ORIGINAL

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION and CITIZENS AGAINST SEA-TAC EXPANSION, Appellants, v. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, and THE PORT OF SEATTLE, Respondents.	PCHB No. 01-160 PRE-HEARING BRIEF OF PORT OF SEATTLE

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I. INTRODUCTION

The third runway and related MPU projects are the most carefully planned, analyzed and mitigated public transportation projects ever proposed in Washington. For the 401water quality certification (401) that is the subject of this appeal, Ecology has required an unprecedented package of sophisticated mitigation measures. This package includes extensive mitigation for impacts to wetlands, including the creation, restoration and enhancement of over 60 acres of new wetlands; retrofit of the entire existing storm water detention system at STIA to current standards; an on-going monitoring and adaptive management program; adoption of stringent fill criteria; and implementation of a sophisticated low flow mitigation plan to address summer low flows in neighboring creeks.

II. BACKGROUND

The Port of Seattle (Port) urges the Board to affirm the Department of Ecology's (Ecology) conclusion that reasonable assurance exists that construction of the third runway and associated improvements (Master Plan Update Improvements, or MPU) at Seattle-Tacoma International Airport (STIA) will not violate state water quality standards or other applicable legal requirements.

Appellant ACC is composed of five small cities and a school district located near the airport. The City of SeaTac, the community that would be most affected by new development at the airport, is not a party to this appeal and does not oppose the MPU projects. ACC raises questions about some of the specifics of the mitigation and monitoring plans, but fails to carry its burden of proof to show that there is not "reasonable assurance" that water quality standards will be met. Because ACC has failed to meet its burden of proof, the Board should affirm Ecology's decision to issue the 401 for the MPU projects.

The Master Plan Update Improvement Projects. The MPU projects include the third runway, the embankment upon which it will be built, new parking and access roads, new terminal facilities, aircraft maintenance areas and other support facilities. A detailed description of the projects is set forth in the testimony of Elizabeth Leavitt at ¶5-13. These projects will be

constructed in a highly urbanized area with many other well-established industrial and development activities taking place nearby.

Alternatives Analyses and Site Specific Evaluation Process That Led to the MPU Projects. The Port decided to pursue the MPU projects after years of careful study and site selection. The Port, the Federal Aviation Administration (FAA), and the Puget Sound Regional Council (PSRC) analyzed numerous alternatives, and ultimately determined that there is a compelling public need for a third runway at STIA. **Cheyne ¶4, 5, 10-21.**

Between 1989 and 1992, the PSRC prepared a programmatic environmental impact statement (EIS) examining potential solutions to the Puget Sound area's air traffic capacity shortage. The preferred alternative, issued in 1992, recommended a new regional airport and the addition of a third runway at STIA. Between 1992 and 1996, the PSRC continued its examination of this issue, studying 34 alternatives, including supplemental or replacement airports from Bellingham to Olympia. In 1996 the PSRC adopted a resolution identifying a third runway at STIA as the preferred and only feasible alternative to address existing air traffic capacity needs in the region. **Cheyne ¶11-14.** The PSRC identified a third runway at STIA as the preferred alternative because, among other things, it would affect far fewer wetlands than other alternatives.

Between 1992 and 1996, the Port and the FAA jointly prepared a site specific EIS under the National Environmental Policy Act (NEPA) and State Environmental Policy Act (SEPA) that examined various alternatives for a third runway at STIA. The Port and FAA issued a final EIS in February 1996 that identified the third runway and associated MPU projects under appeal here as the preferred alternative. These agencies issued a Supplemental EIS in 1997 to address increased air traffic demand projections. Later in 1997, the FAA issued a Record of Decision (ROD) based on the EIS and the Supplemental EIS, concluding that no possible or prudent alternatives to the MPU projects exist, and that all reasonable steps had been taken to minimize environmental impacts. **Cheyne ¶17.**

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Well over a decade of careful analysis of alternatives – both alternative sites and alternative configurations at STIA – has been completed by federal, state and local agencies. The process culminated in the MPU projects being identified as the best, and realistically, the only feasible alternative to meet the Puget Sound region's air capacity demand due to weather-related delays.

ACC's Mission is to Stop the Project. Throughout this process, ACC has filed legal challenges to each and every decision supporting the MPU projects. While every one of these challenges has failed, it is important to recognize that ACC's explicit mission is "[t]o stop the construction of any additional runways at Seattle Tacoma International Airport." **Cheyne ¶20.** Obviously, ACC has the legal right to appeal the 401. However, the Board should understand that no amount of mitigation, design changes, best management practices or other actions to address water quality impacts will satisfy ACC. Consequently, when ACC witnesses testify that certain conditions in the 401 do not provide reasonable assurance, the Board should be aware only eliminating the project would be acceptable to ACC.

The MPU Projects and the Environmental Conditions Imposed on Them Set an Extraordinarily High Standard of Environmental Protection. The design constraints proposed for the MPU projects and the environmental permitting processes for these projects set a new high water mark for environmental protection. A number of environmental agencies have closely scrutinized the MPU proposal. The U.S. Fish & Wildlife Service and National Marine Fisheries Service found, subject to certain mitigation conditions, that the MPU projects pass muster under the Endangered Species Act. **Leavitt ¶15-17.** Ecology issued the 401 after determining that the MPU projects will meet state water quality laws.

The conditions these agencies imposed are unprecedented. For example, stringent criteria have been set for fill material that is *not* being placed in wetlands. To the Port's knowledge, no 401 has ever set chemical concentration limits for fill material to be used at a construction site.

Similarly, the 401 requires the Port to manage its stormwater in a manner that will set a new standard in Washington. Among other things, the Port must retrofit the *existing*

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stormwater collection and treatment system at STIA. While this condition may exceed Ecology's authority under §401, the Port has agreed to it. Furthermore, the Port must mitigate predicted reductions in area stream flows. While the Puget Sound Stormwater Manual encourages mitigation of hydrologic impacts of development, the low flow mitigation proposed for this project is unmatched in its quality and sophistication. **Fendt ¶7-30; Swenson ¶14-20.**

These are just three examples of extraordinarily stringent water quality protection conditions imposed in the 401. ACC may insinuate that there was not an "arms-length" relationship between Ecology and the Port, and that Ecology succumbed to political pressure in issuing the 401. The evidence does not support these insinuations. The MPU projects are among the largest public construction projects undertaken in this state. It is a large, expensive, and controversial project. The Port and Ecology were subject to extraordinary pressure to ensure that the MPU projects were designed and constructed in a manner that protects water quality. And, knowing full well that the 401 would be appealed, Ecology based the 401 conditions on valid scientific and technical information, relied on conservative assumptions, and required thorough monitoring and adaptive management.

This brief addresses the issues set forth in the Board's pre-hearing order dated November 26, 2001. It begins by providing background on the MPU projects, then turns to Issue 4, which is the fundamental question facing the Board. Next, the brief addresses the remaining issues in the order they are listed in the pre-hearing order. Where it makes sense to do so, related issues are grouped together. The brief also cites to relevant portions of the prefiled testimony.

III. ISSUE 4 – IS THERE REASONABLE ASSURANCE THAT WATER QUALITY STANDARDS WILL BE MET

This is the basic question presented when a 401 is appealed. 40 CFR §121.2(a)(3). The evidence easily supports a conclusion that reasonable assurance exists. Reasonable assurance does not mean absolute certainty. The Board has interpreted "reasonable assurance" as equivalent to a preponderance of the evidence. *Friends of the Earth v. Department of Ecology*, PCHB Nos. 87-63 & 87-64 (1988). Specifically, the Board held that the appellant "must

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establish by a preponderance of the evidence that Ecology did not have 'reasonable assurance' the applicable provisions [state water quality standards] would be complied with." *Id.* at 25.

ACC has the burden to prove that reasonable assurance does not exist in this case. WAC 371-08-485(2); *Friends of the Earth v. Department of Ecology* at Conclusion of Law IV. ACC has failed to meet this burden. The testimony of ACC's witnesses is replete with statements that they "have concerns" or that "questions remain unanswered." Almost all of the impacts that ACC witnesses claim "might" exist are unquantified. This simply is not enough. ACC must establish by a preponderance of the evidence that there is not reasonable assurance that water quality standards will be met. Overcoming Ecology's determination that there is, in fact, reasonable assurance, coupled with the substantial testimony, exhibits and other evidence supporting this determination, requires more than unsupported speculation and concern. It requires proof by a preponderance of the evidence that reasonable assurances does not exist.

IV. ISSUE 1 – PUBLIC NOTICE REQUIREMENTS

Key Witnesses: Ann Kenny; Elizabeth Leavitt. Ecology satisfied all applicable requirements to provide public notice and opportunity for comment on the Port's 401 application. WAC 173-225-030 sets forth the public notice and hearing requirements that govern an application for a 401. In summary, they require Ecology to mail notice of the application to interested persons, to hold a public hearing if there is "sufficient public interest," and to give the public an opportunity to submit written comments on the application.

The Port submitted a Joint Aquatic Resource Permit Application (JARPA) to Ecology and the U.S. Army Corps of Engineers in October 2001. The two agencies held a public hearing on the Port's application on January 26 and 27, 2001, and set a 52-day period during which the public could submit written comments. Ecology also considered comments submitted after the formal comment period ended. These actions satisfied the requirements of WAC 173-225-030.

V. ISSUE 2 – COMPLIANCE WITH THE COASTAL ZONE MANAGEMENT ACT

Key Witness: Ann Kenny. ACC contends that Ecology erroneously concurred in the Port's certification that the MPU projects comply with Washington State's Coastal Zone

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Management Program (CZMP or approved program). The approved program consists of four parts: 1) water quality standards; 2) air quality standards; 3) the Shoreline Management Act, Ecology's shoreline regulations and the various local shoreline master programs; and 4) SEPA and its implementing regulations. Whether the MPU project will comply with state water quality standards is the primary question before the Board, and is addressed throughout this brief. ACC does not contend and has not presented any evidence that the MPU project will violate air quality laws, or that it is inconsistent with the Shoreline Management Act, Ecology's shoreline regulations or any local master program.

This leaves SEPA and its implementing regulations. The Board granted summary judgment to the Port and Ecology on issue 14, "Did Ecology and Port comply with SEPA?" While an order has not yet been issued, we anticipate that the Board's decision on this motion precludes further debate on whether SEPA review was adequate.

The remainder of this brief demonstrates there is reasonable assurance that water quality standards will be met during construction of the MPU projects and implementation of required mitigation. Since all elements of the CZMP are satisfied, Ecology properly concurred with the Port's certification of consistency.

VI. ISSUE 3 – SCOPE OF WATER QUALITY CERTIFICATION

Key Witness: Ann Kenny. Under § 401, Ecology has authority to impose conditions on the "project" in general, provided the conditions are related to water quality. *See PUD No. 1 of Jefferson Cy. v. Washington Department of Ecology*, 511 U.S. 700 (1994). Here, the "project" consists of the MPU improvements described in the JARPA. Ecology analyzed the water quality impacts from each of the proposed improvements and, where necessary, included conditions in the 401 to address those impacts. The scope of the 401 – geographic, operational, and temporal – is appropriate to address these impacts.

ACC contends that the 401's application to "Port 404 Projects" is not consistent with the Clean Water Act. This phrase appears in Condition E of the 401, which establishes fill criteria, and is used to distinguish those MPU fill projects that may affect water quality from

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those that will not. The fill criteria apply to those areas of the MPU project that will have a direct impact on or that have the potential to affect state waters. Ecology is currently assessing which specific projects meet this standard, based on how close the project is to state waters, whether project fill will be capped, and the volume, type, and source of the material. The fill criteria will apply to all projects with direct or potential impacts on water quality. **Kenny ¶34.** This is all that §401 requires.

Condition B sets out the duration of the various conditions in the 401. At a minimum, all conditions will be in effect during construction. Many conditions, including those relating to natural resource and low flow mitigation, as well as monitoring to ensure compliance with those conditions, exist in perpetuity. Even those conditions that have defined endpoints can be extended if appropriate. For example, some of the monitoring requirements will remain in effect "in no event for a duration less than eight (8) years." **Exhibit 1, Condition B.1.**

VII. ISSUES 5, 6, 7 & 22 – TIMING OF REASONABLE ASSURANCE DETERMINATION AND USE OF LATER-PRODUCED REPORTS, FUTURE MONITORING AND ADAPTIVE MANAGEMENT

Key Witnesses: James Kelley; Jan Cassin; Katie Walter. ACC argues that the Board may consider only the documentary evidence and data in existence on September 21, 2001, the date on which Ecology issued the amended 401. Because the Board's review is *de novo,* these arguments should be dismissed. The Board has repeatedly held that the determination of whether there is reasonable assurance that a project will comply with state water quality standards occurs at the hearing before the Board, not at some earlier date. *Barrish & Sorenson Hydroelectric Co. v. Ecology*, PCHB No. 94-193 (Sept. 26, 1995 Final Order) (in appeal of §401 decision, the Board "must make a decision based on the proposed project as it is presented to the Board at this hearing"); *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, PCHB No. 99-067 (Sept. 23, 1999 Order on Motions to Dismiss) (Board determines consistency "as of the date of hearing").

