-delegated authority under the Clean Water Act
 25 was to ensure that the subject property or project

1 meets state water quality standards.
 2 Q. Have you talked with Tom Luster recently?
 3 A. No.
 4 Q. When was the last time you talked with him?
 5 A. Last June.
 6 Q. How did you prepare if you did for having
 7 your deposition taken here today?
 8 A. I spoke with my attorney, and I attended a
 9 deposition training that she put on.
 10 Q. And that's Joan Marchione?
 11 A. That's correct.
 12 Q. Did you do anything else?
 13 A. I reread the prefile -- not prefile testimony
 14 -- the documents associated with this project again.
 15 What do you call them? They're not depositions, but
 16 the motions, I guess. Those are the documents that I
 17 looked at.
 18 Q. And did you talk to anyone else other than
 19 your attorney about your deposition?
 20 A. No.
 21 Q. Or anything related to preparation for your
 22 deposition?
 23 A. No.
 24 Q. Talk to Katie Walter?
 25 A. No, I didn't.

1 Q. Or review Katie Walter's deposition
 2 testimony?
 3 A. I read through it, yes.
 4 Q. Did you think that was part of the stay
 5 motion documents?
 6 A. Those are the documents I was referring to,
 7 yes.
 8 Q. Well, let me clarify, then. Katie Walter
 9 submitted what would be known as an affidavit or a
 10 declaration. That's a sworn statement when we were
 11 asking the PCHB for a stay. Is that what you read?
 12 A. Yes.
 13 Q. Did you read the transcript of her deposition
 14 which took place last week?
 15 A. No.
 16 Q. I wanted to clarify that.
 17 A. Oh, no, I'm sorry.
 18 Q. There's a difference, in other words, between
 19 a deposition, which is what we're doing here today, and
 20 a declaration.
 21 A. No.
 22 Q. Am I clearer now?
 23 A. Yes.
 24 Q. That's a good transition into what I'm going
 25 to hand out as an exhibit, your declaration.

1 (Deposition Exhibit No. 172 was marked for
 2 identification.)
 3 Q. (BY MR. EGLICK) Showing you what has been
 4 marked as Exhibit 172 to your deposition. Can you
 5 identify it?
 6 A. Yes. This is my declaration.
 7 Q. That you submitted to the Pollution Control
 8 Hearings Board in this case in opposition to a stay?
 9 A. Yes.
 10 Q. Did you write it?
 11 A. I did.
 12 Q. And did you consult with anyone in writing
 13 it?
 14 A. I consulted with my attorney.
 15 Q. Anyone else?
 16 A. I spoke with Katie Walter.
 17 Q. Anyone else?
 18 A. I believe that's all.
 19 Q. Now looking on page 3 of your deposition.
 20 Do you see you've got a footnote there referring to a
 21 publication?
 22 A. Yes.
 23 Q. And the two editors of the publication are
 24 who?
 25 A. Amanda AZOUS and Rich Horner.

1 Q. That's Amanda Azous, correct?
 2 A. Yes.
 3 Q. And Horner, H-o-r-n-e-r?
 4 A. Correct.
 5 Q. And who are they? Do you know them?
 6 A. Yes, I do.
 7 Q. Who are they?
 8 A. Well, Amanda Azous is present here today.
 9 Q. What do you know about her?
 10 A. I've known Amanda for 15 years.
 11 Q. Is she a wetlands expert?
 12 A. Yes, she is.
 13 Q. And Rich Horner---
 14 A. Rich Horner is a professor at the university.
 15 Q. I take it from your declaration that you
 16 worked on this project on which they published this
 17 final report?
 18 A. Yes.
 19 Q. What's a ratio zombie, Mr. Stockdale?
 20 A. I refer to that in paragraph 13 of my
 21 declaration.
 22 Q. Right.
 23 A. By that, the context of that was a discussion
 24 noting that we at ecology use ratios as guidelines to
 25 evaluate the adequacy of a mitigation project. By

1 ratio zombie, what I mean by that is and I quote that
 2 it's not -- it's important not to become a ratio
 3 zombie. It's important not to be totally or too
 4 focused on the ratio, because it's more important to
 5 look at the functions that are being evaluated in the
 6 project. You use the ratios as a guideline. You don't
 7 use them as the only decision-making tool.
 8 Q. Now, have you read the Pollution Control
 9 Hearings Board decision granting a stay in this case?
 10 A. Yes.
 11 Q. And are you familiar with its analysis on
 12 wetlands?
 13 A. I did read it, yes.
 14 Q. Did you think that that decision reflected a
 15 ratio zombie approach as you use the term?
 16 A. I would have to reread that, but it's not
 17 what comes to mind, no.
 18 (Deposition Exhibit No. 173 was marked for
 19 identification.)
 20 Q. (BY MR. EGLICK) Showing you what has been
 21 marked as Exhibit 173 to your deposition. Can you
 22 identify it?
 23 A. This is an e-mail that I sent to Tom Luster
 24 and Ray Hellwig on February 17, year 2000.
 25 Q. And this is summarizing a meeting that you

1 had with who?
 2 A. With Jim Kelley.
 3 Q. And would it be accurate to characterize this
 4 memo as setting out your position on various issues
 5 relating to wetlands and the third runway project as a
 6 result of that meeting? Take a minute and look at it.
 7 MR. EGLICK: Since the witness is taking a
 8 few minutes to read it, why don't we go off the record.
 9 (Discussion off the record.)
 10 A. Can you restate your question, please?
 11 Q. (BY MR. EGLICK) Why don't we have the
 12 reporter read it back.
 13 (The reporter read back as requested.)
 14 A. Can you define position?
 15 Q. (BY MR. EGLICK) What do you think position
 16 means?
 17 A. I'm asking you to clarify for me what you
 18 mean by my position.
 19 Q. I'm asking you what your understanding of the
 20 word position is, and since I'm asking the questions,
 21 I'd ask you to answer.
 22 A. I'm looking for clarification on your
 23 question right now.
 24 Q. You're saying that you don't know what the
 25 word position means?

1 Q. Since you don't understand what the word
 2 position means, what about your expert opinion, because
 3 I assume that ecology is offering you as an expert of
 4 some sort: is that correct?
 5 A. That is correct.
 6 Q. So assuming that you're an expert as ecology
 7 claims, is it accurate to say that this Exhibit 173 to
 8 your deposition sets out your in ecology's view expert
 9 opinion on issues relating to wetlands and the third
 10 runway as a result of a meeting with Mr. Kelley?
 11 A. That is correct.
 12 Q. Could you look at the third page of Exhibit
 13 173, and could you read that top paragraph on the page
 14 into the record, please?
 15 A. "I told Jim that there is an in-basin
 16 mitigation opportunity Ecology and EPA identified as
 17 desirable to the Port. The Port has, to date, not
 18 considered it. That is the headwater wetland in the
 19 Walker Creek basin. There is an undetermined amount of
 20 fill that can be removed from that wetland. This may
 21 be a mitigation opportunity the Port can purchase to
 22 raise their ratio to 1 to 1. If the FCHB asks me if
 23 the Port pursued all in-basin mitigation opportunities,
 24 I will have to say no."
 25

1 Q. Was this opportunity that you're describing
 2 here ever included as part of the port's plans?
 3 A. No.
 4 Q. So if the ECHB asked you if the port pursued
 5 all in-basin mitigation opportunities, then according
 6 to this memo, you're going to have to say no; is that
 7 correct?
 8 A. That's correct.
 9 Q. And that's still the case today; isn't that
 10 correct?
 11 A. Yes.
 12 Q. Looking down on this page, the third
 13 paragraph down you refer to an HGM-based method for
 14 evaluating wetland function; is that correct?
 15 A. Yes.
 16 Q. What is the HGM method?
 17 A. It is the Washington state wetland function
 18 assessment method.
 19 Q. Who came up with that method if that's the
 20 correct scientific term?
 21 A. The method was developed by a group of
 22 professionals in the northwest, and it was -- the
 23 effort was led by ecology.
 24 Q. And how is that method used?
 25 A. That method is used to assess wetland

1 functions for two classes of wetlands, riverine and
 2 depressional.
 3 Q. Are there any aspects of the port's various
 4 proposals relating to wetlands for the airport where
 5 that method would be apt to apply, a-p-t?
 6 A. It could be used to assess the functions of
 7 the riverine and the depressional wetlands.
 8 Q. So is that answer then a, yes, there are
 9 aspects of the port proposals where this method would
 10 be aptly applied?
 11 A. Yes.
 12 Q. And was it applied to your knowledge?
 13 A. To my knowledge, it was not.
 14 Q. And is this memo to your knowledge the reason
 15 -- expressed to your knowledge the reason why not,
 16 quote, because at the time that the port conducted its
 17 studies, the method was not available?
 18 A. That is correct.
 19 Q. Now, this memo was written in February 2000;
 20 is that correct?
 21 A. That's correct.
 22 Q. And when did the method become available?
 23 A. If I'm not mistaken, it was earlier in 2000
 24 that it was published.
 25 Q. Do you know -- are you familiar with the fact

1 that the port withdrew its 401 application and then
 2 resubmitted it?
 3 A. Yes.
 4 Q. And that occurred, didn't it, in the fall of
 5 2000?
 6 A. I believe so.
 7 Q. And that was after this Exhibit 173 was
 8 written, wasn't it?
 9 A. Yes.
 10 Q. And was there some point at which ecology
 11 considered having the port conduct its analysis
 12 pursuant to this HGM method after February 2000?
 13 A. No.
 14 Q. Now, just so I understand, if you look at
 15 this third paragraph again, the comment that you make
 16 here is, quote, the HGM-based method mentioned by Sarah
 17 -- that's Sarah Cook, isn't it?
 18 A. Yes.
 19 Q. And she was someone -- a wetlands expert who
 20 submitted comments on behalf of Airport Communities
 21 Coalition; is that correct?
 22 A. Yes.
 23 Q. So you're referring to a comment she made; is
 24 that correct?
 25 A. Yes.

1 Q. And she says or you say, quote, the HGM-based
 2 method mentioned by Sarah was just released by ecology.
 3 It was not available at the time that the port
 4 conducted its studies, so the comment is irrelevant,
 5 end quote. So was your point here strictly related to
 6 the timing between the port's studies and the HGM
 7 methods release --
 8 A. Yes.
 9 Q. -- when you use the term "irrelevant"?
 10 A. Yes.
 11 Q. So other than the timing issue, is there some
 12 other question of relevance that you meant to convey in
 13 this memo?
 14 A. I believe -- well, the port had also already
 15 done a function assessment using another method, and
 16 they already issued their report for the function
 17 assessment.
 18 Q. That's a timing issue, correct?
 19 A. They'd already conducted their function
 20 assessment, so, yes, I guess it is a timing issue.
 21 Q. Now, when applications were submitted to
 22 ecology in other areas or other applications that
 23 you're aware of after this HGM method was adopted by
 24 ecology, was that the method that ecology asked to be
 25 used in functional assessments; HGM, that is?

1 A. No.
 2 Q. So what is HGM used in, then?
 3 A. It's used for larger projects.
 4 Q. Let me reword the question, then. When
 5 larger projects came in after the HGM method was
 6 adopted, is that the method that ecology had used for
 7 determining function?
 8 A. I don't know if we've used it yet on any
 9 other project.
 10 Q. Have larger projects of the size of the
 11 airport project -- when you say larger project, what do
 12 you mean?
 13 A. I think of projects like the Auburn racetrack
 14 or large road projects, some of the Sound Transit
 15 projects that are being considered, projects requiring
 16 an individual 404 permit.
 17 Q. Now, what is it about the HGM method that
 18 makes it something that ecology applies to larger
 19 projects?
 20 A. The method applies to projects first of all
 21 where wetland impacts are to those two classes of
 22 wetlands. They don't apply to other -- they don't
 23 apply to sloped wetlands or to estuarine wetlands.
 24 Q. Estuarine wetlands means as if on the coast
 25 line, something like that?

1 A. Or in inner tidal areas.
 2 Q. Where there's -- would it be accurate to say
 3 where there's some kind of interaction with marine
 4 waters --
 5 A. Yes.
 6 Q. -- salt water?
 7 A. Yes.
 8 Q. Go ahead.
 9 A. I'm trying to recall your question.
 10 Q. Well, the question was what makes it a method
 11 that ecology applies to what you've called larger
 12 projects, and I think you were explaining.
 13 A. The method was intended to be a rapid
 14 assessment method, but the reality is that it's not.
 15 It requires a lot of training to learn how to use it,
 16 and it takes a fair amount of time to apply it.
 17 Q. Now, why does it take a fair amount of time
 18 to apply it?
 19 A. It would take somebody who was new to the
 20 method a lot of time. I imagine that with time
 21 somebody could become more adept at using it, but it's
 22 not a rapid method.
 23 Q. Now, why is it not a rapid method? Does it
 24 require, for example, more data than other methods?
 25 A. Yes.

1 Q. And is there something wrong with it
 2 requiring more data?
 3 A. No.
 4 Q. So it requires a more detailed look at
 5 functions; is that correct?
 6 A. Yes.
 7 Q. Could you look at page 4 of this Exhibit 173?
 8 Do you see I think it's the third paragraph down? It
 9 starts, "I told Jim."
 10 A. Yes.
 11 Q. Could you read that into the record if you
 12 would?
 13 A. "I told Jim we will restrict the use of the
 14 mitigation area so it can't be used for off-site
 15 regional stormwater control. He said the Port expects
 16 this restriction. My understanding is there is
 17 interest in the area to use the site for regional
 18 stormwater storage."
 19 Q. Now, what's that about?
 20 A. This refers to the Auburn wetland mitigation
 21 site.
 22 Q. And you're saying here that there's interest
 23 in the area to use for regional stormwater. What's
 24 that a reference to?
 25 A. I was referring to interest that I had heard

1 on behalf of some developers in the Auburn area who
 2 wanted to use the Auburn mitigation site as a
 3 stormwater detention and treatment facility for their
 4 planned developments.
 5 Q. Now, how did you hear about that?
 6 A. I don't recall specifically when or from who,
 7 but I may have heard it likely from somebody at the
 8 port.
 9 Q. What's the matter, if anything, with using
 10 the mitigation area for stormwater storage?
 11 A. Well, that actually is the question that
 12 started the ten-year wetlands research program was the
 13 whole question of when and if wetlands should or could
 14 be used for stormwater detention and treatment.
 15 Q. Well, let me -- it seems as if you're telling
 16 Mr. Kelley this is not something that you want to see
 17 as a use of the mitigation site; is that correct?
 18 A. That's correct.
 19 Q. So why did you tell him that?
 20 A. Well, I told Mr. Kelley that we were going to
 21 -- in our deliberation we were going to make it clear
 22 that that mitigation site would not be available for
 23 somebody else to use as a stormwater detention and
 24 treatment facility.
 25 Q. Actually, it doesn't say treatment here, does

1 it? It just says storage, doesn't it?
 2 A. It says storage.
 3 Q. So what's the matter with -- why would
 4 ecology insist on not allowing the mitigation site to
 5 be used for stormwater storage? What's the thinking
 6 behind that?
 7 A. The thinking -- well, we have found that
 8 wetlands that are being used to meet detention needs,
 9 the storage function of those wetlands is being
 10 maximized to meet the needs of the development, and
 11 oftentimes that practice results in degradation of the
 12 wetland system.
 13 Q. What do you mean by degradation of the
 14 wetland system?
 15 A. If you take a forested wetland, for example,
 16 and you build an outlet structure or you impound that
 17 forested wetland and use it as a bathtub for
 18 stormwater, you can and often will kill the trees in
 19 the wetland.
 20 Q. Is the Auburn mitigation site forested?
 21 A. Portions of that site are designed to be
 22 forested, yes.
 23 Q. What percentage?
 24 A. Offhand I don't recall, but it's 30 to 50
 25 percent perhaps.

1 Q. And the rest is not forested; is that right?
 2 A. The rest will be scrub, shrub, and emergent
 3 and some open water.
 4 Q. Is the stormwater storage a problem in some
 5 way for the nonforested wetland as well?
 6 A. Yes.
 7 Q. Why?
 8 A. There are specific life cycle requirements
 9 that a lot of species have that can -- that are
 10 affected when wetlands are used for stormwater control.
 11 There are water quality effects. But probably most
 12 importantly is that under state and federal law,
 13 wetlands as waters of the state are not to be used as
 14 water pollution control facilities, so there's a legal
 15 question as well.
 16 MS. MARCHIORO: Why don't we take a break.
 17 MR. EGLICK: Sure.
 18 (Recess taken.)
 19 (Deposition Exhibit No. 174 was marked for
 20 identification.)
 21 Q. (BY MR. EGLICK) Showing you what has been
 22 marked as Exhibit 174 to your deposition,
 23 Mr. Stockdale. Do you recognize it?
 24 A. This looks familiar.
 25 Q. What is it?

1 A. It is a color map of the west side of the
 2 airport, the north end of the airport, primarily the
 3 Miller Creek drainage labeled wetland and stream
 4 impacts in the Miller Creek basin.
 5 Q. Can you show me on here areas that you
 6 observed at your last site visit? What I could do is
 7 give you a red pen, or maybe a blue pen would be better
 8 with which to mark them. How would that be?
 9 A. So what we looked at or where we were?
 10 Q. All of the above.
 11 A. I believe this general area is where the
 12 trailer is.
 13 Q. Why don't you mark that and write the word
 14 "trailer" if you would. You're doing this, are you
 15 not, in blue pen?
 16 A. Blue pen.
 17 Q. Maybe put your initials on there so we'll
 18 know you wrote that on there rather than the map maker.
 19 There you go.
 20 A. (Writing). I do not recall where the
 21 stormwater pond is that we looked at. I mean, I'd be
 22 guessing in trying on this map where it was.
 23 Q. What about the embankment work that you
 24 referred to?
 25 A. Well, again, I would be guessing. I believe

1 it was up in this general area.
 2 Q. Why don't you indicate that general area.
 3 A. (Writing). Again, I could be wrong.
 4 Q. Any other areas where you observed
 5 construction work or where you observed any other
 6 particular place you observed on your site visit?
 7 We're talking about the last one in June of 2001; is
 8 that correct?
 9 A. That's correct. Again, I would be guessing
 10 where -- you know, where along this area.
 11 Q. It looks like you're pointing to places south
 12 of where you just circled and said general embankment.
 13 A. That's correct.
 14 Q. You're saying there's some other areas there,
 15 but you're not exactly sure where?
 16 A. That's correct.
 17 Q. But it's somewhere in the area of the -- I
 18 guess there are a couple of stubs that go out to the
 19 east as you're looking at the map, and you're saying
 20 it's somewhere in the area of those two stubs below
 21 where you marked general embankment fill area; is that
 22 correct?
 23 A. I'm off here. This isn't the third runway.
 24 This is 12th Avenue right here; is that correct? Is
 25 this the second runway here or is this the second

1 ~~runway? See, that's why I'm having a hard time with~~
2 ~~this map. Unfortunately those features aren't noted on~~
3 ~~the map.~~

4 Q. Have you looked at the key at the bottom?

5 A. No. So that would indicate that the orange
6 ~~color is the third runway embankment.~~

7 Q. Well, let me ask you another question, and
8 maybe you can in a break try to orient yourself on this
9 and I'll come back to it. I don't want to testify for
10 you as to where things are located, but I'll certainly
11 give you a chance to take a look at it and I can ask
12 you some more questions about it. You were referring
13 to Walker Creek headlands before, were you not?

14 A. Headlands?

15 Q. Headwater wetlands or something like that.

16 A. Can you tell me where I referred to that?

17 Q. That is the headwater wetland in the Walker
18 Creek basin.

19 A. Okay.

20 Q. Is that something you can show us its general
21 location?

22 A. Yes. That's wetland 44a.

23 Q. And can you circle that for us?

24 A. (Drawing).

25 Q. And maybe -- thank you -- put your label on

1 it.

2 A. (Writing):

3 Q. We'll come back to that. Could you take a
4 look at page -- we're back to your declaration by the
5 way, which is Exhibit 172. Could you take a look at
6 page 7, paragraph -- actually, page 6, paragraph 15?
7 Do you see that?

8 A. Yes.

9 Q. I notice your first sentence here says that
10 "ecology recognizes that public infrastructure projects
11 may require a unique blend of natural resource
12 mitigation strategies." Do you see that?

13 A. Yes.

14 Q. And then look over if you would on page 7 of
15 your declaration, paragraph 16. You've listed here,
16 haven't you, some objectives that ecology set out in
17 1998 with regard to its review of the third runway
18 project?

19 A. Yes.

20 Q. And see the second bulleted item there?

21 A. Yes.

22 Q. Could you read that into the record, please?

23 A. It says, "Ecology has the responsibility to
24 protect, mitigate for, and restore the water quality,
25 hydrology, food-chain support functions, and aesthetics

1 of the Miller Creek and Des Moines Creek basins, and
2 related sub-basins in and around SeaTac Airport from
3 impacts associated with the Third Runway/Master Plan
4 Improvement project."

5 Q. And could you read the next bulleted item as
6 well, please?

7 A. "Ecology's responsibilities are linked to
8 insure the protection of all beneficial uses in
9 receiving waters including water quality, water
10 quantity and fish."

11 Q. Now, those are -- if you know, those are
12 based on the state water quality standards, aren't
13 they, that ecology is supposed to enforce under the 401
14 program?

15 A. Yes.

16 Q. Is there a state water quality standard that
17 provides some different approach for public
18 infrastructure projects?

19 A. Is there a water quality standard?

20 Q. Is there a state water quality standard that
21 provides a different approach for public infrastructure
22 projects?

23 MR. PEARCE: Objection; calls for a legal
24 conclusion.

25 Q. (BY MR. EGLICK) To your knowledge.

1 A. No.

2 Q. So if you could look back at page 6,
3 paragraph 15, where you're saying, "Ecology recognizes
4 that public infrastructure projects may require" and so
5 on.

6 A. Uh-huh.

7 Q. Let's talk about that for a moment. What's a
8 public infrastructure project?

9 A. A public infrastructure project would include
10 an airport or an essential public facility like a
11 highway, perhaps a wastewater treatment plant.

12 Q. And are you basing that on a definition or is
13 that a term you came up with yourself for your
14 declaration?

15 A. No. I believe the Growth Management Act
16 defines what an essential public facility is.

17 Q. Well, I'm asking you about your definition of
18 public infrastructure project. Did you come up with
19 the definition of public infrastructure project on your
20 own or is there some regulation someplace that defines
21 public infrastructure project for you?

22 A. No. Perhaps I should have used essential
23 public facility instead of public infrastructure
24 project to be more clear.

25 Q. So then public infrastructure project is not

1 something that you're aware is defined anywhere in any
 2 particular way?
 3 A. No. Not that I'm aware of.
 4 Q. Is there something that -- let me start over.
 5 A public infrastructure project is then one
 6 sponsored, for example, by a government; is that
 7 correct?
 8 A. Yes.
 9 Q. Is this sentence, this first sentence of
 10 paragraph 15 of your declaration, saying that things
 11 that would not be acceptable for a privately sponsored
 12 project are acceptable for a publicly sponsored
 13 project?
 14 A. State law RCW 90.74 says that.
 15 Q. So your answer to that question is yes?
 16 A. Yes.
 17 Q. And your authority for it is state law 90.74?
 18 A. Correct.
 19 Q. So your testimony is that in preparing this
 20 declaration and describing the way that you looked at
 21 the third runway project, it made a difference that
 22 this was a public infrastructure project in terms of
 23 the evaluation of whether state water quality standards
 24 were met?
 25 MR. PEARCE: Objection; mischaracterizes the

1 earlier testimony.
 2 Q. (BY MR. EGLICK) Well, if it mischaracterizes
 3 it, Mr. Stockdale, you can correct me right now.
 4 A. I'm trying to follow -- could you please
 5 restate your question?
 6 MR. EGLICK: Could you read the question?
 7 (The reporter read back as requested.)
 8 A. Well, state law directs us to consider
 9 infrastructure projects and to approach the mitigation
 10 strategy differently than we normally do.
 11 Q. (BY MR. EGLICK) So if there's a mitigation
 12 strategy that doesn't meet the standards of the state
 13 water quality standards, you can adopt it if it's a
 14 public infrastructure project?
 15 MS. MARCHIORO: Objection; calls for a legal
 16 conclusion.
 17 Q. (BY MR. EGLICK) Was it your understanding
 18 that if a mitigation strategy was authorized, for
 19 example, under 90.74 -- I assume you're familiar with
 20 90.74, aren't you? You cite it in your declaration,
 21 don't you?
 22 A. Yes.
 23 Q. You're very familiar with it, aren't you?
 24 A. Yes.
 25 Q. So this is not Greek to you in terms of

1 understanding what we're referring to when we say RCW
 2 90.74; is that correct?
 3 A. That's correct.
 4 Q. So when you were applying RCW 90.74 in your
 5 review of the third runway project, was it your
 6 understanding that 90.74 in any way lowered the bar --
 7 do you understand what I mean by lowered the bar?
 8 A. Yes.
 9 Q. -- on whether water quality standards were
 10 met by a public infrastructure project?
 11 A. RCW 90.74 does not lower the bar on what
 12 standards projects need to meet.
 13 Q. So whatever the unique mitigation is or is
 14 not for a public infrastructure project -- that's your
 15 term -- that mitigation still if you will cut the
 16 mustard under the state water quality standards just
 17 like any other project; is that correct?
 18 A. That's correct.
 19 Q. And if a proposal is permitted -- a
 20 mitigation proposal is permitted under 90.74 but
 21 doesn't meet the state water quality standards in terms
 22 of what it accomplishes, then that's not an acceptable
 23 proposal; isn't that correct?
 24 A. If a project doesn't meet water quality
 25 standards, we aren't able to certify it.

1 Q. Regardless of whether the project's
 2 mitigation complies with RCW 90.74; isn't that correct?
 3 A. That's correct.
 4 Q. Let's look at page 8 of your declaration,
 5 paragraph 18. You've got this -- what would you call
 6 this? A matrix? A chart?
 7 A. Yes.
 8 Q. Which would you call it?
 9 A. A table.
 10 Q. We've got this table entitled Compensatory
 11 Mitigation. Do you see that?
 12 A. Yes.
 13 Q. And for in-basin mitigation, you've got a
 14 number of values listed under five categories. Do you
 15 see that?
 16 A. Yes.
 17 Q. For a total of 102.27 acres; is that right?
 18 A. That's correct.
 19 Q. Now, I just want to go over these numbers and
 20 understand what they mean to you. Wetland creation,
 21 there's a zero for in-basin mitigation; is that right?
 22 A. That's correct.
 23 Q. So that means no wetlands are being created
 24 in the in-basin area; is that right?
 25 A. That's correct.

1 Q. Now, there are wetlands being created in
 2 Auburn, aren't there?
 3 A. Yes.
 4 Q. So why aren't they counted here?
 5 A. They are being counted here.
 6 Q. Well, not under in-basin, are they?
 7 A. They're being counted in the out-of-basin
 8 mitigation.
 9 Q. And what's the difference?
 10 A. The difference is that the Auburn site is not
 11 in the Miller Creek or the Des Moines Creek basin.
 12 Q. So it's not in the impacted basins; is that
 13 correct?
 14 A. Correct.
 15 Q. Now, you have under wetland restoration here
 16 6.6 acres for in-basin mitigation; is that correct?
 17 A. Correct.
 18 Q. Now, what is that -- first of all, what's
 19 being done by the port for the 6.6 acres of credit?
 20 A. Of restoration?
 21 Q. Yes.
 22 A. I believe all of that is at the Vacca Farm
 23 area where in part some fill is being removed from part
 24 of the Vacca Farm property that is east or sort of
 25 southeast of the current alignment of the creek, so

1 that part of the former wetland is being restored, and
 2 there are also -- the Vacca Farm wetland or former
 3 wetland, the drained wetland, is being restored. The
 4 drain tiles are being removed. I believe that's the
 5 primary locations of that acreage.
 6 Q. Of the 6.6 acres?
 7 A. That's right.
 8 Q. Now, so would this 6.6 -- is that the kind of
 9 thing you were talking about doing at the Walker Creek
 10 head -- what was that term again?
 11 A. The Walker Creek headwater wetland.
 12 Q. Headwater wetland. Is that the same kind of
 13 thing you were talking about doing there?
 14 A. If the -- I haven't done an assessment of
 15 what is possible there, but there is an area there that
 16 is fill in the wetland, so if that fill is removed and
 17 the hydrology in the soils are restored, then that
 18 would qualify as wetland restoration.
 19 Q. And then you have here wetland enhancement,
 20 21.46; is that right?
 21 A. That's correct.
 22 Q. What's enhancement, wetland enhancement?
 23 A. Enhancement is a mitigation activity where an
 24 existing wetland is -- I don't want to use the word
 25 restored, because I'm going to confuse you -- the

1 existing wetland is improved if you will. The
 2 difference between wetland restoration and wetland
 3 enhancement primarily is where you're restoring an area
 4 that once was a wetland versus wetland enhancement is
 5 where the activity is taking place in an existing
 6 wetland.
 7 Q. So what is -- this 21.46 you cite here, what
 8 is -- what activities are being counted as wetland
 9 enhancement to get to this 21.46 value?
 10 A. Well, for example, part of the fairways at
 11 the golf course are currently wetland, but they're
 12 highly degraded wetland, and the fairway is being
 13 decommissioned or returned back to a more naturally
 14 vegetated plant community, so in those areas, the plant
 15 communities are being restored.
 16 Q. In an existing wetland?
 17 A. In an existing wetland.
 18 Q. And then you've got a category of 23.55
 19 wetland preservation.
 20 A. That's correct.
 21 Q. Now, what's that mean? Not 23.55. What's
 22 wetland preservation mean?
 23 A. Wetland preservation is mitigation credit
 24 that is given for a project when as part of the
 25 mitigation package wetlands are -- existing high

1 quality wetlands are incorporated into the mitigation
 2 package, and in some circumstances, we give mitigation
 3 credit for that at a reduced ratio.
 4 Q. Let me understand something here. Wetlands
 5 are protected under both state and federal law, aren't
 6 they?
 7 A. Yes.
 8 Q. And particularly if it's a significant
 9 wetland, you're really not allowed to go in and alter
 10 or destroy it anyway, are you?
 11 A. In most circumstances, yes.
 12 Q. But this -- I'm using your numbers for a
 13 moment, and we may have to talk about that later, but
 14 your chart here is saying the port is getting
 15 recognition if you will of 23.55 acres for preserving
 16 that which must be preserved anyway? Am I
 17 understanding what you're saying?
 18 A. Now, when you talk about getting credit, you
 19 have to drop down to the last row in the table when
 20 looking at mitigation credit. It's really a small part
 21 of the overall mitigation package.
 22 Q. Well, whatever part it is, is my
 23 understanding that I conveyed to you in my question
 24 correct as to what's occurring?
 25 A. That's correct.

1 Q. Kind of like -- never mind. Strike that.
 2 Then you've got a number here that says
 3 upland buffer enhancement. Do you see that?
 4 A. Yes.
 5 Q. By the way, are you sure all that 21.46 that
 6 you're saying is wetland enhancement -- are you sure
 7 none of that's in the uplands either?
 8 A. As far as I know, that acreage includes
 9 wetlands that have been delineated and verified as
 10 wetlands.
 11 Q. Where are the 23 acres located that we talked
 12 about as wetland preservation? Do you know that?
 13 A. I believe most of that acreage is in the Des
 14 Moines Creek basin.
 15 Q. Do you know where?
 16 A. I believe it's in the borrow site areas.
 17 Q. Do you know what future plans the port has
 18 for that area that you're referring to?
 19 A. No, I don't.
 20 Q. So what's the mechanism for preserving this
 21 area into the future?
 22 A. The mechanism is that the area is set aside
 23 in the conservation easement or with a deed
 24 restriction.
 25 Q. And do you know whether the entire area

1 that's referred to in the 23 acres has been set aside
 2 in that way?
 3 A. Has been set aside currently?
 4 Q. Yeah. As part of the 401.
 5 A. I believe that it has been, yes.
 6 Q. And that's already occurred. Is that your
 7 testimony?
 8 A. I don't believe it has occurred. It's part
 9 of the mitigation package that's been committed to.
 10 Q. But at the time of the issuance of the 401,
 11 had it occurred or not?
 12 A. No.
 13 Q. And has it occurred since?
 14 A. None of this has occurred.
 15 Q. I understand construction hasn't occurred
 16 because there's a stay among other things or shouldn't
 17 have occurred, I guess would be a better way of putting
 18 it. Would you agree with that?
 19 A. Right.
 20 Q. But with regard to the requirement for
 21 preservation and the mechanism that you're saying is
 22 going to make that so, it's your testimony that that
 23 has not yet occurred; is that correct?
 24 A. As far as I know, no.
 25 Q. Looking back at upland buffer enhancement.

1 What's upland? What does that mean?
 2 A. Not wetland.
 3 Q. And what's buffer?
 4 A. Well, buffer is defined as a protected zone
 5 adjacent in this case to a wetland or stream complex.
 6 Q. And what's enhancement again?
 7 A. In terms of upland buffer enhancement?
 8 Q. Yeah.
 9 A. In this case, there is a hundred-foot buffer
 10 on either side of Miller Creek that will be enhanced or
 11 revegetated and protected as a buffer for Miller Creek.
 12 Q. So the buffer is required in any event, is it
 13 not?
 14 A. We do require buffers on wetland mitigation
 15 sites.
 16 Q. So it would have been required regardless of
 17 the enhancement? The buffer was already a requirement;
 18 is that correct?
 19 A. No.
 20 Q. In other words, consistent with state water
 21 quality standards, ecology would have issued a 401
 22 without requiring buffers in that location?
 23 A. Depending on what the activity is, we may or
 24 may not have required -- well, for example, if the
 25 impact -- if the only wetland mitigation activity that

1 was determined to be required for this project was at
 2 the Vacca Farm, we would have required a buffer around
 3 the Vacca Farm wetland. That would have been the
 4 buffer.
 5 Q. Is there any distinction between requiring a
 6 buffer and requiring buffer enhancement?
 7 A. Yes.
 8 Q. What's the distinction?
 9 A. Well, the distinctions are numerous, and they
 10 depend on the site-specific situation.
 11 Q. Is it your testimony, then, that when a
 12 buffer is required, it's typically without regard to
 13 the condition that the buffer will be left in?
 14 A. That depends on a specific situation.
 15 Q. Well, is it your testimony that in some
 16 situations when a buffer is required, part of the
 17 requirement of the buffer itself is a specific
 18 condition that the buffer will be left in?
 19 A. Yes.
~~20 Q. In this case, if I'm understanding correctly,~~
~~21 the idea of the buffer has been separated from the idea~~
~~22 of what its condition will be; is that correct?~~
~~23 A. I'm not sure I follow that question.~~
 24 Q. And maybe I'm not following the theory of
 25 wetlands here, but let me try to ask it another way.

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1 Upland buffer enhancement, which is getting 50.66 acres
2 allocated to it on your table here -- do you see that?

3 A. Yes.

4 Q. That is saying we have a buffer that we've
5 already said must exist, and now we're going to require
6 that enhancement of that buffer occur and then give
7 some level of credit for that; is that correct?

8 A. You said that we've already determined that
9 it has to exist?

10 Q. That a buffer has to exist, and now we,
11 ecology, are saying we're going to give some level of
12 credit for enhancement of the buffer; is that correct?

13 A. We're giving credit for a buffer that is 200
14 feet wide, so it's 100 feet on each side of the creek,
15 and that buffer is being revegetated.

16 Q. Does the upland buffer enhancement category
17 include both the requirement for the buffer and the
18 enhancement with vegetation or whatever you put in a
19 buffer, or is the upland buffer enhancement category
20 here simply referring to what you do to the buffer
21 after you've required its establishment?

22 A. The acreage -- the 50.66 acres that
23 translates into 13.31 mitigation credits includes the
24 entire area that's being provided in a protected
25 buffer.

1 Q. Let me try it another way. If you did not
2 have the category here that said upland buffer
3 enhancement, is there any other category in this table
4 that includes a requirement that buffers themselves
5 exist?

6 A. I guess I'm -- let me give you another
7 example. At the Faine Field wetland mitigation bank in
8 Everett, there is two --

9 Q. I think I'd rather you answer my question.

10 A. Okay.

11 MR. EGLICK: If you could read back the
12 question, please.

13 (The reporter read back as requested.)

14 Q. (BY MR. EGLICK) And the table I'm referring
15 to is this table paragraph 18, page 8 of your
16 declaration, which I think it's obviously based on.

17 A. So if we didn't call it upland buffer
18 enhancement, where would we account for 50.66 acres?

19 Q. Well, I guess my question is, isn't buffer
20 required anyway?

21 A. It depends on where and how much. Again,
22 when I gave you the Vacca Farm example, if this was the
23 only area where the mitigation activity was occurring,
24 we would require a buffer be placed around that
25 wetland. That's not the case in this situation.

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1 MR. EGLICK: Could you read back that answer,
2 please?

3 (The reporter read back as requested.)

4 Q. (BY MR. EGLICK) What buffer would you require
5 around the Vacca Farm in the example you just gave?

6 A. There is a buffer around Vacca Farm and Lora
7 Lake that's being required as part of this project.

8 Q. And what is that?

9 A. It's variable. On Lora Lake, I think what's
10 being provided is 25 feet. I think there's room for
11 about 60 feet between Des Moines Memorial Drive and
12 Vacca Farm.

13 Q. And is there any buffer enhancement
14 associated with that?

15 A. Yes.

16 Q. And is that buffer enhancement included
17 anywhere in this table on paragraph 18, page 8 of your
18 declaration?

19 A. I think it is, yes.

20 Q. Where?

21 A. I think it's included in the 50.66.

22 Q. And what is the enhancement that's included?
23 What does it consist of?

24 A. Well, on Lora Lake, there is a shelf if you
25 will of flat ground. It's about 25 to 30 feet wide,

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1 and that area is being revegetated into a scrub/shrub
2 community, I believe. The bulkhead that forms much of
3 the shoreline on the lake is being knocked out, and the
4 shoreline is being made more natural if you will. So
5 it's essentially growing a buffer where there isn't one
6 now.

7 Q. And would that be the same kind of activity
8 that's referred to in upland buffer enhancement for the
9 whole 50 acres?

10 A. Generally. The natural resource mitigation
11 plan has quite a bit of narrative of what the buffer
12 enhancement entails. It shows species. It sort of has
13 a template for the planting plan and so forth.

14 Q. So is it largely a planting plan?

15 A. It's largely a planting plan. It also
16 includes control of invasive species like primarily
17 blackberry and reed canary grass, Japanese knotweed
18 where it exists. Along the creek it includes removal
19 of nonnative material like rebar and concrete and just
20 garbage that we typically find in urban streams.

21 Q. Anything else?

22 A. Well, the idea is to grow back a multistory
23 riparian corridor.

24 Q. And what credit, then, is given that in this
25 table, that plan you've just described?

1 A. The credit is one to five, so there's a 1 to
2 5 discount, so there's five acres of riparian buffer
3 reestablishment, and it is given one acre credit.
4 Q. And what percent if you know of the in-basin
5 mitigation is actual wetland creation?
6 A. What percent?
7 Q. Yes.
8 A. There's zero percent in-basin creation.
9 Q. And what percent is wetland restoration?
10 A. By acreage or by credit?
11 Q. By acreage.
12 A. Well, I would probably ask you for a
13 calculator, but it's about 10 percent, I believe.
14 Q. What is meant by wetland function?
15 A. Wetland functions are the physical, chemical,
16 and biological -- let me backtrack. Wetland functions
17 are what wetlands do on the landscape as compared to
18 wetland values. You often hear a term "wetland
19 functions and values," and it's important to separate
20 those.
21 Q. Is there anything with regard to -- well,
22 what's your understanding of what function is as
23 opposed to value?
24 A. Well, wetland functions vary on the landscape
25 depending on the type of wetland, their position on the

1 A. It depends on who you talk to.
2 Q. Well, I think today I'm talking to you,
3 Mr. Stockdale.
4 A. Okay. All right.
5 Q. For example --
6 A. It's an important clarification, because it
7 depends on who you're talking about, okay? Flood
8 storage is a function that as a society and as
9 government agencies that we value because it's what
10 wetlands do, but the land owner that owns that wetland
11 may not personally value that function.
12 Q. But you're not answering my question. I
13 think I did clarify it. I'm not asking you to speak
14 for the land owner, and I'm not asking you to speak for
15 local governments or anything of that sort. I'm asking
16 you as Erik Stockdale, who's been presented here today
17 by ecology as ecology's -- you're listed -- I assume
18 you know this -- as ecology's wetland expert. You know
19 that, don't you?
20 A. Yes.
21 Q. So here you are, and I'm asking you to put
22 yourself in your shoes, not in someone else's shoes,
23 and answer the question.
24 A. And the question is is there a hierarchy of
25 wetland functions?

1 landscape, and so forth, but generally speaking, we say
2 that wetlands can -- they provide water storage areas
3 if they're connected to surface flow. They provide a
4 tremendous amount of primary productivity, so they
5 support a productive food web that then supports a wide
6 variety of species. Some wetlands improve water
7 quality. They play an important role in the role in
8 nutrients in aquatic systems.
9 Q. And are there some functions that are
10 considered higher than others in terms of wetlands?
11 A. Higher? Well, that would be a value
12 judgment.
13 Q. Well, do wetland scientists make those
14 judgments?
15 A. We make them all the time.
16 Q. And what's a higher functioning wetland
17 typified by functionally?
18 A. Well, when you say a higher functioning, do
19 you say that -- I want to make sure I understand.
20 There are different levels at which wetlands will
21 provide these functions. Is that what you mean by
22 higher functioning?
23 Q. Is there a hierarchy of functions?
24 A. In terms of our preference?
25 Q. Yes.

