POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, CITIZENS AGAINST SEATAC EXPANSION, Intervenor, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and THE PORT OF SEATTLE, Respondents.	PCHB 01-160 ORDER GRANTING SUMMARY JUDGMENT ON ISSUE 14

This matter comes before the Board on a motion for summary judgment filed on February 8, 2002, by the Port of Seattle (Port). The summary judgment motion asks the Board to enter judgment in favor of the Port on Issue No. 14 relating to the State Environmental Protection Act (SEPA). Issue No. 14 specifically asks "[d]id Ecology and the Port comply with SEPA?"

The Board, comprised of Kaleen Cottingham, presiding, and Robert V. Jensen, reviewed and considered the following pleadings and documents, together with all attachments thereto, filed in support and in opposition to the summary judgment motion:

1. Port of Seattle's motion for partial summary judgment on SEPA issue;
2. ACC's and CASE's response to the Port's motion for partial summary judgment;

3. Ecology's memorandum in response to the Port's motion for partial summary judgment on SEPA issue; and

4. Port's reply memorandum supporting motion for partial summary judgment on SEPA issue.

Based on this review and being otherwise fully apprised in the circumstances of this case the board enters the following ruling.

BACKGROUND

ACC and CASE (hereinafter referred to as ACC) have appealed a § 401 water quality certification issued by Ecology. This water quality certification is a necessary pre-requisite to the issuance of a § 404 dredge and fill permit by the U.S. Army Corps of Engineers. The project at issue is the Port's implementation of its proposed master plan development actions at the Seattle-Tacoma International Airport, including the construction of the third runway.

In February 1996, the Port, as the SEPA lead agency, issued a Final Environmental Impact Statement (FEIS) for the proposed master plan development actions, including the actions for which a §404 permit (and the related §401 certification) is required.

The FEIS included a discussion of the stormwater management plan prepared to mitigate water quality and hydrology impacts of the project, including peak flow and low-flow impacts. The FEIS included a discussion of the fill requirements for the project and the sources of the fill, including off-site and on-site borrow sources. The FEIS also contained extensive analysis of the impacts to area streams and wetlands.

After the FEIS was issued, the Federal Aviation Administration (FAA) and the Port realized the growth in air transportation demand was higher than the range of forecasts on which the FEIS had been based. Accordingly, the FAA and the Port conducted additional environmental review and a Supplemental Environmental Impact Statement (SEIS) was published in May 1997. Among other things, the SEIS considered changes to biotic communities, wetlands and floodplains, and land use impacts caused by the changes related to the new forecasts. The additional environmental information about construction impacts discussed the need for project fill and disclosed that fill would be obtained from both on-site and off-site, permitted fill sources. The SEIS provided additional information about wetland functions and values. As had the FEIS, the SEIS noted the exact area of impacted wetlands could change, because the Port would not have access to the private property until the condemnation and purchase of those lands was complete.

The FEIS and SEIS were determined by the FAA to be legally adequate. The Ninth Circuit Court of Appeals upheld this determination. In addition, the Port of Seattle's hearing examiner determined the environmental review for the project was legally adequate. This decision was upheld by the King County Superior Court and the Court of Appeals.

As new information regarding the Port's developments at the Airport has come to light, both the Port and FAA have continued to conduct environmental reviews of the project's impacts. This has included the issuance of addenda in January and May of 2000. The latter addendum addressed the proposed 67-acre wetland mitigation site near Auburn.

In August 2001, the FAA issued a formal environmental reevaluation as part of a revised record of decision. This included a July 2001 reevaluation of impacts to wetlands, endangered and candidate species, and other flora and fauna. With regard to wetlands, the FAA concluded the newly identified wetlands were of the same general significance as the wetlands identified in the SEIS. The FAA also found the hydrologic functions that affect habitat and hydrologic conditions in both on-site and off-site locations were not different from the SEIS evaluation. As to endangered or candidate species (including salmon), the FAA relied on the biological opinion developed by the U.S. Fish and Wildlife Service. The FAA concluded there would be no adverse habitat impacts, and the impacts to water quality, hydrology, and aquatic habitat were all adequately disclosed in the FEIS and SEIS. As a result, the FAA issued a formal order indicating the preparation of a second SEIS was not warranted. This decision was not appealed. Subsequently, Ecology issued § 401 Certification No. 1996-4-02325 to the Port. As a result of a stipulation between the parties entered by the Board on September 28, 2001, Ecology rescinded the earlier § 401 Certification and the re-issued § 401 Certification No. 1996-4-02325 (amended-1) on September 21, 2001. The appeal of this reissued certificate was filed on October 1, 2001.