For example, the Board should consider evidence showing that the Natural Resources Mitigation Plan (NRMP) complies with all conditions imposed in the 401, and includes

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additional in-basin wetland mitigation at the Des Moines Nursery site not required by the 401. **Kelley ¶37-43 and Exhibit 1216**. The fact that 401 conditions have been met, or that project refinements have been made, since September 2001 does not mean that Ecology lacked reasonable assurance at that time.

ACC makes a similar argument with respect to dam safety permits. Several of the surface detention ponds proposed in the Stormwater Management Plan may require a dam safety permit for construction. ACC claims that Ecology should have required a construction permit pursuant to WAC 173-175 before it issued the 401. The dam safety permit is a construction permit, which assures that the final stormwater ponds comply with appropriate engineering standards. Here, ACC has provided absolutely no evidence that it is not feasible to safely engineer the stormwater ponds, which are described in detail in the project's Stormwater Management Plan. More importantly, ACC has established no linkage between dam safety review and reasonable assurance. Finally, Washington courts have routinely approved permit conditions that require compliance with further detailed regulation. *E.g., Anderson v. Pierce Cy.*, 86 Wn. App. 290, 293 at n.2, 936 P.2d 432 (1997) (upholding permit for soil bioremediation facility on condition that project comply with Puget Sound Air Pollution Control Agency regulations).

The 401 requires substantial monitoring to ensure that required mitigation is provided and effective, and to identify potential problems that may need further mitigation. For example, Condition D(1)(g) requires the Port to monitor the hydrology and condition of all wetlands "downslope" of the embankment, report the results to Ecology, provide a trends analysis yearly, and perform additional mitigation if needed. This condition is part of the adaptive management approach Ecology required to be certain that mitigation measures are successful. **Walter ¶14-23 and Kelley ¶29-34**. The monitoring allows the project mitigation to adapt so that water can be provided to the enhanced and restored downstream wetlands in amounts that will optimize wetland functions. Washington and federal courts have specifically approved this adaptive management approach. *West 514, Inc. v. Spokane Cy.*, 53 Wn. App. 838, 844-849, 770 P.2d 1065 (1989) (upholding approval of shopping mall that depended on future air quality

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monitoring to "confirm that the project will not have a significant adverse environmental impact"); and *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993) (upholding condition that required water quality monitoring to determine compliance with state water quality standards and additional mitigation if monitoring disclosed any problems).

Similarly, Conditions I(1)(a) and (1)(3) require the Port to monitor the low flow mitigation system to ensure that enough water is available for adequate mitigation. A contingency plan is required—and provided—in the December 2001 Low Flow Analysis and Summer Low Flow Impact Offset Facility Proposal in case the system as built does not match the modeled results. **Exhibit 1308.** This example of adaptive management operates very simply: if monitoring determines that the low flow mitigation system is not providing enough water to the streams, the system can be modified to retain and/or release additional water. It is simply not true to suggest, as ACC has, that a failure to meet exactly the predicted results will cause a violation of water quality standards.

VIII. ISSUE 8 – LOW FLOW IMPACTS

Key Witnesses: Paul Fendt; Joe Brascher; Charles Ellingson; Kelly Whiting. The MPU improvements will add a total of approximately 106, 6, and 128 acres of new impervious surface to the Miller Creek, Walker Creek, and Des Moines Creek watersheds, respectively. Absent mitigation measures, these new impervious surfaces and the construction of the runway embankment would increase peak flow rates in those streams during rainstorms, and would reduce flows during seasonal low flow periods. **Fendt ¶7.** The projected impacts during low flow periods are very minor. In Walker Creek, the net impact would be a reduction of 0.11 cubic feet per second (cfs), which translates to a decrease of 3 mm in depth and 30 mm in width. In Des Moines Creek, average flows would be reduced by 0.8 cfs, or 9 mm in depth and 101 mm in width. Miller Creek would actually experience a slight increase of 0.1 cfs in total streamflow during low flow periods, with no appreciable increase in depth and a 6 mm increase in stream width. **Fendt ¶37.**

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To mitigate peak flow impacts and thereby avoid erosion, scouring, and habitat damage associated with uncontrolled stormwater discharges, the Port will capture all stormwater runoff and detain it in 344.1 acre-feet of stormwater detention facilities, including ponds and vaults. The Port will slowly release collected stormwater at carefully developed flow rates to avoid peak flow impacts, as required by Ecology's and King County's continuous flow analysis methods. **Fendt ¶10, 14.**

The Port will mitigate the very small reductions in stream flows during historic low flow periods predicted to occur as a result of the project by three means. First, the Port will infiltrate a portion of the collected stormwater into the embankment itself, which will delay flows into Miller and Walker Creeks, reducing seepage into these streams during periods of high precipitation and increasing seepage during seasonal low flow periods. Second, the Port will retain approximately 9% of the stormwater detained during high precipitation months and then release it into Des Moines and Walker Creeks during the summer low flow season. This controlled release of detained water will replicate the timing and volume of preproject baseflow, as the Port's consultants determined through the hydrologic modeling described below. Third, the retirement of existing water uses will improve seasonal low flows in Miller Creek. **Fendt ¶14 – 17.**

The Port's plan to construct wetponds, wetvaults, and other systems to mitigate for low flow impacts utilizes standard engineering principles commonly applied in stormwater management. While the scale of the MPU project is larger than most, the constructibility and engineering issues are far from unique and do not raise feasibility concerns. **Fendt ¶20 – 24; Swenson ¶16-20.** To meet peak flow control requirements, the Port has prescribed very low release rates for designated detention facilities. Under the Port's plan, the proposed peak flow pond constructed for each of the three watersheds will store stormwater more than 62% of the time. Detention periods and volumes have been established to closely mimic predevelopment conditions and to comply with the Port's NPDES permit and the 401. **Fendt ¶25 - 30.**

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Analysis of Historic Flows. The Port formulated its mitigation plan only after it completed a comprehensive evaluation of historical streamflows and the probable effects the runway and underlying embankment would have on flows in affected streams. The Port's hydrogeologists and hydrologists quantified these effects through hydrologic modeling. **Fendt ¶3; Brascher ¶6; Ellingson ¶4 - 5.** The Port, its consultants, and Ecology evaluated the data generated from this modeling to design appropriate facilities and systems to capture, detain, treat, and release stormwater. **Fendt ¶14 - 19.** The objective of these mitigation measures was to mimic predevelopment hydrologic conditions, to protect aquatic biota and to ensure compliance with water quality standards.

The Port undertook a lengthy and comprehensive evaluation of low flow impacts in the Miller, Walker, and Des Moines Creek watersheds, including extensive data collection and analyses, before formulating and applying its hydrologic modeling plan. The Port's evaluation of low flow impacts began in 1995, when it conducted an initial hydrologic modeling study for the EIS. It continued this analysis through 1997, with the preparation of the Des Moines Creek Basin Plan, and 1998, with the preparation of the Preliminary Comprehensive Stormwater Management Plan. During this period, the Port and its consultants considered and ultimately rejected numerous alternative means to mitigate streamflow impacts. **Fendt ¶32 – 37.**

The work the Port and its consultants performed to quantify low flow impacts began with a detailed analysis of 47 years of precipitation reports. From these records, the Port identified historical streamflow levels, daily and weekly average flows, and baseflow (groundwater seepage or surface water slowly released from lakes or wetlands) volumes, periods, and variability. From this analysis, the Port's consultants identified a low flow period – that is, the time of year when stream flows are typically at their lowest – a corresponding mitigation period, and a volume of necessary mitigation water for each stream. **Fendt ¶40 - 45.**

Modeling of Project Impacts. At the same time, the Port's consultants and modelers formulated a modeling protocol that applied a series of sophisticated computer models to quantify the effects of additional impervious surfaces and embankment fill on flows in Miller and

Walker Creeks. The models generated information on rates and volumes of surface runoff and infiltration; infiltration and vertical seepage through embankment layers to the drainage layer beneath the embankment; transport through the drainage layer or by further infiltration through till to aquifers; and recharge to streams. **Brascher ¶29 - 34; Ellingson ¶36, 42 - 44.**

The particular models selected to simulate streamflows were those that would most accurately predict flow rates and volumes at each discrete hydrologic stage between precipitation and stream recharge. **Brascher ¶8 - 10; Ellingson ¶6 - 8.** In addition, the Port assigned responsibility over each particular component of the overall model to the consultant most familiar and most experienced with that aspect of hydrologic modeling. Mr. Brascher, an expert on the Hydrologic Simulation Program – Fortran ("HSPF"), assumed primary responsibility for the initial component of the model depicting surface runoff and infiltration. HSPF is considered the most effective and accurate model to simulate such flows, which are dominated by runoff and evapotranspiration. It is generally considered the best model currently available for representing the complete hydrologic cycle. **Brascher ¶4, 8.**

Using the data generated by Mr. Brascher's HSPF modeling, Mr. Ellingson applied the Hydrus model, which most effectively simulates infiltration and deep percolation, to gage vertical flows through the embankment. **Ellingson ¶19 - 37.** Data from the Hydrus modeling was used to run a third model – the Slice model – which effectively simulates quasi-horizontal water movement through saturated soils, to measure flows beneath the embankment. **Ellingson ¶38 - 43.** Mr. Ellingson then integrated the results of this modeling across the fill embankment and provided the resulting data to Mr. Brascher for input back into the "built-condition" Miller Creek and Walker Creek HSPF models. **Ellingson ¶44 - 46.** In addition to acting as Project Manager for stormwater management and low flow mitigation issues, Mr. Fendt provided oversight of the overall modeling and calibration process. **Fendt ¶3, 50 - 56.**

ACC challenges the Port's integration of several models to simulate the various phases of water transport from precipitation to streams, asserting that it unnecessarily complicated the analysis. (Alternatively, ACC contends that components of the Port's model were overly

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simplistic.) However, no single model could have accurately and effectively simulated present and future hydrologic conditions in a project of this complexity. By integrating different models, the Port's consultants capitalized on the best features of each model, while minimizing the limitations inherent in any single model. **Brascher ¶9; Ellingson ¶7 - 8.** The Port's modeling resulted in accurate and reliable data, and was properly calibrated. In other words, the data generated by the model matched known conditions within a reasonable margin of error. **Brascher ¶14 - 23; Fendt ¶57; Whiting ¶9.**

Model Calibration. The Board will hear much about whether these models were appropriately calibrated. Hydrologic calibration relies on mass-balance water accounting, a concept that requires all precipitation to be accounted for in streams or receiving waters, including lost or gained groundwater. In addition to accounting for all water entering and leaving a system, a model must accurately depict the natural and artificial components of a watershed. The ability of a model to replicate or estimate stream flows depends on whether it accurately considers the various parameters that affect stream flow, including how the soils, vegetation, and impervious areas respond to rainfall, how the water is routed from upstream to downstream areas, and how interflow and groundwater are removed and added to the surface water system. **Fendt ¶53.** The calibration undertaken by the Port's consultants showed a close relationship between model output and measured flows, and accurately simulated both low flows and the impacts of the proposed construction. **Brascher ¶24; Fendt ¶57 - 62.** Ecology witnesses confirm the validity of the calibration performed. **Whiting ¶8.**

Even if this careful modeling process has underestimated impacts to streams, there is reasonable assurance that water quality standards will be met. This is because the 401 requires the Port to monitor streamflows and, if necessary, to implement contingency measures to fully mitigate project impacts. The Port can meet this requirement simply by modifying the times and rates at which it releases detained stormwater.

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IX. ISSUE 9 – WATER RIGHTS

Key Witnesses: Paul Fendt ¶7-30; Steve Swenson. ACC contends that the Port must obtain a water right to manage stormwater generated at the airport as required under its NPDES permit and the 401 and that without a water right there is no reasonable assurance that water quality standards will be met. ACC is wrong for several reasons. Managing stormwater as required by water quality permits, where the objective is to replicate predevelopment hydrologic conditions, and where no use is made of the water, simply does not require a water right. Moreover, even if a water right were legally required, it would provide absolutely no additional assurance that water quality standards will be met.

ACC earlier filed a summary judgment motion on this issue, which the Board denied. The parties agreed there are no disputed issues of material fact. The Port hereby incorporates the legal argument it made in response to the summary judgment motion.

X. ISSUES, 10, 11, 12, 13, 20 & 21 – STORMWATER AND OTHER WATER QUALITY ISSUES AND RELIANCE ON NPDES PERMITS

Key Witnesses: Keith Smith; Charlie Wisdom; Paul Fendt; Don Weitkamp; Bill Stubblefield. ACC makes a number of allegations relating to pollutants in existing stormwater discharges, compliance with current and future NPDES permits, de-icing chemicals, mixing zones, and work in the Gilliam Creek Basin. ACC's arguments fail because 1) it has not provided any evidence that stormwater discharges at STIA violate water quality standards; 2) even if such evidence had been provided, stormwater discharges are not required to meet numeric water quality criteria; and 3) there is nothing inappropriate in the 401's reliance on and incorporation of the Port's current and future NPDES permits.

Before addressing these issues, it is important for the Board to understand the extent to which water quality at STIA has been and will be improved under the Port's NPDES permit and the 401. The Port is currently utilizing and will continue to utilize stormwater BMPs, treatment processes, pollution prevention measures, and monitoring and adaptive management techniques that will protect water quality in area streams and wetlands.