1 Q. Yes.
2 A. In the Miller Creek basin?
3 Q. Well, let's start in the general and we'll
4 move to the specific.
5 A. Wetlands provide functions. That's what they
6 do. We have an assessment method that helps us
7 determine the level at which those functions are
8 provided. There are several methods that try to
9 address that.
10 Q. Well, I don't think I was asking you the
11 assessment method. Maybe I should ask you another
12 question. You're sitting here and you're supposed to
13 be ecology's wetland expert. In your understanding, is
14 the highest function that a wetland can provide
15 stormwater storage?
16 A. No. You're asking me a value judgment. The
17 question that we're charged with evaluating -- yeah,
18 it's important to distinguish between wetland functions
19 and wetland values, and what you're asking me is to
20 make a judgment of both at the same time, and I can't
21 do that.
22 Q. Is a wetland that functions primarily as a
23 stormwater storage facility a wetland that is
24 functioning at its highest possible level?
25 A. I would need more information in terms of the

1 landscape position to be able to answer that.
 2 Q. Did you make such an analysis with regard to
 3 the wetlands and the proposed wetland plan for the Port
 4 of Seattle third runway project?
 5 A. Did I do a function assessment?
 6 Q. Yes.
 7 A. No. The applicant did the function
 8 assessment.
 9 Q. I understand the applicant did one. I'm
 10 asking whether you did.
 11 A. No.
 12 Q. Based on the functional assessment that you
 13 reviewed, are the -- strike that.
 14 So you didn't do any independent assessment
 15 of wetland functions under the port's third runway
 16 application?
 17 A. No.
 18 Q. Did you do any quantification of what effect
 19 removal of anthropogenic activities or influences would
 20 have at the Port of Seattle third runway site?
 21 A. I'm trying to understand what you mean by
 22 anthropogenic.
 23 Q. Well, it's a term that Katie Walter used
 24 quite a bit in her deposition, so I assumed that was
 25 wetland scientist speak. You're not familiar with the

1 term?
 2 A. Oh, I know what it means, but I'm trying to
 3 understand -- I tried to understand what would happen
 4 in the Miller Creek buffer when the homes were removed
 5 within the buffer area. Is that --
 6 Q. I think my question was did you do a
 7 quantification?
 8 A. I did a qualification.
 9 Q. So is your answer no to the question of
 10 whether you did a -- let me finish, because otherwise
 11 the reporter won't get it.
 12 A. Sorry.
 13 Q. The answer is no, then, to the question of
 14 whether you did a quantification; is that correct?
 15 A. That's correct.
 16 Q. What's TRACON?
 17 A. TRACON is an FAA project that is being
 18 proposed for the -- in the buy-out area.
 19 Q. What do you mean in the buy-out area? You
 20 mean in the third runway project site, right?
 21 A. Yes.
 22 Q. And what does the project to your knowledge
 23 consist of?
 24 A. What does it consist of?
 25 Q. Yeah.

1 A. It is a building and accessory -- perhaps
 2 some accessory structures like radar facilities or
 3 radio towers and parking area.
 4 Q. How big a building?
 5 A. I don't know.
 6 Q. No idea?
 7 A. (Shaking head).
 8 Q. Did you ever inquire?
 9 A. No.
 10 Q. Do you know how many accessory structures?
 11 A. No.
 12 Q. How big?
 13 A. No.
 14 Q. Same question for the radar facilities. What
 15 do you know about them?
 16 A. I don't know.
 17 Q. You said parking?
 18 A. (Nodding head).
 19 Q. How much parking are we talking about?
 20 A. I don't know.
 21 Q. How many employees?
 22 A. I don't know.
 23 Q. Any idea?
 24 A. No.
 25 Q. Did you make any inquiries?

1 A. No.
 2 Q. I guess does the FAA and its employees count
 3 as anthropogens or whatever the correct word would be?
 4 You're laughing, to it must not be the correct word.
 5 A. Anthrops. Do they qualify as anthropogenic?
 6 Q. Yeah.
 7 A. Well, something that is anthropogenic would
 8 include something that is related to human activity.
 9 Q. So the TRACON unless they're using nonhumans
 10 would count, then, wouldn't it?
 11 A. Yeah. I believe so.
 12 Q. And the FAA is going to have employees there
 13 and so forth as far as you know, right?
 14 A. As far as -- yes.
 15 Q. And when you're building a building and a
 16 parking lot and radio and radar and the things you
 17 described, does that count as urban type development?
 18 A. Yes.
 19 Q. So is there some reason that -- in your
 20 declaration you've got a lot of what I guess you've
 21 told us now is unquantified description to the board of
 22 removal of all this what Katie Walter called
 23 anthropogenic stuff. Why isn't TRACON in there,
 24 something that's coming in?
 25 A. Well, I haven't reviewed TRACON as a project

1 because it hasn't triggered our permit process.
 2 Q. You were aware of it, weren't you?
 3 A. Yes. I'm aware of it.
 4 Q. And it's going on the third runway site; is
 5 that correct?
 6 A. Uh-huh.
 7 Q. And, in fact -- we'll get to this later --
 8 you've had communications about it in the course of
 9 your third runway review, haven't you?
 10 A. Yeah, because I wanted to know where it was
 11 going to be, sure.
 12 Q. And what the impacts were going to be?
 13 A. That's correct.
 14 Q. And it sounds as if you never got the
 15 information to quantify that, did you?
 16 A. The information that I have on it is that the
 17 footprint of that facility is going to occur outside of
 18 the wetlands and outside of the buffers on Miller
 19 Creek.
 20 Q. When you say the footprint, what do you mean
 21 by the footprint?
 22 A. Well, the project itself in terms of the
 23 buildings or the parking.
 24 Q. How many acres is the project?
 25 A. TRACON.

1 Q. Yes.
 2 A. I don't know.
 3 Q. Isn't it several?
 4 A. It's six or eight acres maybe.
 5 Q. And have you seen any plans?
 6 A. There is a document in my office, yeah. I've
 7 seen a drawing of where it's going.
 8 Q. Well, I'm asking if you've seen any plans,
 9 for example, of where the buildings are going to be
 10 located.
 11 A. I don't know. The project is more than the
 12 building. It's the imperviousness of the footprint of
 13 the project. It's the stormwater facility. It's the
 14 parking. That's what I mean by the footprint.
 15 Q. You say you have a document in your office.
 16 You mean you have a rolled up set of plans that shows
 17 where all those are going to be located?
 18 A. No. It's a report that was sent to us by the
 19 FAA.
 20 Q. Now, I notice there isn't anything about
 21 TRACON in the 401 certification, is there?
 22 A. I don't think there is, no.
 23 Q. Do you know anything about how they're
 24 handling stormwater for TRACON?
 25 A. No, I don't.

1 Q. With a parking lot, that would be an issue
 2 wouldn't it?
 3 A. Uh-huh.
 4 Q. And with a building, wouldn't it?
 5 A. Yes.
 6 Q. How long have you known about TRACON? A
 7 couple years?
 8 A. A year or year and a half.
 9 MS. MARCHIORO: It's about 20 after 12.
 10 MR. EGLICK: Do you want to take lunch?
 11 MS. MARCHIORO: Yeah. Why don't we go ahead
 12 and do that.
 13 MR. EGLICK: Actually, let me make sure that
 14 I'm done with --
 15 MS. MARCHIORO: That's fine.
 16 (Discussion off the record.)
 17 Q. (BY MR. EGLICK) Do you know what TRACON
 18 stands for by the way? It's T-r-a-c-o-n, isn't it, all
 19 caps?
 20 A. Correct.
 21 Q. It's got something to do with how they do the
 22 air traffic control for the area, doesn't it?
 23 A. That's correct.
 24 Q. For the whole -- I'm not talking about just
 25 for Des Moines but for the whole region, right?

1 A. Yes. I do not know what the acronym stands
 2 for.
 3 MR. EGLICK: Why don't we take a lunch break.
 4 (Lunch recess taken 12:17 to 1:17 p.m.)
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AFTERNOON SESSION
 1:17 P.M.
 --oCo--

CONTINUING EXAMINATION

BY MR. EGLICK:
 Q. Mr. Stockdale, have you had a chance to look at a copy of the current operative but stayed -- I guess operative in the sense it was issued on September 21 but stayed by the Department of Ecology -- 401 certification?
 A. I looked at about half a page.
 Q. Are you familiar with it?
 A. Yes.
 Q. By the way, I think we've agreed that this is exhibit, I believe, 2, isn't it --
 MS. MARCHIORO: It's No. 1.
 MR. EGLICK: Then the August one must be 2.
 Q. (By MR. EGLICK) -- to the depositions. Did you review the certification, the September certification before it was issued?
 A. Yes.
 Q. Could you look at, then, Exhibit 172 to your deposition, which is your declaration? Do you see that?

~~A. Yes.~~
 Q. Could you look at page 10? Could you read the -- do you see the sentence at line 10 to line 11 on page 10 that starts "under the 401 certification"?
~~A. Yes.~~
 Q. And then it says, quote, the port is also required to retrofit the entire stormwater system at the airport, end quote. Do you see that?
 A. Yes.
 Q. Is there a particular portion of the 401 certification that you rely on for that statement? By that statement, I mean the statement, quote, under the 401 certification, the port is also required to retrofit the entire stormwater system at the airport, end quote.
 A. I relied on the water quality program and my understanding of what was being required for the stormwater infrastructure for the project for that statement.
~~Q. In other words, where the declaration on page 1, lines 17 and 18 says that you, quote, have personal knowledge of the facts stated herein, end quote, do you see that? Page 1, lines 17 and 18. That's the first paragraph of the declaration.~~
~~A. Correct.~~

Q. Now, did you when you prepared this declaration have personal knowledge from your review of the 401 that the port is required to retrofit the entire stormwater system at the airport?
 A. My understanding of that comes from the many meetings that I've attended with the port and with ecology staff.
 Q. So was that understanding, then, based upon a review of the 401 that was actually issued and placed as the final decision by ecology?
 A. The 401 reflects the final decision by ecology.
 Q. But you're not able to show me in the 401 where this statement that you made on page 10, lines 10 through 11 of your declaration can be found, are you?
~~A. That's correct.~~
 Q. Are you aware of whether or not the port is able under the 401 to not keep retrofitting of the facility in pace with its construction of new impervious surface?
 A. I have no knowledge of that.
 Q. In other words, just to make sure you understand the question, do you know whether or not under the 401 the port could build impervious facility at a pace faster, for example, than it retrofits

existing facilities?
 A. I have no knowledge of that.
 Q. Are you aware whether or not under the 401 the port can change its obligation for retrofit based on an argument of feasibility?
 A. I have no knowledge of that.
 Q. Are these issues that you at all were made aware of prior to writing your declaration on personal knowledge to the Pollution Control Hearings Board?
 A. No.
 Q. Why don't you take a look at page 26 of the September certification if you would. If you would review subsection C on that page in particular. Did you have a chance to read that?
 A. I did.
 Q. Do you notice where that section that you just read on subsection C on page 26 of the September 401 certification refers to a port demonstration that a 20 percent rate of retrofit isn't, quote, feasible, quote? Do you see that?
 A. Yes.
 Q. When you wrote your declaration to the board, were you aware that the port had any opportunity to argue that the retrofit schedule would not be feasible?
 A. No.

1 Q. Could you look at Exhibit 173, please? We
 2 were talking about that earlier. That's the e-mail
 3 dated February 17, 2000, from you to Ray Hellwig and
 4 Tom Luster about your meeting with Jim Kelley. Do you
 5 see that?
 6 A. Yes.
 7 Q. And you recognize it?
 8 A. Yes.
 9 Q. Could you look on page 2 of that Exhibit 173
 10 to your deposition? Could you read into the record if
 11 you would the paragraph that starts, "I also told Jim"?
 12 By the way, is Jim here a reference to Jim Kelley, the
 13 port's wetland consultant from Parametri:?
 14 A. Yes.
 15 Q. Could you read this paragraph into the
 16 record, please?
 17 A. "I also told Jim that the prior converted
 18 wetlands at Vacca Farm meet the wetland criteria in the
 19 State of Washington wetland delineation manual, are
 20 regulated as wetlands by the State under RCW 90.48 and
 21 therefore need to be included in the enhancement
 22 category for ratio calculation. As we have discussed
 23 internally and with the Port on several occasions, this
 24 is where there will be a difference in wetland acreage
 25 between the way the Corps" -- c-o-r-p-s -- "/EPA apply

1 404 and the State applies RCW 90.48. The State is not
 2 bound by the exclusion provided to certain agricultural
 3 lands in the Food Security Act manual. The FCC label
 4 does not reflect wetland functions and resulted from
 5 political compromise in Washington DC with the
 6 agricultural lobby."
 7 Q. Thank you for reading that into the record,
 8 and I assume where it says PCC, that's another
 9 reference to prior converted --
 10 A. Croplands.
 11 Q. -- cropland? Okay.
 12 Now, looking at this statement, you say,
 13 quote, Vacca Farm, quote, therefore need to be included
 14 in the enhancement category for ratio calculation,
 15 quote. Is that as opposed to some other category that
 16 Mr. Kelley was proposing to include Vacca Farm in?
 17 A. I believe so.
 18 Q. And what category was he proposing to include
 19 it in?
 20 A. I presume that it was wetland restoration.
 21 Q. And what category have you included it in in
 22 your table in your declaration to the board that we've
 23 looked at as Exhibit 172?
 24 A. I believe we -- I included it under the
 25 wetland restoration, at least some of it.

1 Q. And, in fact, when we were talking about it
 2 earlier, you referred to it as wetland restoration?
 3 A. Right. Some of it may also be in -- some of
 4 it also is in the wetland enhancement column.
 5 Q. And was there some point at which you decided
 6 that the comment that you made in this Exhibit 173 was
 7 not accurate concerning Vacca Farm?
 8 A. Yes.
 9 Q. And when was that?
 10 A. It was subsequent to this time when we
 11 discussed further the restoration activity and the
 12 enhancement activity that was being proposed at the
 13 Vacca Farm.
 14 Q. And when you say we, who are you referring
 15 to?
 16 A. Jim Kelley and myself.
 17 Q. And when did this discussion occur that --
 18 you'd agree the statement you make here in Exhibit 173
 19 is not tentative in any way, is it, on its face?
 20 A. The way it's written?
 21 Q. Yeah.
 22 A. No.
 23 Q. So when was this meeting with Mr. Kelley that
 24 resulted in you changing your position?
 25 A. I don't recall exactly when it was.

1 Q. And do you know who else was there?
 2 A. As far as I know, it was me who made that
 3 decision.
 4 Q. Well, was there anyone else in the meeting
 5 with you and Mr. Kelley?
 6 A. I don't think so.
 7 Q. Did you keep notes of that meeting, because
 8 we've looked, and under public disclosure, we're
 9 supposed to have all your notes. We haven't seen any
 10 notes of that meeting. Do you have any notes of it?
 11 A. If it was made at one of those meetings, it
 12 should be in those notes if I wrote it down.
 13 Q. Is it possible you didn't write it down?
 14 A. It's possible.
 15 Q. And is there some memorandum to file that we
 16 might not have received in which just as here you
 17 memorialized your position you memorialized your
 18 reversal in position?
 19 A. I don't think so.
 20 ~~Q. Let's take a look at something else, then.
 21 (Deposition Exhibit No. 175 was marked for
 22 identification.)
 23 Q. (BY MR. EGLICK) Showing you what has been
 24 marked as Exhibit 175 to your declaration. Do you
 25 recognize it? Excuse me. To your deposition.~~

1 A. Do you know what the date is for this
 2 attachment?
 3 Q. Well, actually, I think it's an attachment to
 4 Mr. Kelley's declaration, but if you don't recognize
 5 it, I can bring in the declaration itself. With that
 6 hint, do you recognize it?
 7 A. Well, this is the format that has been used
 8 in the natural resource mitigation plan to account for
 9 ratios of the mitigation package.
 10 Q. Why don't you take a look at the substance.
 11 Do you recognize this as coming from Mr. Kelley's
 12 declaration to the Pollution Control Hearings Board?
 13 A. Yes.
 14 Q. Remember when we were talking before about --
 15 well, first of all, you can see here that is it what,
 16 six acres of Vacca Farm is included under wetland
 17 restoration? Do you see that? 6.6 acres.
 18 A. Yes.
 19 Q. And then remember that number we were talking
 20 about in your declaration in that table again? We were
 21 talking about the amount of in-basin wetland
 22 enhancement, and I think you said it was 21.46 acres.
 23 A. Yes.
 24 Q. Didn't you say that that was -- am I correct
 25 you said that was the golf course, the Tyee golf

1 course?
 2 A. It included wetlands at the golf course,
 3 yeah. It includes some of the wetlands at the Vacca
 4 Farm.
 5 Q. And a number of other things as well, doesn't
 6 it?
 7 A. I think it also may include some of the
 8 wetlands that are associated with Des Moines Creek or
 9 Miller Creek.
 10 Q. If you take a look at Mr. Kelley's attachment
 11 to his declaration, Exhibit 175, does that give you
 12 some other information from his perspective?
 13 A. So again your question is?
 14 Q. My question is looking at Mr. Kelley's
 15 attachment D to his declaration to the board, which is
 16 Exhibit 175, does that give you further information at
 17 least from his perspective on what the components of
 18 the wetland enhancement category which you list in your
 19 table as 21.46 acres is?
 20 A. I'm trying to remember how we did -- there
 21 was something that we subtracted from 28.06. I'm
 22 trying to remember. One of the tables that we were
 23 working on had an addition error. I used their tabular
 24 data numbers to come up with this.
 25 Q. Well, would you agree with me that at least

1 based on Mr. Kelley's summary, Exhibit 175, that Tyee
 2 golf course is really a small part of what you call
 3 wetland enhancement, isn't it?
 4 A. Yeah. Yeah.
 5 Q. Let's take a look, then --
 6 (Deposition Exhibit No. 176 was marked for
 7 identification.)
 8 Q. (BY MR. EGLICK) Showing you what has been
 9 marked as Exhibit 176 to your declaration. Can you
 10 identify it?
 11 A. This is an e-mail that I sent to Ray Hellwig
 12 and Tom Luster on April 12, 1999, regarding bird strike
 13 hazard monitoring at Sea-Tac.
 14 Q. And what's bird strike hazard monitoring?
 15 A. This e-mail has to do with a series of
 16 discussions that we had with the airport regarding
 17 in-basin mitigation and the potential that those
 18 mitigation activities would have to increase the bird
 19 strike hazard in and around the airport.
 20 Q. And that was a claim that the port and FAA
 21 were making at various points, weren't they?
 22 A. Yes.
 23 Q. And you were suggesting, were you not,
 24 monitoring to determine, for example, whether there
 25 really would be a problem in the future?

1 A. That's correct.
 2 Q. And what kind of monitoring came out of this
 3 e-mail?
 4 A. As far as I know, no monitoring was
 5 conducted.
 6 Q. Then I can't ask you about it.
 7 (Deposition Exhibit No. 177 was marked for
 8 identification.)
 9 Q. (BY MR. EGLICK) Showing you what has been
 10 marked as Exhibit 177 to your declaration. Can you
 11 identify it?
 12 A. This is an e-mail that I sent to Tom Luster
 13 on April 19, 1999.
 14 Q. And the subject is an e-mail from Gail Terzi?
 15 A. That's correct.
 16 Q. And who is she?
 17 A. Gail Terzi works for the U.S. Army Corps of
 18 Engineers.
 19 Q. And she is an expert in wetlands, for
 20 example --
 21 A. Yes.
 22 Q. -- for the corps?
 23 A. She's one of them.
 24 Q. Is the text that is set out here from Gail
 25 Terzi?

1 A. Yes.
 2 Q. And how did she happen to send this e-mail to
 3 you if you know?
 4 MR. PEARCE: Objection. It calls for lack of
 5 personal knowledge.
 6 MR. EGLICK: Well, we'll find out.
 7 Q. (BY MR. EGLICK) If you know.
 8 A. She sent it to me via e-mail.
 9 Q. Right. How do you know what occasion there
 10 was that she would send you an e-mail? Did you, for
 11 example, call and ask her what the corps' view was on
 12 the topic of the e-mail?
 13 A. I don't recall.
 14 Q. Well, were you at the point when this e-mail
 15 was received from Gail Terzi exchanging information
 16 from the corps on items related to review of the port's
 17 applications?
 18 A. We must have had a discussion about Highway
 19 509.
 20 Q. And what's Highway 509 have to do with all
 21 this, all this being the port application?
 22 A. The Department of Transportation is proposing
 23 to connect 509 where it currently ends in the southwest
 24 vicinity of the airport and connect it to Interstate 5.
 25 Q. Actually, it's a port proposal, isn't it,

1 through the Department of Transportation?
 2 A. It's a state highway, so I'm going to assume
 3 it's a state project.
 4 Q. You don't have any knowledge of port
 5 involvement in it?
 6 A. Well, it's being built with an off-ramp to
 7 the airport.
 8 Q. And what's the off-ramp going to be used for
 9 in particular?
 10 A. Well, it's going to serve as the southern
 11 access point to the airport similar to the way that
 12 there is a northern access point off of SR 518.
 13 Q. And, in fact, isn't it true that it's going
 14 to be used to facilitate bringing materials for the
 15 third runway project to the airport site?
 16 A. Well, that is being done off of an
 17 interchange, isn't that correct, on the existing
 18 highway?
 19 Q. I have to ask you the questions.
 20 A. I don't know. I've heard of various routes
 21 that are going to be used to deliver fill material.
 22 Q. Do you see in Exhibit 177 where Ms. Terzi
 23 refers to "I agree"? Do you see that, quote, I agree
 24 there are a lot of conflicting items going on, end
 25 quote? Do you see that?

1 A. Uh-huh.
 2 Q. She says, quote, about the 509 proposal and
 3 the third runway, quote. Do you see that?
 4 A. Yes.
 5 Q. Who is she agreeing with? Do you know? Is
 6 that with you?
 7 A. I don't know.
 8 Q. Was this in response to some communication
 9 that you had sent to her?
 10 A. I don't know.
 11 Q. Do you see the sentence further down that
 12 says, quote, also obviously the secondary and
 13 cumulative impacts to the watershed(s) -- watersheds, I
 14 guess -- takes on a whole new light when you consider
 15 both projects, end quote? The "I guess" was my
 16 interlineation. That's not in the quotation. Do you
 17 see that?
 18 A. I do.
 19 Q. Do you know what she was referring to there?
 20 A. Well, I believe she's referring to cumulative
 21 impacts that may result from the 509 project when
 22 considered together with the third runway project.
 23 Q. In fact, if you look at the e-mail, isn't she
 24 including another project as well in her comment, the
 25 SASA project? Do you see that?

1 A. Yes.
 2 Q. What's the SASA project?
 3 A. I believe SASA stands for south aviation
 4 safety area.
 5 Q. Now, were those cumulative impacts to your
 6 knowledge taken into account to your knowledge in the
 7 401 decision issued by ecology on September 2001?
 8 A. The cumulative impacts from 509 and SASA?
 9 Q. Yes.
 10 A. No.
 11 Q. Let's look at something else, then.
 12 (Deposition Exhibit No. 178 was marked for
 13 identification.)
 14 Q. (BY MR. EGLICK) Looking at what's been marked
 15 as Exhibit 178 to your declaration -- to your
 16 deposition. Boy, I'll tell you. After explaining to
 17 you the difference, I'm now caught in your terminology
 18 here. Exhibit 178 to your deposition, can you identify
 19 it?
 20 A. This is an e-mail that I forwarded to Tom
 21 Luster. It's an e-mail that was sent to me by Sarah
 22 Suggs. She sent it to me on January 28 of 2000, and I
 23 forwarded it to Tom that same day.
 24 Q. And who is Sarah Suggs again?
 25 A. Sarah Suggs is one of my co-workers. She's a

1 wetland specialist in the northwest region of ecology.
 2 Q. Now, why did you -- and I see you forwarded
 3 it to Tom Luster with the question, quote, did you see
 4 this quote.
 5 A. That actually follows the subject line that
 6 Sarah Stugs sent to me.
 7 Q. You didn't change it?
 8 A. No.
 9 Q. And why did you forward it to Tom Luster?
 10 A. Tom Luster was the 401 coordinator for the
 11 project at the time.
 12 Q. For what project?
 13 A. For the third runway project.
 14 Q. And did you understand that this SEPA notice
 15 was part of the third runway project?
 16 A. Yes.
 17 Q. And could you read into the record the
 18 description of what the SEPA notice was for?
 19 A. The description from the SEPA notice reads
 20 "third runway wetland fill and temporary construction
 21 at Sea-Tac International Airport; include the quantity
 22 of wetlands affected, design of retaining wall and
 23 design of construction only temporary interchange;
 24 more."
 25 Q. Now, what did you understand that temporary

1 interchange was a reference to? Was that 509 temporary
 2 interchange?
 3 A. Below that it says "location, interchange at
 4 SR 509 and South 176th Street."
 5 Q. So that was your understanding that it was
 6 related to the 509 temporary interchange in part?
 7 A. Yes.
 8 (Deposition Exhibit No. 179 was marked for
 9 identification.)
 10 Q. (BY MR. EGLICK) Showing you what has been
 11 marked as Exhibit 179 to your deposition. Can you
 12 identify it?
 13 A. It's dated April 26, 2000, and this looks
 14 like my handwriting.
 15 Q. So these are your handwritten notes?
 16 A. Yes.
 17 Q. Two pages of them?
 18 A. Yes.
 19 Q. Are these notes of a meeting?
 20 A. It was a meeting at the port.
 21 Q. Did you have a list there of who was in
 22 attendance?
 23 A. Yes.
 24 Q. Can you read that into the record? Or I'll
 25 tell you what. I'll read it, and tell me if I've got

1 your writing -- if I'm reading your writing -- Tom
 2 Walsh, right?
 3 A. Yes.
 4 Q. Lawyer for the port, right?
 5 A. Yes.
 6 Q. Tracie Goodwin, lawyer for the port?
 7 A. Yes.
 8 Q. Ray, is that Ray Hellwig?
 9 A. Ray Hellwig.
 10 Q. Joan Marchionto, ecology's lawyer?
 11 A. Yes.
 12 Q. Tom Luster?
 13 A. Yes.
 14 Q. Elizabeth L, is that Elizabeth Leavitt?
 15 A. Leavitt.
 16 Q. L-e-a-v-i-t-t?
 17 A. L-e-a-v-i-t-t.
 18 Q. Michael Chayne for the port, C-h-a-y-n-e?
 19 A. Yes.
 20 Q. Paul Fendt, F-e-n-d-t, for the port?
 21 A. Yes.
 22 Q. Jim Kelley for the port?
 23 A. Yes.
 24 Q. It says Kevin. Is that Kevin Fitzpatrick?
 25 A. I believe so.

1 Q. And that's DCE, right?
 2 A. Yes.
 3 Q. And what was the purpose of the meeting?
 4 A. It looks like there were five different items
 5 that we talked about that day.
 6 Q. And these were items related to the third
 7 runway application pending before DCE?
 8 A. Correct.
 9 Q. And was one of them the 509 temporary
 10 interchange?
 11 A. Yes.
 12 Q. Do you see you have a line maybe about ten
 13 lines down from the top where you see Tom Luster's name
 14 and then a colon after it?
 15 A. Uh-huh.
 16 Q. Can you read what you have in your notes
 17 after that? I assume this is what he said at the
 18 meeting?
 19 A. Yes.
 20 Q. Could you read it?
 21 A. It says, "If there is an indirect impact, it
 22 needs to be folded into the 401."
 23 Q. And was it your understanding that there was
 24 an indirect impact from the 509 temporary interchange?
 25 A. I don't recall if we determined that there

1 was an indirect impact from that project.
 2 Q. Well, what was your understanding?
 3 A. Well, there was a lot of discussion about the
 4 extent of wetlands on the DOT right-of-way. I spoke
 5 with Amanda quite a bit about that. I spoke to Gail
 6 Terzi. There was a question about some sort of a
 7 detention pond I believe on the west side of 509 that
 8 had taken on wetland characteristics, and there was a
 9 question about whether it was a pollution control
 10 facility or a regulated wetland.
 11 I think the corps ultimately decided that
 12 there was a very small wetland like a couple of hundred
 13 square feet that existed on -- I do not recall where on
 14 that -- where that interchange is being built that may
 15 be affected or not. I don't remember. But it seemed
 16 like such an insignificant impact that I don't remember
 17 addressing it later on down the road.
 18 Q. Now, the corps was addressing direct impacts
 19 on a wetland, wasn't it?
 20 A. The corps considers indirect impacts as well.
 21 Q. I'm asking with regard to the 509 temporary
 22 interchange issue, the corps was considering direct
 23 impacts on a wetland, wasn't it?
 24 A. Well, they looked at this whole question
 25 about wetlands that were going to be affected by the

1 interchange, yes.
 2 MR. EGLICK: Could you read back the
 3 question, please?
 4 (The reporter read back as requested.)
 5 A. Yes.
 6 Q. (BY MR. EGLICK) Would you agree if you know
 7 that the scope of 401 review is broader than the scope
 8 of corps review with regard to effects on wetlands?
 9 A. Yes.
 10 Q. And one way that it's broader is that ecology
 11 under 401 looks to indirect impacts, doesn't it?
 12 A. Yes.
 13 Q. What were the indirect impacts that were the
 14 subject of concern and I guess referred to --
 15 Mr. Luster says if there's an indirect impact. We know
 16 that Ms. Terzi referred to cumulative and indirect
 17 impacts. What were those indirect impacts that were
 18 being considered, if any, with regard to that 509
 19 interchange?
 20 A. Well, they could include the failure of
 21 erosion control practices. It could include deposition
 22 or discharge of dust into the wetland if loads weren't
 23 -- there are a lot of different things you could
 24 consider. I think a lot of different things were
 25 considered.

1 Q. When you say deposition of dust, you're not
 2 talking about bringing dust in in front of a court
 3 reporter, are you?
 4 MS. MARCHICRO: Objection; argumentative.
 5 Q. (BY MR. EGLICK) I'm asking you in a
 6 semihumorous way, Mr. Stockdale, what do you mean by
 7 deposition of dust?
 8 A. Well, when construction equipment delivers
 9 and hauls dirt, the roadway becomes coated with dust
 10 from the trucks as well as the dirt that is tracked
 11 over the road, and then that material then is
 12 discharged during a storm event.
 13 Q. And were there enough trucks involved to your
 14 knowledge with regard to the 509 temporary interchange
 15 to make that a concern?
 16 A. I would have deferred to the water quality
 17 people to make that determination.
 18 Q. Well, did you look into it at all from the
 19 point of view of wetland impacts?
 20 A. When I looked at the wetland impacts from the
 21 construction of the interchange, I recall feeling like
 22 the impacts were insignificant.
 23 Q. And did that include indirect impacts?
 24 A. There really wasn't much for me to consider
 25 in terms of indirect impacts.

1 Q. Did you know how many trucks a day were going
 2 to be using the temporary interchange over how many
 3 years?
 4 A. No.
 5 Q. Did you ask?
 6 A. No.
 7 Q. Would it make a difference if it were one
 8 truck a day for one week or 10, 20, 30, a hundred, a
 9 thousand times that amount over a period of years?
 10 A. The water quality engineer would have looked
 11 at that to make sure that a stormwater management
 12 system for that interchange was adequate to manage for
 13 the anticipated traffic levels on that interchange.
 14 Q. Were you involved in that review?
 15 A. No.
 16 Q. Do you know if it actually took place?
 17 A. No. I don't know.
 18 Q. Looking at the bottom of your notes on the
 19 first page here. Do you see the heading CZM?
 20 A. Yes.
 21 Q. And you say here, quote, do you not,
 22 agreement to postpone CZM consistency may not be legal,
 23 end quote?
 24 A. Yes.
 25 Q. What's that a reference to?

1 A. I believe at the time the 401 application was
 2 bumping up against the six-month CZM consistency
 3 determination.
 4 Q. And this refers to an agreement to postpone
 5 that determination, does it not?
 6 MS. MARCHIORO: Objection. The document
 7 speaks for itself.
 8 A. We must have talked about it, because that's
 9 what I wrote down.
 10 Q. (BY MR. EGLICK) Well, when you referred to an
 11 agreement, what were you referring to?
 12 A. Well, I don't have knowledge of -- I don't do
 13 consistency determinations. In fact, they still
 14 confuse me, so I don't understand -- I can't answer how
 15 it was handled other than what it says.
 16 Q. Now, as I understand it, it's your testimony
 17 that there was a decision that the 509 temporary
 18 interchange didn't cause any direct impacts; is that
 19 right?
 20 A. That's what I recall, yes.
 21 (Deposition Exhibit No. 180 was marked for
 22 identification.)
 23 Q. (BY MR. EGLICK) Showing you what has been
 24 marked as Exhibit 180 to your deposition. Can you
 25 identify it?

1 A. These are my handwritten notes from an
 2 internal meeting at ecology on May 23 of 2000.
 3 Q. And the attendance list is Jeannie. Is that
 4 Jeannie Summerhays?
 5 A. Yes.
 6 Q. S-u-m-m-e-r-h-a-y-s?
 7 A. Yes.
 8 Q. Ray H, is that Ray Hellwig?
 9 A. Yes.
 10 Q. Tom Luster?
 11 A. Yes.
 12 Q. Joan M?
 13 A. Joan Marchioro.
 14 Q. John Glynn, G-l-y-n-n?
 15 A. Yes.
 16 Q. Kevin F, is that Fitzpatrick?
 17 A. Yes.
 18 Q. And Paul --
 19 A. Ehlers.
 20 Q. E-h-l-e-r-s?
 21 A. Correct.
 22 Q. And these are all ecology persons involved in
 23 the 401 certification application by the port?
 24 A. Yes.
 25 Q. Would you look at the middle of the page? Do

1 you see where you have a section that says "509 temp
 2 access"?
 3 A. Yes.
 4 Q. And is that a reference to this issue of the
 5 509 temporary interchange that we've been discussing?
 6 A. Yes.
 7 Q. Can you take a look at that? Do you see
 8 where it says "corps makes" -- what does that say?
 9 A. Primary call.
 10 Q. And then you have written there, "There are
 11 no direct impacts," right?
 12 A. That's correct.
 13 Q. And then could you read the next sentence,
 14 please?
 15 A. "Public notice did not address" -- I believe
 16 that's RDF for regional detention facility -- "and
 17 other projects with potentially and cumulatively
 18 significant impacts."
 19 Q. And when you say or when you said here in
 20 your notes public notice, what were you referring to?
 21 A. The 404 public notice.
 22 Q. And was that the joint notice issued by the
 23 corps and the Department of Ecology for the 404, 401
 24 application?
 25 A. Yes.

1 Q. And to your knowledge, has there ever been a
 2 public notice issued by the corps or ecology that has
 3 addressed what you say here was not?
 4 A. The public notice was not reissued.
 5 Q. Well, there was a new public notice issued,
 6 wasn't there, after the port withdrew its application?
 7 A. Yes. You are correct.
 8 Q. So my question is meant to call your
 9 attention to that as well. I don't want you to leave a
 10 misimpression on the record, and I wouldn't want to
 11 lead you to do that, so think about not just the notice
 12 that was operative on May 23, 2000, when you wrote
 13 these notes but the notice that was then issued months
 14 later. Did that notice to your knowledge --
 15 A. To my knowledge, it did not.
 16 Q. -- include the things which you note here
 17 were omitted?
 18 A. Correct.
 19 Q. So that notice did not include those things,
 20 correct?
 21 A. Correct.
 22 (Deposition Exhibit No. 181 was marked for
 23 identification.)
 24 Q. (BY MR. EGLICK) Showing you what has been
 25 marked as Exhibit 181 to your deposition. Can you

1 identify it?

2 A. These are my notes on June 5 of 2000. It

3 looks like it was a conference call. Joan Marchioro

4 was on the phone. It looks like at the port it says

5 Tom Hubbard, Elizabeth --

6 Q. Would that be Leavitt?

7 A. Elizabeth Leavitt.

8 Q. Would that be Jim Kelley under her name?

9 A. I believe that's Jim Kelley. I think I keep

10 misspelling his name, so I apologize. And then at

11 ecology it was obviously Ray Hellwig, John Glynn.

12 Q. By the way, I don't know whether I asked you

13 this, but remember on Exhibit 180, when you say RDF

14 there, did I ask you -- and if I did, I apologize --

15 RDF means regional detentional facility?

16 A. Regional detention facility.

17 Q. And what is that by the way?

18 A. That is at the northwest ponds. That's the

19 regional facility that King County is building on the

20 northwest ponds.

21 Q. Now, is that something that is on the

22 property that's part of the airport project site?

23 A. It's part of the golf course, and it includes

24 the northwest ponds.

25 Q. Let's go back to -- and if you know, hasn't

1 the port at one time or another said, well, maybe we'll

2 use that RDF instead of doing some of these other

3 things we've said we're going to do with regard to

4 stormwater?

5 A. Yeah. I mean, there was discussion about

6 that, but to be honest, I don't remember how it ended

7 up.

8 Q. So you don't know whether in the current

9 stormwater plan they refer to that again, do you?

10 A. I don't know.

11 Q. Have you seen the latest version of the

12 stormwater management plan from the port?

13 A. Which is the latest?

14 Q. I think it's -- that's a good question. I

15 believe the latest is December 2001, but that's not

16 necessarily gospel.

17 A. I haven't looked at that one.

18 Q. When is the last one you did look at? That's

19 probably a better thing to kind of pin things down here

20 since my information may not be accurate.

21 A. I wouldn't be able to answer that right now.

22 Q. Was it before or after the latest ecology 401

23 decision was issued in September?

24 A. It was before that.

25 Q. Now looking at Exhibit 181. Back to that.

1 There's some discussion here of --

2 MR. EGLICK: Why don't we take a break.

3 (Recess taken.)

4 Q. (BY MR. EGLICK) Exhibit 181 is what we were

5 talking about. You there, Mr. Stockdale?

6 A. Yes.

7 Q. There's a reference here to, quote, what sort

8 of emergency action will override 401, end quote.

9 What's that all about?

10 A. This is at a time when we were trying to

11 address the wildlife hazard management plan that was

12 developed for the airport by the USDA animal control

13 people. That's the manual that the wildlife hazard

14 managers at the airport use to mitigate for bird strike

15 hazard problems.

16 At one point in time, there was a discussion

17 about whether or not a quote-unquote emergency at the

18 airport could override the 401 and allow the airport to

19 among other things fill the wetlands that were being

20 provided for mitigation.

21 Q. So in other words, the issue was whether what

22 the port was promising it would preserve, enhance, and

23 so on in terms of wetlands could later be done away

24 with or altered under the rubric of emergency?

25 A. Yeah. Maybe not done away with, but where

1 water could be drained, certain vegetation could be

2 removed.

3 MR. PEARCE: Objection.

4 Q. (BY MR. EGLICK) Did you mention the term

5 "fill"?

6 A. Yeah. That's obviously to us the worst case

7 scenario.

8 Q. I'm not a wetlands scientist, but I always

9 thought if you filled a wetland you did away with it.

10 Is that not true?

11 A. I guess I should say in addition to -- short

12 of doing away, there are these other action or

13 activities that were being discussed to manage for bird

14 strike hazards.

15 Q. And filling would do away with a wetland,

16 wouldn't it?

17 A. Oh, sure.

18 Q. Now, how did that issue get raised?

19 A. Well, it's been an undercurrent in the

20 mitigation design at the airport all along.

21 Q. The issue of emergency?

22 A. No. The issue of the port's understandable

23 interest in limiting bird strike hazards near the

24 airport.