In response to this summary judgment motion, ACC contends Ecology's § 401 Certificate is invalid because the Port and Ecology failed to comply with SEPA. In particular, ACC claims the EIS and other environmental documents issued for the Port's master plan update are legally inadequate and that a supplemental EIS must be prepared. The Port counters with six independent reasons why the Board should grant summary judgment, including: 1) the Board lacks jurisdiction to hear an administrative appeal of the SEPA review conducted by the Port; 2)

ACC is barred from relitigating the adequacy of the Port's SEPA review; 3) the § 401 Certification does not contain any administratively appealable SEPA decisions; 4) the Board has no jurisdiction to hear a claim that Ecology "failed to act" to require additional environmental review; 5) the law does not allow any administrative SEPA review claiming supplemental SEPA review should be required; and 6) Ecology's actions in this case are categorically exempt from SEPA.

ANALYSIS

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56. WAC 371-08-300. Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154 (1975). A material fact is one upon which the outcome of the litigation depends. *Jacobsen v. State*, 89 Wn.2d 104 (1977). The burden is on the moving party to demonstrate there is no genuine issue as to a material fact and, as a matter of law, summary judgment is proper. If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev.,* 115 Wn.2d 506, 516 (1990). The non-moving party must "set forth specific facts showing there is a genuine issue for trial." *LaPlante v. State,* 85 Wn.2d 154, 158 (1975). A non-moving party may not oppose a motion of summary judgment by nakedly asserting there are unresolved factual questions. *Bates v. Grace United Meth.,* 12 Wn. App. 111, 115 (1974).

In ruling on a motion for summary judgment, the Court must consider all of the material evidence and all inferences most favorably to the non-moving party and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. *Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915 (1988); *Wood v. Seattle*, 57 Wn.2d 469 (1960).

In the case at hand, the Port has met its burden of showing there is no genuine issue as to a material fact. ACC has not set forth specific facts showing there is a genuine issue for trial. Therefore, this matter is appropriate for a summary judgment determination.

The Board has jurisdiction to hear and decide appeals from decisions of Ecology including " the issuance, modification, or termination of any permit, certificate, or license by the Department." RCW 43.21B.110. This includes the §401 Certification. See, e.g., *Okanogan Highlands Alliance v. Ecology*, PCHB Nos. 97-146, 182, 183, 186, 99-019 (2000) (holding the Board has jurisdiction pursuant to Chapter 43.21B RCW to consider appeals of Ecology decisions including the adequacy of mitigation plans and the issuance of § 401 Certifications.)

As part of this jurisdiction, the Board also has the authority to address SEPA compliance in the context of the underlying appeal of the decision made by Ecology, in this case the § 401 Certification. The Port argues the actual decision made by Ecology to issue a §401 Certification is categorically exempt from SEPA compliance, as is the granting of a certificate of consistency under the Coastal Zone Management Act. See WAC 197-11-800 (10) and WAC 197-11-855(3). These exemptions are, however, subject to an exception.

> If a proposal fits within any of the provisions of Part Nine of these rules, the proposal shall be categorically exempt from the threshold determination requirements (WAC 197-11-720) except as follows:
>
> (b) The proposal is a segment of a proposal that includes:
>
> (i) A series of actions, physically or functionally related to each other, some of which are categorically exempt, and some of which are not.

WAC 197-11-305(1)(b)(i).

Therefore, the Board, in reviewing a §401 Certification for error, must determine whether other parts of the project are non-exempt and, if so, whether the overall project complied with SEPA. Here, the Port's proposal plainly includes substantial components that are not categorically exempt. Therefore, the overall project is subject to SEPA, including any categorically exempt actions.

A permitting agency is entitled to rely on existing SEPA documentation and may implicitly adopt such documentation in rendering its regulatory decision. RCW 43.21C.034; WAC 197-11-600(3)(a). FEIS adequacy may be subject to separate administrative appeals before several agencies with jurisdiction which must use the same statement. See *Diehl v. Mason Co.*, 94 Wn. App. 645 (1999).

The Port argues that ACC is barred by collateral estoppel from re-litigating the adequacy of the Port's environmental review. The Board disagrees. While it may be true that the Port's environmental documentation, for its decision making purposes, has been ruled adequate and thus cannot be relitigated. The issue before the Board is whether Ecology's reliance on the existing environmental documents is appropriate, or whether such documents are inadequate without supplementation or addendum.

There is little SEPA case law on the extent to which detailed mitigation plans must be developed and included in an EIS or when existing environmental documents must be supplemented to address mitigation measures. In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), the U.S. Supreme Court applied the rule of reason to hold that quite general statements of potential mitigation measures were adequate under NEPA. The State Court of Appeals, in *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn. App. 439 (1992), upheld the adequacy of allegedly general descriptions of mitigation measures with virtually no assessment of cost and effectiveness. Later, in *Kiewit Construction Group v. Clark Co.*, 83 Wn. App. 133, 141 (1996), the court upheld the county council's determination of EIS inadequacy, in part because of the EIS' failure to address a potential traffic mitigation measure.