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Virtually the entire stormwater collection and treatment system at STIA – not just the stormwater system associated with the MPU projects – will be retrofitted to meet current stormwater requirements. **Fendt ¶19, 78, 91.** As described above, hydrologic impacts from the MPU projects will be mitigated in a manner that surpasses any existing system the Port is aware of. **Fendt ¶14-19.** There will be marked water quality benefits from the Port's enhancement and protection of wetland and streamside buffers.

The Port conducted a Biological Assessment under the Endangered Species Act (ESA), which concluded that the MPU projects would not be likely to affect species listed under the ESA. Both the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service concurred in this conclusion. **Weitkamp ¶5-6, 23-25.** NMFS further concurred in the MPU projects' Essential Fish Habitat review conducted by the Port, FAA, and the Corps. This review concluded that the projects will have no adverse effects on commercial or recreational fish, including three species of salmon and numerous other Puget Sound area species. **Weitkamp ¶26.**

Relationship Between the Port's NPDES Permit and the 401. The water quality requirements described above and many others are set forth in the Port's NPDES permit and the 401. Ecology has used both regulatory tools to ensure that water quality requirements will be met at the MPU projects. ACC asserts, without citing to any authority, that Ecology's reliance on the NPDES permit is inappropriate. Contrary to ACC's assertion, it is entirely appropriate for Ecology to use the NPDES permit to address water quality issues at STIA. The NPDES permit is the primary tool for doing so under the Clean Water Act. ACC's peculiar argument is directly contradicted by several holdings from this Board. *Protect the Peninsula's Future v. Ecology*, PCHB 96-178 (1996); *Okanagon Highlands v. Ecology*, PCHB No. 97-146 (1999) (Order Denying Summary Judgment). It is ironic that ACC argues against use of the NPDES permit to address future water quality issues. STIA is and will continue to be an operating facility for the foreseeable future. As the Board knows, water quality regulatory requirements change with some regularity, and in most cases become more stringent over time. It is through the periodic revision and reissuance of the NPDES permit that new requirements are imposed on

existing discharges. It is entirely appropriate for Ecology and the Port to address future water quality issues through the NPDES permit and not through the "one-time" 401.

ACC has Failed to Prove Violations of the Water Quality Standards. ACC argues that current stormwater discharges at STIA violate water quality standards, and these existing violations preclude a finding of reasonable assurance. This argument fails for a number of reasons. The most fundamental is that the Port's stormwater discharges currently comply with water quality standards, and ACC has failed to produce any credible evidence to the contrary.

Assuming that stormwater discharges must meet numeric water quality criteria, an assumption that, as discussed below, this Board, Ecology and the Port disagree with, there simply is no evidence that stormwater discharges at STIA violate these criteria. ACC's claims of violation are based on end-of-pipe (or in-pipe) "grab" samples. **Wisdom ¶14-15.** But these end-of-pipe samples are *not* taken from waters of the state (defined in WAC 173-201A-020 as "lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands and all other surface waters and water courses within the jurisdiction of the state of Washington"). Instead, the samples were collected from the discharge itself. **Id.**

Additionally, compliance with state water quality criteria is determined by analyzing samples collected over certain minimum time frames and with defined frequencies that are rarely met by stormwater discharges. **Wisdom ¶16.** There is no evidence that ACC followed these established sampling protocols. As such, ACC's experts' conclusions regarding compliance with state water quality criteria are meaningless. **Wisdom ¶16; Stubbefield ¶9; Fitzpatrick ¶ 9-11.** Finally, the only in-stream data ACC cites is old, contains widely varied results, and is impossible to attribute to any discharges at STIA. For example, discharges to the headwaters of Des Moines Creek includes run-off from one of the busiest highways in the state, along with associated commercial and industrial facilities. **Stubblefield ¶17.** Accordingly, ACC has no valid, scientific proof of existing violations.

In addition to this failure of proof, the assumption underlying ACC's contention is that stormwater discharges must meet numeric water quality criteria. This is incorrect. What is

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required to demonstrate compliance with federal and state water quality requirements is ongoing compliance with the discharger's NPDES permit. As stated above, the Port does so comply. This is significant, because the NPDES permit states: "Compliance with this permit is deemed compliance with the Federal Water Pollution Control Act (33 U.S.C. §1251 et seq.) and the Water Pollution Control Act (RCW 90.48);" *see also See Oregon Natural Resources Council v. U.S. Forest Service,* 834 F.2d 842, 849 (9th Cir. 1987) (water quality standards are enforceable only when translated into effluent limits or other enforceable obligations in NPDES permits). Moreover, the Board has held that compliance with numerical effluent limits is not required for stormwater. *Puget Soundkeeper Alliance v. Ecology*, PCHB No. 98-50 (April 15, 1999). The Board has also held that the use of BMPs for stormwater management constitutes AKART. *See, e.g., Waste Action Project v. Ecology*, PCHB No. 97-69 (Oct. 13, 1997). Thus, even if the Board finds that the Port's stormwater discharges violated numeric water quality criteria, it does not mandate a finding of "no reasonable assurance," because numeric criteria do not apply to discharges of stormwater.

WET Testing and Preliminary Screening Studies Show That the Port Will Comply With Site-Specific Standards. One of the best indications of the high quality of stormwater discharges from STIA is whole effluent toxicity (WET) testing. WET testing exposes sensitive aquatic species to undiluted stormwater effluent and determines the toxicity of the entire sample, not just of a single constituent. Thus it provides a reliable test of what the most sensitive species actually experiences. In addition to the WET testing specified in the NPDES permit, toxicity testing during qualifying storm events showed no evidence of in-stream or outfall toxicity. **Wisdom ¶17-18.**

The results of the Preliminary Water Effect Ratio (WER) studies provide reasonable assurance that metal concentrations will be below the site-specific water quality criteria. Condition J.2.a of the 401 requires that these criteria be developed. Contrary to ACC's contentions, the implementation of site-specific water quality criteria will not result in

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"relaxation of the water quality standards." Rather, the use of a WER is encouraged by EPA and is expressly provided for in WAC 173-201A-040(3)(dd).

The Port recently undertook in-stream characterization and stormwater sampling studies for zinc and copper, after preliminary screening indicated that these were the only metals of concern. Preliminary results show no exceedances of chronic water quality standards for either zinc or copper, and only limited exceedances for some storm events in Des Moines Creek for zinc. **Stubblefield ¶24-29.** This basin drains both International Boulevard and other industrial areas, so it is not possible to say whether these exceedances are attributable to the Port. **Stubblefield ¶27.** However, the range-finding study for the WER for copper suggests that a site-specific standard will be higher than any observed exceedance and that standards can be met, even if *all* copper is attributable to STIA. With respect to zinc, the exceedances are infrequent, of short duration, and not particularly high. As a result, water quality standards for zinc can be met either through a WER alone, or a WER in combination with water quality BMPs. **Wisdom ¶8, 42-44, 48; Stubblefield ¶14; 22-29.**

ACC's Allegations Regarding Glycols Are Entirely Without Merit. Glycol de-icers are used relatively infrequently at STIA because of the mild climate, and usage is limited to brief mid-winter episodes. All glycol application takes place in areas draining to the Industrial Wastewater System, with appropriate BMPs in place, so that only minimal amounts of glycol appear in stormwater.

The Port's NPDES permit recognizes that minimal amounts of de-icing agents will drip from aircraft and mix with stormwater. ACC claims that toxic amounts of glycol are discharged to stormwater and that amounts as low as 1.8 mg/l are toxic, relying on a single study that was based on inaccurate data. When corrected, ACC's own data confirm that Type I glycols (the type used the overwhelming majority of the time) are a concern at levels of approximately 1800 mg/L and over. All of the concentrations that ACC reports are well under that threshold. **Wisdom ¶6, 22-29.**

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Mixing Zones Are Not "Pre-Allowed" by the §401 Certification. ACC complains that the 401 inappropriately authorizes "mixing zones," which are used in water quality monitoring to assure that sampling accurately reflects the dispersion of any contaminants within receiving waters. Condition A.2 of the 401 mentions mixing zones in the context of monitoring, and requires that any mixing zones be minimized. This is not an "allowance" for a mixing zone, but if there were one in the future, it would have to be minimized. Moreover, the mere mention of a mixing zone is not an admission that water quality standards will be violated. Ecology regulations specifically allow mixing zones. WAC 173-201A-100(10); *Waste Action Project v. Ecology*, PCHB No. 97-69 (Oct. 13, 1997) (allowing mixing zone to demonstrate compliance on pollutant-by-pollutant basis).

Retrofitting Existing Stormwater System Is Required. ACC claims that retrofitting will not occur because the Port has discretion on whether to retrofit. Again, ACC is incorrect. Condition J.1 of the 401 requires that the entire STIA facility be retrofitted for peak flow control. All but a small portion (80 acres) of STIA must also be retrofitted for stormwater quality, and those 80 acres must be retrofitted before new development can occur. Retrofitting and removal of urban uses will significantly improve water quality in the Des Moines, Walker and Miller Creek basins. This is already occurring in Miller Creek, where removal of the effects of urbanization is allowing native vegetation to return and the watershed to restore itself. **Weitkamp ¶4, 17-18.**

Because No MPU Projects Are Planned for Gilliam Creek, the 401 Appropriately Did Not Consider that Watershed. ACC maintain that Ecology should have considered impacts of the MPU projects on Gilliam Creek. As noted above, even were such impacts considered, the effect of the MPU projects is to *improve* conditions in area streams. Because the MPU improvements will not cause water quality impacts to Gilliam Creek, there was no need to address that watershed in the 401. **Leavitt ¶12.**

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XI. ISSUE 15 – FILL CRITERIA

Key Witnesses: Elizabeth Leavitt; Linn Gould; Elizabeth Clark; Michael Riley; John Strunk; Ann Kenny; Kevin Fitzpatrick; Chung Yee. The Port will build the third runway on an earthen embankment with imported fill materials. The 401 includes conditions that ensure the fill materials do not contain chemical constituents that could leach out in concentrations that might threaten water quality. The U.S. Fish & Wildlife Service first established fill criteria for the Third runway in its Biological Opinion, and Ecology drew on those conditions when it developed fill criteria for the 401. Inclusion of protective fill criteria in a 401 is unprecedented. **Kenny ¶36.** Ecology has gone far beyond what is normal for construction projects in this state, demonstrating Ecology's concern for water quality.

ACC contends that the numeric fill criteria are not stringent enough to protect water quality. In particular, ACC argues that constituent in fill should not exceed "natural background" concentrations. ACC bases its argument on an erroneous interpretation of WAC 173-201A-040(1), which states that "[t]oxic substances shall not be introduced above natural background levels in waters of the state which have the potential either singularly or cumulatively to adversely affect characteristic water uses." The key is not whether concentrations of substances in soil exceed natural background levels, but whether use of the soil could adversely affect characteristic water uses. To be prohibited, there must be some proof that soil concentrations exceeding natural background levels will have an adverse effect on characteristic uses in receiving waters. Although ACC has gone to great lengths to criticize the manner in which the fill criteria were developed, it has offered no evidence whatsoever to show that the fill criteria will not protect water quality.

In contrast, Dr. Michael Riley's work demonstrates that all of the numeric fill criteria are fully protective of water quality. Dr. Riley ran a computer model that simulated how chemical constituents present in fill materials could leach out, move through the embankment, and eventually discharge to the drainage layer that underlies the embankment. Dr. Riley deliberately built a great deal of conservatism into the model. For example, he assumed that all of the fill used in the embankment contained the maximum concentrations of metals allowed under the 401's

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numeric fill criteria. The model did not account for several natural processes that would further reduce the concentrations of any chemical constituents that leach from the embankment fill. **Riley ¶7, 21, 30-34.** According to the modeling results, even over the course of a thousand years, not one of the constituents would discharge from the embankment at concentrations that exceed water quality standards. **Riley ¶27.** Dr. Riley also conducted a sensitivity analysis to determine how the model results would change if the concentrations of the metal that leaches most easily, arsenic, was increased 10 times. Even if the entire embankment were made of soil containing arsenic at 10 times the limits allowed under the 401, water leaving the embankment would not exceed water quality standards. **Riley ¶32-33.** This result is not surprising, given the extremely protective nature of the fill criteria.

The Port can accept fill only from sources that pass every step of a multi-step screening process. This process begins with a strict limitation on the types of sources that can even be considered; notably, the Port cannot take fill from any source with previously identified contamination, even if that contamination has been remediated. Before accepting fill from any of the sources approved by the 401, the Port must perform both a Phase I and a Phase II Environmental Site Assessment. These assessments determine, through record review and site reconnaissance, the potential for contamination in the fill. **Leavitt ¶18.** After the Port determines a source has no likelihood of contamination, it collects samples to confirm this, and then compares the sampling results to numeric fill criteria – that is, maximum concentrations of various metals and petroleum hydrocarbons allowed in the fill. **Clark ¶27-32.** Even after fill is accepted for use, the Port still inspects shipments to ensure they contain no contamination.