25 Q. And that's the issue in which you suggested

1 that they do a monitoring study that we talked about
 2 earlier; isn't that right?
 3 A. Yes.
 4 Q. That was never performed; isn't that right?
 5 A. That's correct.
 6 Q. So where did the idea come from in the
 7 discussions that, well -- and I assume the idea was
 8 that whatever the 401 requires, it might later be
 9 changed; is that right?
 10 A. (Nodding head).
 11 Q. Unilaterally; is that correct?
 12 A. That's correct.
 13 Q. Was that something that ecology suggested?
 14 A. No.
 15 Q. So who suggested that or what entity
 16 suggested that? That might be an easier question for
 17 you.
 18 A. It came -- I recall it coming up at a meeting
 19 at the port or somebody from the airport said that the
 20 airport manager, the operations manager, felt like he
 21 had the authority to override the 404, the 401 because
 22 of the authority that the FAA gave him under this bird
 23 strike hazard requirement.
 24 Q. And didn't there come a time when you more or
 25 less put your foot down and said it has to be made

1 clear as part of any 401 that no one will unilaterally
 2 override the 401 plans with regard to wetlands, for
 3 example?
 4 A. Yeah. I guess you could put it that way. We
 5 had a lot of discussion about this.
 6 Q. And is there someplace in the 401 that was
 7 issued in September 2001, which is the last one, I
 8 guess, issued by ecology -- I know it's the last one
 9 issued by ecology that we know of now. Is there
 10 someplace in that 401 where ecology addressed that
 11 issue directly? Do you know what I mean by that issue?
 12 A. The emergency.
 13 Q. Yes.
 14 A. I don't think that we resolved it in the 401.
 15 I think we reached a point in signing off on the
 16 wildlife hazard management plan where I felt like the
 17 issue had been resolved.
 18 Q. Well, as far as you know in terms of
 19 conditions that govern how the port will conduct
 20 itself, are they not with regard to the 401 in the 401?
 21 A. They meaning?
 22 Q. Those conditions governing how the port will
 23 conduct itself.
 24 A. As far as the protection, the long-term
 25 protection of the wetlands, yes, that's in the 401

1 there are restrictive covenants that are part of the
 2 401.
 3 Q. Well, isn't this an issue -- and by this I
 4 mean this question of whether the port will later
 5 decide there is a quote-unquote emergency and change
 6 the plans it's agreed to -- isn't that an issue that
 7 should have been addressed and resolved as part of the
 8 final negotiations on the 401 document that was issued?
 9 MR. PEARCE: Object to the form.
 10 A. We could have included language. I don't
 11 think the 401 has anything about that. I doubt it
 12 does. I'd have to read it to be sure. But, again, I
 13 think that I feel like we resolved that when we finally
 14 got the wildlife hazard management plan to be very
 15 prescriptive as to what steps needed to be taken when
 16 certain problems came up.
 17 Q. (BY MR. EGLICK) And is the wildlife hazard
 18 management plan description of the process that you're
 19 referring to incorporated as a condition of the 401?
 20 A. No. I don't think so.
 21 Q. What's your understanding of how long the 401
 22 or a 401 certification is supposed to be in effect with
 23 regard to a particular project?
 24 A. You know, I'm not sure. There are certain
 25 requirements that kick in and then go away and some

1 that last longer, so it depends on what element of the
 2 401.
 3 Q. Would you agree with the statement that the
 4 401 certification is supposed to be for the life of the
 5 project?
 6 A. Yeah.
 7 Q. Would you agree with the idea that the life
 8 of the project and of the certification can be longer
 9 than any individual's tenure at the Department of
 10 Ecology, for example?
 11 A. Tenure?
 12 Q. Yeah.
 13 A. Oh, yeah.
 14 Q. So you're smiling, right? Do you know
 15 something I don't about your tenure?
 16 A. Well, I don't intend on being there forever.
 17 Q. That's my point. What do they say in the old
 18 testament? There rose up a pharaoh who knew not
 19 Joseph. Do you recall that section?
 20 A. Uh-huh.
 21 Q. Is it possible, then, that there could be a
 22 time when your oral history as to what you thought the
 23 port agreed to with regard to an emergency would not be
 24 available?
 25 A. The agreement that we reached is contained in

1 the wildlife hazard management plan.
 2 Q. Which you've already agreed is not included
 3 in the 401 certification, is it?
 4 A. Yeah. I don't think we did.
 5 (Deposition Exhibit No. 182 was marked for
 6 identification.)
 7 Q. (BY MR. EGLICK) Showing you what has been
 8 marked as Exhibit 182 to your deposition. Can you
 9 identify it?
 10 A. This is an e-mail that I sent to Jim Kelley
 11 and Elizabeth Leavitt on Monday, June 12, of the year
 12 2000 regarding wildlife hazard management plan and a
 13 conversation that I had, I believe, with Jim Kelley on
 14 June 9 of 2000, so three days before.
 15 Q. This e-mail in section 6 starting on -- I
 16 guess starting and finishing on the first page deals,
 17 does it not, with this question again of whether the
 18 port could fill a wetland as a so-called emergency
 19 action; is that right?
 20 A. Yes.
 21 Q. Can you read into the record the last two
 22 sentences of section 6?
 23 A. "Ecology will seek clear indications that the
 24 airport manager" --
 25 Q. Can I interrupt you? I apologize for that

1 but I wanted you to start with the beginning of that
 2 sentence.
 3 A. You're right. Okay. "As part of the final
 4 negotiations on the 401, Ecology will seek clear
 5 indications that the airport manager understands what
 6 is required of the Port to remain in compliance with
 7 the permit. I say this now, and on the record, so that
 8 there is no misunderstanding in the future that we
 9 identify this as an area of continued concern."
 10 Q. When you say on the record, what do you mean?
 11 You just grunted, but the court reporter can't pick up
 12 grunts, so I'll have to ask you what that grunt means,
 13 Mr. Stockdale. You're laughing.
 14 A. I laughed at myself because obviously it's on
 15 the record. It was in an e-mail.
 16 Q. Well, it was on the record in the sense that
 17 we got it in a stack of papers under the Public
 18 Disclosure Act, and maybe you meant for us to find it
 19 or not, but I guess what I'm --
 20 A. Oh, no, no, no.
 21 Q. I'm asking what you meant by on the record at
 22 the time.
 23 A. Well, at the time, I think the fact that I
 24 sent an e-mail put it in the record, but I'm just
 25 laughing because I tend to be -- repeat myself.

1 (Deposition Exhibit No. 183 was marked for
 2 identification.)
 3 Q. (BY MR. EGLICK) Showing you what has been
 4 marked as Exhibit 183 to your deposition. Can you
 5 identify it?
 6 A. This is an e-mail dated July 17, 2000, from
 7 me to Tom Luster regarding proposed Sea-Tac TRACON.
 8 Q. Now, is this the TRACON -- all upper case
 9 T-r-a-c-o-n -- facility we talked about earlier in your
 10 deposition?
 11 A. Yes.
 12 Q. You have on here -- why don't you just read
 13 your communication to Mr. Luster into the record,
 14 please.
 15 A. "For some reason this project" -- now, below
 16 -- hang on. Below it is an e-mail that Tom Luster had
 17 forwarded to me from a Michelle Avolio at the FAA, so I
 18 guess in response to Tom I said, "For some reason this
 19 project just falls off my radar screen. Is it still
 20 active? Are we on the critical path, or are we in a
 21 hold position? If so, when do we run out of gas?" I
 22 guess I'd been working on airports for a while.
 23 Q. That was an aviation analogy, I take it?
 24 A. I guess.
 25 Q. And then subsequent to that, I understand

1 then you were advised that it was a project that was
 2 proceeding; is that correct?
 3 A. Yes.
 4 Q. And who is Michelle Avolio, A-v-o-l-i-o?
 5 A. I don't know other than that she works at the
 6 FAA.
 7 Q. She's the person in any event who had sent an
 8 e-mail to Tom Luster, who then passed it on to you and
 9 to which you then responded; is that correct?
 10 A. That's correct.
 11 (Deposition Exhibit No. 184 was marked for
 12 identification.)
 13 Q. (BY MR. EGLICK) Showing you what has been
 14 marked as Exhibit 184 to your deposition. Can you
 15 identify it?
 16 A. It is an e-mail sent to me on September 27 of
 17 2000. The subject line says "forward Dinsmore draft."
 18 Q. Why don't you take a minute to familiarize
 19 yourself with it. Let me know if you're through.
 20 A. I am.
 21 Q. Do you know what the Dinsmore draft is?
 22 A. No.
 23 Q. Do you know what this was about, this e-mail
 24 that Tom Luster sent you?
 25 A. I can guess.

1 Q. Well, I don't want you to guess. It doesn't
 2 ring a bell with you, any of this?
 3 A. Well, I know what was happening at the time
 4 that this was sent out.
 5 Q. Why don't you tell us.
 6 A. The second public notice was up against its
 7 one-year deadline, and we were not yet ready to approve
 8 the project. There was still outstanding issues. I
 9 believe that we asked the port to either withdraw the
 10 application and reapply or we were going to give them a
 11 denial.
 12 Q. Can you look on the third page of Exhibit
 13 184?
 14 A. Uh-huh.
 15 Q. Are you on the third page? Could you count
 16 in one, two, three? Maybe yours is different than
 17 mine. That's quite possible. I got a page that's
 18 numbered at the bottom right 318. Are you missing that
 19 page?
 20 A. That's page 2.
 21 Q. Are you missing page 317, then?
 22 A. Yes.
 23 MR. PEARCE: I'm also missing 317.
 24 MR. EGLICK: Can I take one of the unofficial
 25 copies and off the record.

1 (Discussion off the record.)
 2 (Deposition Exhibit No. 185 was marked for
 3 identification.)
 4 Q. (BY MR. EGLICK) Showing you what has been
 5 marked as Exhibit 185 to your deposition. Can you
 6 identify it?
 7 A. This is an internal ecology memo that I wrote
 8 on October the 9th of 2000 to Tom Luster, Ray Hellwig,
 9 Joan Marchioro, Kevin Fitzpatrick, Dave Garland, and
 10 Jeannie Summerhays.
 11 Q. And what was your prompt or occasion for
 12 writing the memo?
 13 A. This memo outlines the remaining issues of
 14 the natural resource mitigation plan that I had
 15 identified at the time -- at that date, as of that
 16 date.
 17 Q. Was there a reason that you were as of that
 18 date, October 9, 2000, preparing such a summary?
 19 A. Yes.
 20 Q. What was it?
 21 A. I was moving off of the project, and I needed
 22 to document moving off the project in the sense of the
 23 day-to-day review and attending of meetings and so
 24 forth, and I wanted to document for the record what the
 25 remaining issues were at that time.

1 Q. So if you look back at 184 -- do you have 184
 2 there such as it is at the moment?
 3 A. I do.
 4 Q. Do you see the date at the top of 184 is
 5 what?
 6 A. September 27.
 7 Q. On September 27, 2000, had you requested or
 8 been removed from the project?
 9 A. I wasn't removed. It's less than two weeks
 10 apart. We were at that point where I was removing
 11 myself from the project.
 12 Q. But as of September 27, 2000, had you done
 13 so?
 14 A. It hadn't been formalized, no.
 15 Q. When you drafted your October 9, 2000, memo,
 16 did you have any indication that Tom Luster was going
 17 to not be on the project anymore?
 18 A. I don't remember when Tom left the project.
 19 I don't remember that date, but I don't think so.
 20 MR. EGLICK: Here is a substitute Exhibit
 21 184.
 22 Q. (BY MR. EGLICK) Looking at Exhibit 185, which
 23 we were still talking about. We'll get back to 184.
 24 Can you look at the second paragraph in section 1 of
 25 Exhibit 185 on the first page? Do you see it?

1 A. Yes.
 2 Q. And read the sentence that starts
 3 "consultant."
 4 "Consultant will report to Tom Luster and
 5 respond to his requests for technical consultation."
 6 So obviously at that time Tom was still on the project.
 7 Q. And you didn't have any indication he was
 8 leaving, did you?
 9 A. No.
 10 Q. Looking down to number 3.
 11 A. Yes.
 12 Q. Could you read the heading on number 3 and
 13 then the first two sentences into the record, please?
 14 A. "Continuity between design and
 15 implementation. We retain a strong interest in
 16 ensuring that the designers of the mitigation elements
 17 are present to guide successful installation. The
 18 mitigation ratios we negotiated with the Port are based
 19 in part on this assumption."
 20 Q. Now, is there something in the 401 as it was
 21 issued in September 2001 that addresses this issue?
 22 A. I don't think so.
 23 Q. And I can see you're reading ahead here. Let
 24 me ask you the question. In fact, on the next page of
 25 this Exhibit 185, you actually recommend that there be

1 something in the 401 to that effect, don't you?
 2 A. Yeah.
 3 Q. You're laughing. Why are you laughing?
 4 A. That was a pretty smart recommendation.
 5 Q. Why don't you read that recommendation into
 6 the record.
 7 A. "Recommendation: Given this, I recommend we
 8 craft a condition for the 401 that re-opens the
 9 negotiated mitigation ratios if the port chooses to
 10 select construction oversight/supervision that does not
 11 include the original designer team."
 12 Q. Now, we've already agreed there's nothing in
 13 the 401 that ecology issued that does this, is there?
 14 A. I don't think so, no.
 15 Q. Let's look down at number 4. I don't want to
 16 spend a lot of time on this, but given the efforts I've
 17 had to make to get things in this case, I'm kind of
 18 curious about this. You make a recommendation here,
 19 which I guess as you put it -- would you agree this is
 20 also in your words a pretty smart recommendation, this
 21 one that says "I suggested to Jan Cassin"? Can you
 22 read that into the record?
 23 A. Yes.
 24 Q. Go ahead.
 25 A. "I suggested to Jan Cassin -- she works at

1 Parametri:
 2 Q. And that's the port's consultants, right?
 3 A. She's one of them, yes. She works for Jim
 4 Kelley. -- "5-26-2000 that the Port make documents and
 5 maps available on the web."
 6 Q. Why don't you read the next sentence too.
 7 A. "Updated documents can be managed efficiently
 8 this way, and all parties with interest can have ready
 9 access."
 10 Q. Now, would you agree today that that still
 11 seems using your term like a pretty smart
 12 recommendation?
 13 A. I think that recommendation still stands,
 14 yes.
 15 Q. And was that ever implemented?
 16 A. No as far as I know.
 17 Q. Was that recommendation in part prompted by a
 18 concern that the documents be readily available to
 19 ecology staff for review without the need for
 20 transferring paper copies back and forth?
 21 A. No. It was more to make the documents
 22 available to the public.
 23 Q. Why were you concerned about that?
 24 A. Because the weekly public disclosure requests
 25 that we were getting did require a fair amount of our

1 time to respond to, and that was time that we couldn't
 2 spend working on the project.
 3 Q. Did the port ever tell you why they wouldn't
 4 adopt that recommendation you made?
 5 A. No.
 6 Q. Take a look if you would at number 7 on the
 7 second page of Exhibit 185. Do you see where the
 8 heading of that one is?
 9 A. Yes.
 10 Q. What's the heading say?
 11 A. "Cumulative impacts from SR 509 and South
 12 Access road."
 13 Q. Would it be accurate to say that -- well, why
 14 don't you go ahead and read into the record if you
 15 would this section and then the first bulleted point
 16 under it.
 17 A. Number 7, "Cumulative impacts from SR 509 and
 18 South Access road. Parametri: is operating under the
 19 assumption that if adequate mitigation is required for
 20 each of the projects in the golf course area -- and in
 21 paren I say "regional stormwater facility at northwest
 22 ponds, SR 509/South Access, and SASSA," end paren,
 23 "then when considered jointly, the projects will not
 24 result in cumulative impacts. I can follow the logic
 25 of this to a point, but I remain concerned that such

1 assumption is not based on much of an analysis. I
 2 believe what is needed" -- I guess I should have said
 3 it one of the following.
 4 Q. And then what's the first bulleted point
 5 under your suggestion of what's needed?
 6 A. "A coordinated mitigation strategy between
 7 WSDOT, the Port, and the basin planning committee."
 8 Q. Now let's just take that one. Did that
 9 happen to your knowledge?
 10 A. There were a fair number of meetings between
 11 ecology and DOT and the basin planning -- not the basin
 12 planning committee but King County, David Masters, who
 13 were working on that.
 14 Q. In fact, David Masters doesn't speak for the
 15 basin planning committee, does he?
 16 A. No. No, not at all.
 17 Q. Because the basin planning committee includes
 18 on it, for example, doesn't it, several independent
 19 cities that are incorporated?
 20 A. I believe so, yes.
 21 Q. Did you ever see a document that indicated
 22 that there was a coordinated mitigation strategy among
 23 DOT, the port, and the basin planning committee?
 24 A. No.
 25 Q. Now your next bulleted recommendation, if

1 you could read that into the record.
 2 A. "A more detailed evaluation of the cumulative
 3 impacts, and an assessment of the mitigation provided
 4 for the port impacts in the basin."
 5 Q. Now, can you point to a document where this
 6 recommendation was fulfilled?
 7 A. The design drawings for SR 509 and the south
 8 access road were refined. What I mean by refined, they
 9 were -- they changed to avoid some of the wetland
 10 impacts that were considered as possible or potential
 11 at the time that I wrote this, so the design did
 12 change, and those drawings would have to be reviewed.
 13 But the natural resource mitigation plan also was
 14 updated to address some of this.
 15 Q. Now, is there a portion of the natural
 16 resource mitigation plan that provides what you call
 17 for here, which is a more detailed evaluation of the
 18 cumulative impacts and an assessment of the mitigation
 19 provided for the port impacts in the basin?
 20 A. I don't know. I'd have to look.
 21 Q. Well, when is the last time you looked at the
 22 natural resource mitigation plan?
 23 A. Just before the last -- before the
 24 certification was issued.
 25 Q. And when you looked at it then, was this

1 present in it, this more detailed evaluation of the
 2 cumulative impacts and an assessment of the mitigation
 3 provided for the port impacts in the basin?
 4 A. I think it did address some of the questions
 5 of the cumulative impact.
 6 Q. I want you to answer the question I'm asking,
 7 because you're making a very specific recommendation
 8 here, aren't you?
 9 A. Yes.
 10 Q. Is that specific recommendation fulfilled in
 11 the last NRMP that you looked at?
 12 A. I don't know.
 13 Q. And did you think to check that before you
 14 signed off on the NRMP, or did you not sign off on the
 15 NRMP? Maybe I should ask you that.
 16 A. No. I signed off on it.
 17 Q. So did you check to see if this
 18 recommendation had been fulfilled before you signed off
 19 on the last NRMP?
 20 A. I don't recall.
 21 Q. Well, isn't it true that at that point
 22 ecology was past the point where you could have done
 23 anything about it anyway because the decision had been
 24 made to issue the permit, the certification?
 25 A. Sorry. Say that again.

1 Q. Isn't it true that by the time you were
 2 reviewing the -- the last time you reviewed the NRMP,
 3 the decision had already been made to issue a
 4 certification?
 5 MS. MARCHICRO: Objection; no foundation.
 6 A. No. I disagree.
 7 Q. (BY MR. EGLICK) When was the last time you
 8 reviewed an NRMP?
 9 A. The last time I looked at it was just before
 10 we approved the 401, we issued the 401.
 11 Q. And how close to the issuance of the 401 was
 12 that?
 13 A. Within a week.
 14 Q. And you're saying that within a week of when
 15 it was issued there had not been a decision to issue a
 16 401 certification?
 17 A. That was the decision. The 401 is the
 18 decision.
 19 Q. Right. The 401 is the written embodiment of
 20 the decision; is that correct?
 21 A. That's correct.
 22 Q. But before a written embodiment of a decision
 23 is made, someone has to make the decision that it will
 24 be written with an approval in it, doesn't one,
 25 someone?

1 A. Yes.
 2 Q. Do you know when that occurred?
 3 A. It was a very dynamic and those are very
 4 dynamic times. I mean, there are a lot of things that
 5 are coming together all at once.
 6 Q. Do you know when that occurred?
 7 A. When it all came together?
 8 Q. When the decision was made to issue a 401
 9 certification approving the port application.
 10 A. I think it was made within a couple of weeks
 11 of writing it.
 12 Q. Prior to writing it?
 13 A. Yes.
 14 Q. And who wrote it?
 15 A. Who wrote the 401?
 16 Q. Yes.
 17 A. Ann Kenny.
 18 Q. And who made the decision?
 19 A. To? The decision was made by me for the
 20 wetlands element. It was made by Kevin Fitzpatrick for
 21 the stormwater and I believe the low flow. That date
 22 asked us if we felt like we had reasonable assurance to
 23 issue the 401, so the decision was made when technical
 24 staff felt like we could make the decision.
 25 Q. And when you made that decision, did you sit

~~1 I don't and go over those remaining issues that you had
2 noted in your October 9, 2000, memorandum, which is
3 Exhibit 185?
4 A. No. And that's why I laughed when I said
5 that that was a smart recommendation, because in
6 hindsight, I wish that I had done that.
7 Q. Was there some time pressure in issuing the
8 401, Mr. Stockdale?
9 A. Yes.
10 Q. And how so? Was there some urgent business
11 you had to get on to so you had to get this 401 out?
12 A. This has been an urgent project for five
13 years.
14 Q. Well, what was the time pressure for issuance
15 of the 401, this 401?
16 A. The time pressure was getting -- at this
17 stage was making the written record that constitutes
18 the 401 all come together once we had agreed that it
19 was time to issue the 401.
20 Q. And you had no indication that there was
21 pressure in any other way to get the 401 issued?
22 A. There was other pressure, sure.
23 Q. What was that?
24 A. There was pressure from all sides.
25 Q. I'm asking you about pressure to get the 401~~

1 certification issued.
2 A. There's been pressure from the port to issue
3 the certification for at least three years.
4 Q. Well, let's talk about the pressure that
5 occurred, if any, in July and August of 2001. We can
6 agree, can't we, the first certification was issued on
7 August 10, 2001?
8 A. That's correct.
9 Q. So was there any pressure in July 2001 to get
10 the 401 certification to approve the port project
11 issued?
12 A. Yes.
13 Q. And where did the pressure come from to get
14 that approval issued?
15 A. Well, the pressure was in -- there was
16 pressure from me that I generated for making sure that
17 I'm ready for the decision, and that includes making
18 sure that I have documents that I can approve and --
19 ~~20 Q. I'll ask another question, then, because
21 maybe I'm not making myself clear. Apart from your own
22 pressure on yourself, where was the pressure coming
23 from?
24 A. Well, the pressure came from the port and --
25 Q. How did the pressure come from the port?
26 A. Well, it came in the press. It came through~~

~~1 the governor's office.
2 Q. How did it --
3 A. It came from attorneys.
4 Q. How did it come from the governor's office?
5 A. Well, it came through knowing that they were
6 meeting with the governor's office, and it came from
7 hearing from the governor's office before I even got
8 back to my office after having a meeting at the port.
9 It came from the press. It came --
10 Q. Now, how can you hear from the governor's
11 office before you even get back to your office about a
12 meeting you had with the port? How would they even get
13 ahold of you?
14 A. Well, because they complained to the
15 governor's office within minutes of us leaving the
16 airport, and I was reached on a cell phone before I
17 even got back to the office.
18 Q. And what was the complaint?
19 A. Oh, I mean, it's a whole string of
20 complaints. It was a complaint about Tom Luster. It
21 was a complaint about me. I mean --
22 Q. But in August 2001 and July 2001, Tom Luster
23 wasn't working there anymore, was he?
24 A. No. When you asked me where the pressure
25 came from, it's been a pressure cooker for over three~~

1 years.
2 Q. Let's focus for a moment, though -- although
3 I'm very interested in the whole saga, but let's try to
4 take it in small, chewable bites. In July and August
5 2001, pressure -- and by pressure I don't mean whatever
6 pressure you have to do your job internally but what
7 pressure was coming from the governor's -- let me
8 finish the question, and that will help give you a
9 focus for your response. What pressure was coming from
10 the port?
11 A. What pressure was coming from the port --
12 Q. For issuance of the 401 approval.
13 A. Well, they were meeting with the governor's
14 chief of staff, who was then calling the director and
15 Ray Hellwig, and they wanted to know why we couldn't
16 issue the 401. I must tell you that ecology management
17 did a very good job shielding the technical staff from
18 the pressure in terms of making a decision that wasn't
19 right.
20 I mean, granted the pressure was there, and I
21 could see the effect that it was having on management,
22 but nonetheless, never was I asked by Ray Hellwig to
23 make a decision that I couldn't support, so that's --
24 it's important for you to understand that, yeah, the
25 pressure really got to me, but never did that pressure

1 make me make a decision that I felt like I couldn't
 2 support.
 3 Q. But then again, you never told Mr. Hellwig,
 4 did you, that you were against issuance of a 401 in
 5 July or August 2001, did you? Did you?
 6 A. Not in August of 2001.
 7 Q. And not in July of 2001, did you?
 8 A. No.
 9 Q. Now, what happened earlier when there was
 10 pressure from the port and someone indicated that they
 11 were not with the program on issuance of a 401 for the
 12 port? By with the program, I mean not in favor of
 13 issuance of the 401 at a particular time.
 14 MS. MARCHICRO: Objection; vague.
 15 MR. PEARCE: Objection; no foundation.
 16 A. I don't understand. What happened --
 17 Q. (BY MR. EGLICK) Well, let's go back to your
 18 description of an incident. You said you had a meeting
 19 with the port and before you got back to your office
 20 you had a call from the governor's office?
 21 A. Yeah. I got a call from Gordon White,
 22 because he wanted to know -- the governor's office was
 23 calling him, and they wanted to know what had happened.
 24 Q. And this was when you say you hadn't even
 25 gotten back to your office, so how much time had

1 elapsed since you had left the meeting with the port?
 2 A. Twenty minutes.
 3 Q. And the complaint was what?
 4 A. Gordon wanted to know what happened at the
 5 meeting.
 6 Q. And why did he want to know?
 7 A. Because he didn't know how to answer the
 8 questions from the governor's office.
 9 Q. Now, were you in a position where you were
 10 asked for input on whether Tom Luster should remain on
 11 the 401 team? Do you know what I mean by 401 team?
 12 A. Uh-huh.
 13 Q. What do I mean?
 14 A. The 401 team included me and Kevin. Before
 15 Kevin it was Lisa --
 16 Q. Kevin Fitzpatrick?
 17 A. Kevin Fitzpatrick. And it included the
 18 county engineer. Now, there was an internal team that
 19 the county person didn't sit at, but it included either
 20 the immediate technical staff and Ray Hellwig and Joan.
 21 Q. Joan who?
 22 A. Joan Marchicoro.
 23 Q. She was a member of ecology's 401 team?
 24 A. Well, Joan attended many of our meetings, so
 25 whether I could say she was a member of the team or

1 ~~Q. Well, I don't -- I never considered that~~
 2 ~~Q. Well, that's okay. Tom Fitzpatrick testified~~
 3 ~~that she was, so you're in good company.~~
 4 Now, were you asked at any time whether Tom
 5 Luster should remain a member of the 401 team?
 6 A. I actually had concerns about Tom. I reached
 7 a point in our review of the project where I was
 8 concerned about Tom's objectivity in the process.
 9 Q. And the concern was that Tom was not agreeing
 10 with the ecology consensus that the project was
 11 approvable; is that correct?
 12 A. Tom wasn't -- Tom kept rehashing and bringing
 13 up issues that we had already resolved.
 14 Q. When you say we had already resolved, Tom was
 15 the 401 coordinator, was he not?
 16 A. Right.
 17 Q. And I take it in Tom's view, Tom was saying
 18 they were not resolved; is that correct?
 19 A. Tom was double-guessing technical issues that
 20 squarely fell in the realm of the stormwater engineer
 21 reviewing the project and not to him.
 22 Q. So it was a question of jurisdiction?
 23 A. He was also --
 24 Q. Is that correct? Is it a question of
 25 jurisdiction?

1 MR. PEARCE: Objection; argumentative. And
 2 you're not letting the witness answer the question.
 3 MR. EGLICK: I'm asking for the witness to
 4 answer my question before he moves on to another one.
 5 MR. PEARCE: You're not letting him answer
 6 because you don't enjoy the answer.
 7 MR. EGLICK: Roger, limit your objections to
 8 appropriate ones.
 9 A. The concern -- Tom --
 10 Q. Excuse me, Mr. Stockdale.
 11 MR. EGLICK: Could you read back my question,
 12 please?
 13 (The reporter read back as requested.)
 14 A. What do you mean by jurisdiction?
 15 Q. (BY MR. EGLICK) Well, you testified, did you
 16 not, that Tom Luster was not accepting, I think you
 17 said, technical staff's view on a particular issue, and
 18 I'm asking whether your testimony is that Mr. Luster
 19 was required to accept that view because he didn't have
 20 jurisdiction over that area of the 401.
 21 A. He also didn't have the expertise.
 22 Q. Well, answer my question first if you would.
 23 Are you saying it's a jurisdictional issue or some
 24 other answer?
 25 A. It's more than just jurisdictional.

1 Expertise is probably more important.
 2 Q. And are there particular issues that you can
 3 identify that Mr. Luster raised where he did not have
 4 expertise? I'm not asking for general topic areas but
 5 particular specific issues.
 6 A. Well, there were issues about the
 7 relationship of the MPDES permit to the 401, and Tom
 8 was double-guessing the water quality program manager's
 9 decision on that, so there was an agency policy issue
 10 that Tom disagreed with, and he was trying to find a
 11 way to undermine the water quality program manager.
 12 Q. Now, is that an issue that has to do with
 13 environmental or engineering expertise?
 14 A. Absolutely.
 15 Q. What environmental or engineering expertise
 16 goes into deciding the relationship between a 401
 17 certification and an MPDES permit?
 18 A. I'm not a water quality engineer, so I'm not
 19 sure I can answer that.
 20 Q. Well, you just told me that that doesn't --
 21 that that involves environmental expertise as opposed
 22 to something else, so I'm wondering if you can identify
 23 for me what it is, because it sounds very much to me
 24 like a jurisdictional issue, but I'm hoping you'll be
 25 able to explain your answer.

1 A. Well, like I said, Tom was inserting himself
 2 in areas where he did not have the expertise, and he
 3 was double-guessing technical staff.
 4 Q. And by inserting himself, you mean Tom was
 5 asserting what the scope of review and responsibility
 6 of a 401 certification was in a way that was
 7 inconsistent with what others were saying was that
 8 scope; is that correct?
 9 A. That's fair.
 10 Q. And it was your view that as the senior 401
 11 coordinator for the statewide 401 program, that was an
 12 area outside of Mr. Luster's expertise; is that
 13 correct?
 14 A. I'm not the senior 401 expert.
 15 Q. No. Tom Luster was.
 16 A. Right.
 17 Q. And it was your view that in that capacity,
 18 the question of relationship between the 401 program
 19 and the MPDES permit program was an area outside his
 20 expertise; is that correct?
 21 A. Yeah.
 22 Q. So that's a specific area where Tom Luster
 23 was in your view raising inappropriate issues; is that
 24 correct?
 25 A. That's correct.

1 Q. Now, we've talked to Katie Walter about this,
 2 but let me ask you. Was there any deadline set for
 3 drafting of a 401 approval in the summer of 2001?
 4 A. I'm sure that there was a target date that we
 5 were working towards.
 6 Q. And who set the deadline?
 7 A. I think it was set by Ray in a meeting, one
 8 of the meetings that we had when we met and decided
 9 that we were ready to move forward.
 10 Q. Was there any involvement in setting that
 11 deadline of the governor's office?
 12 A. I don't think so.
 13 Q. Do you know whether or not there was a
 14 meeting with the governor in which the port and ecology
 15 agreed on a deadline for issuance of a 401?
 16 A. No, I don't.
 17 Q. Would you know if there was?
 18 A. If it was something that came up in a
 19 meeting, yes.
 20 Q. Only if you attended the meeting, though;
 21 isn't that correct?
 22 A. If I attended the meeting.
 23 Q. Now, how did it happen that Katie Walter got
 24 picked to be the consultant to ecology on wetlands?
 25 A. I picked her.

1 Q. And had you originally intended to pick
 2 someone else?
 3 A. There was somebody else that I wanted to
 4 hire, yes.
 5 Q. Who was that?
 6 A. That was Dyanne Sheldon.
 7 Q. And Dyanne Sheldon is a wetlands expert?
 8 A. Yes.
 9 Q. Why are you laughing?
 10 A. Because she works for you.
 11 Q. Well, she doesn't work for me, but in any
 12 event, do you have any reservation about her expertise
 13 as a wetlands person, scientist?
 14 A. No, I don't.
 15 Q. So she was your first choice; is that
 16 correct?
 17 A. Yes.
 18 Q. And the port told you they didn't want you to
 19 hire Dyanne Sheldon, didn't they?
 20 A. That's correct.
 21 Q. And then ecology didn't hire her, did they?
 22 A. No, we didn't.
 23 Q. You thought that was pretty bad that the port
 24 told you you couldn't hire her, didn't you?
 25 A. Yes.

1 Q. But then you didn't hire her, did you?
 2 A. We weren't able to, no.
 3 Q. Now, what was the difference between Katie
 4 Walter and Dyanne Sheldon or Shannon & Wilson and
 5 Dyanne Sheldon that made Dyanne Sheldon your first
 6 choice?
 7 A. Well, to be honest, Dyanne -- I've known
 8 Dyanne longer than any other wetland consultant --
 9 Q. You worked with her at King County, didn't
 10 you?
 11 A. I did. And I've just known her for a long
 12 time. When we called -- we put out a bid to three or
 13 five consulting firms. When I sat down and I started
 14 thinking about who else to send it to, Katie was
 15 probably the second person that I thought of. Granted
 16 our -- we couldn't hire somebody who was currently
 17 working for the port or who had worked for the port on
 18 the project.
 19 MR. EGLICK: Could you read back the
 20 question, please?
 21 (The reporter read back as requested.)
 22 Q. (BY MR. EGLICK) I may have gotten you off the
 23 track there by interjecting that you worked with her at
 24 King County, but I still would like you if you would to
 25 address that question. What was the difference?

1 A. I would say that they're both equally
 2 qualified in terms of giving us the kind of expertise
 3 that we were looking for and moving the natural
 4 resource mitigation plan from where it was at the time
 5 that I left to the time that the certification was
 6 issued.
 7 Q. There's no difference in your mind of the
 8 service that either would provide in terms of strength
 9 of knowledge, ability, analysis, or anything else?
 10 A. I don't think so. I mean, Dyanne has more
 11 experience overall in the field, but I'm not sure that
 12 that limited Katie's ability to provide us with what
 13 she did.
 14 Q. Dyanne has more experience in the field. You
 15 mean as being a wetland scientist; is that correct?
 16 A. That's correct.
 17 Q. Now, you're saying Dyanne Sheldon was your
 18 first choice. You're saying the port told you they
 19 didn't want to hire Dyanne Sheldon; is that correct?
 20 A. Uh-huh.
 21 Q. The port was paying the bill, wasn't it?
 22 A. Uh-huh.
 23 Q. Did the port give a reason as to why it did
 24 not want you to hire Dyanne Sheldon?
 25 A. Not to me.

1 Q. To your knowledge, did they give a reason to
 2 anyone?
 3 A. They went, I believe, to the governor's
 4 office to complain about this saying --
 5 Q. To complain about what?
 6 A. That we wanted to hire Dyanne Sheldon. And
 7 they said that they felt that she was biased.
 8 Q. Have you ever worked on a project before
 9 where ecology's choice of a wetland scientist ends up
 10 being a matter taken to the governor's office?
 11 A. No.
 12 Q. Why don't you take a look at Exhibit 185.
 13 We've talked about this some, but could you look at
 14 page 81 bottom right corner? It's page 4 of the
 15 exhibit as the exhibit is internally numbered. Then do
 16 you see the second bulleted point under number 10?
 17 A. Yes.
 18 Q. Could you read that into the record, please?
 19 A. "Some of the wetlands downslope of the
 20 proposed MSE wall remain wet through the summer. Page
 21 62 IA," which I believe is the implementation
 22 agreement, "however, proposes a hydrology performance
 23 standard that will assure that hydrology is maintained
 24 for the remaining wetland downslope of the wall only to
 25 mid-April. I have spoken with Jim Kelley about this,

1 and he agrees that this standard needs more attention."
 2 Q. Now, let's go to July 2001, and you're
 3 telling me, you know, you reviewed the NRMP and so on
 4 and the 401 before it was issued; is that right?
 5 A. Yes.
 6 Q. So how did you fix this one, this issue that
 7 you raised in December of 2000?
 8 A. It doesn't look like we fixed it.
 9 Q. Did you change your mind?
 10 A. No. I just don't think that we extended it
 11 through the summer.
 12 Q. And you had review of the 401 before it was
 13 issued?
 14 A. Yes.
 15 Q. And it was a very deliberate review --
 16 A. Yeah. This is my mistake.
 17 Q. We've come up with a number of these now,
 18 haven't we?
 19 MS. MARCHIGRO: Objection; argumentative.
 20 MR. EGLICK: Okay. I'll withdraw the
 21 question.
 22 (Deposition Exhibit No. 186 was marked for
 23 identification.)
 24 Q. (BY MR. EGLICK) Looking back at 185 for a
 25 minute, Mr. Stockdale, if you would before we go to

1 identifying 186. Just thinking about what we've been
2 talking here, when the decision was made to draft the
3 401 certification in 2001, this past summer, did you
4 raise any issues where you said, no, this has not been
5 addressed, we can't issue this 401 because something
6 has not been addressed?

7 A. Did I raise any issues?

8 Q. Yes. In July and August 2001.

9 A. At that point, I felt like the issues had
10 pretty much been resolved.

11 Q. Is it the case that today here as we go over
12 your October 9, 2000, memo it turns out that there's
13 some issues that you identified very early on that had
14 not been resolved in July and August 2001? Is that
15 correct?

16 A. Well, there's two issues that we've
17 identified that through my lack of attention didn't
18 make it into a specific 401 condition.

19 MR. EGLICK: Can you read back the question,
20 please?

21 (The reporter read back as requested.)

22 A. Yes.

23 Q. (BY MR. EGLICK) And, in fact, when you were
24 telling me about there was no pressure to say yes, for
25 example -- you recall you made a little bit of a

1 statement about that; is that correct?

2 A. Correct.

3 Q. You don't really know what result would have
4 occurred if you had said wait a minute, there's some
5 things outstanding here, because you never said that,
6 did you?

7 A. I never said what?

8 Q. Wait a minute, there are some issues
9 outstanding here.

10 A. I said that -- I did not say that in July. I
11 said that for about three years before that.

12 Q. And I'm asking about July and August 2001.
13 You never said that, did you?

14 A. No.

15 Q. Let's look at Exhibit 186. Can you identify
16 it?

17 A. This is an e-mail that I sent to Ray Hellwig
18 and Jeannie Summerhays on October the 30th, year 2000.

19 Q. Now, I notice that this e-mail has on it
20 "deliberative memo." Do you see that?

21 A. Uh-huh.

22 Q. Now, this was about the contract with Dyanne
23 Sheldon that ultimately didn't go through, is that
24 right?

25 A. He didn't have a contract with Dyanne.

1 Q. Well, I notice what's the first four words
2 or six words of this memo say?

3 A. It says, "I recommend the contract with
4 Dyanne be open-ended."

5 Q. So this was a reference to a contract with
6 Dyanne Sheldon; is that correct?

7 A. It's in reference to a contract that we
8 wanted to sign with Dyanne, but we didn't have a
9 contract with her.

10 Q. Now, looking at the top of the memo, I notice
11 here it says "deliberative memo." Do you see that?

12 A. Uh-huh.

13 Q. Did you put that on here?

14 A. It looks like I did.

15 Q. And where it says "protected"?

16 A. Uh-huh.

17 Q. Did someone tell you to put that on here?

18 A. No.

19 Q. Well, was this memo deliberative about the
20 contract with Dyanne Sheldon?

21 A. Yes.

22 Q. And so that's why you put it on?

23 A. Yes.

24 Q. So your understanding was if you were writing
25 out what should be the nature of the contract with

1 Dyanne Sheldon, then you could label it as deliberative
2 and protect it from public disclosure?

3 A. That's probably what I thought at the time.

4 Q. I see you have a recommendation here. Do you
5 see this second paragraph in this memo?

6 A. Yes.

7 Q. Could you read that into the record, please?

8 A. "I also recommend that a firewall be put in
9 place between Dyanne and the Port. Dyanne should be
10 insulated from the Port to the same extent that Ecology
11 employees are."

12 Q. So what's a firewall?

13 A. I was concerned that because we were asking
14 the port to pay for Dyanne that they would use that as
15 a way to try to influence her review.

16 Q. And, in fact, later on didn't it happen that
17 when Katie Walter had to do more than was expected and
18 her allocation of money ran out that Ecology had to go
19 back and ask the port if they could keep Katie Walter
20 on?

21 A. I believe Ann Kenny went to the port and
22 asked for more money, yes.

23 Q. So the port held the purse strings; is that
24 correct?

25 A. Well, we were asking the port to pay for it.

1 to pay for the review.
 2 Q. The port then, is it correct to say, held the
 3 purse strings for the review by the outside wetlands
 4 consultant who took over a lot of your duties; is that
 5 correct?
 6 A. I'm not sure I understand what you mean by
 7 purse strings.
 8 Q. The port had control of whether or not money
 9 would be allocated to the task?
 10 A. They had control over whether they agreed
 11 with us or not to hire -- to -- well, yeah, they paid
 12 for that review.
 13 Q. And they could have said, We're not paying
 14 for Katie Walter anymore, could they have not?
 15 A. I guess they could have.
 16 Q. So what firewall was ultimately put in place?
 17 A. Well, in the case of Dyanne, it wasn't
 18 necessary.
 19 Q. Well, because you weren't able to hire her;
 20 is that correct?
 21 A. That's correct.
 22 Q. So I was asking and you're smiling. I think
 23 you know what I was getting at here. What firewall was
 24 put in place with regard to Katie Walter?
 25 A. We let Katie know that she wasn't working for

1 the port, she was working for us, and to let us know if
 2 she had independent contact from the port that we
 3 weren't made aware of. That wasn't necessary with
 4 Katie.
 5 Q. So that's the only thing that in your mind --
 6 I mean, that's what in your mind constituted a
 7 firewall?
 8 A. Well, in that situation, yes.
 9 Q. Katie Walter was aware, wasn't she, that the
 10 money was coming from the port?
 11 A. Yes.
 12 Q. And, in fact, there came a time when she had
 13 to wait for ecology to get permission from the port to
 14 have Katie Walter continue with her review; isn't that
 15 correct?
 16 A. There was a time when the contract needed to
 17 be amended.
 18 Q. And is that a nice way of saying the port
 19 needed to agree to give more money so Katie Walter
 20 could continue working?
 21 A. Yes.
 22 MS. MARCHIORO: Why don't we take a break.
 23 (Recess taken.)
 24 Q. (BY MR. EGLICK) You said you had worked with
 25 Dyanne Sheldon at King County?