In the case before us the FEIS, SEIS and addenda provide a detailed look at the impacts of the proposed action, the implementation of the Master plan update for the Port's facilities at the Airport. For the most part, these environmental documents clearly describe the proposed mitigating measures, although some of the measures have become more specific over time. The procedural obligation to include these mitigation measures is not the same, however, as the substantive obligation to mitigate the adverse environmental impacts. The former is the question before us in the summary judgment motion, that latter will continue to be part of the case, and is fully dependent on factual matters not yet before the Board. The mandate of SEPA does not

require that every remote and speculative consequence of an action be included in the EIS. *Cheney v. City of Mountlake Terrace,* 87 Wn.2d 338, 344 (1976). A reasonably thorough discussion of the significant aspects of probable environmental consequences is all that is required. *Trout Unlimited v. Morton*, 509 F. 2nd 1276 (9th Cir. 1974). The EIS must present sufficient information for a reasoned choice among alternatives. *Toandos Peninsula Ass'n v. Jefferson Co.*, 32 Wn. App. 473, 483 (1982). Thus, SEPA does not require an EIS to contain a fully developed mitigation plan, so long as sufficient information is available to the decision-maker on the need for such mitigation and a reasonable description of potential mitigation measures.

WAC 197-11-440(6) sets forth when the environmental review must set forth mitigation details as follows:

> Indicate what the intended environmental benefits of mitigation measures are for significant impacts, and may discuss their technical feasibility and economic practicability, if there is concern about whether a mitigation measure is capable of being accomplished. The EIS need not analyze mitigation measures in detail unless they involve substantial changes to the proposal causing significant adverse impacts, or new information regarding significant impacts, and those measures will not be subsequently analyzed under SEPA (See WAC 197-11-660(2)). An EIS may briefly mention nonsignificant impacts or mitigation measures to satisfy other environmental review laws or requirements covered in the same document (WAC 197-11-402(8) and 197-11-640).

WAC 197-11-440(6)(c)(iv).

It is insufficient for ACC to rest on the mere contention that there has been a change that warrants supplementation, in this case an evolution in the details of the mitigation plans following the issuance of the FEIS, SEIS or any addenda. In order to

defeat summary judgment, ACC must show that the proposed changes result in a different type or significantly different degree of impact than that considered in the FEIS, SEIS or its addenda. See: *Protect the Peninsula's Future v. Ecology and Sequim*, PCHB 96-178 & 179 (Order granting summary judgment June 27, 1996). This is particularly true since the three proposals ACC has identified as lacking SEPA review relate to mitigation for impacts sufficiently described in the existing environmental documents. Those three are: 1) the Natural Resources Mitigation Plan; 2) the Comprehensive Stormwater Management Plan; and 3) the Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal.

As mentioned earlier, NEPA does not require a fully developed plan detailing what steps will be taken to mitigate adverse environmental impacts. See: *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). SEPA requires more fully developed mitigation plans when those plans or measures involve substantial changes to the proposal causing significant adverse impacts, or new information regarding significant impacts, and those measures will not be subsequently analyzed under SEPA. WAC 197-11-440. In the matter before us, the evolving mitigation plans have not required substantial changes to the proposal nor has new information on significant impacts of the proposal been presented to the Board. It is the proposal, in this case the implementation of the Port's master plan update, which is subject to evaluation under SEPA, not each individual mitigation measure or plan.

This decision is distinguishable from the Board's ruling in *Okanogan Highlands Alliance v. Ecology,* Supplemental Order on Petition for Reconsideration at 3-4, PCHB 97-146 (Feb. 14, 2000). In that case the Board dealt with the adequacy of addenda to the final EIS, which specifically dealt with the mitigation plans for the proposed mine. The board concluded a supplemental EIS was not necessary, but nonetheless concluded the addenda were inadequate. Here we do not have an EIS document, which by itself, specifically discusses the mitigation plans, so the issue is whether a supplemental EIS or an addendum is required. For the reasons stated above, the Board concludes no supplemental EIS document is required and thus we do not reach the SEPA adequacy issue decided in Battle Mountain Gold.

For these reasons, the issuance of the § 401 Certification does not, as a matter of law, violate the requirements of SEPA.

For the above noted reasons the Board enters the following:

ORDER

The Port's motion for summary judgment on Issue No. 14 is GRANTED.

SO ORDERED this 14th day of March, 2002.

POLLUTION CONTROL HEARINGS BOARD

KALEEN COTTINGHAM, Presiding

ROBERT V. JENSEN, Member