The 401 establishes different numeric fill criteria for different parts of the embankment. **Exhibit 1320, Figure 2**. The most stringent criteria apply to the "drainage layer cover," a wedge-shaped section of the embankment in direct contact with the base, or drainage layer. For some constituents, less restrictive criteria apply to fill used throughout the remainder of the embankment. Finally, to protect terrestrial ecological receptors, the Biological Opinion established different numeric criteria for some constituents in fill used in the surficial three feet of

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the embankment. Although the fill criteria in the Biological Opinion and the 401 differ somewhat, the Port must comply with the most stringent criterion for each constituent. **Leavitt ¶22; Clark ¶30.**

Each numeric fill criterion is set either at the natural background concentration of the constituent in question; at the lowest concentration that laboratories can reliably measure, known as the practical quantitation limit (PQL); or at the concentration determined to be protective of water quality based on a conservative "backcalculation" approach set forth in MTCA. The backcalculation begins with the water quality standard and "works back" to determine the maximum concentration of a substance that can be present in soil without causing an exceedance of that water quality standard in leachate emanating from the soil. The backcalculated values are very conservative because they do not account for additional dilution and attenuation that will occur between the time the constituents leave the soil and the time they reach the receiving waters, if ever. **Gould ¶15-17, 29.**

If sample results from fill proposed to be imported to the site show exceedances of the fill criteria, the 401 allows the Port to perform further testing to determine whether a prospective fill source is suitable. The Synthetic Precipitation Leaching Procedure (SPLP) is a commonly-used method for testing the potential of chemical constituents to leach from soil. If a particular constituent will not actually leach out of fill material under simulated acid rain conditions, it is extremely unlikely that it will leach out under normal circumstances. It is equally unlikely that the constituent could have an adverse effect on receiving waters. The SPLP evaluates risk based on real world conditions, not on conservative theoretical assumptions. **Gould ¶18-22.**

ACC also contends that some fill the Port accepted prior to issuance of the 401 contained elevated levels of certain constituents, including petroleum hydrocarbons and some organic compounds. Before the 401was issued, Ecology and the Port had written agreements with acceptance criteria for fill, including numeric fill criteria. With one exception, none of this "historic fill" accepted pursuant to the Ecology agreements and used for the third runway embankment exceeded the numeric fill criteria in those agreements. The lone exception was some

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fill accepted from the Black River Quarry. Two of 14 samples taken from that source had concentrations of petroleum hydrocarbons slightly higher than the level then allowed by the Ecology agreement. All were lower, however, than the level set under the 401. **Clark ¶1, 11-13**

The Black River Quarry fill does not pose a threat to water quality. Dr. Riley's modeling specifically studied the effect this material would have on water discharging from the embankment, and again found that even over a thousand-year period, none of the constituents leaching from the embankment would exceed water quality standards. **Riley ¶23-25, 29.**

ACC also contends that the 401 does not require the collection of a sufficient number of samples from a prospective fill source. Before it collects any samples, however, the Port has already taken several steps to ensure the source is not contaminated. Sampling simply confirms what the other steps in the process have already shown: that fill from the source will not harm water quality. Furthermore, the 401 establishes only the *minimum* number of samples that must be taken from a source where no contamination is suspected. ACC's expert, Dr. Lucia, acknowledges that the minimum number of samples required by the 401 could be sufficient at a source where the samples show little variability. In cases with greater variability, Ecology may always require more sampling. By retaining control of the number of samples the Port collects, Ecology provides itself with reasonable assurance that sufficient sampling will occur.

Finally, ACC alleges that embankment construction activities, particularly dewatering associated with excavation performed to improve the embankment subgrade, will alter the fate and transport of groundwater contaminants adjacent to this excavation. Such an impact is highly unlikely. The dewatering influence will extend approximately 80-175 feet from the excavation boundaries, due in part to the use of sheet piles during construction. ACC has not identified any sources of groundwater contamination that might exist within this zone of influence. The only known area of contaminated groundwater is contained within the AOMA, which is a substantial distance (between 0.5 mile and one mile) from the dewatering zone. **Strunk ¶9.**

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XII. ISSUE 16 – EMBANKMENT FAILURE

Key Witnesses: Michael Bailey. As described above, the third runway will be constructed partially on an embankment of compacted earth fill, so that the new runway elevation matches the existing airfield. The new embankment will vary up to a maximum fill thickness of about 165 feet. Three mechanically stabilized earth (MSE) retaining walls will be used to limit the extent of embankment slope in the vicinity of wetlands that are tributary to Miller Creek. These walls use steel and other materials to reinforce the earth. The walls will have lengths of approximately 900, 1,100 and 1,450 feet and exposed faces that range up to maximum heights of 50 to 135 feet above ground.

ACC contends there cannot be reasonable assurance that water quality standards will be met since the MSE walls and the embankment itself may fail in an earthquake, spilling soil into nearby wetlands. Michael Bailey's testimony shows that this is extremely unlikely. If the MSE wall "fails," the likely result would be a slight deformation, not a collapse that would release soil into the surrounding environment. **Bailey ¶37.**

The Port has conducted an extremely extensive review of the MSE wall and its ability to withstand an earthquake. An experienced engineering team designed the MSE walls employing field testing (subsurface borings and tests to define the soil and groundwater conditions), state-of-the-art computer modeling, and laboratory analysis. In addition, the Port engaged a technical review board consisting of internationally recognized experts in seismology, structural design, and geotechnical engineering to oversee the project. This peer review verified that the wall design meets the standard of practice for structures of this type. **Bailey ¶8-26.**

The Port based the wall design on a seismic event with a 10 percent probability of exceedance in 50 years (average return period of 475 years), which is consistent with practices at other commercial and transportation facilities, building code requirements for most cities in the vicinity, and current provisions of a national code for transportation structures. **Bailey ¶43-51.**

In developing the MSE wall designs, the Port evaluated eight types of retaining walls, more than sixty wall and embankment slope geometric configurations, and nine alternative methods for accomplishing subgrade improvements below the MSE walls. Although ACC has

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raised unsupported allegations that excavation and replacement of soils under the embankment (to provide better support) will affect the hydrology of Miller Creek and adjacent wetlands, the Port's evaluation shows that construction-related impacts will be mitigated by the use of sheet pile. No long-term effects to Miller Creek are expected. **Bailey ¶57-60**. This evaluation includes criteria for reasonable assurance that the walls will not harm water quality.

XIII. ISSUES 17 & 18 – EXISTING CONTAMINATION AND COMPLIANCE WITH MTCA AGREED ORDER

Key Witness: John Strunk. ACC contends that existing groundwater contamination elsewhere at STIA could migrate to MPU construction areas, and this possibility precludes a finding of reasonable assurance. To evaluate this risk, the Port conducted an extensive analysis of historical operations, groundwater conditions, and preferential migration pathways. This analysis demonstrates that it is highly unlikely that contaminated groundwater at STIA will migrate to the third runway project area. **Strunk ¶4-21.**

Multiple lines of evidence indicate that existing groundwater contamination is confined to areas near the STIA aircraft operations and maintenance area (AOMA) where historic releases occurred. **Strunk ¶5-21.** This contamination is more than one-half mile away, and will not likely migrate to the MPU project area via any of the theoretical pathways that ACC has alleged, through groundwater, utility trenches, or any other mechanisms. **Id.** The hydrogeological evidence shows that shallow groundwater in the area is found in "perched" groundwater zones, zones that are discontinuous, and at some areas of the airport, is absent altogether, thereby physically preventing the lateral migration of perched groundwater in those areas. **Strunk ¶6, 7.**

The environmental data do not support ACC's allegation that contaminated groundwater is migrating preferentially within backfill of subsurface utility line trenches such that it would affect the third runway project. The layout of existing utility lines is very complex and circuitous, and almost entirely limited to the AOMA. It is highly unlikely that any groundwater within AOMA utility line backfill would eventually migrate to the third runway area. **Strunk ¶16-20.** Finally, the Port will implement Best Management Practices (BMPs) during the construction of new utility lines within the AOMA, including but not limited to dewatering

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utility trenches and the use of low permeability fill, to prevent the migration of contaminated groundwater. **Strunk ¶21.**

ACC has presented no evidence that contradicts these findings. Instead, it would have the Board believe, apparently on faith, that groundwater pollutants will migrate more than half a mile, through isolated groundwater zones or shallow discontinuous utility trenches filled with low permeability materials, to reach the third runway construction area. Reasonable assurance exists that this will not occur.

Issue 18 assumes that the Port has not complied with an Agreed Order Ecology issued under the Model Toxics Control Act, requiring the Port to identify and study existing contamination at STIA. The premise underlying ACC's contention, however, is unsupported by any evidence. The Port is not in violation of the Agreed Order. Moreover, ACC does not provide any explanation as to why violations of the Agreed Order—even if they existed—would affect Ecology's reasonable assurance determination. As explained above, it is highly unlikely that existing areas of contamination at STIA—including those areas covered by the Agreed Order—will affect in any way construction of the MPU improvements. **Strunk ¶5-21.**

XIV. ISSUE 19 – WETLAND IMPACTS AND MITIGATION

Key Witnesses: James Kelley; Jan Cassin; Katie Walter; and Erik Stockdale.

The MPU projects will permanently fill 18.37 acres of wetlands and 0.92 acres of prior converted cropland near STIA. Construction will temporarily affect 2.05 acres of wetlands. The Natural Resources Mitigation Plan outlines the mitigation taking place both on-site (in the sub-basins adjacent to the Airport) and off-site (at a 65-acre site in Auburn). **Exhibit 1216.** The mitigation far exceeds the requirements for most projects, and provides mitigation in excess of Ecology's 2:1 target.

In the sub-basins on or adjacent to STIA, the Port will 1) restore 11.95 acres of severely degraded wetlands; 2) enhance 22.32 acres of degraded wetlands; and 3) enhance 54.9 acres of wetland and riparian buffers. **Kelley ¶35-43; Stockdale ¶5-11; Walter ¶2-3.** As part of the

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on-site mitigation, the Port is replacing urban uses that have severely degraded wetlands and streams.

At the off-site mitigation area in Auburn, which is in the same Water Resource Inventory Area as STIA, the Port will create 29.98 acres of new, high-quality wetlands, enhance 19.5 acres of wetlands, and enhance 15.9 acres of wetland buffers. **Kelley ¶6-11; Cassin ¶11, 17-18; Stockdale ¶16-17.** All wetland functions in-basin are being fully replaced in-basin, with the exception of the minor waterfowl habitat function. **Kelley ¶49-86; Cassin ¶12-16.**

ACC claims that the project's impact will violate Washington's antidegradation policy, which is found at WAC 173-201A-070 ("Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed"). In particular, ACC argues that new wetlands must be created in the small sub-basins near STIA, that the functional analysis of area wetlands was not appropriate, and that too much credit is being allowed for the 1.7 mile-long restoration of the Miller Creek riparian corridor.

Off-Site Mitigation Is Appropriate and Required for Public Safety. The Port must create new wetlands off-site because the FAA forbids the creation of new wetlands within 10,000 feet of a runway for serious public safety reasons. Under FAA rules, wildlife attractants, such as wetlands, may be sited no closer than 10,000 feet from turbine aircraft movement areas. The FAA imposed this requirement as a condition of its 1997 Record of Decision approving the new third runway. **Exhibit 1080.** Put simply, if birds are ingested into jet turbine engines, the engines can fail and the plane has a significant risk of crashing. Since 1960, at least 78 civilian aircraft and 201 civilian lives have been lost worldwide to wildlife strikes, and even more military aircraft and lives have been lost. Between 1994 and 2000, reported wildlife/aircraft collisions at STIA averaged 22.5 per year. This federal prohibition is a significant constraint on the wetlands mitigation that can be provided for the MPU projects. Nevertheless, the Port is replacing all of the in-basin wetland functions at the 65-acre Auburn site, and is adding a small amount of open water for waterfowl habitat.

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Washington law specifically allows out-of-basin mitigation. RCW 90.74.020 (for public infrastructure projects, "the departments of ecology and fish and wildlife may not limit the scope of options in a mitigation plan to areas on or near the project site, or to habitat types of the same type as contained on the project site"). This is consistent with the requirements of the U.S. Army Corps of Engineers. **Exhibit 1046** (allowing off-site mitigation when on-site mitigation not practicable); *see* 33 C.F.R 320(r) at n.1. Off-site mitigation is also consistent with Ecology's guidance on wetland regulation. **Exhibit 2025** (emphasizing that wetland restoration and enhancement are preferred mitigation, and explaining that off-site mitigation is allowed on a case-by case basis).

In addition, the requirements of RCW 90.74 (allowing out-of-basin mitigation) must be construed *in pari materia* with the broad, general antidegradation policy of RCW 90.48.010 and WAC 173-201A-070 because both statutes treat the same subject matter. *Hallauer v.Spectrum Properties, Inc.*, 143 Wn.2d 126, 146, 18 P.2d 540 (2001) (statutes treating the same subject must be read as a unified whole, but when the statutes conflict, the specific statute will control the general statute). Here, the Legislature's specific direction allowing off-site mitigation for public infrastructure projects must be followed. In fact, without off-site mitigation a new or expanded airport could never be located in western Washington, because the evidence shows that any new airport will affect more acres of wetlands than construction of the third runway, and the FAA will not allow new wetland creation adjacent to new airports or new runways. Ecology followed the requirements of RCW 90.74 in this case. The mitigation meets all legal requirements and is consistent with Ecology policy. **Stockdale ¶45-49; Kelley ¶46-48.** The proposed off-site mitigation provides a full range of wetland functions, not just flood storage and waterfowl habitat as ACC claims. **Cassin ¶12-14**. The off-site mitigation is needed to mitigate waterfowl habitat impacts and to reach Ecology's goal of 2:1 replacement.