1 A. Yes.
 2 Q. And would you agree that she has substantial
 3 regulatory experience?
 4 A. From her work at King County in terms of
 5 working for a local government, yes.
 6 Q. And wasn't she the first wetland scientist to
 7 work in a local government regulatory program in the
 8 state?
 9 A. I think she was.
 10 Q. And she more or less helped create that
 11 program at King County, didn't she?
 12 A. Yes.
 13 Q. And for many years, she was the senior
 14 wetland scientist there, wasn't she?
 15 A. She was.
 16 Q. Now, does Katie Walter have comparable
 17 regulatory experience?
 18 A. Katie does a fair amount of on-call
 19 consulting for local governments, so she helps Pierce
 20 County and several other cities administer their local
 21 ordinances.
 22 Q. The question I asked, though, was -- and I
 23 won't have it read back because I think I can repeat it
 24 closely enough -- does Katie Walter have similar to
 25 Dyanne Sheldon regulatory experience, similar to Dyanne

1 Sheldon's?
 2 A. Probably not as much, no.
 3 Q. Here's a document I'd like you to identify.
 4 (Deposition Exhibit No. 187 was marked for
 5 identification.)
 6 Q. (BY MR. EGLICK) Showing you what has been
 7 marked as Exhibit 187 to your deposition. Can you
 8 identify it?
 9 A. This is a letter to me from Dyanne Sheldon
 10 dated November 21, 2000, that is her proposal to us to
 11 perform the natural resource mitigation plan review.
 12 Q. And when you say it's her proposal, are you
 13 referring to the attachments to the cover letter which
 14 are all part of Exhibit 187?
 15 A. When you say attachment --
 16 Q. Well, the first page of Exhibit 187 is a
 17 cover letter signed by Dyanne Sheldon. Then there are
 18 pages that go on that have headings such as
 19 qualifications, project experience --
 20 A. That's correct.
 21 Q. -- list of projects. So when you were
 22 identifying this as her proposal, you were referring to
 23 the packet in its entirety or just to the front page?
 24 A. No. All of it.
 25 Q. Could you take a look at page 6 of the

1 ~~proposal and Ms. Sheldon's numbering is on the bottom~~
 2 ~~right. Do you see page 6?~~
 3 ~~A. Yes.~~
 4 Q. By the way, you had said that Dyanne Sheldon
 5 works for ACC; is that correct?
 6 A. I believe so, yes.
 7 Q. She was -- at the time she made her proposal
 8 to ecology, she wasn't working for ACC to your
 9 knowledge, was she?
 10 A. No.
 11 Q. So that came after ecology --
 12 A. That came after, yes.
 13 Q. So ecology had the first opportunity to bring
 14 her into this delightful experience; is that correct?
 15 A. Yes.
 16 Q. But I'll give you the option of saying that
 17 you don't agree with the part of my question that
 18 called it delightful as an experience, right, because
 19 you're smiling.
 20 Take a look at page 6. Do you see the first
 21 full paragraph on that page?
 22 A. It starts with "based on the work."
 23 Q. Yeah.
 24 A. Uh-huh.
 25 Q. Could you read the second sentence in that

1 paragraph?
 2 A. "Based on my knowledge of the project to
 3 date, it appears that the indirect long-term
 4 hydrological impacts to the remaining wetlands and
 5 stream resources will be a key issue point."
 6 Q. Go ahead. Read the next sentence too if you
 7 would.
 8 A. "In addition, the technical feasibility of
 9 the proposed mitigation efforts will require intense
 10 scrutiny."
 11 Q. And then could you read also the last
 12 sentence of this paragraph into the record?
 13 A. "At issue of course, is the feasibility of
 14 the design to infiltrate surface water generated on the
 15 fill of the runway plateau into the wetlands left at
 16 the toe of the plateau embankment in a manner and rate
 17 which will replicate pre-fill plateau conditions in the
 18 wetlands and down slope streams."
 19 Q. Now, do you have any or did you have any
 20 disagreement with Ms. Sheldon's identification of these
 21 as some of the key issues that would have to be
 22 resolved on the port's application?
 23 A. No. I agree.
 24 Q. Do you know whether Ms. Walter or the Shannon
 25 & Wilson -- I understand Ms. Walter works with Shannon

1 & Wilson?
 2 A. She does.
 3 Q. Did that proposal that Shannon & Wilson
 4 submitted identify as specifically what some of the key
 5 issues would be on further review of the port
 6 application?
 7 A. That is one of the issues that she looked at.
 8 Q. My question was did the Shannon & Wilson
 9 proposal identify with the same specificity --
 10 A. Yeah. I don't know if it did or not.
 11 Q. Who else besides ecology saw the proposals
 12 submitted by persons wanting to be hired by ecology to
 13 be its wetland reviewer for the port's 401
 14 certification application?
 15 A. So who else reviewed these submittals?
 16 Q. Other than persons in ecology.
 17 A. I don't think anybody else did.
 18 Q. Well, then, how on earth would the port have
 19 known that Dyanne Sheldon was one of the applicants?
 20 A. Because they found out from ecology that I
 21 was recommending that we hire Dyanne.
 22 Q. How?
 23 A. I can only guess that somebody mentioned it
 24 to somebody at the port.
 25 Q. But it wasn't you?

1 A. Well, actually, I don't know. It's possible
 2 that I did.
 3 Q. You understand why I'm asking. If this was
 4 an internal ecology decision, I'm trying to understand
 5 how the port would even be in a position to know who
 6 the candidates were, who a finalist was to be able to
 7 complain to the governor. Do you understand the area
 8 of inquiry, then?
 9 A. I believe, yes.
 10 Q. So do you know whether or not the proposals
 11 from the various applicants -- there were five, weren't
 12 there?
 13 A. There were three or five, and I'm trying to
 14 remember who they all came from. I don't remember
 15 that. I try not to remember everything. Now, the
 16 concern --
 17 Q. Could you answer the question that's on the
 18 floor? I'll tell you what. I'll repeat it. I'm
 19 trying to find out -- I think you've answered no, but I
 20 want to be sure -- whether or not the proposals were
 21 somehow given to the port.
 22 A. No. I doubt they were, because they were
 23 sent to me directly.
 24 Q. But then again, you are testifying that the
 25 port became aware of who had submitted the proposals.

1 A. Well, there's a timing issue here, because I
 2 had proposed -- now, this is November 21, and I had
 3 proposed -- initially this memo -- I had proposed to
 4 hire Dyanne back in late September, early October, and
 5 that was before I was aware of the contracting
 6 requirements that we had to go through.

7 I at the time didn't even know that we had to
 8 put it out and request proposals from other people, so
 9 the port knew that we wanted to hire Dyanne before we
 10 even asked for these proposals, so it was before we
 11 received these proposals that they were aware that we
 12 wanted to hire Dyanne, and I still fully intended to
 13 hire Dyanne.

14 Q. Even after the proposals were received?

15 A. Well, what led to me not being able to hire
 16 Dyanne is that she disqualified herself in this
 17 proposal.

18 Q. And that was by what?

19 A. Because her bid -- and she was dead on. She
 20 was over the \$18,000 limit that we asked for. She came
 21 in at \$30,000, so she was accurate in terms of telling
 22 us what she thought it was going to take to do the
 23 work, but under the contracting provisions, we had to
 24 limit it at \$18,000 or under \$20,000 for the first
 25 round, so much to my dismay, Dyanne disqualified

1 herself.

2 Q. Well, you're saying she disqualified herself
 3 in the sense that she said, look, you and I both know
 4 this is going to cost more than ecology has said it
 5 will cost?

6 A. And she put it in writing, so I couldn't
 7 accept this bid.

8 Q. And, in fact, when you said dead on, what you
 9 mean is that in fact Dyanne was right about what it
 10 would cost; is that correct?

11 A. Absolutely. Actually, it was more than that.
 12 I think we ended up paying Shannon & Wilson more than
 13 that.

14 Q. And, in fact, what you did for Shannon &
 15 Wilson ultimately was to allow them to break it up and
 16 do an initial contract and then amendments to get
 17 around the limit; is that correct?

18 A. That's what ended up happening, yeah.

19 Q. Did ecology ever tell Dyanne Sheldon we'll
 20 break it up for you, submit a proposal now for an
 21 initial phase and then if we need to ask for more we
 22 can?

23 A. That's what I told Dyanne to do, yes.

24 Q. Before or after she made her submittal?

25 A. Before. She acknowledges that in the second

1 paragraph.

2 Q. Why don't you show me that?

3 A. It says, "I realize that you've provided an
 4 estimate of \$18,000 to complete this work, and under
 5 other circumstances I might have modified my estimate
 6 of hours to conform within that cost limit."

7 Q. Okay. Now, I thought what you just testified
 8 to was that you had advised that the \$18,000 was not to
 9 complete the work but that could be just a first phase,
 10 and I thought that you testified to was then that she
 11 acknowledges that she had been advised of that in this
 12 letter. Now, I'm reading this or listening to you read
 13 this section, and it's a reference to \$18,000, quote,
 14 to complete this work, end quote, so is your testimony
 15 still that Dyanne Sheldon was advised that in the end
 16 the work completed could cost more than \$18,000?

17 A. Yes.

18 Q. But it's not reflected as you had testified
 19 it was in this letter, is it?

20 MS. MARCHICRO: Objection; mischaracterizes
 21 the witness's testimony.

22 A. Well, what I said was what I read here, and I
 23 said that she acknowledged that we had told her that we
 24 were looking for an initial submittal for \$18,000.

25 Q. (BY MR. EGLICK) And the initial submittal was

1 to quote, complete this work, end quote. Do you see
 2 that, the sentence you just read?

3 A. Those are Dyanne's words.

4 Q. And did you ever get back to Dyanne Sheldon
 5 and say, well, no, we didn't mean you would have to
 6 complete the work at \$18,000? Did you?

7 A. What we had to do was to talk to somebody --
 8 one of the contract managers, and the contract manager
 9 -- I don't recall who that was -- looked at the
 10 spreadsheet and said that because the spreadsheet shows
 11 the proposal at \$30,150 that that disqualified Dyanne
 12 from the proposal because there were other proposals
 13 that were for less.

14 Q. Did you answer my question, though,
 15 Mr. Stockdale? Would you like to have it read back?

16 A. I thought I answered the question.

17 MR. EGLICK: Could you read back the
 18 question, please?

19 (The reporter read back as requested.)

20 A. I did talk to Dyanne about the submittal
 21 after she sent it to me.

22 Q. (BY MR. EGLICK) And did you tell her that she
 23 would not have to complete the work for \$18,000 but
 24 that additional monies could be requested and obtained
 25 from the port?

1 A. Yes. That was the understanding all along
 2 she understood that.
 3 Q. Well, are you referring as you previously
 4 were to her letter in this exhibit as your support for
 5 that?
 6 A. I don't quite understand your question.
 7 Q. Okay. Let me ask it another way. Look at
 8 Exhibit 187. There's a sentence that you read to me
 9 that says, quote, I realize that you've provided an
 10 estimate of \$18,000 to complete this work, and under
 11 other circumstances I might have modified my estimate
 12 of hours to conform within that cost limit, end quote.
 13 So that conveys, does it not, that it's her
 14 understanding that the completion of the work is to be
 15 for \$18,000, a cost limit? Is that correct?
 16 A. That is what that reads.
 17 Q. Take a look if you would at this next
 18 document we'll have marked.
 19 (Deposition Exhibit No. 188 was marked for
 20 identification.)
 21 Q. (BY MR. EGLICK) Exhibit 188 to your
 22 deposition, can you identify it?
 23 A. This is the November 27, 2000, proposal for
 24 consulting services that Sam Casne at Shannon & Wilson
 25 sent to me.

1 Q. Now, I'm wondering if you can point out to me
 2 in Exhibit 188 where there was any comparable
 3 identification -- by the way, you agreed those were key
 4 issues, didn't you?
 5 A. Yes. I identified those as key issues for
 6 Dyanne.
 7 Q. Can you show me in Exhibit 188 anywhere that
 8 those are addressed in the same specific terms?
 9 A. Well, the first place that I see where that
 10 is mentioned is on page -- what page number do I give
 11 you?
 12 MS. MARCHICRO: Use this reference number.
 13 THE WITNESS: Is that the reference number,
 14 014? Is that correct?
 15 A. It's a list of tasks by times. "In
 16 particular, evaluate proposal to discharge water at
 17 base of embankment/wall to provide baseflow support to
 18 remaining wetlands on Miller and Walker creeks."
 19 Q. (BY MR. EGLICK) Go ahead. Read the rest of
 20 it if you would.
 21 A. "Evaluate hydrologic impacts from borrow
 22 sites 3 and 4. Consult with Ecology's Water Quality
 23 hydrogeologist, Dave Garland, if necessary."
 24 Q. And you're saying this is comparable to the
 25 specific reference made in Dyanne Sheldon's proposal?

1 Q. Now, remember I asked you and this is a
 2 proposal that was ultimately accepted, wasn't it?
 3 A. That's correct.
 4 Q. I take it the Shannon & Wilson was acceptable
 5 to the port?
 6 A. The port did not have a say in that
 7 determination.
 8 Q. Well, you didn't get any call from the
 9 governor's office on Shannon & Wilson, did you?
 10 A. We told the port that we were going to hire
 11 Dyanne Sheldon regardless of how they felt about it.
 12 Q. Could you answer my question, please,
 13 Mr. Stockdale?
 14 A. I did not get a call from the governor's
 15 office about hiring Shannon & Wilson.
 16 Q. Remember I asked you to take a look at a
 17 portion of Exhibit 187, which was Dyanne Sheldon's
 18 description of what she thought were some key issues?
 19 Remember it was the indirect long-term hydrological
 20 impacts to the remaining wetlands and stream resources,
 21 and she also referred to the feasibility of the design
 22 to infiltrate surface water generated on the fill of
 23 the runway plateau into the wetlands left at the toe of
 24 the plateau embankment? Do you recall all that?
 25 A. Yes.

1 A. What do you mean by comparable?
 2 Q. This is a similar identification of a key
 3 issue?
 4 A. No. It's laid out differently.
 5 Q. Other than being laid out differently, are
 6 you saying it's equivalent in terms of the importance
 7 given to the issue?
 8 A. No. I don't think it highlights it in the
 9 same way.
 10 Q. In fact, how many hours for what you've
 11 identified as a key issue and you've agreed that
 12 Ms. Sheldon was correct to identify as a key issue --
 13 how many hours does this proposal say is going to be
 14 devoted to key issue?
 15 A. Two hours.
 16 Q. In fact, isn't that about the lowest -- I
 17 guess there are a couple of one-hour tasks, but isn't
 18 that about the lowest amount of hours that's devoted to
 19 any task?
 20 A. Yes.
 21 Q. And you're not receding, are you, from your
 22 testimony that what Ms. Sheldon identified as a key
 23 issue, are you?
 24 A. No.
 25 (Deposition Exhibit No. 189 was marked for

1 identification.)
 2 Q. (BY MR. EGLICK) Showing you what has been
 3 marked as Exhibit 189 to your declaration. Can you
 4 identify it?
 5 A. This is a letter written by Ann Kenny to a
 6 Mr. Bill Garrity, executive director of CECW, and I
 7 don't recall what that stands for. It's some sort of
 8 an engineering group, professional group.
 9 (Deposition Exhibit No. 190 was marked for
 10 identification.)
 11 Q. (BY MR. EGLICK) Showing you what has been
 12 marked as Exhibit 190. Can you identify it?
 13 A. This is a letter to me from the Consulting
 14 Engineers Council of Washington, Mr. Bill Garrity,
 15 dated November 22, 2000.
 16 Q. Does that refresh your recollection what CECW
 17 is?
 18 A. It does.
 19 Q. What is it?
 20 A. Consulting Engineers Council of Washington.
 21 Q. And, in fact, according to this exhibit
 22 Mr. Garrity is executive director of the CECW, isn't
 23 he?
 24 A. That's correct.
 25 Q. Do you have any idea of how the CECW happened

1 statute.
 2 Q. Now, did you amend the proposal as
 3 Mr. Garrity had requested citing RCW -- well, citing
 4 the RCW?
 5 A. No.
 6 Q. Is that what Exhibit 189 is, then, is a draft
 7 letter -- was that draft letter later put into final
 8 responding to Mr. Garrity?
 9 A. I believe this letter went out.
 10 Q. So Mr. Garrity said, no, don't pick based on
 11 some estimate that you put in the request for proposal,
 12 pick based on qualifications, and there's a statute
 13 that requires it, and ecology got back to Mr. Garrity
 14 and said no; is that right?
 15 A. Well, we said -- and the letter states what
 16 we said. We checked with an attorney general on this
 17 -- that RCW -- we agree that RCW 9A.80 applies when
 18 governmental agencies want to hire architectural,
 19 engineering, and land surveying service. However, in
 20 this case, Ecology is seeking the services of a
 21 Professional Wetland Scientist to evaluate the impact
 22 of the Port of Seattle's project to wetlands and their
 23 biological functions. We are not looking for the
 24 services of an architect, an engineer, a land surveyor,
 25 or a landscape architect."

1 to be writing to you about this matter of review of the
 2 RFP for the third runway?
 3 A. No.
 4 Q. Have you ever received a letter from the CECW
 5 before about any consulting contract?
 6 A. No.
 7 Q. Was this a total surprise to you when you
 8 received this letter?
 9 A. Yes.
 10 Q. Did you ever talk to Mr. Garrity?
 11 A. No. I didn't. I don't know if Ann did or
 12 not.
 13 Q. What was your understanding of what his
 14 objection was, if any, to the bid process?
 15 A. Well, apparently this RCW stipulates that
 16 RFPs can't include a cost estimate in the bid document,
 17 I guess.
 18 Q. In fact, why don't you look on the second
 19 page of the Exhibit 190, and if you could read that
 20 first sentence of the last paragraph into the record,
 21 I'd appreciate it.
 22 A. "We suggest amending the request for proposal
 23 to eliminate any requirement for estimates of cost or
 24 fees, so that the apparent successful proposer is
 25 selected based on qualifications as required by the

1 to the distinction that you made -- and this
 2 was, I assume, you as part of the decision-making group
 3 at ecology; is that correct?
 4 A. You mean that's reflected in this exhibit?
 5 Q. Yes.
 6 A. 189?
 7 Q. Yes.
 8 A. Well, this letter was written by Ann Kenny
 9 after she consulted with Leslie Seffern, who is an
 10 Assistant Attorney General.
 11 Q. What kind of folks do hydrogeology review in
 12 terms of the profession? What degree do they have?
 13 A. What what do they have?
 14 Q. You're a hydrogeologist. What's your degree
 15 in? Is it liberal arts?
 16 A. No.
 17 Q. What's it in?
 18 A. I imagine that it's in one of the physical
 19 sciences.
 20 Q. And you're probably an engineer, aren't you?
 21 A. Well, you could be.
 22 Q. Were any of the people who Shannon & Wilson
 23 said were going to work on the project engineers? Why
 24 don't you take a look if you would at page -- if you
 25 look on the right-hand side of page 019 of Exhibit 188

1 and read the second sentence, the first column of that
 2 page under qualifications for this project. Do you see
 3 that?
 4 A. Yes.
 5 Q. What does that second sentence say?
 6 A. "We have wetland scientists, fisheries
 7 scientists, wildlife biologists, hydrologists, and
 8 engineers to support the Department of Ecology's review
 9 of the Natural Resource Mitigation Plan."
 10 Q. And, in fact, some of the persons who did the
 11 work are engineers, aren't they?
 12 A. Scott Bender is a hydrogeologic -- I don't
 13 know what his title is, but I believe he is a
 14 hydrogeologist.
 15 Q. Well, do you see in the list of his
 16 qualifications where it refers to his project
 17 engineering?
 18 A. Yes.
 19 Q. Now, did you go back and look and see whether
 20 the folks who were going to work on this project who
 21 submitted proposals involved or -- excuse me -- were
 22 engineers, whether from Shannon & Wilson or some of the
 23 other firms?
 24 A. No.
 25 (Deposition Exhibit No. 191 was marked for

1 identification.)
 2 Q. (BY MR. EGLICK) Showing you what has been
 3 marked as Exhibit 191. Can you identify it?
 4 A. This is an e-mail that I wrote to Gail Terzi
 5 and Jonathan Freedman on October 11, year 2000.
 6 Q. Why don't you read the middle paragraph into
 7 the record, please. You're laughing again. Why is
 8 that?
 9 A. I just made a comment about how e-mail is
 10 forever. "The Port is whining about me wanting to be
 11 excused from the project. We are in the process of
 12 choosing a consultant to take over my involvement, and
 13 they don't like who we want to hire. They want to
 14 quote-unquote help us choose. The nerve."
 15 Q. You were saying they want to, quote, help,
 16 quote, us choose?
 17 A. That's right.
 18 Q. So the word "help" in your e-mail is in
 19 quotes, is that correct, just for the court reporter's
 20 benefit there?
 21 A. That's right.
 22 Q. Now, what do you mean they want to help us
 23 choose, they being the port?
 24 A. The port. They wanted a role in choosing who
 25 we selected.

1 Q. And how did you know that?
 2 A. I imagine through discussions that I had with
 3 Ray Hellwig.
 4 (Deposition Exhibit No. 192 was marked for
 5 identification.)
 6 Q. (BY MR. EGLICK) Showing you what has been
 7 marked as Exhibit 192 to your deposition. Can you
 8 identify it?
 9 A. These are notes that I took at a meeting on
 10 March 22, 2001.
 11 Q. And can you tell who attended the meeting
 12 from the notes?
 13 A. Ann Kenny, Kelly Whiting, Katie Walter.
 14 Q. Now, looking at the last page of Exhibit 192,
 15 which is the third page. Does that work for you too?
 16 It's the third page?
 17 A. Yes.
 18 Q. Could you read the first three lines on that
 19 page?
 20 A. "What is the life-span of geotextile?"
 21 Q. That's one line.
 22 A. "No provision for channel dynamics?" Third
 23 line, "What if maintenance is required?"
 24 Q. So what is this reference to geotextile?
 25 A. This reference is to the geotextile membrane

1 that has been proposed to be used at the Vacca Farm.
 2 Q. And that's in the relocated stream channel?
 3 A. Miller Creek.
 4 Q. And for what distance approximately is that
 5 going to be used?
 6 A. I'm not sure.
 7 Q. Well, is it --
 8 A. Seven to 900 feet.
 9 Q. So a significant length; is that correct?
 10 A. Yes.
 11 Q. And what's the purpose of the geotextile?
 12 A. The geotextile is to -- the design at the
 13 Vacca Farm is for some peat to be removed to provide
 14 compensatory floodplain storage, and as that peat is
 15 shaved down to the right elevation and the creek is
 16 relocated through that peat, the geotextile membrane is
 17 going to be laid down to serve as a permeable barrier
 18 between that new face of peat that is exposed and the
 19 gravel, the stream gravel that is going to be placed on
 20 top of it.
 21 Q. Now, what's permeable mean?
 22 A. Permeable as compared to impermeable in that
 23 permeable it's going to pass water.
 24 Q. Does it matter whether it's permeable or not,
 25 this geotextile membrane?

1 A. That's what it's designed to do.
 2 Q. To be permeable?
 3 A. To be permeable.
 4 Q. Why does it matter if it's permeable or not?
 5 A. Well, that barrier -- you don't want that
 6 barrier to become an aquatard.
 7 Q. A what?
 8 A. An aquatard.
 9 Q. Can you explain for the record what an
 10 aquatard is?
 11 A. A seal through which water either doesn't
 12 flow through or has a very hard time flowing through.
 13 Q. What difference does it make if it becomes an
 14 aquatard?
 15 A. Mind you, I'm not a hydrogeologist.
 16 Q. Right. But why don't -- you said, I believe,
 17 in your testimony you don't want it to become an
 18 aquatard, so I'll ask you why don't you want it to
 19 become an aquatard? Go ahead and answer.
 20 A. I couched that term so that you understand
 21 that I'm not giving you an engineering -- it's not
 22 based on engineering training. My understanding is
 23 that one of the things that you don't want -- the
 24 reason you don't put down visqueen or plastic or
 25 another permeable material is that you want the creek

1 water that becomes -- the shallow groundwater that the
 2 creek exerts in the new marsh plain, you want that
 3 water to move back and forth through the restored
 4 floodplain.
 5 Q. What happens if it doesn't?
 6 A. Well, it wouldn't if you put down visqueen,
 7 and so you would disconnect that volume of water from
 8 the floodplain.
 9 Q. What's wrong with that?
 10 A. Well, what we're trying to do is to mimick as
 11 much as possible a natural system.
 12 Q. So how much research did you do on the
 13 geotextile fabric that's supposed to make sure that
 14 these problems don't occur?
 15 A. I spoke to Jim Kelley and to Paul Fendt about
 16 the material.
 17 Q. Now, Paul Fendt works for the port; is that
 18 right?
 19 A. That's right.
 20 Q. And Jim Kelley works for the port?
 21 A. That's correct.
 22 Q. So your research consisted of speaking to
 23 them about the geotextile; is that correct?
 24 A. That's correct.
 25 Q. Have you ever had any experience with the

1 particular geotextile in this kind of use?
 2 A. No.
 3 Q. Are you aware of anything in the literature
 4 with regard to the geotextile proposed for use by the
 5 port?
 6 A. Yes, but not -- I mean, I know that it's
 7 being used, but I don't have any experience with it.
 8 Q. Well, when you say you know it's being used,
 9 my question was anything in the literature concerning
 10 use of this geotextile in this kind of application?
 11 A. My understanding is that it has been used in
 12 other areas, and it's been reported in the literature.
 13 Q. Have you read the literature?
 14 A. No, I haven't.
 15 Q. Have you ever found anything in the
 16 literature yourself?
 17 A. I haven't looked for it.
 18 Q. So your understanding comes not from
 19 something you've read but from what?
 20 A. Well, as I said, in discussions that I've had
 21 with Paul Fendt and with Jim Kelley.
 22 Q. So they told you it was somewhere in the
 23 literature?
 24 A. I believe Paul referred to several specific
 25 projects where it's been used.

1 Q. And did you ask for anything to give you any
 2 detail on that?
 3 A. No.
 4 Q. Your third line here on -- by the way, you're
 5 calling it here geotextile. I've seen geotextile at
 6 Home Depot that supposedly lets the water in but won't
 7 let the weeds live. Have you seen that kind of
 8 material at Home Depot?
 9 A. That's not what we're talking about, but I
 10 have, yes.
 11 Q. So what are we talking about here other than
 12 geotextile? Do you have a name for this material?
 13 A. Well, the name is -- it's in the natural
 14 resource mitigation plan. I don't remember what it's
 15 called, but it has a specific trade name.
 16 Q. Did you ever talk to the manufacturer?
 17 A. No, I didn't.
 18 Q. Did you ever read Dyanne Sheldon's comments
 19 on her research?
 20 A. I did.
 21 Q. And did you do any follow-up after reading
 22 her comments?
 23 A. I did.
 24 Q. After reading her comments, did you talk to
 25 the manufacturer?

1 A. No.
 2 Q. Is there any particular project that you can
 3 identify where the geotextile proposed for use by the
 4 port has been used in a like manner?
 5 A. No.
 6 Q. Now, you have this question here, "What if
 7 maintenance is required?" It's the third line on the
 8 third page of Exhibit 192.
 9 A. Correct.
 10 Q. Now, I assume you're talking about -- and
 11 please tell me if I'm wrong -- you're talking about
 12 maintenance with regard to the geotextile; is that
 13 correct?
 14 A. Yes.
 15 Q. So the question is presumably what happens if
 16 the geotextile, for example, doesn't -- what's the
 17 word? Is there a verb? -- permeate water anymore?
 18 Would that be the correct way of saying it?
 19 A. Yeah. If it becomes clogged.
 20 Q. Why would you even worry about whether a
 21 geotextile would become clogged?
 22 A. Well, it's not going to become clogged any
 23 more than what the peat is already clogged in terms of
 24 its transmissivity for water.
 25 Q. Answer if you would, Mr. Stockdale, the

1 A. What water are you referring to?
 2 Q. The water that will flow through the creek.
 3 A. Well, the water that flows through the creek
 4 is not being pretreated right now.
 5 Q. So this will be typical creek water?
 6 A. Yes.
 7 Q. And typical creek water is not free of
 8 debris, is it?
 9 A. No.
 10 Q. Now, is this geotextile being put in in such
 11 a way that without disruption to Miller Creek you could
 12 rip out whatever is covering it, take out the
 13 geotextile, and vacuum any clogs out or anything like
 14 that?
 15 A. If you needed to get in and either replace it
 16 or clean it, you'd be working in the creek.
 17 Q. So it would be disruptive, wouldn't it?
 18 A. I would say so.
 19 Q. And a setback to mitigation, wouldn't it?
 20 A. Uh-huh. Yes.
 21 (Deposition Exhibit No. 193 was marked for
 22 identification.)
 23 Q. (BY MR. EGLICK) Showing you what has been
 24 marked as Exhibit 193 to your deposition. Can you
 25 identify it?

1 question I asked, which was why would you even worry if
 2 the geotextile would become clogged?
 3 A. Well, if it wasn't able to transmit water at
 4 the rate -- for example, at a rate that you're
 5 expecting it to and, let's say, that presents a design
 6 problem or another problem, then obviously the material
 7 isn't going to meet your needs.
 8 Q. And the stream Miller Creek is not going to
 9 have the water filtered, is it, where it's going over
 10 the geotextile?
 11 A. Can you -- filtered?
 12 Q. Is there going to be some mechanism before
 13 the creek water goes over the geotextile that's going
 14 to filter out things that might clog the geotextile?
 15 A. Is it going to be filtered? I don't -- is
 16 there going to be pretreatment of --
 17 Q. Yeah. Before the water goes over the
 18 geotextile.
 19 A. No. The water is -- there's going to be, I
 20 think, 12 or 16 inches of gravel that is placed over
 21 the geotextile.
 22 Q. But that wasn't my question. My question is
 23 is the water going to be treated so that it doesn't
 24 have materials in it of any kind before it goes over
 25 the geotextile?

1 A. This is an e-mail that I sent to Joan
 2 Marchioro on July 19, 2001, which is a forward of Jim
 3 Kelley, an e-mail that he sent to me on that same day.
 4 Q. Now, is this e-mail discussing that court
 5 case that we talked about several hours ago at the
 6 start of your deposition about port acquisition of
 7 property adjacent to Vacca Farm?
 8 A. Yes. This is that parcel number 92.
 9 Q. If you look down where Mr. Kelley has
 10 apparently, is this correct, sent you an e-mail on July
 11 19 at 6:52 a.m.? Do you see where it says "high
 12 priority" in the e-mail to you?
 13 A. Uh-huh.
 14 Q. And then could you read into the record what
 15 he tells you?
 16 A. It says, "The judge ruled in favor of the
 17 Port on the condemnation case, recognizing that with
 18 the exception of Corps regulations, prior converted
 19 croplands were wetlands under local and state
 20 regulations, and would reduce the value of Parcel 92."
 21 Q. Now, parcel 92 is that area that's now part
 22 of what we've loosely called the Vacca Farm mitigation
 23 area?
 24 A. It's part of -- yes.
 25 Q. And then if you would look at your response

1 e-mail at 9:38 a.m. on the same day, July 19, 2001. Do
 2 you see that above?
 3 A. Yes.
 4 Q. Do you see the third -- well, the second line
 5 you're sending a copy of Mr. Kelley's e-mail on to Joan
 6 Marchioro; is that right?
 7 A. That's correct.
 8 Q. And could you read the second paragraph and
 9 the third paragraph of your e-mail to her?
 10 A. The second paragraph?
 11 Q. Yeah.
 12 A. "Here's a brief summary of the decision. I
 13 asked Jim Kelly to try to get me the written decision."
 14 Q. I thought you weren't following the case.
 15 Apparently you were enough to ask Jim Kelley to get you
 16 a copy of the written decision?
 17 A. I guess so.
 18 Q. Then let's read the next paragraph, and if
 19 you could read that into the record.
 20 A. "Funny how the Port's attorneys first argued
 21 with our authority to regulate prior converted
 22 croplands, then used that regulatory authority to argue
 23 for reduced property valuation in a condemnation
 24 proceeding."
 25 Q. Now, when you referred to the port's

1 attorneys having, quote, used that regulatory
 2 authority, quote, were you referring to ecology's
 3 regulatory authority over the property in question as a
 4 wetland?
 5 A. No. I was referring to our regulatory
 6 authority under RCW 90.48 to regulate prior converted
 7 croplands as waters of the state.
 8 Q. Do you see where Mr. Kelley said once again,
 9 quote, prior converted croplands were wetlands under
 10 other local and state regulations, end quote?
 11 A. Yes.
 12 Q. And he's saying that's what the judge ruled
 13 in this case?
 14 A. That's correct.
 15 Q. As far as you know, does ecology have a
 16 disagreement with the judge's ruling?
 17 A. That's consistent with our interpretation of
 18 RCW 90.48.
 19 Q. So the area that we're talking about here,
 20 the property in question, in ecology's view once again
 21 is wetlands; is that correct?
 22 A. That prior converted croplands are wetlands,
 23 yes.
 24 Q. So the area in question that we're talking
 25 about here, which is the area that is now part of the

1 Vacca Farm mitigation area, is wetlands; is that
 2 correct?
 3 A. I don't know how much of that parcel is
 4 wetland, but I know that the issue had to do with
 5 whether or not the prior converted cropland
 6 determination was made on that parcel by the Corps of
 7 Engineers, whether or not that took that area out of
 8 regulation as far as state and local regulations or
 9 not.
 10 Q. And under state and local regulations, that
 11 area is considered wetlands; is that correct?
 12 A. That's correct. Now, I should add that it is
 13 considered wetlands if it meets the definition of a
 14 wetland according to the state delineation manual.
 15 Q. And, in fact, the port's argument was that it
 16 did, wasn't it?
 17 MR. FEARCE: Objection; lack of personal
 18 knowledge.
 19 A. I presume so.
 20 Q. (BY MR. EGLICK) And, in fact, that's what Jim
 21 Kelley had called you about originally was to get some
 22 help on making that argument; is that correct?
 23 A. Actually, I wasn't called by Jim Kelley about
 24 that.
 25 Q. It was Noradyne, did you say?

1 A. I was contacted by an attorney for the port
 2 who was handling the condemnation. She wanted me to
 3 attend the condemnation case, and I -- that's when I
 4 refer in this e-mail about begging out of it, because
 5 that's not my role, and I was contacted by Kevin
 6 Featherston, who was the consultant for Novadyne.
 7 Q. But that was why you were contacted, wasn't
 8 it, because the port wanted assistance in making the
 9 case that the area in question was wetlands, is that
 10 correct, because it would reduce the valuation for
 11 condemnation?
 12 MS. MARCHICRO: Objection; asked and
 13 answered.
 14 A. They wanted to know -- they wanted me to put
 15 into writing, which I did, what the state's regulatory
 16 authority is over prior converted croplands.
 17 Q. (BY MR. EGLICK) So what was funny? Isn't
 18 that the word you use in your e-mail?
 19 A. (Nodding head).
 20 Q. What do you mean by funny?
 21 A. Well, I recall having a rather heated
 22 argument with the port attorney at the Vacca Farm
 23 whether or not ecology even had the authority to
 24 regulate prior converted croplands.
 25 Q. And you took the position that ecology did

1 have the authority to regulate them as wetlands; is
 2 that correct?
 3 A. That's been our position for quite a while,
 4 that's correct.
 5 Q. And which port attorney did you have the
 6 heated argument with?
 7 A. Last name is Fors, Tom Fors, P-o-r-s.
 8 Q. And then what you found funny was that the
 9 port -- and tell me if I'm wrong about this -- the port
 10 took that authority tht ecology had and used that to
 11 argue for a lower valuation in a condemnation case?
 12 Isn't that what you found funny?
 13 A. I would find that funny, yes.
 14 (Deposition Exhibit No. 194 was marked for
 15 identification.)
 16 Q. (BY MR. EGLICK) Showing you what has been
 17 marked as Exhibit 194 to your deposition. Can you
 18 identify it?
 19 A. This is an e-mail with an attached memo. It
 20 is originally from Katie Walter to Ann Kenny, and then
 21 it was forwarded from Ann Kenny to me on August the
 22 1st, 2001.
 23 Q. Do you know why Katie Walter was frantic?
 24 See where it says she's frantically working on the 401?
 25 Do you see that?

1 A. It says, "I am frantically getting more
 2 things on paper."
 3 Q. And that's a reference to the 401, isn't it?
 4 MS. MARCHIORO: Objection; calls for
 5 speculation.
 6 A. It says, "I am frantically getting more
 7 things on paper." so she's frantically trying to get
 8 things on paper.
 9 Q. What things? Take a look at the next page if
 10 you've got any question. Isn't this a draft -- a memo
 11 about draft 401 conditions?
 12 A. 401 conditions.
 13 Q. So I still have the question.
 14 MS. MARCHIORO: The document speaks for
 15 itself. Objection.
 16 Q. (BY MR. EGLICK) Do you know why she was
 17 frantic?
 18 A. No.
 19 Q. Did it seem odd to you at the time that she
 20 said she was frantic?
 21 A. I feel like that quite often.
 22 Q. Please answer my question.
 23 A. Is it odd that she would feel frantic?
 24 Q. Did it seem odd to you at the time that she
 25 said she was frantically trying to get things on paper?

1 A. Well, this is about ten days before we issued
 2 the 401, so, no, it probably wasn't odd that she was
 3 feeling frantic.
 4 Q. Was she trying to meet a deadline?
 5 A. Probably.
 6 Q. And what was that deadline?
 7 A. Well, if the deadline was to get the 401 out
 8 by the date that we did.
 9 Q. You started your response with an if. Is
 10 that the end of your answer?
 11 A. I believe I finished that answer, yes.
 12 MR. EGLICK: Could you read back the
 13 response, please?
 14 (The reporter read back as requested.)
 15 Q. (BY MR. EGLICK) Does that complete your
 16 answer?
 17 A. Your first question was did it strike you odd
 18 that she was frantic, I believe, right?
 19 Q. Do you want me to have the question read back
 20 again?
 21 A. Could you be more clear so that I'm not
 22 dancing around your words?
 23 Q. I'd be happy to. All you need to do is let
 24 me know.
 25 A. I'm trying

1 Q. Let's look at the half an answer you gave
 2 Was the deadline to get the 401 out by the date that
 3 you did?
 4 A. We were obviously working towards a decision
 5 point, and we had asked Katie to put together some
 6 draft 401 conditions.
 7 Q. Was the deadline to get the 401 out by the
 8 date that you did?
 9 A. I don't know. I don't recall there being a
 10 drop dead deadline. There may have been.
 11 (Deposition Exhibit No. 195 was marked for
 12 identification.)
 13 Q. (BY MR. EGLICK) Showing you what has been
 14 marked as Exhibit 195 to your deposition. Can you
 15 identify it?
 16 A. These are notes that I took on September 7,
 17 2001.
 18 Q. So this was after the August 401 was issued
 19 but before the September 401 was issued?
 20 A. Yes.
 21 Q. See on the bottom right corner -- and I take
 22 it this was a meeting with -- your notes of a meeting
 23 with persons regarding the 401 or are these notes of
 24 conversations?
 25 A. It may have been a phone conversation.

1 Q. Do you see where it says "Jim Kelley/Paul
 2 Fendt"?
 3 A. Yes.
 4 Q. Those are two folks who work for the port as
 5 consultants?
 6 A. Uh-huh.
 7 Q. You're saying you think these are notes of a
 8 phone conversation?
 9 A. Yes.
 10 Q. Do you see the line that says
 11 "preconstruction monitoring," and then what does it say
 12 after that?
 13 A. "Bi-monthly November through May."
 14 Q. What's that a reference to?
 15 A. It means hydrologic monitoring that will
 16 occur twice a month in the months November through May.
 17 Q. And what's preconstruction mean?
 18 A. Before construction.
 19 Q. Now, did the word "preconstruction" make it
 20 into the monitoring condition in the 401 issued in
 21 September?
 22 A. No. I recall that there was a question about
 23 what we meant by a condition that addressed monitoring,
 24 hydrologic monitoring.
 25 Q. And the word "preconstruction" was stricken,

1 wasn't it?
 2 A. I believe the question that was asked of us
 3 was if that condition was met --
 4 Q. Mr. Stockdale, my question was the word
 5 "preconstruction" was stricken, wasn't it?
 6 A. I believe so.
 7 Q. And as of September 7, the word
 8 "preconstruction" was still present in your notes on
 9 what the condition would be, wasn't it?
 10 A. It is in my notes, yes.
 11 Q. Do you see the line where it says -- is this
 12 what it says, "Can't come up with a threshold with one
 13 year of data"? Do you see that in your notes?
 14 A. Uh-huh. That's correct.
 15 Q. What is that a reference to?
 16 A. Well, there must have been some discussion
 17 about how much monitoring would be necessary to develop
 18 a threshold of some sort.
 19 Q. And what does it mean when you say can't come
 20 up with a threshold with one year of data?
 21 A. I don't know. It's sort of cryptic, isn't
 22 it? It depends on what threshold you're trying to
 23 establish.
 24 Q. Is threshold another way of saying baseline?
 25 A. You could use that.