All Impacted Wetland Functions (Except Waterfowl Habitat) Are Fully Mitigated In-Basin. Even though off-site mitigation is plainly allowed, impacted wetland functions are fully mitigated in-basin (with the exception of waterfowl habitat, for the public safety reasons

discussed above). **Kelley ¶49 -86; Stockdale ¶12-15.** Functions replaced on-site include contribution to fish habitat, passerine bird habitat, amphibian habitat, small mammal habitat, organic matter export, groundwater exchange, flood storage, nutrient retention and sediment trapping. **Id.**

Although ACC has done no functional assessment of its own, it criticizes the Port for not using Ecology's new WFAM assessment technique. Because WFAM does not apply to "slope" wetlands, it would apply to only 25% of the wetlands on site, and it is not scientifically sound to mix assessment techniques. However, Dr. Kelley ran the WFAM assessment on wetlands on-site, and the WFAM ratings were equal to or lower than the Port's more conservative technique. **Kelley ¶20-25.**

ACC also argues that, because a high percentage of the Miller Creek wetlands are being filled, there "must" be an impact to stream hydrology or fish habitat. In fact, there will be no impact to fish or stream habitat, a conclusion with which the federal resource agencies agree. **Weitkamp ¶38.** In fact, restoration of the riparian corridor will significantly improve stream habitat. ACC is also wrong about the percentage of wetlands impacted in the Miller basin: approximately 5% of the wetlands in the Miller basin are impacted, not the 34% estimated by Ms. Azous. **Kelley ¶17-19.**

Mitigation Plan for Riparian Corridor. ACC criticizes Ecology for giving the Port in-basin credit for enhancing riparian buffers. ACC ignores the major in-basin wetland mitigation – 11.95 acres of restoration and 22.32 of enhancement of the highly degraded existing wetlands. ACC's witnesses also fail to accurately represent the amount of in-basin mitigation by overlooking two major mitigation sites. **Kelley ¶35-45.**

ACC also ignores scientific evidence on the importance of riparian buffers (for which the Port gets only 1:10 credit) and the fact that those buffers will perform many of the functions that the existing wetlands perform. **Stockdale ¶16-33; Cassin ¶34-45.**

With respect to the relocated section of Miller Creek, ACC claims that the forested area next to the creek is only 10-feet wide, will offer no shade, and that the creek will not function.

ACC's witnesses fail to correctly read the project drawings. The forested area is 60-feet wide, and the species types will provide ample shade to the creek. **Cassin ¶46-50; Walter ¶25-27.** Moreover, because of the nature of the peat soils and the levels of the perched groundwater, the stream will not be perched above groundwater and lose water by seepage. **Cassin ¶51-56; Walter ¶28.** The geotextile liner utilized for stream construction is more porous than the peat it abuts by an order of magnitude, and will not clog (at least not any more than peat will clog) and will not affect stream hydrology. **Kelley ¶53-54.**

Embankment Design and Adaptive Management Will Assure Long-Term Wetland Health. ACC claims that the recent "revision" to the embankment construction plan will eliminate water predicted to seep to the existing downslope wetlands. ACC is incorrect. The plan to excavate non-bearing soils under the MSE Wall has been part of the project for years. **Bailey ¶8-13.** Moreover, the Port designed the embankment to deliver water specifically to the existing, downslope wetlands. **Bailey ¶ 57-60.** The amount of water seeping from the embankment to downslope wetlands will be no less than under existing conditions. Under the adaptive management plan, the Port can alter the delivery points of the water as needed to provide adequate hydrology for the existing wetlands. **Kelley ¶29-34; Walter ¶14-20.**

In sum, the evidence shows that the wetland mitigation package, both on-site and off-site, for this project is unprecedented and assures that existing beneficial uses are fully protected.

XV. CONCLUSION

Based on the forgoing, the Port of Seattle urges the Board to affirm Ecology's finding that reasonable assurance exists that MPU projects will comply with state water quality standards, and to affirm the issuance of the 401 and Ecology's concurrence with the CZMA consistency determination.

Respectfully submitted this 12th day of March 2002.

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United States Court of Appeals,
Ninth Circuit.

OREGON NATURAL RESOURCES COUNCIL; Breitenbush Community, Inc.; Michael Donnelly, Plaintiffs-Appellants,
v.
U.S. FOREST SERVICE; Bugaboo Timber Company, Defendants-Appellees.

No. 87-3737.

Argued and Submitted July 7, 1987.
Decided Dec. 21, 1987.

Environmental organization brought action which challenged decision of United States Forest Service to approve reoffer of timber sale to timber company. The United States District Court for the District of Oregon, James M. Burns, J., 659 F.Supp. 1441, denied organization's motion for summary judgment and motion for preliminary injunction, and environmental organization appealed. The Court of Appeals, Ferguson, Circuit Judge, held that: (1) claims which were based on the National Environmental Policy Act were entitled to administrative review; (2) segregation of "Spotted Owl" claim was appropriate; and (3) organization was entitled to bring Clean Water Act claims under judicial review provisions of the Administrative Procedure Act.

Affirmed in part, reversed in part, vacated in part and remanded.

West Headnotes

[1] Administrative Law and Procedure k513
15Ak513

[1] Public Lands k10
317k10

Reoffer by the United States Forest Service of returned timber sale required exercise of discretionary judgment, and thus was "decision" by Service; therefore, challengers to sale of timber were entitled to administrative appeal from Service's decision to reoffer, though no appeal was taken from initial decision to offer timber sale. Act Oct. 30, 1986, § 320, 100 Stat. 3341-287.

[2] Administrative Law and Procedure k513
15Ak513

[2] Public Lands k9.1
317k9.1
(Formerly 317k9)

Whether modification of timber contract upon reoffer by the United States Forest Service was more favorable to challengers of sale than initial contract, which had gone into default, was irrelevant to determination as to whether challengers were entitled to administrative appeal of reoffer.

[3] Administrative Law and Procedure k513
15Ak513

[3] Administrative Law and Procedure k701
15Ak701

[3] Health and Environment k25.5(5)
199k25.5(5)

[3] Health and Environment k25.15(3.1)
199k25.15(3.1)

Environmental organizations could not challenge the environmental assessment performed by the United States Forest Service without referral to changed circumstances which may have occurred during five years between date of initial sale and proposed resale of timber; organization failed to timely appeal original environmental assessment and thus could not be allowed second chance at administrative and judicial review.

[4] Federal Civil Procedure k1959.1
170Ak1959.1
(Formerly 170Ak1959)

District court did not abuse its discretion in segregating claim that the United States Forest Service violated the National Environmental Policy Act by permitting logging in area which was presently under consideration for protection as Spotted Owl habitat from challenge to resale of timber; challengers did not seek to amend their complaint until hearing was close at hand, and did not allege that they were unaware of Spotted Owl up until that time or that relevant information concerning Spotted Owl was obtainable only through discovery. Endangered Species Act of 1973, §

7(c)(1), 16 U.S.C.A. § 1536(c)(1).

[5] Health and Environment k25.15(4.1)
199k25.15(4.1)
(Formerly 199k25.15(4))

Challengers to resale of timber by Forest Service were not entitled to maintain action under the citizen suit provision of the Clean Water Act to enforce state water quality standards affected by nonpoint sources; applicable provision of statute which referred to "effluent limitations" were by definition applicable only to point sources. Federal Water Pollution Control Act Amendments of 1972, §§ 301(b)(1), (b)(1)(A-C), 502(11), as amended, 33 U.S.C.A. §§ 1311(b)(1), (b)(1)(A-C), 1362(11).

[6] Administrative Law and Procedure k663
15Ak663

Implied right of action under violated statute is not necessarily predicate to right of action under Administrative Procedure Act. 5 U.S.C.A. §§ 701-706.

[7] Administrative Law and Procedure k668
15Ak668

[7] Health and Environment k25.15(3.2)
199k25.15(3.2)

Challengers to resale of timber by the United States Forest Service were entitled to judicial review of whether timber harvesting violated state water quality standards pursuant to the Administrative Procedure Act; challengers could not enforce state water quality standards with respect to nonpoint sources pursuant to the Clean Water Act, and thus, challengers had no exclusive and comprehensive remedy. 5 U.S.C.A. §§ 701-706, 701(a)(1, 2); Federal Water Pollution Control Act Amendments of 1972, § 505(b)(2), as amended, 33 U.S.C.A. § 1365(b)(2); 42 U.S.C.A. § 1983.

[8] Federal Civil Procedure k2481
170Ak2481

Genuine issues of material fact concerning whether water quality standards of Willamette Basin would be violated by resale of timber by Forest Service and whether timber company received necessary authorization for logging operation precluded grant of summary judgment on issue of whether activities accompanying timber harvest would violate applicable regulations.

***843** Ralph Bradley, Eugene, Or., for plaintiffs-appellants.

Blake A. Watson, Dept. of Justice, Washington, D.C., and John F. Neupert, Miller, Nash, Wiener, Hager & Carlsen, Portland, Or., for defendants-appellees.

Victor M. Sher and Todd D. True, Seattle, Wash., for amicus curiae Sierra Club, Inc. and The Wilderness Society.

Appeal from the United States District Court for the District of Oregon.

Before GOODWIN and FERGUSON, Circuit Judges, and STEPHENS, District Judge. [FN*]

> FN* Honorable Albert Lee Stephens, Jr., Senior United States District Judge, Central District of California, sitting by designation.

FERGUSON, Circuit Judge:

Plaintiffs-appellants Oregon Natural Resources Council, Inc. ("ONRC"), Breitenbush Community, Inc., and Michael Donnelly appeal the district court's denial of their motion for summary judgment and motion for preliminary injunction. The plaintiffs also appeal the court's order granting summary judgment for defendants-appellees United States Forest Service ("USFS") and Bugaboo Timber Co. ("Bugaboo"). Plaintiffs seek to enjoin Bugaboo from harvesting timber pursuant to a timber sale awarded Bugaboo by the USFS. We affirm in part and reverse in part.

Plaintiffs raise three issues on appeal. First, plaintiffs claim that the USFS violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701- 706, because the USFS did not abide by its own regulations and improperly dismissed plaintiffs' administrative appeal concerning the USFS's Environmental Assessment ("EA") of the ***844** North Roaring Devil timber sale. Second, plaintiffs claim that the EA is inadequate under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, because it does not address cumulative effects, because it does not disclose violations of state water quality standards, and because the sale is precluded by a separate Draft EIS on the Northern Spotted Owl. Third, plaintiffs argue that construction of a bridge and logging road will violate the Federal Clean Water Act ("CWA"), 33 U.S.C. § 1251, and Oregon water quality standards enforceable under the Clean Water Act.

I.

In 1977, the USFS adopted a final programmatic

Environmental Impact Statement ("EIS") on Multiple Use Land Management and Time Management Plans for Willamette National Forest. The EIS divided the forest into five planning units, one of which, the North Santiam Planning Unit, contains the North Roaring Devil timber sale, the subject of this lawsuit. In 1980, the USFS completed an EA for the North Roaring Devil timber sale and made a Finding of No Significant Impact ("FONSI"). No administrative challenge was made at that time. In 1981, the USFS sold the North Roaring Devil timber to a private company. However, no harvesting took place and the sale was later returned by the buyer to the USFS in accordance with the Federal Timber Contract Payment Modification Act of 1984 ("FTCPMA"), 16 U.S.C. § 618 et seq. Pursuant to the FTCPMA, the USFS modified and reoffered the sale on December 5, 1985.

On January 20, 1986, the plaintiffs sought to appeal the reoffer pursuant to USFS regulations, which state that "[d]ecisions of Forest Officers concerning the National Forest System ... are subject to appeal." 36 C.F.R. § 211.18(a)(1). The USFS dismissed the appeal, claiming that it was untimely because it was not filed within forty-five days of the original decision to sell the timber, made on September 29, 1980. See 36 C.F.R. § 211.18(c)(1). Thereafter, the USFS awarded the timber sale to Bugaboo on October 1, 1986. On October 20, 1986, plaintiffs sought to appeal the award of the resale. The USFS again dismissed the appeal as untimely.

The present action was filed on October 21, 1986. The winter months prevented the timber company from taking further action. On January 7, 1987, plaintiffs filed a motion to amend their complaint to include a NEPA claim and a claim under the Endangered Species Act, 16 U.S.C. § 1536(c)(1), concerning the Northern Spotted Owl. The district court temporarily denied the amendment. On March 26, 1987, the court allowed the amendment after it segregated the issues for discovery and trial at a later date. On May 7, 1987, the district court issued an opinion denying plaintiffs' motions for summary judgment and injunctive relief and granting summary judgment for defendants, 659 F.Supp. 1441. Plaintiffs timely appeal.