1 Q. Have you started drafting your prefile
 2 testimony yet for the Pollution Control Hearings Board?
 3 A. Had I at this time?
 4 Q. Have you?
 5 A. My prefile -- no, I haven't.
 6 Q. Are you aware that you --
 7 THE WITNESS: That's what you and I were
 8 talking about today, Joan? I can't talk to her.
 9 A. No. I haven't started drafting it. I want
 10 to make sure I know what you mean by testimony.
 11 Q. (BY MR. EGLICK) It's prefile testimony for
 12 the Pollution Control Hearings Board hearing.
 13 A. No. I haven't started drafting it.
 14 Q. Are you familiar with a publication
 15 Compensating for Wetland Losses under the Clean Water
 16 Act, copyright 2001 by the National Academy of
 17 Sciences?
 18 A. Yes, I am.
 19 Q. And that's, isn't it, a study of what works
 20 in terms of wetland mitigation under the Clean Water
 21 Act?
 22 A. Yes.
 23 Q. And is it something you've read?
 24 A. I've read quite a bit of it.
 25 Q. Is there any particular part of it that you

1 think is poorly analyzed?
 2 A. No.
 3 Q. So this is something that you would consider
 4 a useful reference in your field?
 5 A. Yes.
 6 Q. Have you reviewed -- I may have asked you
 7 this briefly earlier, but have you reviewed the
 8 Pollution Control Hearings Board staff decision?
 9 A. Yes.
 10 Q. And its analysis with regard to wetlands?
 11 A. Yes.
 12 Q. And are there particular parts of that
 13 decision with which you disagree in terms of the
 14 wetlands analysis? I won't ask you about other areas.
 15 A. Yes.
 16 MR. EGLICK: What I'd like you to do, then --
 17 and I think it's previously admitted. I have a note
 18 here that says this is Exhibit 141. I'm surprised it's
 19 so late in the game. Does that ring a bell with any of
 20 the other counsel?
 21 Q. (BY MR. EGLICK) Why don't you take a look at
 22 the decision if you would, and if you could just
 23 identify for me the portions that you disagree with
 24 with regard to wetlands.
 25 A. Actually, the way that this is written, this

1 ~~is a legal argument, and I'm not qualified to disagree~~
 2 ~~with it. I probably was reading into it something that~~
 3 ~~is not there.~~
 4 ~~Q. Well, are there any -- certainly this is a~~
 5 ~~legal decision, but there are some factual predicates~~
 6 ~~to it with regard to wetlands, and I'm asking whether~~
 7 ~~with regard to the factual predicates there is anything~~
 8 ~~that you disagree with with regard to the wetlands~~
 9 ~~portion of the decision.~~
 10 ~~A. No.~~
 11 ~~Q. And you've looked through the wetlands~~
 12 ~~portion of the decision and you're comfortable with~~
 13 ~~that response?~~
 14 ~~MS. MARCHIORO: Objection. That's not the~~
 15 ~~witness's testimony.~~
 16 ~~MR. EGLICK: No. I'm asking whether he's~~
 17 ~~looked through the wetlands portion of the decision and~~
 18 ~~he's comfortable with his response that he just gave.~~
 19 ~~I'm not asking him whether he's comfortable with the~~
 20 ~~outcome the board mandated.~~
 21 ~~Q. (BY MR. EGLICK) Do you understand that,~~
 22 ~~Mr. Stockdale?~~
 23 ~~A. Yes.~~
 24 ~~Q. I'm basically giving you a chance to tell me~~
 25 ~~that you're now going to look over the factual~~

1 ~~predicates a second or third time and tell me there's~~
 2 ~~one that you disagree with.~~
 3 ~~A. One of the issues that we're going to be~~
 4 ~~addressing is the whole question of accepting riparian~~
 5 ~~buffer restoration in lieu of wetland impacts, and I~~
 6 ~~think that that's not really a factual issue that the~~
 7 ~~board has ruled on.~~
 8 ~~Q. Why don't you tell me who we is.~~
 9 ~~A. Ecology.~~
 10 ~~Q. And you're saying you're going to be~~
 11 ~~addressing in your testimony to the board the issue you~~
 12 ~~just identified?~~
 13 ~~A. Well, I anticipate that's going to come up,~~
 14 ~~sure.~~
 15 ~~Q. And explain again if you would perhaps in a~~
 16 ~~little bit more detail the issue that you're referring~~
 17 ~~to that you anticipate will come up in your testimony.~~
 18 ~~A. Well, the board goes through and lays out the~~
 19 ~~mitigation package in terms of ratios. For example, on~~
 20 ~~page 12 at line 10, appellants have shown a likelihood~~
 21 ~~of success on the merits that out-of-basin mitigation~~
 22 ~~and upland buffer enhancement may not meet federal~~
 23 ~~Clean Water Act standards of no degradation of~~
 24 ~~beneficial uses. Appellants have shown a likelihood of~~
 25 ~~success of showing the current mitigation plan does not~~

1 ~~could be beneficial uses within the basin proposed for~~
 2 ~~the filled mountains.~~
 3 ~~So one of the questions that's going to come~~
 4 ~~up is how given that that's what they have concluded,~~
 5 ~~how it is that ecology certified that the mitigation~~
 6 ~~package does in fact protect beneficial uses.~~
 7 ~~Q. And you were referring to some focus your~~
 8 ~~testimony is going to have on riparian wetlands?~~
 9 ~~A. Did I say riparian wetland or did I say~~
 10 ~~riparian forest, buffer, whatever -- no. Not riparian~~
 11 ~~-- well, riparian corridor.~~
 12 ~~Q. And explain what exactly your position is on~~
 13 ~~that.~~
 14 ~~A. My position on what?~~
 15 ~~Q. On that question of how ecology happened to~~
 16 ~~issue a certification in light of riparian corridor~~
 17 ~~issues.~~
 18 ~~A. Well, we accepted a mitigation package that~~
 19 ~~has a significant element of riparian corridor~~
 20 ~~enhancement as a form of mitigation and the~~
 21 ~~reconnection of the fragmented habitat that currently~~
 22 ~~exists in that reach of Miller Creek.~~
 23 ~~Q. And is that going to be the justification for~~
 24 ~~the acceptance, the reconnection of fragmented habitat,~~
 25 ~~in your testimony?~~

1 ~~A. Is that the only justification?~~
 2 ~~Q. Is that one of them?~~
 3 ~~A. Well, that's one of the elements that we~~
 4 ~~considered in our decision, yes.~~
 5 ~~Q. So what other elements are you going to~~
 6 ~~convey in your testimony to the board were part of the~~
 7 ~~justification for accepting the port's proposal with~~
 8 ~~regard to wetland?~~
 9 ~~A. Well, I'm going to address the value of~~
 10 ~~riparian corridor restoration in an urban environment~~
 11 ~~and the value that has for the aquatic resources in a~~
 12 ~~basin.~~
 13 ~~Q. And any other issues that you're going to~~
 14 ~~address in your testimony concerning the rationale for~~
 15 ~~the port's -- for ecology's acceptance of the port's~~
 16 ~~wetland plan?~~
 17 ~~A. Well, my previous declaration addressed what~~
 18 ~~I felt were the environmental benefits that were being~~
 19 ~~proposed in terms of the overall benefit to Miller~~
 20 ~~Creek, and so that -- one of the things that that~~
 21 ~~didn't include is the literature that addresses the~~
 22 ~~value of replacing and restoring riparian corridors in~~
 23 ~~terms of the functions that that vegetation provides.~~
 24 ~~It's very similar to the role that a forested wetland~~
 25 ~~would provide within that corridor.~~

1 Q. What literature are you referring to?
 2 A. Well, there's quite a bit. There's actually
 3 more literature on riparian functions than there is
 4 wetland functions.
 5 Q. What literature in particular are you
 6 referring to?
 7 A. Well, there's quite a bit of literature that
 8 is coming out of the Center for Stream Site Studies at
 9 the University of Washington. There's a National
 10 Academy of Sciences report. The Smithsonian Institute
 11 provided a very extensive bibliography on riparian
 12 systems, and that catalogued several hundred key
 13 articles. There's --
 14 Q. Are there particular articles that you have
 15 relied upon either in the decision that was made or in
 16 your preparation for testimony to the PCHB?
 17 A. There are some key documents, yes, that I've
 18 read.
 19 Q. What are they?
 20 A. I'd have to pull them out of my file. I
 21 don't recall the title or the author.
 22 Q. And you have them in your file with regard to
 23 the 401 application by the port?
 24 A. Yes, I do.
 25 Q. We haven't seen them, so if these are things

1 you have in your port 401
 2 A. Okay. They're not in my port 401 file. It's
 3 part of my library. I have a very extensive library.
 4 Q. Can you identify any of these articles,
 5 documents, publications?
 6 A. Well, for example, the bibliography by
 7 Cordell with the Smithsonian Institute provides several
 8 hundred references that have to do with riparian
 9 ecosystems.
 10 Q. Well, I'm sure it does, but I guess the
 11 question is are you going to support your testimony to
 12 the board by referring to a bibliography of several
 13 hundred articles or are you going to refer to
 14 particular articles in that bibliography?
 15 A. No. I'll refer to particular articles.
 16 Q. And which ones will they be?
 17 A. Well, like I said, right now they don't come
 18 to mind.
 19 Q. Did you have any articles in mind when the
 20 401s were issued for the port's certification
 21 application?
 22 A. That was part of the basis on which we
 23 accepted riparian restoration.
 24 Q. Did you have any particular articles in mind
 25 when the 401 decisions were issued by the Department of

1 ecology.
 2 A. Well, particular articles. I have articles
 3 in my library that I've read and that I used to support
 4 the argument on which part of our decision was based.
 5 Q. And can you identify those articles?
 6 A. I will identify those articles.
 7 Q. I'm asking whether you can today.
 8 A. Today -- I just said that I don't know if the
 9 Chris May article addresses that, for example. There's
 10 an article by Kevin Featherston, research that he did
 11 out on the rain forest. There's a lot of literature,
 12 but I can't tell you which one specifically addressed,
 13 for example, the role of riparian forest to the
 14 contribution of dissolve organic matters.
 15 Q. So is it correct, then, to say that you
 16 didn't attempt to identify those articles prior to the
 17 issuance of the 401? Is that correct?
 18 A. Not for purposes of referencing it in a
 19 bibliography.
 20 Q. But you're going to for purpose of your
 21 testimony go back and see if any of the articles listed
 22 in this bibliography you referred to will support
 23 ecology's position; is that correct?
 24 A. I do have articles that support the position.
 25 Q. And just to be clear, you say you do have

1 articles that support ecology's position, but you
 2 cannot now identify them; is that correct?
 3 A. That's correct.
 4 Q. But you're going to try to go back and
 5 identify them before you testify to the board; is that
 6 correct?
 7 A. Yeah. I think it would -- yes.
 8 Q. But you didn't try to identify them before
 9 the 401 decisions were issued, did you?
 10 A. No, I didn't.
 11 Q. Is there any other issue that you will be
 12 raising in your testimony that you haven't identified
 13 here? You've talked about riparian corridors. You've
 14 mentioned a couple of other things. Is there any other
 15 issue that you will be raising in your testimony before
 16 the board?
 17 A. Not that I can think of.
 18 Q. Just a couple of wrap-up questions here. Is
 19 a WRIA -- does that term ring a bell with you?
 20 A. Water resource inventory area.
 21 Q. Is that the same thing as a watershed in
 22 terms of water experts talk about a watershed? Is WRIA
 23 the same thing as how a scientist would identify a
 24 watershed?
 25 A. It can be. It depends at what scale you're

1 talking about.
 2 Q. Well, is a WRIA a scientific designation or
 3 an administrative designation?
 4 A. It's based on a watershed boundary, so that's
 5 a scientific determination.
 6 Q. Well, maybe I'm not asking the question
 7 correctly, but does a WRIA always have boundaries that
 8 are co-extensive with a particular watershed's
 9 boundary?
 10 A. There can be several watersheds within a
 11 water resource inventory area.
 12 Q. And a water resource inventory area is a
 13 concept established by legislation, is it not?
 14 A. I believe so, yeah.
 15 Q. And is a basin in water talk so to speak the
 16 same as a watershed?
 17 A. Well, there could be -- again, it depends on
 18 the scale that you're talking about, because you can --
 19 Pigeon Creek in northwest Everett is a basin. It's a
 20 watershed. It's also part of the Puget Sound trough.
 21 I mean, it depends on what scale you're
 22 talking about, and that's one thing that's confusing
 23 about how people define watersheds and catchments and
 24 basins is it depends on the scale. You can have a
 25 watershed that's ten square miles and it can be a

1 thousand square miles. They both can be watersheds.
 2 Q. Is a basin always co-extensive with a
 3 watershed?
 4 A. It can be.
 5 Q. Is it a --
 6 A. You can also have several basins within a
 7 larger watershed.
 8 Q. And is a WRIA always co-extensive with a
 9 basin?
 10 A. Well, I'm thinking. In King County, for
 11 example, the Green River basin, King County broke the
 12 Green River basin into several subbasins. They each
 13 can be considered a watershed or a basin.
 14 Q. Individually?
 15 A. Individually.
 16 Q. Do you recall that there is a hydrologic
 17 standard in the 401 -- I think actually it was changed
 18 from August to September 2001 401 -- that talks about
 19 requiring groundwater within ten inches of the surface
 20 in certain wetlands?
 21 A. Right.
 22 Q. Do you recall that?
 23 A. Yes, I do.
 24 Q. And that's supposed to be a standard to
 25 monitor whether there's been an impact on one of these

1 wetlands that's supposed to be protected under the 401
 2 certification; is that correct?
 3 A. Well, that standard would measure whether or
 4 not the wetland boundary has shifted as a result of the
 5 project.
 6 Q. Would that standard measure whether there was
 7 hydrologic impact on the wetland?
 8 A. Not the standard itself, because measuring
 9 whether you have hydrology at ten inches or not is not
 10 going to tell you whether there's been impact.
 11 Q. Aren't there some wetlands that are
 12 identified as having flowing and standing water?
 13 A. Yes.
 14 Q. So if you've got this ten-inch standard for
 15 checking the soils and you get an answer about whether
 16 there's water in that ten inches of soil, that doesn't
 17 really tell you whether or not there's been an
 18 alteration in a wetland that used to have flowing and
 19 standing water, does it?
 20 A. Well, one thing is to have flowing water.
 21 Another thing is to have standing water. Are you
 22 saying that the wetland has flowing and standing water?
 23 Q. Either one. What I'm asking is whether
 24 checking to see whether there's water ten inches down
 25 gives you any assurance that there's either flowing or

1 standing water where there used to be.
 2 A. No. You would have to base that on more than
 3 one observation of the depth of the groundwater.
 4 Q. Well, if you made five observations of the
 5 depth of the groundwater and you found there was water
 6 within ten inches of soil, would that tell you whether
 7 there was flowing or standing water where there used to
 8 be?
 9 A. Well, if there's flowing water, you're going
 10 to see it, and if there's standing water, you're also
 11 going to see it.
 12 Q. Is there some standard in the 401
 13 certification that addresses determining as part of
 14 monitoring whether or not where there used to be
 15 flowing or standing water there still is in the same
 16 way?
 17 A. Whether it's flowing or standing -- that's
 18 not language that we used in the certification.
 19 Q. What I'm getting at is -- and maybe I'm not
 20 asking it in a proper way -- is presumably if there are
 21 wetlands -- and I understand, for example, there are
 22 several wetlands out there, you would agree, wouldn't
 23 you, that are now typified for significant parts of the
 24 year by flowing or standing water?
 25 A. Or parts of wetlands.

1 Q. Would you agree with that?
 2 A. Sure.
 3 Q. What is there in the 401 condition that
 4 assures that -- in the 401 conditions that assure that
 5 that condition will continue?
 6 A. I don't think there is one.
 7 Q. Isn't there a difference between a wetland
 8 that has flowing and/or standing water and a wetland
 9 that doesn't?
 10 A. I can think of many differences, yes.
 11 Q. And aren't there some differences in terms of
 12 value?
 13 A. Again, let's not get into the value argument.
 14 We need to talk about wetland function.
 15 Q. Aren't there differences in terms of
 16 function?
 17 A. Yes.
 18 Q. And isn't one of the purposes of 401
 19 certification to prevent degradation of wetland
 20 function?
 21 A. That's correct.
 22 Q. And to maintain the typical characteristics
 23 that have been there before?
 24 A. That's correct. Well, not always what's been
 25 there before, not in a mitigation wetland.

1 Q. Well, is it an acceptable outcome under a 401
 2 certification for a wetland that has been typified in
 3 the past by having at significant times flowing or
 4 standing water to no longer have it post-certification,
 5 post-project construction?
 6 A. Well, it depends on what portion of the
 7 wetland you're talking about, because I can think of
 8 wetlands on Miller Creek that are near the creek or
 9 part of the creek depending on the time of the year
 10 that have flowing or standing water and where the earth
 11 of the wetland is higher up topographically rarely is
 12 connected to the creek directly, so it depends on where
 13 in the wetland you're talking about. Presumably you're
 14 talking about the edge of the wetland.
 15 Q. Well, are there any wetlands or any portions
 16 of wetlands at the airport site where it would not be
 17 an acceptable outcome to have what have previously been
 18 areas of flowing or standing water no longer be
 19 characterized by flowing or standing water?
 20 A. I would need to look at what wetland you're
 21 talking about, because I don't want to say yes or no
 22 without having more information.
 23 Q. Well, was that looked at before the 401
 24 conditions were issued?
 25 A. Was the question of flowing or standing

1 water --
 2 Q. And maintaining those wetland characteristics
 3 considered before the 401 was issued?
 4 A. We had extensive discussions with Parametric
 5 about the issue of wetlands downgradient from the big
 6 wall.
 7 Q. My question, though, was was the issue of
 8 maintaining flowing and standing water characteristics
 9 in site wetlands considered before the 401 was issued?
 10 A. Yes.
 11 Q. And my question is, are there conditions in
 12 the 401 which will maintain those characteristics?
 13 A. The performance standard if you look at the
 14 monitoring requirement doesn't measure for that.
 15 Q. My question is, are there conditions in the
 16 401 which will maintain those characteristics?
 17 A. Of which particular wetland?
 18 Q. Any wetland that might have a characteristic
 19 of flowing or standing water.
 20 A. The whole goal of the 401 is to protect the
 21 wetlands that are not being affected by the project, so
 22 I'm trying to understand your question without just
 23 saying yes or no, because I can think of many different
 24 situations where I could say yes and some where I could
 25 say no.

1 Q. Well, point if you would, then, to a
 2 condition regarding wetlands in the 401 from September
 3 that is directed toward maintaining flowing or standing
 4 water condition in on-site wetlands.
 5 A. Well, I believe I've already answered that
 6 there isn't a condition in the 401 that addresses
 7 flowing or standing water.
 8 Q. And you've also, I think, said you needed
 9 some identification of what wetlands might have flowing
 10 or standing water; is that correct?
 11 A. No. You said -- I don't want to get into
 12 this you said, he said, kind of thing, but it depends
 13 on which wetland you're talking about, because some
 14 don't have flowing or standing water.
 15 Q. And for the ones that do, the question is is
 16 there any condition in the 401 which maintains that
 17 characteristic for those wetlands, and I think your
 18 answer is no.
 19 A. That's correct. I don't think we addressed
 20 that in the 401.
 21 Q. Can you explain to me what this sentence
 22 means? It's on page 5, paragraph 13 of your
 23 declaration. Quote, wetland enhancement by its very
 24 definition results in the improvement of a suite of
 25 wetland functions (primarily habitat) at the expense of

1 wetland acreage. Enhancement can therefore result in
2 the loss or diminishment of acreage-based functions
3 such as water quality improvement, end quote.

4 A. What exhibit number is that?

5 Q. I think that's 172.

6 A. Page 5?

7 Q. Paragraph 13. It's the two sentences on
8 lines 16 through 19.

9 A. Ch, okay. And your question is what?

10 Q. What does that mean? I can break it down
11 more if you'd like. I had trouble getting through that
12 one.

13 A. Wetland enhancement is an activity -- let's
14 say you take a degraded reed canary grass pasture.
15 It's an area that was a wetland and continues to be a
16 wetland, but its vegetation has been removed and/or
17 grazed. Let's say you build a 7-Eleven on the corner
18 of that field and the mitigation is to enhance what's
19 left, so you've shrunk the wetland in acreage, but
20 you've bumped up the level of function on the remaining
21 wetland.

22 So some wetland functions -- for example,
23 small mammal habitat or pasturine bird habitat,
24 probably to some extent primary productivity -- some
25 functions you've increased their level of performance

1 by revegetating the wetland, removing the grazing
2 pressure, but some functions are acreage based. Some
3 water quality improvement functions are tied primarily
4 to the size of the well, not always, but to the size
5 and to the soil and to the slope.

6 Q. And water quality improvement is one that is
7 tied to the acreage size of a wetland? Isn't that what
8 you're saying?

9 A. Yes.

10 Q. And what else is tied to size?

11 A. Well, it also depends on the topography of
12 the wetland.

13 Q. What else is tied to size?

14 A. In terms of wetland function, water quality
15 is probably the most size-dependent function, although
16 it's relative to what? Certainly some habitat
17 functions are performed in larger wetlands where
18 there's a mix of wetland types and topographies and
19 there's interior habitat in connection to other
20 wetlands and so forth. The purpose of -- the reason
21 that I included this in my declaration --

22 ~~Q. Well, I didn't ask you that. I guess if
23 you're going to kind of go beyond my question, I'd
24 rather take the time to ask you another one. The last
25 question I have for you, Mr. Stockdale, is were you~~

1 ~~contacted by the port after the August 2001 401 was
2 issued?~~

3 ~~A. Was I contacted by the port?~~

4 ~~Q. Yeah.~~

5 ~~Q. Did anybody at the port call me?~~

6 ~~Q. Yeah. And complain.~~

7 ~~A. Not that I recall.~~

8 ~~Q. Did they call and say, We don't like this
9 401?~~

10 ~~A. If they did, they didn't complain to me.~~

11 ~~Q. Were you aware that the port had complained
12 about the August 401?~~

13 ~~A. Well, they probably did.~~

14 ~~Q. Pardon me?~~

15 ~~A. They probably did. No. I don't know.~~

16 ~~Q. You have no knowledge either way?~~

17 ~~A. Well, there was some questions that were
18 raised, one, like I said, about the hydrologic
19 monitoring downslope of the fill prism, but I don't
20 think that constitutes a complaint.~~

21 ~~Q. Well, did the port to your knowledge ask for
22 changes in the August 401?~~

23 ~~A. As far as the wetland element, they wanted
24 clarification about that condition.~~

25 ~~Q. And how do you know that?~~

1 ~~A. Well, because we changed it.~~

2 ~~Q. Well, how do you know the port wanted
3 clarification about it?~~

4 ~~A. Because they had questions about it.~~

5 ~~Q. How do you know they had questions about it?~~

6 ~~A. Because I probably heard about it through
7 Ray.~~

8 ~~Q. Ray?~~

9 ~~A. Hellwig.~~

10 ~~Q. But no one called you from the port and said,
11 We've got questions about the wetlands conditions?~~

12 ~~A. I don't think so.~~

13 ~~Q. None of the port wetland scientists or
14 consultant, whoever?~~

15 ~~A. No. I don't think Jim called me, no.~~

16 ~~Q. So whatever information you got about the
17 possible need for changes didn't come through
18 wetland-to-wetland person consultation?~~

19 ~~A. No.~~

20 ~~Q. It came in some other way; is that correct?~~

21 ~~A. Yeah.~~

22 ~~Q. When were you first aware that ecology was
23 going to change the 401 conditions?~~

24 ~~A. Well, sometime after we issued it there was
25 the question of clarifying that. You know, to be~~

1 honest with you, there was some -- there were
 2 discussions circling around it, but I wasn't part of
 3 those.
 4 Q. So no one came to you -- let me start over.
 5 Strike that.
 6 You didn't go to someone and say, I think we
 7 need to change the 401?
 8 A. No.
 9 Q. Did you think the August 401 was a competent
 10 401 decision?
 11 A. I was glad to be done with it.
 12 Q. Well, you got to focus on the question I ask.
 13 It will save us both a lot of time. Did you think the
 14 August 401 was a competent 401 decision?
 15 A. Yes.
 16 Q. When it was issued, did you have any thought
 17 in your mind that it would be changed within the space
 18 of a month or so?
 19 A. No.
 20 Q. Never occurred to you?
 21 A. I will not try to guess what the reaction is
 22 going to be.
 23 Q. I'm not asking you to guess what the port's
 24 reaction would be. I'm asking whether it ever occurred
 25 to you when the August 401 was issued that you would be

1 changing it within the space of a month or so.
 2 A. No. I had no reason to anticipate that.
 3 Q. You've agreed with the word competent. Would
 4 you call it an acceptable decision?
 5 A. The August 401, yes.
 6 Q. Was it an appropriate decision?
 7 A. I believe so.
 8 Q. Was it consistent to what you understood the
 9 scope of a 401 decision ought to be?
 10 A. Yes.
 11 Q. Thank you. I don't have any other questions
 12 now. Thank you very much, Mr. Stockdale.
 13 MR. PEARCE: I have one briefly on clean-up.
 14 EXAMINATION
 15 BY MR. PEARCE:
 16 Q. There was some testimony, Mr. Stockdale,
 17 about the wildlife hazard management plan, I think; is
 18 that correct?
 19 A. Yes.
 20 Q. You said that's not to your knowledge a
 21 condition in the 401? You said that was one of the
 22 things you thought you might have left out?
 23 A. It was in reference to one of the items in my
 24 memo of October 2000 where I suggested that we include
 25 language that gave us some sort of assurance that the

1 airport manager clearly understood what was in the 401,
 2 and subsequent to that, I believe that the way that
 3 that was resolved was that the 401 is being attached to
 4 the wildlife hazard management plan. It's part of the
 5 management plan.
 6 Q. Are you aware whether the -- let me strike
 7 that.
 8 The natural resources mitigation plan is a
 9 requirement in the 401, is it not?
 10 A. Yes.
 11 Q. Are you aware whether the wildlife hazard
 12 management plan is an appendix and required in the
 13 NRMP?
 14 A. I don't know if it's an appendix in the NRMP
 15 or not.
 16 Q. If it were, then it would be required as part
 17 of the NRMP, would it not?
 18 A. Yes.
 19 Q. That's all I have. Thanks.
 20 MR. EGLICK: I have something else, but do
 21 you, Joan?
 22 MS. MARCHICRO: No.
 23 FURTHER EXAMINATION
 24 BY MR. EGLICK:
 25 Q. With regard to the colloquy you just had with

1 Mr. Pearce, is it your testimony that everything that
 2 is attached to the NRMP then is automatically imported
 3 as a condition of the 401 in your understanding of the
 4 401?
 5 A. As a condition?
 6 Q. Yes.
 7 A. Well, there are a lot of things -- I'm trying
 8 to think what you're referencing as a condition. If
 9 it's part of the natural resource mitigation plan,
 10 which is clearly referenced in the 401, then I think it
 11 would follow that it would be part of that plan.
 12 Q. Once again, I'll ask you to answer the
 13 question I asked. Is it your testimony that everything
 14 that is attached to the NRMP is then imported as a
 15 condition into the 401 certification?
 16 A. I think that's a reasonable assumption, yeah.
 17 Q. And is there something in the 401
 18 certification that you can point to that bears that
 19 out?
 20 A. That bears that the attachments are
 21 conditions?
 22 Q. That the attachment -- for example, all the
 23 attachments to the NRMP are imported with the status of
 24 conditions into the 401.
 25 A. I'd have to look at the 401.

1 Q. Well, you've got it there. Do you want to
 2 take a minute and look at it?
 3 A. I'm going to have to tell my son that I'm not
 4 going to make my commitment with him.
 5 Q. This is the last question.
 6 A. Well, it's going to take me some time to
 7 answer that question fully. I mean, this document is
 8 fairly -- you're asking me for a fairly precise answer.
 9 Q. Well, okay. I thought you were familiar with
 10 this document and it would be an easy matter for you to
 11 go through and show me what you had in mind. If not,
 12 then fair enough. I'm serious about that,
 13 Mr. Stockdale. If it's not something you're not
 14 familiar with it enough to kind of point to me what you
 15 had in mind --
 16 A. No. I'd have to go look for it.
 17 Q. Well, then we'll just leave it at that so you
 18 can make your commitment.
 19 (Deposition concluded at 5:38 p.m.)
 20 (Signature was reserved.)
 21
 22
 23
 24
 25

1
 2
 3 RE: ACC v. DOE; PCHB; 01-160
 4 Erik Stockdale; January 23, 2002
 5
 6 I, Erik Stockdale, have read the within transcript
 7 taken January 23, 2002, and the same is true and
 8 accurate except for any changes and/or corrections, if
 9 any, as follows:
 10 PAGE LINE CORRECTION
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22 Signed at _____, Washington, on the
 23 _____ day of _____, 2002.
 24 _____
 25 Erik Stockdale

CERTIFICATE

1
 2
 3 I, Mary L. Green, the undersigned Certified Court
 4 Reporter and Notary Public, do hereby certify
 5 That the testimony and/or proceedings, a transcript
 6 of which is attached, was given before me at the time
 7 and place stated therein; that any and/or all
 8 witness(es) were by me duly sworn to tell the truth;
 9 that the sworn testimony and/or proceedings were by me
 10 stenographically recorded and transcribed under my
 11 supervision to the best of my ability; that the
 12 foregoing transcript contains a full, true, and
 13 accurate record of all the sworn testimony and/or
 14 proceedings given and occurring at the time and place
 15 stated in the transcript; that I am in no way related
 16 to any party to the matter, nor to any counsel, nor do
 17 I have any financial interest in the event of the
 18 cause.
 19 WITNESS MY HAND AND SEAL THIS 28TH DAY OF JANUARY
 20 2002.
 21
 22 MARY L. GREEN, CSR #GREENML497R2
 23 Notary Public for the State of Washington,
 24 residing in King County.
 25 My appointment expires 4/4/05.

CC: Y

**DEPOSITION UPON ORAL EXAMINATION OF
GORDON WHITE
JANUARY 16, 2002
ACC V. STATE OF WASHINGTON, ET AL.**

Carla R. Wallat, CCR, RPR, CRR

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AR 001844

CORRECTION & SIGNATURE PAGE

RE: ACC V. STATE OF WASHINGTON, ET AL.
 PCHB No. 01-160
 DEPOSITION OF: GORDON WHITE, JANUARY 16, 2002

I, GORDON WHITE, have read the
 within transcript taken JANUARY 16, 2002, and the same
 is true and accurate except for any changes and/or
 corrections, if any, as follows:

PAGE	LINE	CORRECTION
23	16	Replace the word "budget" with "others".
39	2	Replace the word "recertification" with "rectification."
43	14	Replace the word "programmer" with "program lead."
49	13	Replace the word "room" with "program."
59	9	Replace the word "Corps" with "Core"
63	5	Replace the word "certifications" with "conditions."

Signed at Gordon White Department of Ecology
 on the 1st day March, 2002.

Gordon White

GORDON WHITE

AR 001845

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
Appellant,)
vs.) PCHB No. 01-160
STATE OF WASHINGTON)
DEPARTMENT OF ECOLOGY and)
THE PORT OF SEATTLE,)
Respondents.)

DEPOSITION UPON ORAL EXAMINATION
OF
GORDON WHITE

10:05 A.M.
JANUARY 16, 2002
2425 BRISTOL COURT SW
SECOND FLOOR
OLYMPIA, WASHINGTON

JAN 16 2002

CARLA R. WALLAT, CRR, RPR, CCR #WALLACR346BE

EXAMINATION BY:
MR. STOCK

PAGE(S)

EXHIBITS FOR IDENTIFICATION

- | Exhibit No. | Description | Page |
|-------------|--|------|
| 120 | E-mail dated 8/6/2001, 2:10 PM from Hellwig to Fitzsimmons, White, Kenny, Hart, Marchioro, Young; Subject: Briefing Document for Wed. | 43 |
| 121 | E-mail dated 9/27/2000, 3:22 PM from White to Luster, Hellwig, Fitzpatrick, Marchioro, Stockdale | 55 |
| 122 | E-mail dated 9/27/2000, 2:41 PM from Luster to White; Subject: FW: Dinsmore Draft and draft denial letter | 62 |
| 123 | E-mail dated 8/11/2000, 4:48 PM from Hellwig to Fitzsimmons; Subject: Meeting with Mic Dinsmore, POS, Wes Gilman, (PSRC?) and the Governor re SeaTac | 65 |
| 124 | E-mail dated 7/18/2001, 2:21 PM from Hellwig to Hart; Subject: FW: Memo for Governor Locke - Port of Seattle Proposed Third Runway Project | 99 |
| 125 | E-mail dated 8/5/2001, 3:48 PM from Kenny to White, Hellwig, Stockdale, Fitzpatrick, Drabek, Garland, Wang, | 110 |

A P P E A R A N C E S

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ALSO PRESENT: NONE

Walter, Whiting, Marchioro, Young,
Subject: Revised Draft 401 for Third Runway
and attachments

126 White's handwritten notes 115

AR 001846

OLYMPIA, WASHINGTON; JANUARY 16, 2002

10:05 A.M.

--oOo--

GORDON WHITE,
sworn as a witness by the Notary
Public, testified as follows:

EXAMINATION

BY MR. STOCK:

Q. Good morning, Mr. White.

A. Good morning, Mr. Stock.

Q. Would you state your name for the record,
please?

A. Gordon White.

Q. What is your residential address?

A. 2431 Columbia Southwest, Olympia, Washington.

Q. You've been deposed before in the Battle
Mountain Gold case; is that right?

A. Yes, I have.

Q. And did you tell the truth in that
deposition?

A. Yes.

Q. Have you reviewed that deposition?

A. Yes.

Q. When was the last time you reviewed it?

A. Two years ago, maybe.

Q. Have you had any other depositions taken of
you?

A. No.

Q. You understand if I ask a question you need
to answer the question unless your attorney instructs
you not to answer the question.

A. Yes.

Q. If I ask a question that you don't
understand, will you ask me to repeat it?

A. Yes.

Q. What is your education?

A. I have a Bachelor's of Arts degree in -- from
Evergreen State College.

Q. What was your major?

A. Well, at Evergreen we don't have specific
majors. But my areas of emphasis were political
science and economics.

Q. Did you take any environmental courses?

A. Some, yes.

Q. Which environmental courses?

A. I can't remember specifically.

Q. But you don't have a degree in any

environmental science; is that right --

A. No, I do not.

Q. One of the things that you and I are going to
have to be careful about is not talking over each other
so the court reporter can get down both what I say and
what you say. Do you understand that?

A. I'll slow down.

Q. Have you taken any graduate courses, graduate
level courses?

A. I think I have, but I don't -- I can't say
which ones. It's not --

Q. You've taken classes after you graduated
from --

A. Yes, I have.

Q. -- Evergreen College? And what classes have
you taken?

A. I've taken some management courses.

Q. Have you taken any environmental courses
after graduating from Evergreen?

A. No.

Q. Have you attended any seminars relating to
any of the environmental sciences since graduating from
Evergreen?

A. Yes, I have.

Q. What seminars?

A. General seminars on wetland science, on --
the Body of Water Law, you know, CLE courses.

Q. How many?

A. Oh, two.

Q. When were those?

A. Oh, four or five years ago.

Q. And was it a one-day seminar?

A. Yes, I believe it was.

Q. So you've taken two one-day seminars in the
past --

A. Four or five years, yeah. I believe, yeah.

Q. Can you think of any other seminars other
than these two one-day seminars?

A. No.

~~Q. What did you do to prepare for the deposition
today?~~

~~A. I thought about the chronology of
decisionmaking that I was involved in, and I spoke with
my attorney.~~

~~Q. Did you do anything else?~~

~~A. Well, in thinking through the chronology, I
reviewed the decision.~~

~~Q. The 401 Certification?~~

AR 001847

~~A. Uh-huh.~~

~~Q. You need to answer yes or no for the court~~

1 reporter.
2 A. Oh, yes.
3 Q. Which decision did you review?
4 A. The decision that I signed in -- what was it?
5 August or September.
6 Q. I don't mean to try to trick you at all.
7 Did you review the August 10 401
8 Certification or the September 21 401 Certification?
9 A. August 10. Thank you for clarifying that.
10 Q. Have you read the September 21 401
11 Certification?
12 A. Yes.
13 Q. When?
14 A. When I signed it.
15 Q. Have you read it since then?
16 A. No.
17 Q. Other than the August 10 401 Certification,
18 did you review any other documents in preparation for
19 this deposition?
20 A. No.
21 Q. Did you speak to anyone about your
22 deposition, other than Ms. Marchioro?
23 A. No.
24 Q. Did you talk to Ann Kenny about her
25 deposition?

1 Q. Was there a particular event in the summer of
2 2000 that you started with?
3 A. As we prepared to make a decision on the
4 submittal from the Port of Seattle in August and
5 September of 2000.
6 Q. What was it about that time frame that you
7 focused on?
8 A. That's when, in my mind, the key issues
9 around stormwater management and wetland management --
10 it's fairly fresh in my mind how we were going through
11 that, and I wanted to make sure I was thinking about
12 that in preparation for this deposition.
13 Q. And then what was the next event in the
14 chronology that you thought about?
15 A. Why I determined that I would deny that
16 application and who I relied on to make that decision.
17 Q. And then keep going. What was the next item
18 you thought about?
19 A. Then the Port withdrawing when they realized
20 that we would deny it, and then just the series of
21 steps to the next decision point. I'm just trying to
22 refresh my memory of just other key events.
23 Q. Have you thought about what has happened
24 since you signed the August 10, 2001 401 Certification?
25 A. Yes.

1 A. No.
2 Q. Did you talk to Ray Hellwig about his
3 deposition?
4 A. No.
5 Q. Have you talked to anybody about any
6 deposition that has been taken in this matter?
7 A. No.
8 Q. Did you attend the deposition training course
9 put on by the attorney general's office to prepare
10 witnesses in this matter?
11 A. No.
12 Q. Tell me what you meant when you said you
13 reviewed the chronology of decisionmaking involved in
14 this matter for purposes of the deposition.
15 A. Yeah, I went back in my mind -- or when I
16 first got involved in the project over four years ago
17 when I first was hired in Ecology in this position,
18 starting with the August 1998 certificate that I
19 signed, and just walked myself through that, just
20 thinking of all the different steps and processes that
21 we'd been engaged in.
22 Q. Walk me through the steps that you thought
23 about for purposes of this deposition.
24 A. I focused mainly on the steps starting in the
25 summer of 2000.

1 Q. Anything in particular stand out in your mind
2 when you went back over the past several months?
3 A. The same kinds of things in terms of key
4 steps on the path to making the determination, making
5 the decision.
6 Q. Let's go back to August 1998. You signed the
7 original 401 Certification that was issued in August
8 1998; is that right?
9 A. Yes.
10 Q. How long prior to your signing that
11 certification had you been involved with the Port of
12 Seattle's application for the third runway project?
13 A. Six months.
14 Q. What is your current position with Department
15 of Ecology?
16 A. I'm the program manager for the Shorelands
17 and Environmental Assistance Program.
18 Q. And was that the position you held in August
19 1998 when you signed the original certification?
20 A. Yes.
21 Q. When did you first become program manager for
22 the Shorelands and Environmental Assistance Program.
23 A. October 1997.
24 Q. And prior to October 1997, what did you do?
25 A. I was a water program manager for Thurston

1 County.

2 Q. How long were you a water program manager for
3 Thurston County?

4 A. Approximately seven years.

5 Q. What were your responsibilities in that
6 capacity?

7 A. I worked with staff from a variety of
8 different departments in Thurston County to focus
9 efforts on protecting ground and surface water
10 throughout Thurston County but with a particular focus
11 on the rural southern portion of Thurston County. And
12 I also was involved in flood plain management and in a
13 variety of issues management directly for the county
14 commissioners.

15 ~~Q. Who brought you in to the Department of
16 Ecology?~~

17 ~~A. The deputy director at that time Dan Silver,
18 hired me.~~

19 ~~Q. Were you a personal acquaintance of
20 Mr. Silver?~~

21 ~~I knew him previous to that~~

22 Q. Describe for me the 401 Certification
23 process, what it is.

24 A. The process as it comes to me is, we have in
25 the regional offices what we call our 401 permit

1 Q. How is it determined who that permit
2 coordinator will be for a particular 401 application?

3 A. It's -- how is it decided?

4 Q. Well, maybe I better ask first: Who decides
5 it?

6 A. Who decides it? Well, we have identified in
7 each of our regional offices the person who would
8 usually handle a 401 permit, and so it's already
9 predetermined by the fact that we have a 401 reviewer.
10 Sometimes that will change based on workload issues,
11 and if there's somebody else who can help out, because
12 for workload issues we need to have somebody else focus
13 on a permit.

14 But the general rule is that the 401 reviewer
15 identified in the office is the reviewer.

16 Q. When does --

17 A. The section manager has the discretion to
18 make workload determinations.

19 Q. When does the headquarters staff of the
20 Shorelands and Environmental Assistance Program get
21 involved in issuing someone's 401 Certification?

22 A. They would get involved in an advisory
23 capacity if there is a particular complex issue that
24 arises from a project. They might be called in to take
25 on a permit because there isn't enough -- because of a

1 reviewers, and depending on the complexity of the
2 project, they will involve from one to maybe four or
3 five individual experts across other programs, usually
4 water quality, the water quality program which is a
5 separate program from the one that I manage. Sometimes
6 water resources in the case of damming licensing, for
7 instance, and of course wetlands staff within the
8 Shorelands and Environmental Assistance Program.

9 And they will -- their primary role is to
10 facilitate the review of applications for 401
11 Certification and then, with relying on the expertise
12 of these collection of experts, then they make
13 recommendations. And depending on the complexity of
14 the project -- and the final signature is either the
15 section manager or the program manager.

16 Q. When you say the section manager, are you
17 referring to the section manager in the regional
18 office?

19 A. Yes, section manager in the regional office.

20 Q. Of the Shorelands --

21 A. Of the Shorelands and Environmental
22 Assistance Program. Thank you for the clarification.

23 Q. Is there always a single permit coordinator
24 assigned to review 401 applications?

25 A. Yes.

1 workload issue in a region.

2 Q. So complex issue or workload issue will get
3 headquarters involved in a 401 application?

4 A. Yeah. For instance, if there is an issue on
5 a permit that the person in the region has a policy
6 question on, they might call in the person in
7 headquarters that's the senior policy lead for 401.

8 Q. Are there any other reasons other than there
9 being a complex policy issue or a workload issue that
10 would result in headquarters Shorelands and
11 Environmental Assistance getting involved in a 401
12 application?

13 A. Just clarify for me, Kevin, the headquarters
14 401 lead, being are there any other reasons why the
15 headquarters 401 need to be involved? Is what you're
16 asking?

17 Q. Yes, that's the question.

18 A. I don't think so. Those are the two primary
19 reasons.

20 Q. How many times has headquarters been involved
21 in issuance of a 401 Certification?

22 A. I don't know the exact number, and we changed
23 the system in 1998, towards the end of 1998, fully
24 implementing in '99 or beginning the implementation, of
25 regionalizing the 401 decisionmaking. So prior to 1999

1 or mid 1998, most of the 401 permit coordination and
2 review was done at headquarters.

3 And so the system I was just describing to
4 you is the system we have in place from '98 forward.
5 Prior to that, I believe most of the 401s would have
6 been managed from the headquarters 401 unit.

7 Q. How many 401 Certifications have you
8 personally signed? You signed BMG, correct?

9 A. BMG.

10 Q. Battle Mountain Gold 401 Certification?

11 A. Yes, I did. I've signed maybe a half a dozen
12 to a dozen. And I've been involved in consulting on
13 probably twice that many.

14 Q. You signed Battle Mountain Gold, correct?

15 A. Yes.

16 Q. You signed the 401 Certification for SeaTac,
17 the three that have been issued --

18 A. The three.

19 Q. -- correct?

20 A. Yes.

21 Q. Have there been any other projects the size
22 and scope of which matched the 401 Certification for
23 the Port of Seattle that you have signed?

24 A. Could you repeat the question?

25 Q. Let me put it another way.

1 Mountain Gold or the SeaTac 401 Certification?

2 A. Yes.

3 Q. And which application is that that you're
4 referring to?

5 A. The Columbia River Channel Deepening Project.

6 And then there are others that I am involved in, but
7 that I do not sign, but -- my section manager who is
8 going to be in the approval or denial role will consult
9 with me. And I would say none of them have risen to
10 the level of those three. They're complex, but
11 they're --

12 Q. You told me that you had signed a half a
13 dozen to a dozen 401 Certifications is that right?

14 A. Yeah, I may have. I haven't reviewed the
15 data on that, so I don't know.

16 Q. Well, other than Battle Mountain Gold and
17 SeaTac, what's the next largest project where you went
18 ahead and signed a 401 Certification?

19 A. I don't remember.

20 Q. Other than those two projects, you can't
21 remember any other certification that you signed?

22 A. No.

23 Q. Because they were insignificant projects?

24 MS. BARNETT: Object to the form of the
25 question.

1 A. I'm not that confused. I just want to hear
2 it again.

3 Q. Sure. Is the 401 Certification that you
4 signed for the Port of Seattle the most technically
5 complex certification that you personally have signed?

6 A. Yes.

7 Q. Battle Mountain Gold would be the next most
8 technically complex; would that be a fair
9 characterization, that you've signed?

10 A. That I have signed.

11 Q. What other 401 Certifications have you signed
12 of a similar technical complexity as the Battle
13 Mountain Gold 401 Certification?

14 You're smiling.

15 A. Well, I'm trying to understand the question
16 because I think I just answered it by saying that when
17 you asked me about the third runway and the Battle
18 Mountain Gold being as two complex projects that I have
19 signed.

20 Q. Are there any other 401 Certifications that
21 you've signed that you consider technically complex?

22 A. No. I am involved in other ones, but I have
23 not yet signed them or it has not come to a final
24 decision yet.

25 Q. That are as technically complex as Battle

1 A. I don't know why I can't remember.

2 Q. (BY MR. STOCK) They weren't big projects I
3 take it?

4 A. Yes.

5 Q. Is that right?

6 A. Yes, they were not big projects.

7 Q. Why have you been involved in the 401
8 Certification process for SeaTac Airport?

9 A. In -- at the Department of Ecology our
10 process is that I will -- I am involved in big projects
11 and I will be making the final determination.

~~12 Q. In the normal course who makes the
13 determination of reasonable assurance for purposes of
14 going ahead and issuing a 401 Certification?~~

~~15 A. Could you repeat the question again?~~

~~16 Q. Sure. In the normal course, who makes the
17 reasonable assurance determination for purposes of
18 going ahead and issuing a 401 Certification?~~

~~19 A. In the normal -- help me understand what you
20 mean by normal. Under normal course I just want to
21 make sure I understand the question, Kevin, I'm sor~~

~~22 Q. That's all right.~~

~~23 Other than in a big project where you would
24 make the final determination, in other situations who
25 makes the determination of reasonable assurance for~~

~~1 purposes of going ahead and issuing a 401
2 certification?
3 A. The team that's been assembled to review the
4 project and the manager in charge.
5 Q. And --
6 A. The next level of management below me which
7 would be the section managers.
8 Q. How is that different from what happened with
9 respect to the 401 Certification for the SeaTac
10 project, if it is?
11 A. The main difference is that I'm involved.
12 Q. Who made the determination that there was
13 reasonable assurance in this case for the SeaTac
14 Airport project to go ahead and issue a 401
15 Certification?
16 A. The team of experts that we assembled advised
17 me, and I made the final determination.
18 Q. Did you decide prior to August 10, 2001 that
19 Ecology had reasonable assurance to go ahead and issue
20 the 401 Certification to the Port of Seattle?
21 A. Could you repeat the question again?
22 MR. STOCK: Could you go ahead and read it,
23 please
24 (Reporter read back as requested.)
25 A. So your question is when did I make my mind~~

1 A. Ching-Pi Wang, excuse me.
2 Q. So other than Kevin Fitzpatrick, Erik
3 Stockdale and Ching-Pi Wang, did you rely upon anyone
4 else to come to your personal conclusion that there was
5 reasonable assurance the project would not result in a
6 violation of state water quality standards?
7 A. Oh, yes. Joan Marchioro for -- in terms of
8 any legal questions.
9 Q. So other than those four individuals you've
10 just mentioned, is there anyone else that you relied
11 upon to come to your personal conclusion of reasonable
12 assurance?
13 A. Those are the people I relied on.
14 Q. Did you rely upon Ann Kenny at all?
15 A. Well, yes. I don't know why I forgot her.
16 Q. Anyone else?
17 A. Yeah, I relied upon Ann for procedural issues
18 and -- I'm trying to think if there was anybody else.
19 I don't think so.
20 Q. What expertise did Kevin Fitzpatrick have
21 that you relied upon?
22 A. For the Stormwater Management Plan that was
23 submitted I relied upon Kevin Fitzpatrick for did he
24 have reasonable assurance that the plan and the
25 conditions that we were proposing gave us reasonable

~~1 up of when did -- when did -- in the process?
2 Q. (BY MR. STOCK) Well, let me ask a
3 preliminary question.
4 A. I want to make sure I'm not confused.
5 Q. I gather you would not have signed the 401
6 Certification had you personally not had reasonable
7 assurance that state water quality standards would not
8 be violated?
9 A. Yes.
10 Q. So at some point in your mind you came to the
11 conclusion that you had reasonable assurance the
12 project would not result in a violation of state water
13 quality standards; is that right?
14 A. Yes.
15 Q. When did you personally make that
16 determination?
17 A. Okay. That's very helpful. Probably, oh,
18 sometime in the week prior to August 10th.
19 Q. And what is it that you relied upon to come
20 to that personal conclusion?
21 A. The determinations and advice --
22 recommendations from the experts that were on our 401
23 review team, and those specific ones would be Kevin
24 Fitzpatrick, and Erik Stockdale. And Ching-Pi.
25 Q. Ching-Pi Wang?~~

1 assurance.
2 Q. Other than the Stormwater Management Plan,
3 did you look to Kevin Fitzpatrick for -- or rely upon
4 Kevin Fitzpatrick for anything else?
5 A. No.
6 Q. What expertise of Erik Stockdale did you rely
7 upon for purposes of coming to your conclusion of
8 reasonable assurance?
9 A. I relied upon Erik Stockdale for his
10 recommendation on the Natural Resource Mitigation Plan
11 that was submitted by the Port, whether it met our test
12 for reasonable assurance.
13 Q. Did you rely upon Erik Stockdale for any
14 other expertise other than his recommendation with
15 respect to the Natural Resources Mitigation Plan?
16 A. No.
17 Q. Ching-Pi Wang, what did you rely upon him
18 for?
19 A. The clean fill parts of the 401
20 determination.
21 Q. Did you rely upon Ching-Pi Wang for anything
22 other than the clean fill criteria in the 401
23 Certification?
24 A. No.
25 Q. Joan Marchioro, you said you relied upon her

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1 in terms of legal questions relating to the 401
 2 Certification; is that right?
 3 A. Uh-huh. Yes.
 4 Q. And did you rely upon her for anything else?
 5 A. No.
 6 Q. Ann Kenny, what did you rely upon her -- what
 7 expertise of hers did you rely upon for purposes of
 8 coming to your personal conclusion that there was
 9 reasonable assurance?
 10 A. I relied upon Ann at two levels, one, for
 11 making sure that the process and format of the 401
 12 Certification was -- you know, was appropriate, that in
 13 designing -- that the conditions that are in the
 14 document fit with the recommendations we were getting
 15 from our experts, sort of as a second screen.
 16 Q. When you say experts, you're referring to
 17 Kevin Fitzpatrick, Erik Stockdale and Ching-Pi Wang?
 18 A. Yes.
 19 Q. Anybody else?
 20 A. No. Although, Kevin, there are people behind
 21 those experts, but I didn't rely on those people so
 22 much as the people that represented -- you know that
 23 there were consultants that reviewed the Natural
 24 Resource Mitigation Plan, and you know there were
 25 consultants, King County, who reviewed the Stormwater

1 A. Yes.
 2 Q. And in fact --
 3 A. Well, let me clarify, or you clarify for me
 4 what you mean by technical expertise.
 5 Q. Well, when you refer to technical staff, what
 6 are you referring to?
 7 A. I'm referring to the technical expertise they
 8 have in the specific area of either stormwater
 9 management or wetland management, and Ann has technical
 10 expertise in the process of pulling together a 401
 11 decision.
 12 Q. Right. But you agree, she does not have
 13 technical expertise with respect to stormwater
 14 management issues?
 15 A. Yes.
 16 Q. And you also agree that she does not have
 17 technical expertise with respect to wetland issues?
 18 A. Yes.
 19 Q. You would agree, wouldn't you, that you don't
 20 have technical expertise with respect to stormwater
 21 management issues?
 22 A. Yes.
 23 Q. And you'd agree that you do not have
 24 technical expertise with respect to wetlands issues?
 25 A. Yes. Let me correct something, though, in

1 Management Plan and that I relied -- I just want to
 2 make it clear, I relied on Kevin's review of that and
 3 Erik's review of that. And of course, there are people
 4 behind Ching-Pi Wang as well that they in turn, you
 5 know, relied on.
 6 Q. With respect to Ann Kenny, you say you relied
 7 upon her for the process and the formatting of the 401
 8 Certification, correct?
 9 A. Uh-huh.
 10 Q. You need to answer --
 11 A. Oh, I'm sorry, yes.
 12 Q. Is there any other aspect or expertise that
 13 Ann Kenny had that you relied upon in coming to your
 14 own conclusion of reasonable assurance?
 15 A. I'd like to take a break and think about that
 16 and consult with my attorney.
 17 Q. Mr. White, you need to answer that question
 18 to the best of your ability without consulting --
 19 A. Oh, I do?
 20 Q. -- Ms. Marchioro.
 21 A. Really I just want help in making sure I
 22 remember.
 23 I don't believe so.
 24 Q. You agree that Ann Kenny is not an individual
 25 with technical expertise?

1 terms of your question around Ann Kenny's expertise.
 2 It's best for me to answer it or it's -- I'm not sure
 3 what her levels of expertise are in terms of training
 4 she's had around either stormwater or wetlands, so I
 5 think it's a more informed answer on my part that I did
 6 not rely on her for her expertise in stormwater or
 7 wetland management. Because she may very well have
 8 expertise in those areas that I don't know about, but I
 9 want to make it clear that I relied on the experts
 10 that -- Kevin Fitzpatrick on the stormwater, Erik
 11 Stockdale on wetlands, et cetera.
 12 Q. Prior to and in preparation for signing the
 13 August 10 401 Certification, how many times did you
 14 meet with Kevin Fitzpatrick with respect to the
 15 Stormwater Management Plan?
 16 A. I don't remember.
 17 Q. Once?
 18 A. It was more than once, but I just don't
 19 remember how many times.
 20 Q. Two or three times?
 21 A. Could have been two or three times.
 22 Q. Less than five times?
 23 A. Yes.
 24 Q. How many times did you meet with Erik
 25 Stockdale with respect to the Natural Resources

1 Mitigation Plan for purposes of coming to your personal
2 conclusion of reasonable assurance?

3 A. More than once, but less than five.

4 Q. And was this in the -- how long before
5 August 10 did you meet with Erik Stockdale with respect
6 to the Natural Resources Mitigation Plan?

7 A. A week before. A week before.

8 Q. And so the week before you signed the
9 August 10 certification, how many times did you meet
10 with Erik Stockdale?

11 A. I don't remember.

12 Q. Less than five times during that week?

13 A. I would -- yeah, I would think so.

14 Q. And the same answer with respect to Kevin
15 Fitzpatrick?

16 A. Yes.

17 Q. And how about Ann Kenny?

18 A. Probably about the same number of times.
19 Typically -- or at the same time. They're all parallel
20 amounts of time, I guess is what I'm trying to say. It
21 could have been more with Ann just because of
22 formatting issues and questions I had around, you know,
23 does this condition fit here or here, those sorts of
24 things.

25 Q. And how about Ching Di Wang?

1 A. No, I did not.

2 Q. Did you read any of the low flow analyses
3 presented to Department of Ecology by the Port of
4 Seattle?

5 A. No, I did not. I have looked at pieces of
6 all those documents as we would meet and discuss them.
7 But I never -- you were asking me the question of did I
8 read the entire document, no, I did not. I relied on
9 the team of experts to do that and inform me.

10 Q. During the year 2000, what percent of your
11 time did you spend on the Port's 401 application?

12 You're smiling again. I gather that it's
13 such a minor percent of your time that it's hard to put
14 a number on?

15 MS. MARCHIORO: Objection, form.

16 Q. (BY MR. STOCK) Is that a fair
17 characterization?

18 A. No, that's not why I was smiling.

19 Q. Why were you smiling?

20 A. It's hard for me to remember how much I
21 spent.

22 Q. Give me your best estimate as to what percent
23 of your time in the year 2000 you spent on issues
24 related to the Port's 401 application. Less than five
25 percent of your time?

1 MS. BARNETT: I'm confused about what the
2 question is.

3 Q. (BY MR. STOCK) Well, did you meet with him
4 prior to signing the 401 Certification for purposes of
5 coming to your personal reasonable assurance conclusion
6 with respect to clean fill criteria?

7 A. I don't recall meeting with him. I reviewed
8 his work and I had -- any questions I would have had,
9 and I don't remember which questions I had, I worked
10 through Ann to work to him.

11 Q. You didn't personally review the Stormwater
12 Management Plan, did you?

13 A. No.

14 Q. And you didn't personally review the Natural
15 Resources Mitigation Plan?

16 A. Well, let me -- let's just back up in terms
17 of personally reviewing. There's different -- "review"
18 is an evaluating term in terms of there's degrees of
19 it.

20 Q. Did you sit down and read the --

21 A. Read the entire document?

22 Q. -- Stormwater Management Plan?

23 A. No, I did not.

24 Q. Did you sit down and read the Natural
25 Resources Mitigation Plan?

1 A. Between one and five percent.

2 Q. And during the year 2001, same answer, one to
3 five percent of your time?

4 A. Same.

5 Q. Did Ecology need to have reasonable assurance
6 for the 401 Certification to be issued on August 10,
7 2001?

8 MS. BARNETT: Objection, calls for a legal
9 conclusion.

10 THE WITNESS: Excuse me, I didn't hear that,
11 Tanya.

12 MS. BARNETT: I said objection, calls for a
13 legal conclusion.

14 Q. (BY MR. STOCK) I'm not asking for any legal
15 opinion on your part, Mr. White. You are not a lawyer,
16 are you?

17 A. No, I am not a lawyer.

18 Q. But you signed the 401 Certification,
19 correct?

20 A. Yes, I did.

21 Q. And was it your understanding that on
22 August 10, 2001 when you signed the 401 Certification,
23 that Ecology had to have reasonable assurance that
24 state water quality standards would not be violated in
25 order for you to sign and for Ecology to issue that 401

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1 Certification?

2 A. When I signed the Water Quality Certification

3 on August 10th, I had reasonable assurance.

4 Q. Did Ecology have reasonable assurance?

5 A. I had reasonable assurance.

6 Q. And you were speaking on behalf of Ecology?

7 A. Yes.

8 Q. And would you agree that if for some

9 reasonable -- if for some reason, reasonable assurance

10 did not exist on August 10, 2001, that Ecology should

11 not have issued that 401 Certification?

12 MS. BARNETT: Objection, calls for a legal

13 conclusion.

14 Q. (BY MR. STOCK) You can go ahead and answer.

15 A. If I did not have reasonable assurance that

16 the project -- the submittal wouldn't meet water

17 quality standards then I would not have signed it.

18 Q. And so the answer to my question is yes?

19 A. The answer to your question is what I

20 answered.

21 MR. STOCK: Can you go ahead and read me my

22 question, please?

23 (Reporter read back as requested.)

24 Q. (BY MR. STOCK) Answer that question, please.

25 A. When I signed the determination I had

1 Q. Prior to signing the August 10 401

2 Certification, had you met with anyone from the Port of

3 Seattle with respect to the reasonable assurance

4 decision?

5 A. I met with Port officials, I'm not sure of

6 the date. We -- it was an on-site visit so I could

7 see -- I wanted to see the footprint. I had been there

8 before, probably a year, a year and a half before that,

9 but that was -- you know, I'm not sure when that

10 meeting was. I'm sorry, I can't recall it.

11 Q. In July of 2001?

12 A. That rings a bell in terms of a time -- the

13 timing. It would be -- it was certainly a month prior

14 to my -- or, you know, 20 to 30 days prior to the

15 decision. That's how it feels like, or my

16 recollection.

17 Q. So you wanted to see the footprint of the

18 project site before you signed the 401 Certification?

19 A. Before I made up my mind.

20 Q. Made up your mind with respect to what?

21 A. We had internally discussed -- the

22 application was before us, we were lining out, Okay,

23 here are the different issues we have to think about,

24 make determinations on. I was meeting with the panel

25 of experts or the group of experts within Ecology who

1 reasonable assurance, and I would not have signed it if

2 I did not believe we didn't have any reasonable

3 assurance.

4 Q. Well, don't you agree that if the science

5 ultimately establishes that there was not reasonable

6 assurance on August 10, 2001, that 401 Certification

7 should not have been issued on that date?

8 MS. BARNETT: Objection, calls for a legal

9 conclusion.

10 Q. (BY MR. STOCK) I'm asking for your

11 understanding Mr. White.

12 A. Yeah, I guess -- I'm confused by it. It's

13 very -- that's hypothetical. I am telling you what I

14 would do or not do based on my conclusion.

15 Q. Were you under pressure from anyone to sign

16 the August 10 401 Certification?

17 A. No.

18 Q. You were under no pressure at all?

19 A. No.

20 Q. Wasn't the Port asking Department of Ecology

21 to get that 401 Certification issued as soon as it

22 could?

23 A. Yes.

24 Q. And you don't consider that pressure?

25 A. No.

1 were studying those issues, reviewing the documents.

2 And I -- so as part of that process, we went

3 to visit the site and look at it to get a feel for the

4 physical dimensions and --

5 Q. My question is, why did you want to see the

6 footprint of the project site before you made up your

7 mind?

8 A. So I could see what wetlands were being

9 impacted, what streams were being impacted, and see the

10 things that I was seeing on maps and in descriptions,

11 written descriptions, and things that were being

12 discussed and described to me by the Ecology experts so

13 I could see it firsthand.

14 Q. Were you accompanied by Port personnel on

15 this site visit?

16 A. Yes, I was.

17 Q. Who accompanied you?

18 A. I don't remember all the names of the people

19 who were there, but I'll tell you who I remember being

20 there. Let's see.

21 Now I can't remember, I'm sorry, but I will

22 remember them.

23 Q. How many people went on this site visit?

24 A. There were, oh, ten.

25 Q. How many from Ecology?

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1 A. Three or four people from Ecology, five or
 2 six from the Port of Seattle. They had their
 3 stormwater lead person there.
 4 Q. This was in addition to people from the Port
 5 of Seattle?
 6 A. I'm including them in the group, whether they
 7 were a Port employee or a consultant. There were four
 8 or five people from the Port of Seattle there.
 9 Q. How did you get around the site?
 10 A. In a van.
 11 Q. Were you all in the same van?
 12 A. I think it was just one van, yes.
 13 Q. Driven by Port personnel?
 14 A. Yes.
 15 Q. Did you get to go where you wanted to go?
 16 A. Every place I asked to go I was able to go.
 17 Q. So you got to see what you wanted to see?
 18 A. Yes.
 19 Q. Did you have to sign any paperwork before you
 20 went?
 21 A. I can't remember -- I don't remember. There
 22 may have been something we signed, signing in. I know
 23 there was a lot of security in terms of going to
 24 different gates and we had to be very careful.
 25 Q. Other than signing a visitor's sheet, was

1 ~~Seattle, three people from the Department of Ecology.~~
 2 Q. You're aware that there were facilitated
 3 meetings between the Port of Seattle and the Department
 4 of Ecology in late 2000 and throughout 2001 prior to
 5 your signing the 401 Certification, correct?
 6 A. Yes.
 7 Q. And those were facilitated by Kate Snider's
 8 firm, correct?
 9 A. Yes.
 10 Q. Did you attend any of those facilitated
 11 meetings?
 12 A. No, I did not.
 13 Q. Did you receive the notes from those
 14 facilitated meetings?
 15 A. Yes, I did.
 16 Q. Did you review the notes of those facilitated
 17 meetings?
 18 A. Yes, I did.
 19 Q. Did you receive them on a regular basis,
 20 whenever they were prepared?
 21 A. Yes.
 22 Q. From whom?
 23 A. I don't -- I can't remember --
 24 Q. Did you --
 25 A. -- who was sending them to me.

1 ~~there any other paperwork that you had to sign?~~
 2 A. I don't think so.
 3 MS. MARCHIORO: Are you going to stay on this
 4 subject or are you going to move to another one?
 5 MR. STOCK: We can take a break.
 6 (Recess taken.)
 7 ~~MR. STOCK: Let's go back on the record.~~
 8 Q. (BY MR. STOCK) How many times have you been
 9 out to the site?
 10 A. Twice.
 11 Q. And the site visit that was in the summer of
 12 2001, how long were you out at the site -- how long did
 13 the site visit last?
 14 A. Four hours, approximately. Three to four
 15 hours.
 16 Q. And prior to the summer 2001 site visit, when
 17 was the other time that you were on the site?
 18 A. I don't recall the exact date. I would place
 19 it -- I would place it either in the fall of '98 or
 20 sometime in early '99.
 21 Q. How long were you out at the site that time?
 22 A. About the same amount of time, three to four
 23 hours.
 24 ~~Q. With how many people?~~
 25 ~~A. Fewer people. Three people from the Port of~~

1 Q. You received them by e-mail?
 2 A. Yes, I would receive them by e-mail either
 3 from Ann Kenny or Ray Hellwig, one of the two.
 4 ~~Q. And those e-mails would be responsive to~~
 5 ~~ACC's, multiple Public Disclosure Act requests,~~
 6 ~~correct?~~
 7 A. No. Let's just back up. I want to make sure
 8 I understand the chain of questioning here, Kevin.
 9 I thought you were asking me the question,
 10 when did I receive the meeting notes from these
 11 facilitated discussions, and you were asking me who
 12 sent them to me. And I think it was somebody within
 13 Ecology, it was either Ann or Ray --
 14 Q. Sure. Regardless of --
 15 A. -- who sent them to me.
 16 Q. -- whether it was Ann Kenny or Ray Hellwig,
 17 you're telling me that you received them on a regular
 18 basis whenever they were generated, correct?
 19 A. Yes.
 20 Q. And you would receive those notes by e-mail?
 21 A. Yes.
 22 Q. And you agree that those e-mails would be
 23 responsive to ACC's Public Disclosure Act requests?
 24 A. Oh, I guess I don't understand that -- I'm
 25 not sure I understand. What do you mean by that

1 they're responsive to their request?

2 Q. That when ACC asked for documents from the

3 Department of Ecology pursuant to the Public Disclosure

4 Act, that those e-mails to you attaching the notes

5 should have been produced in response to those Public

6 Disclosure Act requests?

7 A. Yes.

8 Q. What would you do when you reviewed the

9 facilitated meeting notes, if anything?

10 A. I saved the file in a file, and I read them,

11 absorbed them.

12 Q. Did you ever go back and look at them?

13 A. I may have on occasion, but I don't remember.

14 Q. Were the notes significant to you in any way?

15 A. They were significant to me in that they were

16 clarifying key questions and issues that the Port had

17 about the 401 process and our requirements, and

18 significant in that the Port was getting questions from

19 us about questions we had on their submittals and their

20 various -- their various submittals.

21 Q. Over the course of your involvement with the

22 Searac project, how many times have you met personally

23 with Tom Fitzsimmons on the SeaTac project?

24 A. This is over the four years, since 1998. I

25 just want to make a time frame.

1 Q. Yes, sure. And then we can narrow it down.

2 A. That's great. Thank you.

3 (Witness reviewing document.)

4 Eleven to 12 times since 1998.

5 Q. And you made some handwritten notes there.

6 How did you come to the conclusion that it was 11 to 12

7 times?

8 A. I'll go over this. My recollection is,

9 probably twice in 1998, twice in 1999, probably three

10 times in 2000, and maybe as many as four times in 2001.

11 Q. Let's take the meetings in 2001. Tell me

12 about the four meetings, each of the four meetings in

13 2001.

14 A. Well, I'll go in the most recent one first

15 and that would be -- I don't know the exact date, but

16 it was just prior to August 10th, Tom and I met just

17 prior to he and I meeting with the governor to tell the

18 governor what my determination was going to be.

19 Q. When you say just prior to August 10, what do

20 you mean? The day before, the day of?

21 A. Probably the day before or -- I'd have to

22 look at my calendar if the dates are still on my

23 calendar, because it would be on an electronic

24 calendar. But I've noticed that in my electronic

25 calendar it seems like when we crossed into 2000 that

1 none of it's there anymore. So I can't always find

2 exact dates.

3 Q. So if I make a request for your calendar,

4 your electronic calendar for the year 2000, 2001 and

5 2002, are you going to be able to produce that?

6 A. I'd have to ask the question to see if it was

7 saved somewhere, but I recently looked for a reason

8 separate from this case or project and I couldn't find

9 something a year ago, so that's why I brought it up,

10 whether I could track it to the exact date.

11 (Deposition Exhibit No. 120 was marked for

12 identification.)

13 Q. (BY MR. STOCK) Could you identify

14 Exhibit 120, please?

15 A. This is an e-mail from --

16 Q. Let me stop you for a second.

17 A. Do you want to identify it?

18 Q. No.

19 MR. STOCK: Off the record.

20 (Discussion off the record.)

21 Q. (BY MR. STOCK) You've been handed

22 Exhibit 120, Mr. White. Could you go ahead and

23 identify it for the record, please?

24 A. This is an e-mail from Ray Hellwig sent on

25 Monday, August 6, 2001 at 2:10 p.m., to Tom

1 Fitzsimmons, Gordon White, Ann Kenny, Curt Hart, Joan

2 Marchioro, and Tom Young. The subject is: Briefing

3 document for Wednesday.

4 Q. This refers to a meeting with the governor on

5 Wednesday, August 8, correct?

6 A. It looks like that, yes.

7 Q. And is that the meeting -- is that referring

8 to the meeting that you just told us about between Tom

9 Fitzsimmons, you and the governor?

10 A. Yes.

11 Q. What was the purpose of this -- did you

12 ultimately meet with the governor on August 8?

13 A. Yes.

14 Q. And what was the purpose of the meeting?

15 A. The purpose of the meeting was to review with

16 the governor my decision on the third runway proposal.

17 Q. Was anyone else in attendance at this

18 meeting?

19 A. Governor Locke; chief of staff, Paul Isaki;

20 the Northwest Regional Director, Ray Hellwig; Tom

21 Fitzsimmons; and myself.

22 Q. How long did the meeting last?

23 A. An hour approximately.

24 Q. Was it in the governor's office?

25 A. It was in the deputy -- it was in the chief

1 of staff's office.
 2 Q. Who called the meeting?
 3 A. I believe Tom Fitzsimmons did, initiated it.
 4 Q. And what is your understanding as to why this
 5 meeting occurred?
 6 A. We wanted to brief the governor on what I had
 7 concluded and the parameters of the decision.
 8 Q. When you say we, are you referring to you and
 9 Tom Fitzsimmons?
 10 A. Tom and Ray and myself had discussed, as I
 11 came to my conclusions about what I needed to brief the
 12 governor on.
 13 Q. Why was there a need to brief the governor on
 14 it?
 15 A. He'd received a lot of comments from -- well,
 16 your association and budget and specific legislators,
 17 certainly the Port of Seattle and others, so he knew
 18 about it. It was something that had certainly risen to
 19 his level of attention. And it's not uncommon when
 20 Ecology makes a decision on a project for an issue that
 21 has high profile, to brief the governor in advance of
 22 Ecology announcing its final decision on a particular
 23 issue.
 24 Q. Have you ever briefed the governor on any
 25 other 401 Certification issued by Department of

1 conversations he had had with anyone in the governor's
 2 office concerning the Port's 401 application?
 3 A. Just to clarify, you're asking me, did Tom
 4 tell me about any conversations he had with --
 5 inquiries from the governor's office about what -- I'm
 6 just wanting to make sure I understood the question.
 7 MR. STOCK: Why don't you reread the
 8 question.
 9 (Reporter read back as requested.)
 10 A. Yes.
 11 Q. (BY MR. STOCK) When?
 12 A. Off and on for the year 2001.
 13 Q. And what did Mr. Fitzsimmons say in that
 14 regard to you?
 15 A. We would have short conversations about the
 16 governor's office has received inquiry from either the
 17 Port or from legislators about the status of the
 18 submittal, the status of the project.
 19 Q. Did Mr. Fitzsimmons say anything further with
 20 respect to those inquiries from the governor's office?
 21 A. Yes. Sometimes he would describe -- just in
 22 a very sort of a nutshell, thumbnail sketch about what
 23 the inquiry was about.
 24 Q. What did Mr. Fitzsimmons say with respect to
 25 inquiries from the governor's office prompted by

1 Ecology?
 2 A. No.
 3 Q. Did you have discussions with Tom Fitzsimmons
 4 prior to going to the governor's office on August 8,
 5 what you were going to talk about?
 6 A. Yes.
 7 Q. Did you have discussions with Tom Fitzsimmons
 8 as to how the information would be presented?
 9 A. Yes.
 10 Q. What were those discussions between you and
 11 Mr. Fitzsimmons in that regard?
 12 A. How to best explain the project to the
 13 governor, how to -- it's a very complex project with
 14 lots of detail, how best to present that in a way that
 15 in an hour we could explain both the project, the
 16 project impact and how our decision reached reasonable
 17 assurance and reasonable and prudent conditions to
 18 assure that.
 19 Q. Did Tom Fitzsimmons tell you that he had
 20 gotten a call from the governor's office and that the
 21 governor's office wanted a meeting with key Ecology
 22 staff with respect to the 401 decision?
 23 A. No. I don't remember him talking about that.
 24 Q. Was there any discussion between you and
 25 Mr. Fitzsimmons where he discussed with you prior

1 contacts of the Port of Seattle?
 2 A. Usually they revolved around when would
 3 Ecology make its decision, timing issues, and -- I'm
 4 trying to think if there was anything else that
 5 seemed -- usually nothing of substance so much as just
 6 timing issues.
 7 Q. There were several occasions, weren't there,
 8 where Mr. Fitzsimmons had received questions from the
 9 governor's office with respect to timing of a 401
 10 decision based upon pressure that the governor's office
 11 was receiving from the Port of Seattle?
 12 A. Well, I don't know about, you know, how you
 13 define pressure and et cetera, but I know that Tom
 14 would relate to me that the Port has inquired to the
 15 governor's office about the timing of our decision.
 16 Q. Well, based upon your conversations with
 17 Mr. Fitzsimmons, wasn't it your interpretation that the
 18 Port was pushing the governor's office to put pressure
 19 on the Department to get the 401 Certification issued?
 20 A. I didn't get that impression from Tom's
 21 description to me, but I understand there was concern.
 22 Q. What do you mean when you say you understand
 23 there was concern?
 24 A. I think Tom would say something like this,
 25 that the Port has inquired about concern they have

~~1 about Ecology's when Ecology would make a decision.~~

~~2 Q. So you knew that the Port was expressing
3 concern to the governor's office about the timing of
4 Ecology issuing the 401 Certification?~~

~~5 A. Yes.~~

~~6 Q. And you had conversations with
7 Mr. Fitzsimmons along those lines on several different
8 occasions, correct?~~

~~9 A. Yes.~~

~~10 Q. Both in the year 2001 and in the year 2000?~~

~~11 A. Yes.~~

~~12 Q. Other than this August 8 meeting with the
13 governor on the 401 application of the Port, was there
14 any other occasion on which you met with the governor
15 or his staff related to the Port's 401 application?~~

~~16 A. No.~~

~~17 Q. You found it unusual, didn't you, that you
18 were sitting in the governor's office, the governor's
19 chief of staff's office on August 8, talking about your
20 determination with respect to the 401 application?~~

~~21 A. No, I did not.~~

~~22 Q. You didn't think it was unusual that you were
23 sitting in the governor's chief of staff office talking
24 about the 401 Certification?~~

~~25 MS. BARNETT: Asked and answered.~~

1 A. We discussed with him and he asked what our
2 basis for our decision was, which was technically
3 based.

4 Q. But Mr. Isaki himself didn't provide any
5 technical input to you, I take it?

6 A. No.

7 Q. Nor did the governor?

8 A. No.

9 Q. Did Mr. Fitzsimmons himself provide any
10 technical input to you for purposes of your coming to
11 your own reasonable assurance conclusion?

12 A. No.

~~13 Q. What was the purpose of your discussing with
14 Mr. Fitzsimmons 11 or 12 times over the course of the
15 past four years the 401 application of the Port of
16 Seattle?~~

~~17 A. Give him status reports in terms of where we
18 were in the process in conjunction with the regional
19 director who was involved at the time, and primarily
20 Ray Hellwig who was the regional director during most
21 of the -- or for '99, 2000 and 2001.~~

~~22 Q. And so it's your testimony that over the
23 course of those 11 or so times that you discussed the
24 401 application with Mr. Fitzsimmons that he did not
25 provide any technical input with respect to your com-~~

1 A. I've been there before on other issues.

2 Q. (BY MR. STOCK) But this was the first time
3 that you'd been in the governor's chief of staff office
4 on a 401 Certification, correct?

5 A. Yes.

6 Q. And that wasn't unusual in your mind?

7 A. No. I've been in the governor's office on my
8 decision -- on my decision and the director's decision
9 on adopting the shoreline guidelines. I've been in the
10 office on other issues, so this was another issue to
11 inform the governor on.

12 Q. Given you were sitting in the chief of staff
13 of the governor's office with respect to the 401
14 Certification, isn't that an indication that part of
15 the decision on the 401 Certification was a political
16 decision?

17 MS. BARNETT: Objection, form of the
18 question.

19 A. No.

20 Q. (BY MR. STOCK) Do you know what
21 environmental training Paul Isaki has?

22 A. No.

23 Q. Did Paul Isaki discuss with you any technical
24 aspects of your 401 determination when you were sitting
25 in the governor's office?

~~1 to a reasonable assurance conclusion?~~

~~2 A. No.~~

~~3 Q. So you're not relying upon anything that
4 Mr. Fitzsimmons said with respect to your own personal
5 conclusion with respect to reasonable assurance?~~

~~6 A. No. He would ask questions of a technical
7 nature or questions to make sure that we were doing a
8 very intensive technical scientifically-based review.~~

~~9 Q. I just want to be sure, there's nothing that
10 Mr. Fitzsimmons said to you that you're relying upon
11 for purposes of your determination that there was
12 reasonable assurance?~~

~~13 A. Yes.~~

~~14 Q. What were the other occasions in 2001 that
15 you spoke to Mr. Fitzsimmons with respect to the Port's
16 401 application?~~

~~17 A. Ask the question again.~~

AR 001858

~~18 Q. Sure. You've talked about a meeting with
19 Mr. Fitzsimmons to prepare for the August 8 meeting
20 with the governor's office and then you said there were
21 four occasions in 2001. What were the other occasi-
22 that you met with Mr. Fitzsimmons?~~

~~23 A. I don't remember the exact occasions. What I
24 remember is that either he or I, or he and I and Ray
25 would meet with him briefly to describe where the~~

~~1 project was in the process. I just don't know when
2 exactly those times were.~~

~~3 Q. Were there certain events in 2001 that would
4 trigger a meeting with Mr. Fitzsimmons?~~

~~5 A. Not that I know of, no.~~

6 Q. How about in the year 2000? You said you met
7 three times with Mr. Fitzsimmons in 2000 regarding the
8 Port's application. Describe those for me.

9 A. In September of 2000 I was -- we were
10 reviewing the Port application and I realized that I
11 was going to make a decision to deny the application
12 and so I spoke with Mr. Fitzsimmons about my
13 determination to let him know, give him a head's up.

14 Q. This was prior to the meeting with the Port
15 of Seattle announcing Ecology's decision that it was
16 going to deny the application; is that correct?

17 A. Yes.

18 Q. Tell me about this conversation with
19 Mr. Fitzsimmons prior to that meeting with the Port.

20 A. It was fairly brief, within a half an hour of
21 time frame, and I described to him my basis for denial.

22 Q. What did you tell Mr. Fitzsimmons as to why
23 you were going to deny the 401 application in September
24 2000?

25 A. Based on the recommendations from Kevin

1 Q. Prior to Mr. Luster going on vacation, didn't
2 he tell you there were a number of reasons why Ecology
3 couldn't have reasonable assurance?

4 A. He had left us a memo describing a variety of
5 issues that needed to be resolved in order to, in his
6 mind, obtain reasonable assurance.

7 MR. STOCK: Off the record.

8 (Discussion off the record.)

9 (Deposition Exhibit No. 121 was marked for
10 identification.)

11 Q. (BY MR. STOCK) You have been handed
12 Exhibit 121, Mr. White. Could you identify that,
13 please?

14 A. Yes. This is an e-mail from me, Gordon
15 White, sent on Wednesday, September 27th to Tom Luster,
16 Ray Hellwig, Kevin Fitzpatrick, Joan Marchioro and Erik
17 Stockdale.

18 Q. And what was the purpose of your e-mail to
19 that group of individuals?

20 A. (Witness reviewing document.)

21 It looks like this is a draft memo being sent
22 to the Port regarding the status of Ecology's review
23 and the Port of Seattle's application for a 401 Water
24 Quality Certification for the third runway, and
25 describing in general terms the immediate situation

1 Fitzpatrick on the Stormwater Management Plan, if he
2 did not have reasonable assurance and so that I could
3 not have it as well. I had reviewed that either
4 earlier in that day or a few days prior to that. We'd
5 had a meeting to review the Port's submittal with Kevin
6 Fitzpatrick, Erik Stockdale, the consultants from King
7 County.

8 Q. So you decided in September 2000 that you
9 were going to deny the Port's application based upon
10 Kevin Fitzpatrick's conclusion that he didn't have
11 reasonable assurance because of inadequacies in the
12 Stormwater Management Plan?

13 A. Yes.

14 Q. Is there any other reason why you decided you
15 were going to deny the Port's application in September
16 2000?

17 A. No. I don't remember any others. There
18 could have been, but that was the big issue that we
19 still had on the project.

20 Q. There were other issues, weren't there?
21 Didn't Tom Luster identify several issues to you as to
22 why there wasn't reasonable assurance in September
23 2000?

24 A. He had left on vacation, so he wasn't there
25 when I made my determination.

1 regarding Ecology's perspective on a new project review
2 process.

3 Q. If we had the original of this document, I
4 gather we'd be able to see your edits of the document
5 in a shade of red; is that right?

6 A. Yes.

7 Q. So is this a situation where you are taking a
8 draft of the letter that ultimately was going to go to
9 the Port of Seattle that had been drafted by Ray
10 Hellwig and edited by Tom Luster and then adding your
11 editorial comments?

12 A. Yes.

13 Q. And in your e-mail, you're telling the group
14 that you agree with Mr. Luster's comments; is that
15 right?

16 A. I tend to agree with Tom's comments, is what
17 I say in my e-mail, yes.

18 Q. If you look over in the draft of the letter,
19 the third paragraph down, the last sentence is deleted.
20 It says, "In light of this perspective, we believe a
21 401 Certification can may be issued consistent with the
22 note and provisions numbered below."