II.

We review de novo the district court's grant of summary judgment. Ashton v. Cory, 780 F.2d 816, 818 (9th Cir.1986). We must decide, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Id.

We will reverse the grant or denial of a preliminary injunction only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846, 849 (9th Cir.1985).

III.

Plaintiffs argue that the reoffer of the North Roaring Devil timber sale constitutes a "decision" by the USFS which is subject to administrative appeal. The regulations upon which plaintiffs rely state that "[d]ecisions of Forest Officers concerning the National Forest System ... are subject to appeal." 36 C.F.R. § 211.18(a)(1). The USFS dismissed plaintiffs'***845** appeal of the reoffer on the grounds that the appeal was untimely. The USFS contends that the original decision concerning the sale was made on September 29, 1980, and that the reoffer merely implemented this decision and did not constitute a separate decision within the meaning of 36 C.F.R. § 211.18. Since plaintiffs failed to appeal the original decision in a timely manner, see id. § 211.18(c)(1), the USFS dismissed the later appeal. The district court, after examining the FTC-PMA, agreed with the USFS.

The FTCPMA provides that:

> Timber from returned or defaulted contracts shall be offered for resale in an orderly fashion.... Timber from returned or defaulted contracts shall be given preference in the Forest Service timber sales programs. [FN1]
>
> FN1. The legislative history of this provision states:
> Subparagraph (5)(A) provides that timber from returned or defaulted contracts be given preference for resale in the agency timber sale programs. The intent of this provision is that where other factors are similar, the agencies should offer returned or defaulted timber first before offering new sales. From an economic point of view, these sales should be offered first because of cost savings to the government. They have already received extensive study of such matters as boundaries, rights of way and environmental factors; timber volume and sale designs have already been surveyed, and personnel have already administered the sale. Reoffered sales, however, should be reviewed and updated in order that any newer environmental standards can be taken into account. It is also anticipated that the agency may combine or otherwise realign

some returned sales, such as those which have already been partially operated, and that some sales may not be reoffered at all due to some changed condition. S.Rep. 596, 98th Cong., 2d Sess., reprinted in 1984 U.S.Code Cong. & Admin.News 3796, 3814, 3815.

16 U.S.C. § 618(a)(5)(A).

The district court concluded that in providing for priority reoffers of timber from returned contracts, Congress did not contemplate full review of the earlier decision to sell the timber. Thus, the court concluded that "the reoffer of the North Roaring Devil sale does not constitute a 'decision' within the meaning of 36 C.F.R. § 211.18(a)(1) and USFS did not violate its regulations when it dismissed the appeal as untimely."

Plaintiffs assert, however, that although Congress intended that the USFS move expeditiously to reoffer returned sales, it did not withdraw discretion from the agency to modify or withdraw such sales in appropriate circumstances. According to plaintiffs, the USFS must make a "decision" for each returned sale to determine whether to reoffer the sale and to determine the terms of the reoffer.

Plaintiffs refer to section 320 of the Department of the Interior and Related Agencies Appropriation Act, Pub.L. 99-591, 100 Stat. 3341-287, which was signed into law on October 30, 1986, to buttress their argument. Following passage of the FTCPMA, a controversy existed concerning the nature of administrative review Congress intended to allow for the reoffered sales. In response to this controversy, the Committee on Appropriations recommended that returned or defaulted sales which complied with existing environmental and other statutes and standards at the time of the original sale should "not be subject to further administrative or judicial appeal or review." S.Rep. No. 397, 99th Cong., 2d Sess. 66 (1986). The Conference Committee that prepared the final enacted version of the provision rejected this language. Instead, the Committee adopted the following:

> To assure that National Forest and Bureau of Land Management timber included in sales defaulted by the purchaser, or returned under the Federal Timber Contract Payment Modification Act (Public Law 98-478), is available for resale in a timely manner, such sales shall be subject only to one level of administrative appeal. This limitation shall not abridge the right of judicial review. Actions on such administrative appeals should be completed within 90 days of receipt of the notice of appeal. Sales that are reoffered shall be modified, including minor additions or deletions, as appropriate, to reduce adverse environmental impacts, pursuant to current land management ***846** plans and guidelines, and such modifications in themselves should not be construed to require the preparations of new or supplemental environmental assessments.

Pub.L. No. 99-591, § 320, 100 Stat. 3341-287 (Oct. 30, 1986) (emphasis added).

Plaintiffs contend that the change from the original Senate language to the final statutory text makes it clear that Congress intended to abbreviate the administrative review of reoffered sales. [FN2] Based on this language, the district court concluded that Congress did not intend to "mandate a review of the scope and breadth for which plaintiffs have contended."

> FN2. The legislative history of section 320 adds additional support to plaintiffs' argument. The Committee report states:
> The managers have agreed to include modified Senate language which limits administrative appeals to one level of appeal on all returned or defaulted timber sales within the Forest Service and Bureau of Land Management.
> H.R.Rep. No. 1002, 99th Cong., 2d Sess. 77 (emphasis added). The use of the term "limits" suggests that Congress believed that the ordinary number of administrative appeals, as set forth in 36 C.F.R. § 211.18(f), applied to timber resales.

The district court further concluded that, even if Congress intended to mandate one level of administrative appeal, Congress did not intend section 320 to apply retroactively. Section 320 was enacted on October 30, 1986, twenty-nine days after the North Roaring Devil timber sale was awarded. The court also noted that the modification made by the USFS on December 4, 1985, after the sale was returned but before it was reoffered, reduced the amount of timber to be cut, and reduced the impacts to the Spotted Owl management area without adding any new land to the sale. The court concluded that it would be inappropriate to entertain a full-scale appeal of plaintiffs' claims when all the modifications appeared to be beneficial to plaintiffs.

[1] We conclude that the regulations, and the statutory language of section 320 and its legislative history, support plaintiffs' position. The reoffer by the USFS of a returned timber sale is a decision within the meaning of 36 C.F.R. § 211.18(f)(1), which provides for administrative appeals. The

legislative history of the FTCPMA reveals that a reoffer requires the exercise of discretionary judgment and, thus, a decision by the USFS.

We do not apply section 320 retroactively. Section 320 and its legislative history disclose that Congress was aware of existing administrative rights under the regulations. Section 320 acted as a limitation on these rights. Since neither the FTCPMA nor section 320 specifically withdrew the rights but only limited them, we agree with plaintiffs that they are entitled to the administrative appeals set forth in the regulations. [FN3]

> FN3. Of course, all reoffers of timber sales made after October 30, 1986, are entitled to only one level of administrative appeal. See Pub.L. No. 99-591, § 320, 100 Stat. 3341-287 (Oct. 30, 1986).

[2] Finally, the district court's conclusion that the 1985 modification was favorable to plaintiffs is irrelevant in deciding plaintiffs' claim that they are entitled to an administrative appeal of the reoffer. If the USFS determines that plaintiffs' claims lack merit, it may so decide. However, the procedural question presented here is a separate issue. We therefore reverse the district court's decision and direct that the case be remanded to the USFS for proper administrative review.

IV.

Upon reaching the merits, the district court ruled that the programmatic EIS and the EA satisfied the NEPA. On appeal, plaintiffs argue that defendants have not adequately considered cumulative impacts from other sales. Plaintiffs also argue that the EA fails to consider cumulative impacts from the adjacent Craig Timber Sale and that the EA fails to disclose violations of Oregon water quality standards. Defendants allege that the plaintiffs are barred by collateral estoppel from challenging the EA. The district court did not address this issue. Although mischaracterized ***847** as collateral estoppel, we find defendants' argument meritorious.

The USFS first prepared an EA on the North Roaring Devil timber sale in 1980 and sold the timber in 1981. There was a specified period during which plaintiffs, or any other interested individuals or organizations, could have challenged the EA. No challenge was made. Essentially, defendants contend that plaintiffs had a full and fair opportunity to challenge the manner in which the USFS fulfilled its NEPA obligations and, since plaintiffs failed to challenge the EA then, they should not be permitted to challenge it now.

[3] Insofar as plaintiffs challenge the EA without referring to changed circumstances which may have occurred during the five years or without alleging environmentally significant modifications the USFS made after the timber sale was returned, the defendants' position is legitimate. Plaintiffs should not be allowed a second chance at administrative and judicial review when they failed timely to appeal the original EA.

As stated above, however, plaintiffs are entitled to the administrative appeals set forth in the regulations. If the USFS finds that the EA was not previously challenged and that plaintiffs are time-barred from challenging it because they fail to allege changed circumstances or environmentally significant modifications not addressed earlier, the USFS may so rule in rejecting plaintiffs claims. Until that time, the court cannot review the adequacy of the EA or defendants' argument that plaintiffs are time-barred from raising the issue. Thus, we vacate that portion of the district court's opinion that addresses plaintiffs' NEPA claims.

V.

The district court did not address the question of whether the USFS violated NEPA by permitting logging in an area which presently is under consideration for protection as a Spotted Owl habitat. Plaintiffs' original complaint did not allege a Spotted Owl claim under NEPA or the Endangered Species Act, 16 U.S.C. § 1536(c)(1). On January 9, 1987, the plaintiffs filed a motion to amend their complaint to include the Spotted Owl claims. [FN4] On January 30, 1987, the district court temporarily denied plaintiffs' motion to amend the complaint, indicating that if the claims were allowed, they would be segregated. On March 26, 1987, the court allowed the filing of the amended complaint, but segregated the issues for discovery and trial at a later date. See Fed.R.Civ.P. 42(b).

> FN4. The amended complaint alleged that the USFS was in the process of considering a separate EIS on the impacts of harvesting on the Northern Spotted Owl. The EIS included an alternative prohibiting timber harvesting in all suitable Spotted Owl habitats. The EA at issue in this case recognizes that the North Roaring Devil timber area is suitable Spotted Owl habitat. Plaintiffs allege that two Spotted Owls live in the timber area.

[4] Plaintiffs contend that the district court erred in refusing to consider the Spotted Owl claim prior to

the initiation of the timber harvesting. Plaintiffs claim that the district court's segregation of the Spotted Owl claims effectively condones the USFS's violation of the Council on Environmental Quality (CEQ) regulations. [FN5]

> FN5. By Executive Order, the CEQ issued regulations to federal agencies for implementing NEPA. Exec.Order No. 11991, 42 Fed.Reg. 26,967-68 (1977). The CEQ regulations are binding on all federal agencies and provide guidance to the courts for interpreting NEPA requirements. 43 Fed.Reg. 55,978 (1978).

The applicable regulation states that before a final decision is made on an EIS (the Spotted Owl EIS in this case), "no action concerning the proposal shall be taken which would ... [l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a)(2). Plaintiffs argue that the USFS's decision to proceed with the timber sale effectively limits the reasonable alternatives set forth in the Spotted Owl EIS before the USFS has made its final decision on that EIS. Plaintiffs claim that the district court's decision sanctions such a limitation and is therefore erroneous.

***848** This court reviews the district court's decision to segregate a claim for abuse of discretion. See Airlift Int'l, Inc., v. McDonnell Douglas Corp., 685 F.2d 267, 269 (9th Cir.1982).

We find that the district court did not abuse its discretion in segregating the Spotted Owl claim. Plaintiffs did not seek to amend their complaint until the hearing was close at hand. Plaintiffs do not allege that they were unaware of the Northern Spotted Owl up until that time or that relevant information concerning the Spotted Owl was obtainable only through discovery. Further, the plaintiffs ostensibly can challenge the adequacy of that EIS in a separate proceeding. We conclude, therefore, that despite the impact of the district court's decision, it was not improper, considering the late timing of plaintiffs' amended complaint.

VI.

Plaintiffs allege that the road building and timber harvesting associated with the timber sale violate Oregon state water quality standards [FN6] and that the USFS's failure to comply with these standards violates section 1323 of the CWA. The CWA requires each state to develop and implement "water quality" standards to protect and enhance the quality of water within the state. 33 U.S.C. § 1313. The Act also requires all federal agencies to comply with all state requirements. 33 U.S.C. § 1323.

> FN6. According to plaintiffs, defendants have violated and plan to violate the State of Oregon's Water Quality Standard for nondegradation, which provides that unless the Environmental Quality Commission grants an exemption, "existing high quality waters ... shall be maintained and protected." Or.Admin.R. 340-41-026(1)(a) (1986). Plaintiffs further allege violations of a rule proscribing activities in the Willamette Basin which "either alone or in combination with other wastes or activities will cause ... a 10 percent cumulative increase in natural stream turbidities." Or.Admin.R. 340-41-445(2)(c) (1986).

Plaintiffs claim that the district court erred when it concluded that plaintiffs could not bring a CWA action under section 1365 of the Act (the citizen suit provision) because they failed to provide a sixty-day notice. 33 U.S.C. § 1365(b)(1). Plaintiffs argue that their action is not brought pursuant to section 1365 but instead is brought under the judicial review provision of the APA, 5 U.S.C. §§ 701-706, or, in the alternative, that they gave adequate notice under the CWA.