23 And that sentence is struck on this draft; is
24 that right?

25 A. Yes.

AR 001859

1 Q. Did you or Tom Luster strike that, do you
2 recall?
3 A. I believe I struck it.
4 Q. And why did you strike it?
5 A. As I recall, and this is as I'm remembering
6 this, I felt it's inappropriate and inaccurate to, in
7 terms of where I was in the process and understanding
8 the project, to prefigure a decision.
9 Q. Turn over to the second page of the draft
10 letter, under Item No. 2, where it's addressed to
11 Joan/Kevin, I gather that's Joan Marchioro and Kevin
12 Fitzpatrick?
13 A. Uh-huh. Yes, I see it.
14 Q. What is meant -- well, strike that.
15 In caps the draft says, "This is the key
16 piece of all of this."
17 Did you write that or did Tom Luster?
18 A. I don't know who wrote it.
19 Q. What did it mean to you?
20 A. You know, I don't remember what it meant at
21 that time.
22 Q. This paragraph is talking about the revised
23 Stormwater Management Plan, is it not?
24 A. Yes.
25 Q. And it's saying that there needs -- that the

1 September 2000, the Port submitted a revised Natural
2 Resource Mitigation Plan, correct?
3 A. I believe so.
4 Q. Well, do you know whether they did or not?
5 A. Well, when you say "revised," there were many
6 submittals, and I know that when Erik Stockdale, Kevin
7 Fitzpatrick, myself and Joan and Ray met in September,
8 we were looking at the most recent version of the NRMP,
9 and that Erik expressed his concern of how it fit with
10 the Stormwater Management Plan.
11 Q. And you concluded in September 2000 that you
12 didn't have reasonable assurance that that NRMP was
13 going to mitigate for the impacts to wetlands and
14 wetlands hydrology, correct?
15 A. You know, as I recall, the main issues that
16 Erik was bringing up on the NRMP was how it fit with
17 the SMP, and that was a key issue. This is why we were
18 saying in here, you need to look at both and make sure
19 they fit because if -- I don't know if this is an
20 example how -- if it fits there but it would be, if
21 you're going to build this stormwater facility, how
22 does it relate to the impact to this wetland?
23 Is the footprint on a wetland? Do the maps
24 line up in terms of the footprint of the stormwater
25 impact and the footprint of wetland mitigation? Any

1 Stormwater Management Plan needs to provide a
2 "consistent level of flow control to the receiving
3 waters of Miller, Walker and Des Moines Creeks."
4 A. Yes.
5 Q. And do you agree that that's a key component
6 of Ecology's reasonable assurance determination?
7 A. Yes.
8 Q. On down in that same paragraph, it refers to,
9 The revised SMP will also need to ensure and
10 demonstrate that it is consistent with the mitigation
11 requirements of the Port's Natural Resources Mitigation
12 Plan and that all revisions to the SMP would not result
13 in any additional adverse impacts to wetlands and the
14 wetlands hydrology which are not presently mitigated
15 for in the Natural Resources Mitigation Plan.
16 Do you see that?
17 A. Yes.
18 Q. And at the time, was there impacts to the
19 wetlands and the wetlands hydrology that had not been
20 compensated for or mitigated by the then existing
21 Natural Resources Mitigation Plan?
22 A. We were concerned that it was -- it didn't
23 seem to be addressed in what was submitted to us in
24 September or August when they submitted the plan.
25 Q. And subsequent to Ecology's rejection in

1 there were concerns around that and it was hard to
2 understand them. There wasn't -- didn't seem to be
3 rectified to us that the team that the Port had
4 developing the Stormwater Management Plan was reviewing
5 and taking into account the commitments they were
6 making in the NRMP, and vice versa.
7 Q. So it was your conclusion in September 2000
8 that SMP and the NRMP did not provide Ecology with
9 reasonable assurance?
10 A. Yes.
11 Q. How has the SMP and the NRMP changed so that
12 you had reasonable assurance on August 10, 2001 to sign
13 the 401 Certification?
14 A. I can't speak to the specifics of how they
15 changed, but Kevin Fitzpatrick and Erik Stockdale, in
16 reviewing the final submittals, assured me that they
17 meshed and they addressed those issues.
18 Q. So other than statements by Kevin Fitzpatrick
19 and Erik Stockdale with respect to the Stormwater
20 Management Plan and the Natural Resources Mitigation
21 Plan, you can't explain why, based upon those plans
22 you had reasonable assurance on August 10, 2001; is
23 that correct?
24 A. I based my decision on their recommendations.
25 Q. And other than what Mr. Stockdale and

1 Mr. Fitzpatrick had to say, you can't explain for us
2 sitting here what changed in the Stormwater Management
3 Plan or Natural Resources Mitigation Plan to allow you
4 to come to a conclusion of reasonable assurance?

5 A. No, I can't.

6 Q. Were you aware that the Port has submitted a
7 supplement to the Natural Resources Mitigation Plan
8 within the past month and a half?

9 A. No.

10 Q. Did you know that the Port submitted a
11 revised or a revision to the Natural Resources
12 Mitigation Plan in mid December 2001?

13 A. No.

14 Q. Did you know that the 401 Certification
15 required the Port to submit revisions to the Natural
16 Resources Mitigation Plan?

17 A. Yes.

18 Q. And why was it that the 401 Certification
19 required the Port to submit revisions to the Natural
20 Resources Mitigation Plan?

21 A. I can't recall the specifics of why. These
22 were conditions recommended by Erik Stockdale.

23 Q. Going back to this Exhibit 121, and your
24 making --

25 A. Could I just -- I just want to clarify

1 signature; is that right?

2 A. Yes.

3 Q. How did it come about that instead of the
4 draft denial letter, Ecology decided to issue the
5 letter that ultimately was sent to the Port?

6 A. As I recall, the Port -- we notified the Port
7 that we were going to deny the project and they decided
8 they would withdraw, which I understand is their
9 prerogative to do.

10 Q. Let's go back to your meeting with Tom
11 Fitzsimmons prior to the meeting with the Port in
12 September 2000. You had come to a determination that
13 you did not have reasonable assurance to go ahead and
14 issue the 401 Certification in September 2000; is that
15 correct?

16 A. Yes.

17 Q. You were under intense time pressures at the
18 time because the one-year period was about to lapse; is
19 that right?

20 A. Yes.

21 Q. And you had discussions with Mr. Fitzsimmons
22 about the one-year time period being about to lapse; is
23 that right?

24 A. Yes.

25 Q. Did he convey to you any discussions he had

1 something. This -- looking at this reminds me that

2 Q. Exhibit 121?

3 A. Looking at Exhibit 121 reminds me that I
4 reviewed a Tom Luster memo some time in September
5 preparing -- prior to our September 2000 meeting that
6 I've just described. I reviewed it two days ago. And I
7 think you'd asked me if I could recall any other
8 specifics, and I remember -- now I remember looking at
9 that. So I just want to bring that clarification.

10 It also reminds me that I reviewed a memo
11 from Tom Luster's supervisor, Paula Ehlers, regarding
12 Tom's status on the project. So I just want to clarify
13 in terms of that. It just reminded me.

14 Q. Okay, we'll talk about that in a bit.

15 (Deposition Exhibit No. 122 was marked for
16 identification.)

17 Q. (BY MR. STOCK) Look at Exhibit 122,
18 Mr. White, have you seen this document before?

19 A. Yes.

20 Q. What is it?

21 A. This is a draft denial letter and a draft
22 withdrawal letter that Tom Luster sent to myself
23 regarding this project.

24 Q. So back in September 2000, Mr. Luster had
25 also prepared a draft denial letter for Ecology's

1 had with Port of Seattle representatives regarding
2 Ecology getting a 401 Certification issued within the
3 one-year time period?

4 A. Yes.

5 Q. What did Mr. Fitzsimmons say in that regard?

6 A. I'm trying to recall exactly. It was in the
7 nature of, you know, the Port wanting to know what our
8 determination is going to be, the one-year time line's
9 coming up, that sort of thing.

10 Q. When was this conversation that you had with
11 Mr. Fitzsimmons?

12 A. I don't remember. It was not -- it was not
13 the time when I talked to him about what my
14 determination was in terms of denial.

15 Q. Right. It was prior to the time when you
16 went up and said, Okay, Tom, I'm going to have to deny
17 this application?

18 A. It was prior to that, yes.

19 Q. And was it during the summer of 2000, a
20 couple of months before your determination?

21 A. Yes.

22 Q. In fact, there was a meeting between the Port
23 of Seattle and Mr. Fitzsimmons in May 2000, wasn't
24 there?

25 A. I don't -- I believe there were at least one

1 or two meetings with the Port that Tom may have had, so
2 I don't know the exact dates.

3 (Deposition Exhibit No. 123 was marked for
4 identification.)

5 Q. (BY MR. STOCK) Handing you what's been
6 marked as Exhibit 123, what is this document?

7 A. This is an e-mail from Ray Hellwig to Tom
8 Fitzsimmons with a variety of cc's, identifying that
9 the Port of Seattle's requested a meeting.

10 Q. And were you a part of discussions regarding
11 this meeting with the Port of Seattle that had been set
12 for May 16, 2000?

13 A. I believe tangentially I was. I don't
14 believe I was involved with any -- I'm trying to
15 remember if I was involved in a premeeting with the
16 director and with Ray Hellwig.

17 Q. Prior to receiving this e-mail from Ray
18 Hellwig on May 11th, a copy of it, of his e-mail to Tom
19 Fitzsimmons, were you aware that there had been contact
20 between Martha Choe and the governor's office regarding
21 a meeting with the Port of Seattle?

22 A. No.

23 Q. Once you -- so the first news you had of that
24 was this e-mail from Ray Hellwig to Tom Fitzsimmons?

25 A. I think so.

1 Q. Once you received this e-mail, did you talk
2 to Mr. Fitzsimmons about the possibility of a meeting
3 between Mic Dinsmore, Martha Choe, the governor's
4 office, Wes Ulman, and Department of Ecology?

5 A. I don't recall talking to Tom directly about
6 this e-mail.

7 Q. But you do recall a discussion with
8 Mr. Fitzsimmons about concerns that the Port of Seattle
9 had expressed to him about Ecology's issuance of the
10 401 Certification within the one-year time period?

11 A. Yes.

12 Q. And were those discussions with
13 Mr. Fitzsimmons before this meeting with the Port of
14 Seattle?

15 A. Probably.

16 Q. And what did Mr. Fitzsimmons say?

17 A. He asked questions in terms of the status of
18 the project, where we were, so he could, I imagine,
19 reflect those in a meeting he was going to have with
20 the Port and -- yeah.

21 Q. Did he express frustrations with you that the
22 401 process had not moved along more quickly than what
23 it had?

24 A. No, he did not.

25 Q. Didn't you tell Mr. Fitzsimmons that the

1 reason the 401 process hadn't moved along was because
2 the Port of Seattle had provided inadequate information
3 to the 401 staff?

4 A. I'm not sure if I told him that or if Ray
5 told him that, because as I'm recalling this, it was
6 probably a meeting that Ray and I had to brief the
7 director in advance of this meeting. And Ray was fully
8 engaged in the process, facilitating the process, and
9 would have known much more specifically about that.

10 Q. Was Tom Luster also at that meeting between
11 Tom Fitzsimmons, Ray Hellwig, yourself?

12 A. I don't think so.

13 Q. He was the key 401 permit coordinator at the
14 time, was he not --

15 A. Yes.

16 Q. -- for the Port's application?

17 A. Yes.

18 Q. And hadn't Mr. Luster expressed frustration
19 to you with respect to the inadequate information that
20 the Port of Seattle had been providing to the
21 Department of Ecology?

22 A. Yes.

~~23 Q. And did you in turn express that frustration
24 to Mr. Fitzsimmons?~~

~~25 A. I don't know. Ray may have done it first and~~

~~1 then I wouldn't have said it or I could have said it
2 and Ray just would have supported it. I just can't
3 recall who would have said it first.~~

~~4 Q. Did Mr. Fitzsimmons express frustration to
5 you or Mr. Hellwig about the progress on the review?~~

~~6 A. I don't think he did.~~

~~7 Q. After the meeting with the Port of Seattle on
8 May 16 between Mr. Dinsmore, Mr. Fitzsimmons, Joe Dear
9 of the governor's office, did you talk to
10 Mr. Fitzsimmons about that meeting?~~

~~11 A. I can't recall. I either talked to him or to
12 Ray about the outcome of the meeting.~~

~~13 Q. Mr. Fitzsimmons didn't call you up after the
14 meeting and say, Here's what happened, or, Here's what
15 was said?~~

~~16 A. I can't remember if I talked to Tom and Ray
17 together or if I just got a download from the meeting
18 from Ray.~~

~~19 Q. Tell me about that conversation about what
20 you've heard about the meeting.~~

~~21 A. What I heard was that the Port had expressed
22 concerns about Ecology's timeliness in review, and
23 expressed concerns to them about the timeliness and
24 thoroughness of their submittals, that our concern was
25 that they would spend several months on a submittal and~~

~~then expect us to have a turnaround of one or two weeks
2 to review something they've worked many, many months
3 on~~

4 Q. Was that unreasonable in your mind, where the
5 Port would -- where the Port submitted a revised plan
6 and expected you to turn it around in one or two weeks?

7 A. It can be depending on the level of
8 involvement we had up to that submittal.

9 Q. Well --

10 A. Something that might be 20 volumes thick but
11 we've been involved and it's -- the changes in it are
12 just a few pages, is not unreasonable to expect a
13 relatively rapid turnaround. But as I understood it
14 from Ray and Tom Luster, that I think the submittals in
15 that time frame were quite robust and we needed more
16 time to review them.

17 Q. So in May of 2000, you thought it was
18 unreasonable that the Port had submitted revised plans
19 and was expecting a one- or two-week turnaround from
20 Department of Ecology?

21 MS. MARCHIORO: Objection, mischaracterizes
22 the witness's testimony.

23 Q. (BY MR. STOCK) Well, I don't mean to
24 mischaracterize your testimony, Mr. Gordon. You can
25 just answer the question whether that's the case or

1 Q. Do you recall ACC making a specific request
2 to you personally to allow more time to review that
3 July 23, 2001 low flow analysis prior to you issuing
4 the 401 Certification on August 10, 2001?

5 A. Yes, I think it was made in person.

6 Q. It was made in person. It was also made in
7 writing, wasn't it, by e-mail?

8 A. Sure. Yes.

9 Q. And ACC had requested additional time to
10 review that revised low flow plan that was dated
11 July 23, 2001, correct?

12 A. Yes.

13 Q. And in fact, within 15 days Ecology went
14 ahead and issued the 401 Certification based upon that
15 revised low flow plan; isn't that right?

16 A. I'm hesitating around -- since I can't put my
17 finger on exactly when they submitted and when it was,
18 so.

19 Q. It was dated July 23, 2001, a low flow
20 analysis.

21 A. For the purposes of argument I'll say yes.

22 Q. Well, your answer is yes; isn't that right?

23 A. Yes.

24 Q. It's not for purposes of argument, is it?

25 A. Well, I'd have to examine the record to see

~~not.~~

2 Did you find it unreasonable in May 2000 that
3 the Port was expecting Ecology to turn around a
4 decision when it submitted revised plans within a one-
5 or two-week period after submitting those revised
6 plans?

7 A. Yes.

8 Q. And Department of Ecology had been involved
9 in a review of the Port's application for two years
10 prior to that; isn't that right?

11 A. Yes.

12 Q. And even though you had been involved for two
13 years prior to that, you still thought it was
14 unreasonable for the Port to expect a one- or two-week
15 turnaround whenever it submitted a revised plan?

16 A. Yes.

17 Q. In fact, isn't that what happened when the
18 Port submitted a revised plan on July 23, 2001 with
19 respect to low flow?

20 A. I don't think so. That's not -- that's not
21 how I recall the submittal.

22 Q. On July 23, 2001, didn't the Port submit a
23 revised low flow analysis?

24 A. I don't -- I can't speak to the exact date
25 or -- of that.

1 the exact dates. I just -- I'll say yes.

2 Q. And in fact, you agree it was unreasonable to
3 expect Ecology staff to review that revised low flow
4 plan within the two-week period between the time that
5 it was submitted and the time that Ecology issued the
6 401 Certification on August 10?

7 A. No.

8 Q. Had there been revisions to the low flow plan
9 since August 10, 2001?

10 A. I don't know.

11 Q. Would that be important to you, to know
12 whether there had been revisions to the low flow plan
13 since you signed the 401 Certification?

14 A. I don't know. It depends on the nature of
15 the changes.

16 Q. Does the 401 Certification require the Port
17 to submit supplements or revisions to the low flow
18 plan?

19 A. Yes, I believe so. **AR 001863**

20 Q. And are those revisions or supplements
21 significant in your mind?

22 A. I can't recall the exact nature of the
23 condition, so I can't speak to that right now.

24 Q. Let me go back.

25 What do you recall was said by either

1 Mr. Fitzsimmons or Mr. Hellwig with respect to the May
2 2000 meeting with the Port of Seattle?

3 A. I don't recall -- I don't remember anything
4 else other than what I said. That's it.

5 Q. You subsequently had another conversation
6 with Mr. Fitzsimmons when you told Mr. Fitzsimmons that
7 you couldn't come to reasonable assurance for issuing a
8 401 Certification in 2000, correct?

9 A. Yes.

10 Q. What did Mr. Fitzsimmons say when you went to
11 tell him that?

12 A. He was interested in what the basis for
13 denial would be, what was my basis for denial.

14 Q. What did you say? What did you tell him?

15 A. Inadequacies in the Stormwater Management
16 Plan.

17 Q. And what did he say in response?

18 A. He said, I'd like to learn more about that.

19 Q. So what did you do?

20 A. I put him in contact with Kevin Fitzpatrick.

21 Q. So there were discussions between
22 Mr. Fitzsimmons and Mr. Fitzpatrick that you're aware
23 of relating to the Stormwater Management Plan?

24 A. Yes.

25 Q. Did Mr. Fitzsimmons express any concern to

1 Q. He never expressed to you that Ecology needed
2 to find a way to come to reasonable assurance on this
3 project?

4 A. No.

5 Q. Did he ever express to you that the
6 governor's office wanted a 401 Certification on the
7 third runway project?

8 A. No.

9 Q. He never told you that the governor's office
10 was looking to Ecology to certify the project?

11 A. No.

12 Q. Did Mr. Fitzsimmons ever tell you that any
13 questions with respect to the Stormwater Management
14 Plan needed to be resolved?

15 A. No.

16 Q. Did Mr. Fitzsimmons discuss with you after
17 his conversation with Mr. Fitzpatrick ways in which
18 Ecology could come to a finding of reasonable assurance
19 with respect to the Stormwater Management Plan?

20 A. No.

~~21 Q. What did Mr. Fitzsimmons have to say to you
22 after he talked to Mr. Fitzpatrick?~~

~~23 A. That Kevin had explained to him why Kevin did
24 not have reasonable assurance that the Stormwater
25 Management would meet water quality standards.~~

1 you about your inability to come to a conclusion of
2 reasonable assurance.

3 A. No. And once he talked to Kevin Fitzpatrick
4 he understood very -- in a fairly detailed way, because
5 we did -- I'm remembering at a subsequent conversation
6 he felt very assured that we were making the right
7 decision.

8 Q. Did he, on this initial conversation where
9 you told him you weren't going to be able to sign the
10 401 Certification, express surprise?

11 A. No, he expressed interest in the basis for my
12 decision.

13 Q. Did he question why you weren't able to come
14 to a conclusion of reasonable assurance?

15 A. Only in what I said before, he was interested
16 in why.

17 Q. Did he push you in any way to change your
18 mind?

19 A. No.

20 Q. Has Mr. Fitzsimmons ever said to you that you
21 had to find a way to issue the 401 Certification?

22 A. No. Nobody in my chain of command has ever
23 told me what my decision should be on this project.

24 Q. Well, that wasn't my question.

25 A. No, he did not.

~~1 sufficient so he could explain it to the governor.~~

~~2 Q. Did you and Mr. Fitzsimmons discuss what
3 Mr. Fitzpatrick's problems were with the Stormwater
4 Management Plan?~~

~~5 A. Not in any great detail.~~

~~6 Q. Well, in general?~~

~~7 A. I don't remember.~~

~~8 Q. Was there any other basis upon which you told
9 Mr. Fitzsimmons that you couldn't reach reasonable
10 assurance in September 2000?~~

~~11 A. No.~~

~~12 Q. So the only reason you told Mr. Fitzsimmons
13 you couldn't sign a 401 Certification in September 2000
14 was problems with the Stormwater Management Plan?~~

~~15 A. Yes.~~

~~16 Q. So in Mr. Fitzsimmons's mind in September
17 2000, as far as you knew, that was the only reason he
18 thought that Ecology wasn't coming to reasonable
19 assurance?~~

~~20 MS. BARNETT: Calls for speculation.~~

~~21 A. I can't speculate that.~~

~~22 Q. (BY MR. STOCK) Well, I'm not asking you to
23 speculate. Do you know of any other reason why
24 Mr. Fitzsimmons may have thought Ecology couldn't come
25 to a reasonable assurance in September 2000, other than~~

1 ~~problems with the Stormwater Management Plan?~~
2 ~~A. This issue of the recertification between the~~
3 ~~Stormwater Management Plan and NRMP, Ray Hellwig may~~
4 ~~have discussed that with him. All I recall is I~~
5 ~~specifically focused on the SMP with him when I~~
6 ~~discussed it with him. He may have understood from~~
7 ~~others, like Ray, that there were other reasons.~~
8 ~~Q. Did Mr. Fitzsimmons discuss the NRMP with you~~
9 ~~at all in September 2000?~~
10 ~~A. Not that I recall, no.~~
11 Q. Were you at the meeting with the Port of
12 Seattle in September 2000 in which you advised the Port
13 of Seattle that Ecology was going to deny the
14 application?
15 A. No, I was not.
16 Q. Did you have any discussions with anyone
17 about that meeting after the meeting?
18 A. Yes.
19 Q. Who?
20 A. Ray Hellwig.
21 Q. How about Tom Fitzsimmons?
22 A. I can't remember if I talked to Tom
23 Fitzsimmons about the meeting or not.
24 Q. What did you learn about the meeting?
25 A. That it went very well from our perspective,

1 AFTERNOON SESSION
2
3 1:05 P.M.
4 --oOo--
5
6 CONTINUING EXAMINATION
7 BY MR. STOCK:
8 Q. Mr. White, you've been handed what was
9 previously marked as Exhibit 86. Do you recognize this
10 document?
11 A. Yes. This is a document prepared by Andy
12 McMillan working with staff in our program and other
13 programs on lessons learned from big projects,
14 recommendations from our program.
15 Q. On the first page of Exhibit 86, does it
16 indicate that your program at headquarters received a
17 copy of this?
18 A. Yes, I think so. Yes.
19 Q. Which one is that?
20 A. This would be on the To line under Andy
21 McMillan.
22 Q. Right.
23 A. The ECY DL HQ SEA.
24 Q. And that's you?
25 A. That would be the headquarters staff,

1 that the Port heard our concerns and committed to
2 meeting the standards and issues that we have -- we had
3 brought to them. And that there was an understanding
4 that before we could make a determination of reasonable
5 assurance that the environmental objectives and the
6 standards that we had laid out for them had to be met.
7 MR. STOCK: Off the record.
8 (Discussion held off the record.)
9 (Deposition recessed at 12:15 P.M., to be
10 reconvened at 1:00 P.M.)
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1 including me, in the Shorelands and Environmental
2 Assistance Program.
3 Q. Did you discuss this project with
4 Mr. McMillan as he was working on it?
5 A. Yes.
6 Q. And you had input into this document?
7 A. Yes.
8 Q. What was the purpose of the document?
9 A. To garner lessons learned from how we handle
10 big projects as we review them at the Department of
11 Ecology. And in particular, in our program.
12 Q. And as explained on the first page of the
13 memo attached to his e-mail, those complex projects
14 included the Battle Mountain Gold project, the SeaTac
15 Third Runway and the 304th Street Landfill; is that
16 right?
17 A. Yes.
18 Q. As well as Arrowleaf?
19 A. Yes.
20 Q. What was the Arrowleaf project?
21 A. The Arrowleaf project was a proposal for a
22 destination resort, golf course, ski facility in the
23 upper Methow Valley.
24 Q. Referring you to the first page of the memo
25 under Item 2, it states that, "Managers should not

AR 001865

1 reward project applicants' attempts to get 'early
2 assurances' or do an 'end-around' project staff."

3 What is that in reference to?

4 A. What is it in reference to? I think it says
5 it right here. It's in reference to the perception
6 that project applicants will try to get Ecology
7 managers to assure them that a project is, quote,
8 permitable, et cetera.

9 Q. That was based on more than just a
10 perception, was it not?

11 A. I don't know.

12 Q. Well, Ecology had experienced project
13 proponents on big projects trying to do an end-around
14 project staff, and that's why one of the
15 recommendations specified here is to -- not to reward
16 that behavior; is that right?

17 A. Yeah. I think there was a perception on
18 staff's part that when agency managers would meet with
19 project proponents of these big complex projects that
20 they might have made commitments on facets of the
21 project. And that was certainly not my experience, so
22 I can't just speak to the -- I can only speak to the
23 perception because I see it here, and I spoke to staff
24 about it.

25 And I think it's a reasonable concern to have

1 people aren't clear about what happened.

2 Q. So is this memo that's Exhibit 86 based upon
3 staff experiences, management experiences or both?

4 A. I would say both. Certainly as we debrief
5 from say the Crown Jewel Gold Mine project, earlier
6 facets of the SeaTac third runway, I was not involved
7 in the 304th Street Landfill and in Arrowleaf. As we
8 debriefed individually we recognized, Look, let's
9 review how the process went, because we heard concerns
10 from our staff. Sometimes it seemed like I was out of
11 the loop and I wasn't sure where I stood.

12 And, Okay, let's address that. So Andy -- we
13 asked Andy McMillan our lead wetland person and
14 programmer in our agency to head this up, and we had
15 discussions with managers and staff to scope out what
16 the range of issues are. Then Andy followed up with a
17 two to two-and-a-half-day meeting with staff to go
18 through what seemed to be logical things to improve our
19 processes.

20 Q. Did any staff express to you the concern that
21 the Port was doing an end-around project staff on the
22 third runway project?

23 A. Not that I can recall. No, nobody came to me
24 and said they were doing end-around.

25 Q. What about Tom Luster?

1 in terms of project applicants certainly ask for
2 commitments and managers oftentimes try to address
3 concerns around timeliness of permit review, that sort
4 of thing. Certainly I have done that on projects
5 myself where applicants say, Well, you know, we're
6 anxious for a decision and so can you make a commitment
7 to us?

8 I don't make those commitments. I work with
9 staff and through this -- lessons learned from these
10 big projects, we were able to talk about how best to
11 answer questions that we get from project proponents
12 around timeliness of permit decisions, what standards
13 are we using to decide yes or no on a permit, that sort
14 of thing. And the importance of practicing 360
15 communication around, Okay, I've had a meeting with
16 project proponent X, and making sure that I communicate
17 with staff that are working on the project, Okay,
18 here's what they're asking me.

19 And I did in fact say, Commit to our next
20 meeting to do this and I want you and you and you
21 there. So it's not surprising that when they hear back
22 from a staff person who's working for the project
23 proponent, Oh, guess what, you're going to have to do
24 this in making sure we're clear.

25 Because oftentimes when you have meetings,

1 A. No, he never told me that.

2 Q. Did you ever have meetings individually with
3 the Port of Seattle representatives, any Port of
4 Seattle representative?

5 A. Meaning just me and a Port representative? I
6 talked on the phone two or three times with a person
7 named Charlie -- can't remember his last name. He was
8 brought in by the Port to initially sort of head up the
9 Port's new reapplication process after the 199 -- the
10 August 1998 decision. So I talked to him on the phone
11 a couple times about process issues around what the
12 time line might look like, those sorts of things.
13 Talked to him on the phone twice and I met with him at
14 the Department of Ecology once, one on one.

15 Q. Is he still with the Port?

16 A. I believe he's still with the Port, but he
17 transitioned away from being involved in the project,
18 it seemed like within six months.

19 Q. Other than that individual, have you had
20 private conversations with any other Port
21 representative regarding the third runway project?

22 A. Oh, not that I can recall. There was one
23 with -- nothing in the last year I would say. In '98,
24 prior to my August decision -- oh, who was it that I
25 talked to? She called me a couple times. I think you

1 would know who she was.
 2 Q. Elizabeth Leavitt?
 3 A. No. The person Elizabeth replaced.
 4 Q. Barbara Hinkle?
 5 A. Barbara Hinkle she called me a couple times.
 6 Q. Other than Barbara Hinkle or this man by the
 7 name of Charlie, have you had private conversations
 8 with anyone else at the Port of Seattle?
 9 A. Not that I can recall, no.
 10 Q. You've never had a private conversation with
 11 Elizabeth Leavitt?
 12 A. No. The conversations I had with Elizabeth
 13 would have been on site with other people and then in a
 14 meeting that we had sometime in late '98, maybe early
 15 '99, on their reapplication process when she and others
 16 were in the room.
 17 Q. Take a look at the first page of this Lessons
 18 Learned memo, Exhibit 86. At the bottom of the page it
 19 states, "Occasionally managers make decisions on large
 20 projects and small ones, too, that project staff do not
 21 support."
 22 What's that in reference to?
 23 A. I don't know if it's referencing a specific
 24 project, so nothing really leaps to mind in terms of
 25 specifics. But I'm certain that there are times when

1 project staff aren't going to agree with a final
 2 determination by a manager that that can happen. And
 3 so let's project out about how we handle those
 4 situations.
 5 Q. And does that include findings by managers
 6 with respect to reasonable assurance?
 7 A. I don't know because I just don't know if
 8 there was a specific instance that Andy had in mind
 9 when he wrote this.
 10 Q. When you came to your determination of
 11 reasonable assurance for the SeaTac project and signed
 12 the August 2001 certification, did any staff express
 13 concern to you about your decision?
 14 A. No.
 15 Q. During the time that Tom Luster was employed
 16 by the Department of Ecology, did he express to you a
 17 concern that Ecology could not come to a reasonable
 18 assurance conclusion on the SeaTac application?
 19 A. No. He expressed to me -- he identified
 20 important issues that needed to be resolved in order to
 21 make a decision, but he never expressed to me that
 22 reasonable assurance could never be met, if that's what
 23 you meant. I wasn't quite sure.
 24 Q. Turn over to the second page of the Lessons
 25 Learned memo, the top sentence says, "In the past

1 staff disagreements have resulted in them being branded
 2 as 'not a team player' or as a potentially 'hostile'
 3 witness."
 4 What is that in reference to?
 5 A. Again, I don't know. I don't know if it's
 6 more of a hypothetical collection of projects or if it
 7 refers to a specific instance.
 8 Q. Well, it doesn't sound hypothetical to me.
 9 It says, "In the past, staff disagreements have
 10 resulted in them being branded as 'not team players'.
 11 A. Nothing comes to mind, I guess, would be what
 12 I would say.
 13 Q. What about Tom Luster on the SeaTac third
 14 runway application, was he branded by anyone as not a
 15 team player?
 16 A. No. I've never heard that mentioned at all.
 17 Q. Did you have any discussions with Ray Hellwig
 18 about Tom Luster's review of the third runway
 19 application?
 20 A. Yes.
 21 Q. And in those discussions did Mr. Hellwig
 22 express to you a concern about Tom Luster's performance
 23 on the review of the third runway project?
 24 A. Yes.
 25 Q. And what did Mr. Hellwig say?

1 A. The nature of the concerns were, Tom was
 2 doing a good job of identifying specific issues for the
 3 team to resolve, and once they're resolved Tom would
 4 come back to them. And so he was a little frustrated
 5 with Tom in terms of how to make sure that Tom
 6 understood that that issue had been dealt with and then
 7 continue to move forward. He wasn't sure how to
 8 resolve that.
 9 Q. And how did you respond to Mr. Hellwig?
 10 A. I said, Well, I think it would -- it went
 11 something like this, where I explained to Ray that
 12 Tom's a very thorough person and it could be the nature
 13 of his determination to be thorough that he is coming
 14 back and checking. Since I'm not in the room when Ray
 15 is perceiving this, I expressed to Ray that, Talk to
 16 Tom about it, work with him directly and try and go
 17 from there.
 18 Q. In fact, wasn't that Mr. Luster's job, to
 19 look at what the Port of Seattle submitted and to make
 20 comments?
 21 A. Partly. Most of his job was to work with the
 22 experts on the team, the Ecology team, to make sure
 23 that they were reviewing the specific submittals from
 24 the Port and had the information they needed to then
 25 inform Tom Luster and others, ultimately me, around the

1 adequacy of these submittals. So what we relied on Tom
 2 to do is to make sure that those issues were being
 3 addressed in the submittals, that they were being --
 4 that the experts who were reviewing those were reminded
 5 by Tom that when they reviewed those documents that
 6 those issues -- to help them remember that they
 7 identified those issues as key issues, that in the new
 8 submittal they needed to look at those and they needed
 9 to be addressed.

10 So Tom plays an important role in
 11 facilitating and helping focus the experts' review of
 12 those documents.

13 Q. Mr. Luster was Department of Ecology's senior
 14 expert on 401, was he not?

15 A. Yes.

16 Q. And in that capacity you expected Mr. Luster
 17 to call into question any submittal that he believed
 18 there were problems with?

19 A. I expected Tom to make sure that the experts
 20 who were doing the review reviewed those documents
 21 around the key questions that the team had identified.
 22 That's a very important role for the facilitator to do.

23 Q. And based upon his expertise, he had
 24 questions about a submittal, you expected him to bring
 25 those questions to the attention of the technical group

1 stormwater expertise?

2 A. I don't believe he does.

3 Q. What do you base that upon?

4 A. I base it on some knowledge of his backgrou.
 5 and the nature of his role as a 401 reviewer. We do
 6 not ask our 401 reviewers to have specific expertise
 7 around water quality standards that have to be met
 8 under 401.

9 Q. What is your understanding of Mr. Luster's
 10 background with respect to stormwater issues?

11 A. My understanding, he is not relied upon for
 12 his opinion on stormwater issues.

13 Q. That's not my question. My question is, what
 14 is your knowledge as to --

15 A. Help me understand.

16 Q. My question is, what is your knowledge with
 17 respect to Mr. Luster's stormwater background and
 18 expertise.

19 A. You mean how much do I know about his
 20 training in stormwater issues and that sort of thing?

21 Q. Yes.

22 A. I don't have knowledge to that.

23 Q. And so you can't, based upon a lack of
 24 knowledge, pass judgment on whether Mr. Luster is an
 25 expert with respect to stormwater issues, can you?

1 what was reviewing the Port's submittals?

2 A. If the technical group had questions around
 3 these and they weren't resolved, one of the roles Tom
 4 would play is to bring them up and making sure they
 5 were resolved.

6 MR. STOCK: Why don't you read me my
 7 question, please.

8 (Reporter read back as requested.)

9 A. Well, I think I want to make sure that we
 10 distinguish between what his expertise is and his
 11 expertise is in facilitating discussions. And I didn't
 12 want to give a misimpression that he has expertise in
 13 say stormwater management, that we rely on the
 14 stormwater expert to provide us the opinion on that.

15 Q. (BY MR. STOCK) You're not questioning
 16 Mr. Luster's expertise with respect to stormwater
 17 management issues, are you?

18 A. He doesn't have expertise in stormwater
 19 management issues.

20 Q. How do you know that?

21 A. Well, let me -- let me be more correct.

22 We rely on the experts -- the stormwater
 23 experts in the water quality program to make the
 24 decision on stormwater issues, for one.

25 Q. Are you saying that Mr. Luster doesn't have

1 A. No, I can't.

2 Q. Mr. Luster is an expert with respect to
 3 wetlands, is he not?

4 A. I have no -- I can't speak to that. I have
 5 no knowledge on his expertise. Again, he's not the
 6 person I would rely on in terms of this particular
 7 wetland issue because we have particular experts that
 8 401 reviewers rely upon.

9 Q. Did you rely upon Mr. Luster in coming to the
 10 conclusion in September 2000 that you couldn't have
 11 reasonable assurance that the Port's project would not
 12 violate water quality standards?

13 A. No, I did not.

14 Q. So your testimony is that nothing Mr. Luster
 15 told you influenced your decision in September 2000
 16 with respect to the lack of reasonable assurance?

17 A. No.

18 Q. And you relied exclusively on the technical
 19 staff for your conclusion in September 2000 that there
 20 was a lack of reasonable assurance?

21 A. Yes.

22 Q. How is it that in August 2001 you relied upon
 23 statements of Ann Kenny to come to the conclusion of
 24 reasonable assurance?

25 MR. WAGNER: Objection. I think it

1 ~~mischaracterizes the testimony of the witness~~
2 ~~previously.~~
3 ~~Q. (BY MR. STOCK) Did I mischaracterize your~~
4 ~~testimony, Mr. White?~~
5 ~~A. Yes.~~
6 ~~Q. How did I mischaracterize it?~~
7 ~~A. Well, here's how I heard it, and what I was~~
8 ~~hearing you say is that I relied on Ms. Kenny's~~
9 ~~expertise in these substantive areas, and I did not.~~
10 ~~Q. You relied upon statements of Ms. Kenny in~~
11 ~~August 2001, did you not, to come to the conclusion of~~
12 ~~reasonable assurance?~~
13 ~~A. I think I testified earlier in the day that I~~
14 ~~relied on Ann Kenny in terms of questions I had in~~
15 ~~terms of the form of the document that I had before me~~
16 ~~in terms of the certification.~~
17 ~~Q. Did you rely upon any statements from~~
18 ~~Ms. Kenny to come to the conclusion of reasonable~~
19 ~~assurance in August 2001?~~
20 ~~A. No.~~
21 ~~Q. Nothing Ann Kenny said to you influenced your~~
22 ~~decision one way or the other whether to come to a~~
23 ~~conclusion of reasonable assurance in August 2001; is~~
24 ~~that correct?~~
25 ~~MS. BARNETT: Asked and answered.~~

1 Q. Her administrative expertise?
2 A. Yeah, and her technical writing skill and the
3 process skills and also that she was there as issues
4 were being dealt with through the facilitator process
5 and just making sure that, okay, an issue came up on
6 the Stormwater Management Plan, Kevin would be giving
7 me his reasonable assurance review and I would just
8 ask, Ann, Now, this is everything? And yes, this is
9 the list of the things that we dealt with.
10 So it was really -- it was more of making
11 sure that the list of issues were being addressed.
12 ~~Q. What led to the decision to replace Tom~~
13 ~~Cluster on the 401 application of the Port's?~~
14 ~~A. The workload of policy issues, that was Tom's~~
15 ~~main job. When we transitioned to the regional~~
16 ~~offices, the 401 permit review roles, he was retained~~
17 ~~in headquarters to manage the policy issues and work,~~
18 ~~and work with -- to review, for instance, legislation~~
19 ~~that would come up, to help train and support and~~
20 ~~provide backup to the regional people.~~
21 ~~And that happened while this project was~~
22 ~~still on Tom's plate. And we thought when that -- when~~
23 ~~we initially agreed with the Northwest office, my~~
24 ~~section manager there, to keep Tom on the job, that it~~
25 ~~would perhaps last up to six months and then either the~~

1 A. I relied on Ann Kenny when I asked questions
2 about the form and processes that were identified in
3 the document, the Water Quality Certification. And so
4 in that respect, yes, I relied on her opinion. In
5 terms of substantive issues that were being called out
6 and addressed in the water quality cert, I relied on
7 the experts that I listed before.
8 Q. (BY MR. STOCK) So whatever opinion Ms. Kenny
9 may or may not have had with respect to technical
10 issues in no way influenced the Department of Ecology's
11 decision to come to a finding of reasonable assurance
12 in August 2001; is that correct?
13 A. Not on the technical merits of the case, no.
14 I relied on Ann to, you know, double verification what
15 Kevin is laying out here is what -- these are the
16 issues, so she would verify because she has an
17 important role in terms of making sure the issues got
18 addressed. But again, it's really referencing back
19 around what the lead experts say, and Ann is clarifying
20 did they address this or not, yes, and then how did we
21 do it, how did we get there.
22 Q. So you are relying upon her technical
23 expertise?
24 A. I'm not saying it's technical expertise.
25 It's really around --

1 ~~project would be completed or would transition.~~
2 And as I recall, the region wanted Tom to
3 keep working on it. His section manager, Paula Ehlers,
4 was concerned that, When are we going to get Tom back
5 to work on the other work?
6 We do in our program quarterly reviews of the
7 key accomplishments we need to make every quarter. As
8 we progress through our work plan, we lay out a work
9 plan every year that identifies the key elements, key
10 tasks, key activities, key projects that need to get
11 done. And one of the things that kept coming up is
12 that issues in policy initiatives and work within the
13 401 room were being delayed because Tom was the only --
14 who was the person we would work with on those issues,
15 wasn't available because of this project.
16 And I recall on several occasions just noting
17 that to Tom's supervisor, Paula, that we need to get
18 these projects done and please initiate some
19 conversation with her counterpart in the region,
20 Jeannie Summerhays, is there likelihood that we could
21 transition this project like we have others to regional
22 staff? Does it make sense? Can we preserve
23 continuity? Et cetera, et cetera.
24 Q. Did you have discussions with Mr. Fitzsimmons
25 about the workload in the headquarters office of

~~1 Shorelands and Environmental Assistance?~~
~~2 A. Yes.~~
~~3 Q. Did you have discussions with Mr. Fitzsimmons~~
~~4 with respect to Mr. Luster not being able to do his~~
~~5 policy work because he was working on the Port's 401~~
~~6 application?~~
~~7 A. No. The only discussion I had with Tom~~
~~8 Fitzsimmons about this was to tell him that Paula~~
~~9 Ehlers had made a decision to transition him and shift~~
~~10 his work duties on the project back on his policy~~
~~11 responsibilities.~~
~~12 Q. Whose decision was it to take Tom Luster off~~
~~13 the Port's 401 application?~~
~~14 A. Paula Ehlers decided to shift Tom's~~
~~15 responsibilities.~~
~~16 Q. She alone?~~
~~17 A. Yes. She's Tom's -- she is the supervisor of~~
~~18 that position, so it would be her decision. She~~
~~19 certainly consulted with people.~~
~~20 Q. And she consulted with you?~~
~~21 A. Yes, she did.~~
~~22 Q. And did she tell you about conversations that~~
~~23 she may have had with the Port of Seattle regarding~~
~~24 Tom's review of its application?~~
~~25 A. No.~~

~~1 Mr. Luster's performance on the 401 project is that~~
~~2 correct?~~
~~3 A. Yes.~~
~~4 (Deposition Exhibit No. 124 was marked for~~
~~5 identification.)~~
~~6 Q. (BY MR. STOCK) You've been handed what's~~
~~7 been marked Exhibit 124. Do you recognize Exhibit 124?~~
~~8 A. (Witness reviewing document.)~~
~~9 Yes.~~
~~10 Q. And what's it regarding?~~
~~11 A. It is a memo requested by Tom for the~~
~~12 governor that Tom would be sending to the governor~~
~~13 providing a status update on the decisionmaking process~~
~~14 for the third runway project.~~
~~15 Q. That's Tom Fitzsimmons?~~
~~16 A. Yes, Tom Fitzsimmons, excuse me.~~
~~17 Q. And did you review this before~~
~~18 Mr. Fitzsimmons sent it to the governor?~~
~~19 A. I believe I did.~~
~~20 Q. Did you have any suggestions or input?~~
~~21 A. I don't remember.~~
~~22 Q. Did you offer any changes or suggest that~~
~~23 changes be made in the memo?~~
~~24 A. I don't recall that I did.~~
~~25 Q. Refer to the very last line of the first page~~

~~1 Q. Did you ever have any discussion with~~
~~2 Ms. Ehlers about conversations she had with Port of~~
~~3 Seattle representatives?~~
~~4 A. Only in, let's see, in the early going in~~
~~5 1998, both prior to the 1998 decision on the proposal,~~
~~6 and then probably three or four months after where~~
~~7 she'd had some interaction with -- you know, prior to~~
~~8 August 1998 she'd had interaction, I think, with~~
~~9 Ms. Hinkle and then after that she'd had interaction~~
~~10 with Elizabeth Leavitt, and all around just saying how~~
~~11 the project is going to be managed from Ecology's~~
~~12 perspective.~~
~~13 Q. In conversations that you had with~~
~~14 Ms. Ehlers, did she tell you that she had heard~~
~~15 complaints about Mr. Luster's performance on the 401~~
~~16 application?~~
~~17 A. No.~~
~~18 Q. Did you ever hear any complaints about~~
~~19 Mr. Luster's performance on the 401 application?~~
~~20 A. I heard, as I described earlier, Ray~~
~~21 Hellwig's concerns about Tom.~~
~~22 Q. Did Mr. Hellwig's concerns rise to the level~~
~~23 of a complaint in your mind?~~
~~24 A. No.~~
~~25 Q. So you've never heard any complaints about~~

1 of Exhibit 124. Mr. Fitzsimmons writes to Governor
2 Locke, the last couple of words on that page, "Our goal
3 is a defensible decision wherein we are reasonably
4 assured water quality will be protected."
5 You understood Mr. Fitzsimmons was making
6 that representation to the governor on July 18,
7 correct?
8 A. Uh-huh.
9 Q. You need to answer yes or no.
10 A. Yes.
11 Q. And so on July 18, 2001, was it your
12 understanding that that was Ecology's goal?
13 A. Yes.
14 Q. So by July 18, 2001, rejection of the Port's
15 application wasn't an option in your mind?
16 A. No. Based on what we thought we were going
17 to be getting, we were forecasting where we thought we
18 would be.
19 Q. Where you thought you would be. Where did
20 you think you would be? What do you mean?
21 A. That we would be able to make a decision that
22 we would be reasonably assured that water quality
23 standards are based on -- I think it's identified in
24 earlier paragraphs -- other submittals that we
25 anticipate getting.

1 Q. And yet the Department of Ecology hadn't
 2 received the Port's July 23, 2001 summer offset
 3 analysis for low flow?
 4 A. Yes.
 5 Q. And even though Ecology hadn't received that
 6 document, it believed by July 18 that it had reasonable
 7 assurance?
 8 A. No. We were projecting out that if the
 9 submittals were what we were expecting, then we would
 10 have reasonable assurance.
 11 Q. And that was Ecology?
 12 A. When I reviewed it, I did not take it as we
 13 were saying we're done and we have reasonable assurance
 14 now, July 18th, that we were projecting out that we may
 15 have reasonable assurance based on the adequacies of
 16 these submittals.
 17 Q. But you agree that as of July 18, 2001, that
 18 was Ecology's goal, that's what Mr. Fitzsimmons is
 19 representing to the governor?
 20 A. Yes.
 21 Q. How long before July 18, 2001 did Ecology
 22 have as its goal to come to a defensible decision
 23 wherein Ecology was reasonably assured water quality
 24 will be protected?
 25 A. I don't know.

1 Q. Did Ecology have that goal after the meeting
 2 with the Port of Seattle in September 2000 when Ecology
 3 advised the Port that it was going to reject the
 4 application?
 5 A. I don't know.
 6 Q. Well, on July 18, 2001, you agreed with that
 7 goal. When did you come to the conclusion that that
 8 was Ecology's goal?
 9 A. I don't know when I came to that conclusion.
 10 Q. Was it your goal all along, to come to a
 11 defensible, a legally defensible decision wherein
 12 Ecology would have reasonable assurance that water
 13 quality standards would be protected?
 14 A. It's our goal on any project that we don't
 15 make a decision in the affirmative unless it's legally
 16 defensible and meets our standards. So it would be one
 17 of many goals. It's one way of describing our
 18 environmental objectives to an applicant.
 19 MR. STOCK: Off the record.
 20 (Discussion off the record.)
 21 (Recess taken.)
 22 Q. (BY MR. STOCK) Let's look back at
 23 Exhibit 124, which is in front of you, and on the
 24 second page, the first full paragraph, it states, "We
 25 expect to render a runway decision the week of

1 August 6"
 2 How did Ecology come to the conclusion that
 3 it was going to issue a runway decision during the week
 4 of August 6?
 5 A. We laid out a reasonable schedule in terms of
 6 being able to anticipate what the documents might look
 7 like and how long it would take us to review those
 8 submittals, and then how long it would take us to have
 9 the means we would need to have to come to a decision.
 10 Q. You had discussions with Mr. Fitzsimmons
 11 before this as to the timing that you thought you would
 12 have with respect to your runway decision?
 13 A. Yes, I think Ray and I did.
 14 Q. And in that conversation with
 15 Mr. Fitzsimmons, was he looking for the earliest
 16 possible date from Mr. Hellwig?
 17 A. No, not that I recall.
 18 Q. What do you recall about that conversation?
 19 A. He wanted to know what was going to make a
 20 logical schedule for making a decision so he could
 21 relate that to the governor in terms of when we thought
 22 we'd be able to make a decision.
 23 Q. Is this the conversation where
 24 Mr. Fitzsimmons was asking you because the governor had
 25 received an inquiry from the Port with respect to

1 timing?
 2 A. I don't think so. I think this was almost in
 3 the vein of Ray and I updating Tom in terms of where we
 4 were in the process. I don't think this -- I don't
 5 think or I don't know if this was stimulated by a
 6 request from the governor's office or not.
 7 Q. Well, ultimately you issued the 401
 8 Certification on August 10, correct?
 9 A. Yes.
 10 Q. And that 401 Certification imposes upon the
 11 Port an obligation to present additional information to
 12 the Department of Ecology, correct?
 13 A. Yes.
 14 Q. It requires the Port to submit revisions to
 15 the Natural Resources Mitigation Plan, correct?
 16 A. I believe so.
 17 Q. And there's other information that Ecology is
 18 requiring the Port to submit in that 401 Certification.
 19 And my question is, why didn't Ecology wait to issue
 20 the 401 Certification until after it received this
 21 additional information that it's requiring the Port to
 22 submit in the 401 Certification?
 23 A. We felt we had enough information to make a
 24 determination, and we did.
 25 Q. So Ecology didn't need the information that

1 it was requesting or requiring the Port to submit in
2 the 401 Certification to have reasonable assurance on
3 August 10th?

4 MS. BARNETT: Objection, asked and answered.

5 A. I think I stand by my answer about how we
6 came to the decision.

7 Q. (BY MR. STOCK) Ecology didn't need the
8 information that it is requiring the Port to submit
9 under the 401 Certification in order to have reasonable
10 assurance on August 10; is that correct?

11 MS. BARNETT: Asked and answered.

12 A. I answered the question.

13 Q. (BY MR. STOCK) Answer the question I have
14 asked, Mr. White.

15 A. Well, you're phrasing it differently.
16 What I said was that we had enough
17 information on August 10th to make the determination of
18 reasonable assurance. There are conditions in the
19 permit for additional information and a variety of
20 other conditions to be met, that have to be met to
21 carry out the permit.

22 Q. And so Ecology didn't need to see the
23 information that it was requiring the Port to submit as
24 a part of the 401 Certification in order to have
25 reasonable assurance on August 10th; is that right?

1 A. I would say it differently, that we need to
2 make sure that information is provided, but it wasn't
3 fundamental to our determination of August 10th.

4 Q. Well, you didn't know what that information
5 was going to say because it hadn't been submitted yet
6 on August 10th; that's a fair statement, isn't it?

7 A. We knew why we needed it and what its
8 purposes were, just like all the conditions.

9 Q. Sure. But you didn't know what the
10 information was going to say, did you?

11 A. Not specifically.

12 Q. In general, you didn't know what it was going
13 to say?

14 A. I can't speak to that. These were conditions
15 developed by our experts in terms of follow-up pieces
16 of information that are needed to carry out our
17 requirements for the project.

18 Q. You agree that any belief on the part of your
19 technical experts with respect to what that information
20 was going to say in the future was pure assumption?

21 A. I'd have to ask them. I'd be speculating
22 saying yes or no to that.

23 Q. You weren't relying upon the information that
24 the Port was required to submit under the 401
25 Certification in the future when you came to reasonable

1 assurance on August 10, 2001; is that right?

2 A. I relied upon the reasonable assurance
3 recommendations that I received from our experts as
4 described earlier in my testimony.

5 Q. Correct. And as you came to that
6 determination of reasonable assurance in your mind, you
7 weren't relying upon any information that the Port was
8 going to submit after August 10, 2001, were you?

9 A. Again, I think that's in the nature of
10 speculating of what was in the minds of the people who
11 were recommending to me, the experts.

12 Q. No, Mr. White, I'm asking you what was in
13 your mind on August 10, 2001. When you came to the
14 conclusion that there was reasonable assurance that
15 state water quality standards were not going to be
16 violated by this project on August 10, 2001, you
17 weren't relying upon information that the Port was
18 going to submit in the future, were you?

19 A. Yes. Yes.

20 Q. Yes what?

21 A. I was not relying on information they would
22 submit in the future.

~~23 Did you ask Mr. Fitzpatrick about the
24 information that the 401 Certification was requiring
25 the Port to submit in the future with respect to~~

~~1 stormwater management?~~

~~2 A. Yes, I believe we had a conversation about
3 that.~~

~~4 Q. And what was said?~~

~~5 A. I don't remember.~~

~~6 Q. You don't remember anything Mr. Fitzpatrick
7 said with respect to what information the Port was
8 going to submit after August 10, 2001 that he may have
9 been relying upon to come to a conclusion of reasonable
10 assurance with respect to stormwater management issues?~~

~~11 A. I don't remember.~~

~~12 Q. How about Erik Stockdale; did you have any
13 discussion with Mr. Stockdale with respect to any
14 additional information the 401 Certification required
15 the Port to submit with respect to the Natural
16 Resources Mitigation Plan?~~

~~17 A. Yes, and I don't remember the --~~

~~18 Q. You had conversations with Mr. Stockdale
19 about that, but you don't remember what those
20 conversations were?~~

~~21 A. Yeah, I don't remember the substance of it
22 what those future reports and changes were.~~

~~23 Q. Did you have conversations with Ching-Pi Wang
24 about what additional information the Port was required
25 to submit with respect to flow or potential flow of~~

1 contaminants?

2 A. No.

3 Q. So that didn't enter into your reasonable

4 assurance conclusion?

5 MS. BARNETT: Objection, mischaracterizes the

6 witness's testimony.

7 A. I didn't have a conversation about what you

8 said.

9 Q. (BY MR. STOCK) Right. So it's a fair

10 assumption that if you didn't have a conversation with

11 Mr. Wang about what the 401 Certification required in

12 terms of the Port's submitting additional information

13 on flow contaminants, it wasn't a part of your

14 reasonable assurance conclusion; that's a fair

15 statement, isn't it?

16 A. Well, I think you're parsing it out in a

17 different way than I see it, and that is, it's part of

18 his reasonable assurance recommendation to me, and I

19 based my decision on his reasonable assurance

20 recommendation.

21 Q. So if Mr. Wang came to you and said, I have

22 reasonable assurance with respect to the contamination

23 criteria in the 401 Certification, are you telling me

24 that that was sufficient for you to have reasonable

25 assurance in your mind without any exploration on your

1 ~~part as to what those requirements are?~~

2 ~~A. No, I'm not saying that at all.~~

3 Q. Did you review the fill acceptance criteria

4 in the 401 Certification, you personally?

5 A. No.

6 Q. So you relied exclusively on Mr. Wang in that

7 regard?

8 A. Yes.

9 (Deposition Exhibit No. 125 was marked for

10 identification.)

11 Q. (BY MR. STOCK) You've been handed

12 Exhibit 125. Do you recognize this as a draft of the

13 401 Certification dated August 5, 2001?

14 A. Yes.

15 Q. Did you review this draft when it was sent to

16 you?

17 A. Yes.

18 Q. Did you propose any changes to the draft?

19 A. I think I did.

20 Q. Where are those proposed changes?

21 A. I don't remember specific ones. I just know

22 that I reviewed it and I have a strong recollection

23 that I made recommendations for changes. Largely

24 editorial in nature.

25 Q. Are those --

1 A. I'm trying to remember what specific other

2 changes, but I -- I'm not remembering.

3 Q. Are those proposed edits or changes of yours

4 in writing somewhere?

5 A. They may be, you know, similar to that

6 earlier memo where I made changes in red line

7 strikeout. We have that capability in our word

8 processor. If I made changes, I would have made it in

9 that form and then sent them back to Ann for her

10 review.

11 Q. Do you have a specific recollection sitting

12 here today that you made changes electronically and

13 sent it back to Ann Kenny?

14 A. Yes.

15 Q. Sitting here today, do you recall what any of

16 those changes were?

17 A. No.

18 Q. And was it to this August 5 draft of the 401

19 Certification?

20 A. I'm not sure of that, either this one or it

21 could have been there was another one.

22 Q. Earlier or later?

23 A. I don't remember.

24 Q. Did you share this draft with

25 Mr. Fitzsimmons?

1 A. No, I did not.

2 Q. Did you discuss a draft of the 401

3 Certification with Mr. Fitzsimmons?

4 A. Yes.

5 Q. And when did that conversation occur?

6 A. I don't remember.

7 Q. What was said?

8 A. We talked about the conditions that we were

9 adding to the submittal to achieve reasonable

10 assurance, and explained them to Mr. Fitzsimmons about

11 why they were needed so he could understand them.

12 Q. Was this the meeting that's referred to by

13 Ann Kenny in her second to the last paragraph?

14 A. I believe so.

15 Q. You were a part of that meeting?

16 A. Yes.

17 Q. What was said in that meeting with respect to

18 the conditions?

19 A. We reviewed the conditions, we explained to

20 Tom why they were needed, what role they played in our

21 overall decision on it. Tom asked clarifying questions

22 about the conditions.

23 Q. Wasn't there also a discussion at that

24 meeting regarding the additional information that the

25 Department of Ecology was requiring the Port to submit

1 in the 401 Certification?

2 A. There may have been, but I can't remember

3 specifically.

4 Q. Was there a discussion about the Natural

5 Resources Mitigation Plan at that meeting?

6 A. Probably, but I can't recall specifics.

7 Q. And wasn't there a discussion about the need

8 for the Port of Seattle to submit revisions to the

9 Natural Resources Mitigation Plan in order for the

10 Department of Ecology to have reasonable assurance?

11 A. There may have been, but I don't recall.

12 Q. Do you recall anything that was said at that

13 meeting with respect to additional information that

14 Ecology was requiring the Port to submit?

15 A. No.

16 Q. Was there any question raised at that meeting

17 between you, Tom Fitzsimmons, Ray Hellwig and -- was

18 Ann Kenny also there?

19 A. Yes, she was.

20 Q. Was there any question raised or discussion

21 at that meeting between the four of you as to whether

22 Ecology should hold off issuing the 401 Certification?

23 A. I don't think so. I don't recall, though.

24 Q. Was Mr. Fitzsimmons pushing in that meeting

25 to get the 401 Certification issued by the end of that

1 week?

2 A. No.

3 Q. Was there any discussion at that meeting with

4 respect to the additional information that Ecology was

5 requiring the Port to submit with respect to the low

6 flow plan?

7 A. I don't recall.

8 Q. Do you recall anything about that meeting

9 other than that the conditions of the 401 Certification

10 were discussed among the four of you?

11 A. No.

12 Q. How long did this meeting last?

13 A. I don't remember.

14 Q. Where did it take place?

15 A. I believe it took place in the Ecology

16 headquarters building in one of the meeting rooms on

17 the third floor.

18 Q. Was anyone else present?

19 A. Tom Fitzsimmons was present, Ray Hellwig was

20 present, Ann Kenny was present and I was present. And

21 I don't remember anybody else.

22 Q. Was there a draft of the 401 Certification at

23 the meeting?

24 A. Yes.

25 Q. Did each of you have a copy?

1 A. Yes.

2 Q. Did you go through it item by item?

3 A. Yes.

4 Q. And in that context you can't recall any

5 discussion about additional information that Ecology

6 was requiring the Port to submit?

7 A. No.

8 Q. Was there any concern on the part of anyone

9 prior to you signing that August 10 certification that

10 Ecology needed the additional information the Port was

11 required to submit in order to reach reasonable

12 assurance?

13 A. Excuse me, ask the question again?

14 (Reporter read back as requested.)

15 A. Only the fact that we have it in the

16 certificate.

17 Q. (BY MR. STOCK) Do you recall any discussion

18 with anyone regarding that issue, the need for

19 additional information in order to have reasonable

20 assurance?

21 A. No, I don't. I don't recall.

22 (Deposition Exhibit No. 126 was marked for

23 identification.)

24 Q. (BY MR. STOCK) Handing you what's been

25 marked as Exhibit 126, Mr. White, are these your notes

1 of meetings that you had on July 17, 2001, and then

2 notes of your meeting that you had with representatives

3 of ACC?

4 A. Yes.

5 Q. On the first page of your notes, which is the

6 second page of the exhibit, what was this meeting

7 regarding on July 17?

8 A. This meeting was an update for myself to

9 discuss with our Corps expert -- experts who were

10 reviewing the submittals by the Port on where they saw

11 the project going in terms of reasonable assurance

12 issues that we had with the project, and telling me

13 what they were thinking.

14 Q. And did you take these notes while you were

15 at the meeting?

16 A. I believe so.

17 Q. I see that the time after the date, July 17,

18 is 10 p.m. Did this meeting take place at 10 p.m. on

19 July 17?

20 A. That's a good question. I'm trying to

21 remember what time of the day the meeting occurred.

22 could be that the meeting broke at the close of

23 business, although I have some recollection that it

24 might have stretched into the evening and then I may

25 have sat down and jotted these notes, finishing them up

1 ~~at 1:00. I'm just trying to remember. I can't~~
2 ~~remember exactly~~

3 Q. Under your first section, SMP/Low Flow
4 Status, which is the first section there, can you read
5 the third line of your notes into the record?

6 A. You mean where the second arrow starts?

7 Q. Yes.

8 A. "Reasonably assured that the proposed
9 measures will work. High level assurance that the
10 retrofit requirement will result in a net benefit,
11 i.e., improved level of stormwater management versus
12 preproject conditions. Probably better than
13 stormwater" -- SW, meaning stormwater, "coming off
14 other developments permitted by surrounding cities."

15 Q. What did you mean when you said "reasonably
16 assured

17
18 that the proposed measures will work"?

19 A. That probably the combination of Kevin
20 Fitzpatrick and Kelly Whiting had given me that
21 impression.

22 Q. What did you mean when you said "the proposed
23 measures will work"?

24 A. That they had told me that they will work.

25 Q. What did you take that to mean?

1 historic exceedences of water quality standards from
2 the airport?

3 A. I was aware of concerns about that.

4 Q. Were you aware that there had been historic
5 exceedences of water quality standards?

6 A. I say I'm aware of their concerns about that,
7 but I can't put my finger on the specific -- I couldn't
8 say, Here's where I have observed an exceedence or see
9 a record of that. I just know that there were concerns
10 about that expressed.

11 Q. When you signed the 401 Certification on
12 August 10, 2001, did you know that there had been
13 historic exceedences of water quality standards as a
14 result of airport operations?

15 A. No. I knew there were concerns about it,
16 though.

17 Q. Did you make any assessment of whether
18 existing BMPs at the airport were sufficient to avoid
19 exceedences of water quality standards?

20 A. I did not make a determination of that.

21 Q. Did you rely upon the effectiveness of
22 existing BMPs at the airport to come to your conclusion
23 of reasonable assurance?

24 A. Existing BMPs, clarification?

25 Q. Yes.

1 A. That they will ensure that stormwater runoff
2 will meet water quality standards.

3 Q. Did it mean to you that there was a high
4 level assurance that the retrofit requirement will
5 result in a net benefit?

6 A. That's what it says, yes.

7 Q. Is that what you meant when you wrote that
8 "the proposed measures will work"?

9 A. What I -- what I think I meant when I wrote
10 it down is that that's what I heard in the room, Kevin
11 expressing to me, Will the facilities identified in the
12 SMP work in order to ensure that stormwater runoff
13 meets water quality standards?

14 Q. By that you took him to mean that it would
15 result in a net benefit?

16 A. And -- I -- I see it in two levels; one is,
17 will the runoff that the project creates, that the
18 specific new -- the proposed third runway project will
19 meet water quality standards, and second, that the
20 retrofit itself, because it will address stormwater
21 issues that have been there for a long time, that the
22 retrofit is going to improve the quality of runoff,
23 that that's how you get to net benefit.

24 Q. When you made your reasonable assurance
25 determination, did you know that there had been

1 A. No.

2 ~~Q. Go down to your second to the last arrow on~~
3 ~~that page and read into the record what you've written.~~

4 ~~A. This is the NRMP arrow, clarification?~~

5 ~~Q. Yes.~~

6 ~~A. "NRMP, recent submittal looks good.~~
7 ~~Reasonable assurance that it will work with a few~~
8 ~~additional conditions to ensure functions are~~
9 ~~addressed."~~

10 ~~Q. What were those additional conditions?~~

11 ~~A. I don't recall. This is my recounting of~~
12 ~~what Erik Stockdale, our wetlands expert on the~~
13 ~~project, was telling me in terms of that the submittal~~
14 ~~looked good, but that there were some additional~~
15 ~~conditions needed to ensure the functions are~~
16 ~~addressed. I just don't recall what those are.~~

17 ~~Q. Did you yourself do any independent~~
18 ~~assessment of the NRMP?~~

19 ~~A. No.~~

20 ~~Q. You relied exclusively on what Erik~~
21 ~~Stockdale's conclusion was with respect to whether the~~
22 ~~NRMP would result in reasonable assurance that water~~
23 ~~quality standards wouldn't be violated?~~

24 ~~A. Yes.~~

25 ~~Q. Did the editorial changes that you proposed~~

~~1 to Ann Kenny for the 401 Certification got included in
2 the August 10, 2001 401 Certification?
3 A. I think so.
4 Q. But you don't recall what those changes were?
5 A. No, I don't recall.
6 Q. Were they stylistic in nature or were they
7 technical in nature?
8 A. I don't remember, but more than likely they
9 leaned towards the stylistic side versus the technical.
10 Q. Did you make any technical -- any changes
11 with respect to technical requirements of the 401
12 Certification?
13 A. Not that I remember.
14 Q. Did you make any changes in the
15 recommendations of your technical staff in the 401
16 prior to issuing it on August 10, 2001?
17 A. NO. I don't think I did.
18 Q. You signed the certification on August 10,
19 2001. Then there was a rescission of that August 10,
20 2001 certification and a reissuance on September 21,
21 2001; is that right?
22 A. I believe so. If those are the dates, yes.
23 Q. What led up to the reissuance of the
24 certification on September 21? Or put another way, why
25 was it rescinded and reissued?~~

1 knew about it ahead of time or not. I had heard, I
2 believe, from Ann, although it could be from Ray
3 Hellwig, that the Port had questions about the cert.
4 that they weren't clear about some of the
5 certifications and that they wanted to have a meeting
6 about it.
7 And then I just don't remember the sequence
8 of events in terms of, you know, did I -- what really
9 happened at that meeting or, you know, where in point
10 in time Ann talked to me about the clarification
11 issues.
12 Q. What did Ms. Kenny say to you about the
13 clarification issues?
14 A. She described to me -- as I recall, she
15 described to me the areas that the Port was seeking
16 clarification.
17 Q. What were those areas?
18 A. I don't remember.
19 Q. Why did Ecology go ahead and reissue the
20 certification on September 21?
21 A. To clarify issues in the cert that the Port
22 had brought to our attention.
23 Q. Was there a need for clarification in your
24 mind when you issued that certification on August 10,
25 2001?

1 A. Yes. As I recall, there were clarifications
2 that the Port requested we address, and the best way to
3 address those was in a reissuance of the certification
4 with clarifications in the revised certification that
5 we issued in September.
6 Q. How did you learn about the clarifications
7 that the Port requested in the August 10 certification?
8 A. I don't remember specifically, but I believe
9 it was a communication from Ann Kenny.
10 Q. Well, in fact, didn't Tom Fitzsimmons call
11 you and talk to you about a meeting he had had with the
12 Port of Seattle commissioners and Mic Dinsmore after
13 the August 10 certification had been issued?
14 A. He may have, but I don't recall that, that he
15 called me about that meeting.
16 Q. Did you go to the Port of Seattle after the
17 August 10 401 Certification was issued?
18 A. No, I did not.
19 Q. You knew there was a meeting between Tom
20 Fitzsimmons and Port of Seattle commissioners and Mic
21 Dinsmore after the certification was issued on
22 August 10?
23 A. Yes.
24 Q. How did you hear about that meeting?
25 A. I'm trying to remember. I don't know if I

1 A. I believe there was, otherwise I wouldn't
2 have done it. But I just don't remember the substance
3 of the clarifications.
4 Q. On August 10, 2001 when you issued the
5 certification, you didn't see any need for there to be
6 a reissuance, did you?
7 MS. BARNETT: Objection, argumentative.
8 A. No, I did not.
9 Q. (BY MR. STOCK) So were you surprised when
10 ~~Ann Kenny called you and said the Port's requesting
11 some clarifications?
12 A. When -- she directed me to the document, I
13 think we were on the phone. I looked at it, I
14 thought -- I could see a reasonable person saying that
15 they didn't understand what this meant and that there
16 would be utility to clarifying it.
17 Q. But you don't recall what those
18 clarifications were?
19 A. No. I can't remember.
20 Q. Let me show you a copy of the September 21
21 certification. It previously was marked as Exhibit
22 This is the certification you signed, is it not?
23 That's your signature on the second page?
24 A. Yes, that's my signature.
25 Q. In the last paragraph of the first page, you~~

1 state that, "It shall also be withdrawn," referring to
2 the certification, "if the project is revised in such a
3 manner or purpose that the Corps or Ecology determines
4 the revised project must obtain new authorization and
5 public notice."

6 What did you mean when you wrote that?

7 A. I think it means what it says. I can't say
8 what was in my mind when it was written down. This
9 is -- I think the plain language of it, I mean is
10 pretty clear. If there's a major revision to the
11 project where if they were to change their footprint,
12 discover additional wetlands that they may impact, for
13 instance, then this is essentially reserving our right
14 to require a new authorization and public notice.

15 Q. So in your mind a change of the footprint
16 would result in Ecology determining that the project
17 had been revised in such a manner that new
18 authorization and public notice would be required?

19 MS. MARZHIORO: Objection, calls for
20 speculation.

21 A. It's a matter of degree in terms of what
22 rises to a level of a change in the project that's
23 significant enough for us to look at it to make sure --
24 look at it again -- or I guess what I'm saying,
25 Mr. Stock is that the changes have to rise to a level

1 where we would see that they raise potentially new
2 impacts to water quality standards.

3 Q. (BY MR. STOCK) That's the question that I
4 need answered is, what is the level of revision in the
5 project that you're referring to here that would result
6 in new authorization and public notice?

7 A. Well, it is somewhat speculative for me to
8 think out what it could be, but I gave an example of
9 if, for instance, it was discovered that new
10 wetlands -- additional wetlands were going to be filled
11 or needed to be filled as a result of some change of
12 the project, that would be an example.

13 Q. Are there criteria that Ecology uses to
14 determine whether a revision is such that it would
15 trigger the requirement that you've referred to there
16 in your last paragraph of "new authorization and public
17 notice"?

18 A. I don't know if there are.

19 Q. Well, who would make that determination?

20 A. The same people who make the determination on
21 reasonable assurance.

22 Q. That's you, isn't it?

23 A. Well, in terms of the team. If there are
24 changes to the Stormwater Management Plan or there are
25 changes in the footprint that lead to -- that lead to

1 those changes in Stormwater Management Plan or to the
2 SRMP, it goes through the same process of review and
3 then we would make a decision. We're relying on the
4 technical expertise of our experts to make a
5 determination.

6 Q. And what criteria do you expect your experts
7 to use in making that determination?

8 A. Impact to water quality standards.

9 Q. The potential for impact to water quality
10 standards, the probability? What's the standard that
11 you expect your experts to use to decide whether a
12 revision to the project will trigger the need for new
13 authorization and public notice as you've said in your
14 letter there?

15 A. I would expect, one, it impacts the water
16 quality standards and their assessment that it reaches
17 a threshold of importance to waters of the state, that
18 if it's going to impact waters of the state beyond what
19 the conditions within the existing permit can mitigate
20 or address.

21 Q. Have you discussed with your in-house
22 technical experts the revisions to the Natural
23 Resources Mitigation Plan that the Port submitted to
24 the Department of Ecology in late November 2001?

25 A. No, I have not.

1 Q. Have you discussed with your in-house
2 technical experts the revisions that the Port submitted
3 to the Department of Ecology in mid December 2001 with
4 respect to low flow?

5 A. No, I have not.

6 Q. Do you have any plans on doing that?

7 A. No.

8 Q. As the individual that represents to the Army
9 Corps of Engineers that Department of Ecology has
10 reasonable assurance that state water quality standards
11 won't be violated by this project, aren't you
12 interested to know what these revisions are that the
13 Port has submitted since you made that representation?

14 A. Yes.

15 Q. And do you have plans to go back and talk to
16 your technical experts to determine whether those
17 revisions will affect Ecology's decision?

18 A. The way they would come to me, if there are
19 areas that would be of question, raise a question
20 around our reasonable assurance determination, then I
21 expect them to be brought to me. But once a
22 determination is made at my level, when I make a
23 decision like this, I expect the technical experts
24 involved to continue with the project and review these
25 submitters, and if they are -- somehow don't meet our

1 test of adequacy, then I will need to be advised of
 2 that.
 3 Q. In your review for purposes of coming to a
 4 conclusion of reasonable assurance, did you discuss the
 5 design of the mechanically stabilized earthen wall with
 6 anyone and whether that design impacted water quality
 7 standards?
 8 A. I don't think I specifically discussed it
 9 with anyone, but I do recall Kevin Fitzpatrick
 10 addressing it in some general way in terms of his
 11 comments on how the stormwater master plan interfaced
 12 with the wall design.
 13 Q. Did you have any discussion with
 14 Mr. Fitzpatrick regarding how or whether the MSE wall
 15 design would impact water quality standards?
 16 A. I don't think so. I don't recall.
 17 Q. Did you have any discussion with
 18 Mr. Fitzpatrick as to how or whether the embankment
 19 would impact water quality standards?
 20 A. No.
 21 Q. If I have questions about the impact of the
 22 MSE wall design on water quality standards, who should
 23 I ask those questions of within the Department of
 24 Ecology?
 25 A. Kevin Fitzpatrick.

1 Certification?
 2 A. Several weeks ago.
 3 Q. And in that review did you see any conditions
 4 imposed on the Port with respect to design of the MSE
 5 wall?
 6 A. I don't remember.
 7 Q. One way or the other?
 8 A. I don't remember one way or the other, yes.
 9 Q. Have you had any involvement with respect to
 10 the 401 Certification since you signed the
 11 recertification on September 21, 2001?
 12 (Reporter read back as requested.)
 13 A. I don't recall any. There may have been like
 14 a very summarial status update from Ann or Ray. But
 15 I'm just not recalling any specifics. And then, of
 16 course, just --
 17 Q. Preparing for this deposition?
 18 A. Preparing for this deposition.
 19 Q. But other than this summarial meeting or
 20 discussions that you may have had with Mr. Hellwig or
 21 Ms. Kenny and preparing for this deposition, have you
 22 had any other involvement in the 401 Certification for
 23 the Port's project since you signed the certification
 24 on September 21?
 25 A. I recall that I talked to Ray Hellwig about

1 Q. Other than Kevin Fitzpatrick, are you aware
 2 of anyone else within the Department of Ecology that
 3 may have reviewed the potential impact of the MSE wall
 4 design on water quality standards?
 5 A. Erik Stockdale, in terms of its interaction
 6 with NRMP.
 7 Q. But you didn't have any discussions with Erik
 8 Stockdale with respect to that, did you?
 9 A. I don't think so. I don't recall. I think,
 10 just like with my recollection of the presentation by
 11 Kevin Fitzpatrick on the SMP, that Erik may have
 12 touched on the wall and its interaction with the issues
 13 surrounding the NRMP because of how groundwater would
 14 be discharged from it and its impact on the wetlands.
 15 Q. Well, do you recall discussions with Erik
 16 Stockdale about the potential impact of the MSE wall
 17 design on wetlands?
 18 A. Just at a general level, yes.
 19 Q. When did those discussions occur?
 20 A. I don't remember. It may have been on the
 21 July 17th meeting, but I don't recall.
 22 Q. Does the 401 Certification impose any
 23 conditions on the design of the MSE wall?
 24 A. I don't remember.
 25 Q. When was the last time that you read the 401

1 assuring that the Port was following through on laying
 2 out the groundwork for ensuring that Ecology staff
 3 would be available to review key components of our
 4 conditions to make sure the conditions were met.
 5 Q. I don't understand what you said, Mr. White.
 6 Explain it to me in a different way.
 7 A. There are conditions in the 401 that require
 8 Ecology to make -- to make determinations on various
 9 aspects of the project and to do site visits. And we
 10 are requiring the Port to fund Ecology's time to do
 11 that, and I recall a discussion with Ray about
 12 following up with the Port to do that.
 13 Q. Okay. Other than that, have you had any
 14 other involvement with the 401 Certification since
 15 September 21?
 16 A. Not that I recall, no.
 17 Q. I take it sitting here today you still hold
 18 the opinion that Ecology has reasonable assurance that
 19 state water quality standards won't be violated by the
 20 project?
 21 A. Yes.
 22 Q. And the opinion that you held today with
 23 respect to reasonable assurance is based upon the same
 24 information that you had available to you when you made
 25 that determination on August 10, 2001, is that correct?

1 A. Yes.

2 Q. So none of the additional information that

3 the Port has submitted since August 10, 2001 influences

4 your opinion today that there's reasonable assurance

5 the project won't result in a violation of state water

6 quality standards; isn't that right?

7 A. Yes.

8 Q. Are you aware that the PCHB has issued a stay

9 of the effectiveness of the 401 Certification?

10 A. Yes.

11 Q. When did you become aware of that and how?

12 A. I don't know exactly when.

13 Q. The decision was issued on December 17, if

14 that helps.

15 A. Yeah. I believe I became aware of it a day

16 or two afterwards, Joan Marchioro informed me of that.

17 Q. Other than conversations that you may have

18 had with Ms. Marchioro, have you had discussions with

19 anyone else regarding the PCHB's order of staying the

20 effectiveness of the 401 Certification?

21 A. I don't think so, no.

22 Q. You don't think so or you didn't?

23 A. I don't remember -- I'm relatively sure that

24 I haven't talked to anybody else about it.

25 Q. Do you know what Ecology is doing in response

1 the Port's NPDES permit?

2 A. Yes.

3 Q. Who did you discuss that with?

4 A. Joan Marchioro.

5 Q. Other than Ms. Marchioro, have you had any

6 discussions with anyone?

7 A. No.

8 Q. Have you read the PCHB's summary judgment on

9 the NPDES appeal?

10 A. No, I have not.

11 Q. Have you read the PCHB's stay decision?

12 A. No.

13 Q. Do you understand that you will be testifying

14 at the hearings before the PCHB in this matter?

15 A. Yes.

16 Q. And what do you expect to testify about?

17 A. The basis for my decision.

18 Q. And other than what you've told me sitting

19 here today as to what the basis of your decision was,

20 is there any other basis that you haven't told me

21 about?

22 A. No.

23 Q. Put another way, you've shared with me today

24 everything that your decision that there was reasonable

25 assurance on August 10 when you signed that 401

1 to the stay?

2 A. I believe we've appealed the decision.

3 Q. Other than in the context -- well, let me ask

4 that.

5 Why is Ecology appealing the decision?

6 A. I don't know the specifics of our legal

7 arguments.

8 Q. I'm not asking the specifics of the legal

9 arguments. Why has Ecology gone ahead and joined in

10 the Port's appeal of the stay? Isn't that something

11 for the project proponent to do?

12 A. I believe it was based on the recommendation

13 from our attorney general to do so.

14 Q. Ecology isn't a project proponent, is it?

15 A. No.

16 Q. So other than in the context of the legal

17 proceedings, are you aware of any action that Ecology

18 is taking in response to the PCHB staying the

19 effectiveness of the 401 Certification?

20 A. No.

21 Q. Have you had any discussions with Tom

22 Fitzsimmons about the stay?

23 A. No.

24 Q. Have you discussed with anyone the PCHB's

25 summary judgment with respect to the modification of

1 Certification was based upon?

2 A. Yes, everything that I can remember how we

3 went through the decision, yes.

4 Q. How does AKART relate to your conclusion of

5 reasonable assurance on this project, if it does at

6 all?

7 A. I don't know.

8 Q. You also on September 21 concurred in the

9 Port's certification that the project was consistent

10 with the Coastal Zone Management Act, did you not?

11 A. Yes.

12 Q. Did you do any independent analysis as to

13 whether the Port was in compliance -- the Port's

14 project was in compliance with the Coastal Zone

15 Management Act?

16 A. I did not.

17 Q. Did Ecology do any independent analysis as to

18 whether the Port's project was in compliance with the

19 Coastal Zone Management Act?

20 A. Yes.

21 Q. Who did that independent analysis?

22 A. Ann Kenny would have led the effort to do

23 that.

24 Q. What did you base your concurrency on when

25 you signed this letter on August 10 and then again on

CORRECTION & SIGNATURE PAGE

1 September 21?

2 A. The discussions that I had with Ann in terms

3 of her analysis in working with other experts in the

4 program around the issues and the policies of our

5 Coastal Zone Management plan that touch upon the

6 project, that interface with the project.

7 Q. You had a specific conversation with

8 Ms. Kenny about the requirements of the Coastal Zone

9 Management Plan?

10 A. I believe it came up as we were moving

11 towards a decision.

12 Q. Do you recall a specific conversation with

13 her about that?

14 A. No.

15 Q. So you don't know whether you talked to her

16 about the Coastal Zone Management Act and whether the

17 Port's project was in compliance with that?

18 A. I asked her that question.

19 Q. So you do recall a specific conversation?

20 A. Yeah. I asked her the question, I just can't

21 recall the specifics --

22 Q. Specifics of the conversation?

23 A. Other than that we asked the question -- I

24 asked the question and she explained to me how it

25 would.

1

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3 RE: ACC V. STATE OF WASHINGTON, ET AL.

4 PCHB No. 01-160

5 DEPOSITION OF: GORDON WHITE, JANUARY 16, 2002

6 I, GORDON WHITE, have read the

7 within transcript taken JANUARY 16, 2002, and the same

8 is true and accurate except for any changes and/or

9 corrections, if any, as follows:

10 PAGE LINE CORRECTION

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Signed at _____,

on the _____ day _____, 2002.

GORDON WHITE

REPORTER'S CERTIFICATE

1 Q. What did she say was the basis of Ecology's

2 concurrence that the Port was in compliance with the

3 Coastal Zone Management Act?

4 A. I don't remember. Although, legally the

5 basis would be the Coastal Zone Management program or

6 plan.

7 Q. Do you have any understanding as to whether

8 the Department of Ecology's concurrence is effective in

9 the absence of an effective 401 Certification?

10 MS. MARCHIORO: Objection, calls for a legal

11 conclusion.

12 A. I don't have an opinion.

13 Q. (BY MR. STOCK) Have you ever had any

14 discussion within Department of Ecology as to the

15 relationship between concurrency under the Coastal Zone

16 Management Act and 401 Certification?

17 A. No, not that I can recall.

18 MR. STOCK: That's all the questions I've

19 got, Mr. White. Thank you.

20 (Deposition concluded at 2:54 P.M.)

21 (Signature reserved.)

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3 I, CARLA R. WALLAT, the undersigned Certified Court

4 Reporter and Notary Public, do hereby certify:

5 That the testimony and/or proceedings, a transcript

6 of which is attached, was given before me at the time

7 and place stated therein; that any and/or all

8 witness(es) were by me duly sworn to tell the truth;

9 that the sworn testimony and/or proceedings were by me

10 stenographically recorded and transcribed under my

11 supervision, to the best of my ability; that the

12 foregoing transcript contains a full, true, and

13 accurate record of all the sworn testimony and/or

14 proceedings given and occurring at the time and place

15 stated in the transcript; that I am in no way related

16 to any party to the matter, nor to any counsel, nor do

17 I have any financial interest in the event of the

18 cause.

19 WITNESS MY HAND AND SEAL this 23rd day of

20 January 2002.

21

22 CARLA R. WALLAT, RPR, CRR, CCR #WALLCR346BE

23 Notary Public in and for the State

24 of Washington, residing in King

25 County. Commission expires 1/17/06.

AR 001880