Defendants argue that plaintiffs failed to meet the sixty-day notice under the CWA citizen suit provision or, in the alternative, that plaintiffs are not entitled to bring an action under the CWA because the CWA permits citizen suit enforcement of state water quality standards only to the extent that the requirements are conditions of permits issued under the National Pollutant Discharge Elimination System ("NPDES") established under the Act, 33 U.S.C. § 1342. Because plaintiffs do not allege such violations, defendants state that plaintiffs are without a remedy under the Act. [FN7] Defendants further argue that the CWA provides an exclusive remedy and that plaintiffs cannot seek review under the APA for this type of agency action.

> FN7. Indeed, plaintiffs state in their brief that "[t]he reason for using the APA is that the citizen suit provision arguably applies only to permit violations and not to water quality violations, such as those involved here."

Before we decide whether plaintiffs must comply with the sixty-day notice requirement, we must first resolve the issue concerning whether plaintiffs have a cause of action under the citizen suit provision of the Act, and thus whether the sixty-day notice requirement is applicable. See 33 U.S.C. § 1365(b)(1). Initially, we must consider the language

of the citizen suit provision. The provision states that any citizen may commence a civil action "against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a). Section 1365(f) defines "effluent standard or limitation" as "an unlawful act under subsection (a) of section 1311 ... [or] an effluent limitation or other limitation under section 1311 or 1312 of this title." Plaintiffs concede that section 1311(a) of the Act refers specifically to point source discharges, [***849** FN8] which are not at issue in this case. Plaintiffs also concede that sections 1311(b)(1)(A) and (B) only apply to point sources.

> FN8. The term "point source" means "any discernible, confined and discrete conveyance, included but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[5] We are asked, however, to examine section 1311(b)(1)(C), which lists additional enforceable standards, including state water quality standards. The provision states that in order to achieve the objectives of the Act there shall be achieved "any more stringent limitation including those necessary to meet water quality standards, treatment standards ... or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter." 33 U.S.C. § 1311(b)(1)(C) (emphasis added). It is plaintiffs' contention that because section 1311(b)(1)(C) incorporates state water quality standards established pursuant to section 1313 and does not explicitly refer to point sources, plaintiffs are entitled to sue under the citizen suit provision of the Act to enforce state water quality standards affected by nonpoint sources. [FN9]

> FN9. Nonpoint source pollution is not specifically defined in the Act, but is pollution that does not result from the "discharge" or "addition" of pollutants from a point source. Examples of nonpoint source pollution include runoff from irrigated agriculture and silvicultural activities. See Trustees for Alaska v. Env'tl Protection Agency, 749 F.2d 549, 558 (9th Cir.1984).

We recognize that nonpoint sources of pollution constitute a major source of pollution in the nation's waters. [FN10] However, we do not believe that the Act allows for the enforcement of state water quality standards, as affected by nonpoint sources, under the citizen suit provision. When Congress established the National Pollutant Discharge Elimination System (NPDES) in 1972 and concomitantly created a new approach to regulating and abating water pollution, it drew a distinct line between point and nonpoint pollution sources. Point sources are subject to direct federal regulation and enforcement under the Act. [FN11] See 33 U.S.C. § 1342. Nonpoint sources, because of their very nature, are not regulated under the NPDES. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the Act which encourages states to develop areawide waste treatment management plans. [FN12] See 33 U.S.C. § 1288. We do not agree with plaintiffs that Congress intended section 1311 to apply to nonpoint sources. Section 1311 of the Act is entitled "Effluent Limitations." 33 U.S.C. § 1311. Effluent limitations are defined as "any restriction established by a state or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11) (emphasis added).

> FN10. V. Novotny & G. Chesters, Handbook of Nonpoint Pollution 2 (1981) (asserting that nonpoint sources of pollution account for more than 50% of the total water quality problem).

> FN11. The Act provides that, except under certain specified circumstances, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). A "discharge of a pollutant" is defined in part as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added).

> FN12. Congress recently amended the Clean Water Act and added a new provision dealing with nonpoint sources of pollution which provides grants and assistance to states who develop programs to deal with nonpoint sources. See Water Quality Act of 1987, Pub.L. No. 100-4, § 316, 101 Stat. 52 (Feb. 4, 1987).
> In the new amendments Congress also added the following language to section 1251(a) of the Act, which sets forth the goals and policies of Congress. The new language states that:
> (7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of the Act to be met through the control of

both point and nonpoint sources of pollution.
Pub.L. No. 100-4, § 316(b), 101 Stat. 60 (Feb. 4, 1987).

Three methods for deriving effluent limitations are identified in section 1311(b)(1). The first method is "application of the best practicable control technology currently ***850** available." 33 U.S.C. § 1311(b)(1)(A). The second method is "secondary treatment as defined by the [EPA] Administrator." 33 U.S.C. § 1311(b)(1)(B). The third method includes "any more stringent limitation," including these necessary to meet state water quality standards. 33 U.S.C. § 1311(b)(1)(C). Thus, effluent limitations may be derived from state water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C), but it is the "limitations necessary to meet" those standards, or "required to implement" the standards.

The title and construction of section 1311(b)(1) lead us to the logical conclusion that the "limitations" set forth in section 1311(b)(1)(C) are "effluent limitations" and, therefore, by definition, applicable only to point sources. See 33 U.S.C. § 1362(11). Having reached this conclusion, we find that plaintiffs do not have a cause of action under the citizen suit provision of the CWA. Therefore, the required sixty-day notice under the Act is not applicable in this case. [FN13] The district court, therefore, erred in its conclusion that plaintiffs were subject to the notice requirement.

FN13. Plaintiffs argue that this court previously has recognized the rights of citizens to enforce state water quality standards against the USFS. See Northwest Indian Cemetery Protective Ass'n v. Block, 795 F.2d 688, 697 (9th Cir.1986), cert. granted, 107 S.Ct. 1971 (1987). In Northwest Indian Cemetery, the State of California and private citizens brought suit against the USFS to enforce California Water quality standards and to enjoin the construction of a USFS road. However, neither the district court, Northwest Indian, 589 F.Supp. 921, 927 (C.D.Cal.1983), nor this court, 795 F.2d 688, 697, addressed jurisdiction under the citizen suit provision of the CWA. The district court found that the Forest Service projects would violate the state standards, and this court reviewed the finding for clear error. Id.

We next confront the issue concerning whether plaintiffs may enforce the alleged state water quality standard violations from nonpoint sources pursuant to the APA, 5 U.S.C. §§ 701-706. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. [FN14] Two exceptions to the general rule of reviewability are set out in the APA. Review is not available where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." 5 U.S.C. §§ 701(a)(1), (2).

FN14. The APA also provides for review of "agency action made reviewable by statute" and for review of "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704.

The USFS concedes that APA review is appropriate for some types of final agency action that relate to the CWA. The USFS argues, however, that APA review is not appropriate when citizens attempt to enforce the CWA because Congress impliedly precluded judicial review under the APA when it enacted the citizen suit enforcement provision. The USFS argues that the Supreme Court's decision in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), supports its contention.

In Sea Clammers, an organization whose members harvest fish and shell fish sued various governmental entities and officials from New York, New Jersey, and the federal government, seeking injunctive and other relief with respect to the dumping of sewage, sludge, and other waste into New York Harbor and the Hudson River. Id. at 4-5, 101 S.Ct. at 2618-19. The plaintiffs failed to give proper notice under section 1365(b)(2) of the CWA and were thereby prevented from bringing an action under that provision. 453 U.S. at 6, 101 S.Ct. at 2619. Plaintiffs thus attempted to proceed under an implied private right of action from the Act, id. at 13, 101 S.Ct. at 2622-23, or under the separate authority of 42 U.S.C. § 1983 to enforce alleged violations of the Act, 453 U.S. at 19, 101 S.Ct. at 2625-26.

The Supreme Court rejected plaintiffs' arguments, holding that an implied right of ***851** action did not exist and that Congress could not have intended to preserve the section 1983 right of action when it had created so many specific statutory remedies. Id. at 13-21, 101 S.Ct. at 2622-27. The USFS interpretsSea Clammers as standing for the proposition that the citizen suit provision is the

exclusive means by which an individual may enforce the CWA.

[6][7] We, however, do not interpret Sea Clammers so broadly. First, an implied right of action under a violated statute is not a necessary predicate to a right of action under the APA. Chrysler Corp. v. Brown, 441 U.S. 281, 317, 99 S.Ct. 1705, 1725, 60 L.Ed.2d 208 (1979); Glacier Park Found. v. Watt, 663 F.2d 882, 885 (9th Cir.1981). Second, we interpret Sea Clammers to stand for the proposition that section 1983 is not available to plaintiffs seeking to enforce limitations and standards they could enforce pursuant to the citizen suit provision of the Act. The Court concluded that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." 453 U.S. at 20, 101 S.Ct. at 2626. In the instant case, plaintiffs are not attempting to enforce the Act pursuant to the citizen suit provision. As we stated earlier, plaintiffs cannot enforce state water quality standards with respect to nonpoint sources pursuant to that section because Congress did not so provide. Thus, plaintiffs have no exclusive and comprehensive remedy in the citizen suit provision of the Act, as did the plaintiffs in Sea Clammers. Further, Sea Clammers involved the availability of a damages remedy. Id. at 4, 101 S.Ct. at 2618. Our case is distinguishable because plaintiffs are not seeking damages available under the citizen suit provision. Plaintiffs are merely seeking a determination that the timber harvesting violates the Oregon water quality standards.

Finally, in Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967), the Supreme Court held that "judicial review of final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such specifically was the purpose of Congress." We conclude that by creating a section of the Act specifically addressing nonpoint sources Congress did not intend to cut off review, but intended to protect the interests of persons aggrieved by nonpoint source violations of state water quality standards. [FN15] Judicial review under the APA is therefore "ordinarily inferred" and appropriate. See Barlow v. Collins, 397 U.S. 159, 167, 90 S.Ct. 832, 838, 25 L.Ed.2d 192 (1970).

> FN15. We note also that the "savings clause" in the citizen suit provision of the Act states that nothing in that provision "shall restrict any right which any person ... may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." 33 U.S.C. § 1365(e). We are aware that the Supreme Court rejected the notion that this clause preserved an implied right of action from the statute. Sea Clammers, 453 U.S. at 15-16, 101 S.Ct. at 2623-24. However, we believe that the savings clause preserves rights created by a separate statute such as the APA.

This decision should not be interpreted to suggest that plaintiffs seeking relief under the CWA may circumvent the notice requirement of the citizen suit provision by resorting to the APA. See Allegheny County Sanitary Auth. v. United States Envtl. Protection Agency, 732 F.2d 1167, 1177 (3d Cir.1984). Where plaintiffs may otherwise proceed under the citizen suit provision, they should not be allowed to bypass the explicit requirements of the Act established by Congress through resort to section 1983, Sea Clammers, 453 U.S. at 14-15, 101 S.Ct. at 2623-24, or the APA, Allegheny County, 732 F.2d at 1177.

Finally, our conclusion is in accord with previous Ninth Circuit opinions. In Northwest Indian, 795 F.2d at 697, this court allowed citizens to sue the USFS for violations of water quality standards. Although jurisdiction was not addressed on appeal or below, the district court stated that plaintiffs alleged violations of both the CWA and the APA. Northwest Indian Cemetery Protective Ass'n v. Peterson, 589 F.Supp. 921, 922 n. 1 (N.D.Cal.1983). ***852** For the reasons we expressed earlier concerning the unavailability of this type of action under the citizen suit provision of the CWA, we believe that the court's decision was based on the APA. [FN16]

> FN16. The APA does not itself provide jurisdiction. Califano v. Sanders, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). Federal question jurisdiction is based on 28 U.S.C. § 1331. Id. at 107, 97 S.Ct. at 985; Glacier Park Found. v. Watt, 663 F.2d 882, 885 (1981).

This circuit's decision in City of Las Vegas v. Clark County, 755 F.2d 697 (9th Cir.1985), further supports our conclusion. The USFS implies that language in City of Las Vegas stating that Sea Clammers "precludes suits brought under 28 U.S.C. § 1331 and 42 U.S.C. § 1983," 755 F.2d at 703, necessarily means that suits brought pursuant to the APA and 28 U.S.C. § 1331 also are precluded. However, in City of Las Vegas, the court was interpreting the impact of Sea Clammers with respect to an implied right of action, see 453 U.S. at 15, 101 S.Ct. at 2623-24, and section 1983. Moreover, the

court explicitly recognized that the district court may have had jurisdiction under 28 U.S.C. § 1331(a) to review the Environmental Protection Agency's action under the APA. City of Las Vegas, 755 F.2d at 704. We conclude, therefore, that judicial review is available under the APA.

The district court states that even if it were to consider the CWA claim on the merits, it would reject it. The court stated that it had considered the views of the witnesses regarding the impact of the clear cuts on the river and that while it recognized that activities associated with the timber harvest may cause discoloration and turbidity, these charges would be "minor and transient." The court therefore denied plaintiffs' request for injunctive relief.

The Oregon Water Quality Standards are more complicated than plaintiffs allege. For example, although the regulations require that existing high quality waters be maintained and protected, the regulations also set guidelines for nonpoint source activities. In particular, the regulations state that "[l]ogging and forest management activities shall be conducted in accordance with the Oregon Forest Practices Act so as to minimize adverse effects on water quality." Or.Admin.R. 340-41-026(7) (1986). The regulation to which plaintiffs refer concerning the ten percent cumulative increase in natural stream turbidities in the Willamette Basin also provides exceptions for "limited duration activities necessary to ... accommodate essential dredging, construction or other legitimate activities." Or.Admin.R. 340-41-445(2)(c). The regulation further states that the limited duration activities may be authorized provided that "all practicable turbidity control techniques have been applied" and a permit or certification authorized under sections 1341 and 1344 of the CWA or under Or.Admin.R. 141-85-100 et seq. has been issued. [FN17] Or.Admin.R. 340-41-445(2)(B) (1986).

> FN17. Although a permit or certification may not be required for nonpoint source activities, other restrictions in the regulation may apply.

[8] We believe, however, that plaintiffs' allegations and the regulations may raise questions of material fact concerning whether the water quality standards of the Willamette Basin will be violated and whether defendants have obtained the necessary authorization. We therefore remand this issue to the district court for a determination on the merits of whether summary judgment is appropriate on the issue of whether the activities accompanying the timber harvest will violate the applicable regulations.

We do not express any opinion concerning whether or not the matters involved preclude APA review because the matters constitute agency actions committed to agency discretion by law.

VII.

Defendant Bugaboo argues that plaintiffs' claim for injunctive relief is barred by the doctrines of laches and unclean hands. Bugaboo's argument concerning laches is meritless. Plaintiffs have timely pursued their claims. With respect to Bugaboo's charge that plaintiffs are guilty of unclean ***853** hands because they were engaged in disobedience at the site of the timber sale, the district court specifically found that Bugaboo failed to establish that any of the parties engaged in the demonstrations were plaintiffs' agents.

VIII.

In conclusion, we find that plaintiffs' NEPA claims are entitled to the levels of administrative review set forth at 36 C.F.R. § 211.18(f). We therefore reverse the district court's holding on this issue and vacate its conclusions concerning the merits of the NEPA claim. The district court should grant appropriate injunctive relief while plaintiffs pursue their administrative remedies. We affirm the order segregating the "Spotted Owl" claim. We remand to the district court for a determination on the merits whether summary judgment is appropriate on the CWA claims brought under the judicial review provisions of the APA.

Plaintiffs' request for attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) is denied. Although we rule against the USFS on some of the claims, we cannot conclude that the government's position was not substantially justified. See Sierra Club v. Marsh, 816 F.2d 1376, 1390 (9th Cir.1987). Each party shall bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART and REMANDED for further consideration in accordance with this opinion.

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United States Court of Appeals,
Ninth Circuit.

FRIENDS OF THE PAYETTE, and Idaho Rivers United, Inc., Plaintiffs-Appellants,
v.
HORSESHOE BEND HYDROELECTRIC CO.; United States Army Corps of Engineers; Robert Volz, District Engineer of United States Army Corps of Engineers,
Defendants-Appellees.

No. 92-36611.

Argued and Submitted Jan. 5, 1993.
Decided March 19, 1993.

Environmental organizations brought action under the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA) challenging the approval, without an Environmental Impact Statement (EIS), of a hydroelectric project. The United States District Court for the District of Idaho, Marion J. Callister, J., 811 F.Supp. 524, dismissed. Organizations appealed. The Court of Appeals, Eugene A. Wright, Senior Circuit Judge, held that: (1) the Army Corps of Engineers did not act arbitrarily and capriciously in assessing the environmental effects of the project and in deciding that no EIS was necessary, and (2) it was not an abuse of discretion to decide that wetlands were maintained by an irrigation canal and, thus, that the wetlands were beyond the jurisdiction of the Corps.

Affirmed in part and reversed in part.

West Headnotes

[1] Administrative Law and Procedure 763
15Ak763

[1] Health and Environment 25.15(10)
199k25.15(10)

Arbitrary and capricious standard of review, rather than reasonableness standard, applies in reviewing federal agency's decision not to prepare environmental impact statement (EIS) for project. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[2] Health and Environment 25.10(5)
199k25.10(5)

In deciding whether to prepare environmental impact statement (EIS) for project, federal agency must take hard look at environmental consequences of its action and its decision must be founded on reasoned evaluation of relevant factors. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[3] Health and Environment 25.10(2.1)
199k25.10(2.1)
(Formerly 199k25.10(2))

Army Corps of Engineers did not act arbitrarily and capriciously when it decided that mitigation measures required by permit for construction of hydroelectric project would be sufficient to compensate for adverse effects on wetlands and, thus, that no environmental impact statement (EIS) was necessary, even if mitigation measures would not compensate completely for effects. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[4] Health and Environment 25.10(2.1)
199k25.10(2.1)
(Formerly 199k25.10(2))

Army Corps of Engineers did not act arbitrarily and capriciously when it relied on state certification that hydroelectric project would be in compliance with state water quality standards and on state monitoring of compliance, for purposes of deciding whether environmental impact statement (EIS) was necessary. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[5] Health and Environment 25.10(3)
199k25.10(3)

Determination by Army Corps of Engineers that hydroelectric project would not significantly affect fisheries and, thus, that no environmental impact statement (EIS) was necessary, was not arbitrary and capricious; permit for construction of project included mitigation measures to compensate for fish kills and loss of diversity in bypass stretch. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[6] Health and Environment 25.10(3)
199k25.10(3)

Army Corps of Engineers did not act arbitrarily and

capriciously in deciding that hydroelectric project would not have significant effect on endangered species such as bald eagles, for purposes of deciding whether environmental impact statement (EIS) was necessary; mitigation measures required under project's permit had been designed to protect eagles and their habitat. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[7] Health and Environment 25.10(3)
199k25.10(3)

Army Corps of Engineers did not act arbitrarily and capriciously in deciding that hydroelectric project would not significantly affect recreational activities on river and, thus, that environmental impact statement (EIS) was not necessary; project plans called for mitigation measures of boat ramp upstream from project's dam, water bypass for boats and flotation devices, and removal of diversion bladder to allow boat racing. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[8] Health and Environment 25.10(3)
199k25.10(3)

Army Corps of Engineers did not act arbitrarily and capriciously in deciding that hydroelectric project would not have significant impact on aesthetics and, thus, that environmental impact statement (EIS) was not necessary in light of mitigation measures included in project permit. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[9] Health and Environment 25.10(2.1)
199k25.10(2.1)
(Formerly 199k25.10(2))

Army Corps of Engineers adequately considered possibility that hydroelectric project's water diversion would increase potential for ice formation, ice jams, and flooding and, therefore, decision that Environmental Impact Statement (EIS) was not necessary was not arbitrary and capricious. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[10] Health and Environment 25.10(5)
199k25.10(5)

Army Corps of Engineers adequately considered cumulative impacts on aquatic environment in deciding whether Environmental Impact Statement (EIS) was necessary for hydroelectric project. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[11] Health and Environment 25.10(2.1)
199k25.10(2.1)
(Formerly 199k25.10(2))

Environmental assessment (EA) prepared for hydroelectric project contained adequate analysis of alternatives to issuance of dredge-and-fill permit and, therefore, no Environmental Impact Statement (EIS) was necessary; EA discussed taking no action, increasing bypass flow, relocating powerhouse, eliminating excavation section, and providing flushing flows to eliminate loss of riparian habitat. Federal Water Pollution Control Act Amendments of 1972, ß 404(b)(1), as amended, 33 U.S.C.A. ß 1344(b)(1); National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[12] Health and Environment 25.10(5)
199k25.10(5)

Army Corps of Engineers could justifiably rely on environmental assessments (EAs) prepared by Federal Energy Regulatory Commission (FERC) as lead agency in evaluating proposed hydroelectric project; Corps reviewed prior studies and conducted its own independent analysis of project's environmental impacts and responded by requiring alteration of aspects of project to lessen impacts. Federal Water Pollution Control Act Amendments of 1972, ß 404(b)(1), as amended, 33 U.S.C.A. ß 1344(b)(1); National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[13] Federal Courts 12.1
170Bk12.1
(Formerly 170Bk12)

Controversy is moot when issues presented are no longer live or parties lack legally cognizable interest in outcome.

[14] Health and Environment 25.15(5.2)
199k25.15(5.2)

Even if court challenge to hydroelectric project under National Environmental Policy Act (NEPA) became moot upon determination by Army Corps of Engineers that it had no jurisdiction over wetlands, challenge under Clean Water Act (CWA) to issuance of dredge-and-fill permit was not moot if permit contained insufficient mitigation measures to

compensate for loss of wetlands. Federal Water Pollution Control Act Amendments of 1972, ß 404(b)(1), as amended, 33 U.S.C.A. ß 1344(b)(1); National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[15] Navigable Waters 38
270k38

Army Corps of Engineers did not act arbitrarily and capriciously in deciding that wetlands near site of proposed hydroelectric project were maintained by irrigation canal and, thus, that Corps did not have jurisdiction over impact of dredge-and-fill operations on wetlands. Federal Water Pollution Control Act Amendments of 1972, ß 404(b)(1), as amended, 33 U.S.C.A. ß 1344(b)(1); National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[16] Navigable Waters 38
270k38

Army Corps of Engineers satisfied procedural requirements in giving public notice, in setting extended comment period, and in ultimately deciding not to conduct public hearing before approving hydroelectric project; it was reasonable to conclude that public hearing would have been mere forum to allow project proponents and opponents to air their views. Federal Water Pollution Control Act Amendments of 1972, ß 404(b)(1), as amended, 33 U.S.C.A. ß 1344(b)(1); National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

[17] Administrative Law and Procedure 746
15Ak746

[17] Health and Environment 25.15(5.1)
199k25.15(5.1)

District court did not abuse its discretion in excluding expert testimony and affidavits offered by environmental organizations in action challenging refusal by Army Corps of Engineers to prepare Environmental Impact Statement (EIS) for hydroelectric project; administrative record adequately explained decision and showed that Corps considered relevant factors. National Environmental Policy Act of 1969, ß 102, 42 U.S.C.A. ß 4332.

*991 Jim Jones, Boise, ID, for plaintiffs-appellants.

D. Marc Haws, Asst. U.S. Atty., Boise, ID, David P. Hirschi, Salt Lake City, UT, for defendants-appellees.

Appeal from the United States District Court for the District of Idaho.

Before: WRIGHT, Senior Circuit Judge, and FARRIS and KLEINFELD, Circuit Judges.

EUGENE A. WRIGHT, Senior Circuit Judge:

Two environmental groups allege that the Army Corps of Engineers violated the National Environmental Policy Act by issuing a dredge-and-fill permit for a hydroelectric project without preparing an environmental impact statement. Because we conclude that the Corps' action was not arbitrary and capricious, we affirm the district court's dismissal of the action.

I

On March 10, 1992, the Horseshoe Bend Hydroelectric Company began construction of a 9.5-megawatt hydroelectric generating facility on the Payette River near Horseshoe Bend, Idaho. When completed, the facility will work as follows: An inflatable *992 bladder diversion dam will divert up to 3,500 cubic feet of water per second from a four-and-a-half-mile stretch of the river, routing the water down a diversion canal to a power house. The water will then pass over the powerhouse turbines before returning to the river. A minimum flow of 400 cfs will remain in the river channel, also known as the bypass stretch.

The facility is being built at the site of a decommissioned run-of-the-river hydroelectric project, which operated from 1902 to 1954. The new project will expand and use the old project's diversion canal, which had contained valuable wetlands. Project construction has almost completely destroyed those wetlands.

Before starting construction, HBHC and its predecessor in interest, the Boise Cascade Corporation, had to obtain the approval of several state and federal agencies. In July 1986, the Federal Energy Regulatory Commission issued a license for the project to Boise Cascade. Before doing so, FERC prepared an environmental assessment in August 1984 and a supplemental EA in April 1986. Both concluded that the project would not significantly affect the environment. In April 1987,

FERC approved Boise Cascade's transfer of its license to HBHC.

HBHC then obtained the necessary state permits allowing it to appropriate water from the river, gain construction access to state-owned lands and build the dam. Lastly, HBHC needed to secure a dredge-and-fill permit from the Army Corps of Engineers. The permit, required by section 404 of the Clean Water Act, would allow HBHC to place dredged or fill material in the river. *See* 33 U.S.C. ß 1344 (1988). HBHC applied for the permit on December 9, 1991. The Corps issued it on March 30, 1992. Although interested parties requested a public hearing, the Corps did not hold one.

Like FERC, the Corps found that the project would not significantly impact the environment within the meaning of the National Environmental Policy Act. Therefore, the agency did not prepare an EIS, but issued instead an EA and a finding of no significant impact. The ß 404 permit has 17 conditions designed to mitigate environmental harm.

Friends of the Payette and Idaho Rivers United, Inc., two environmental organizations, filed suit, claiming that the Corps' actions violated NEPA and the Clean Water Act. [FN1] They sought a declaration that the Corps had not complied with NEPA and the CWA and an injunction halting the project pending preparation of an EIS.

> FN1. The Idaho Division of Environmental Quality and FERC were defendants. The action against IDEQ was dismissed by stipulation. The district court dismissed FERC after finding that we have exclusive jurisdiction over appeals from FERC decisions.

The district court set the case for trial. Because it found that admission of almost all extra-record evidence was unwarranted, however, the court disallowed the testimony of 13 of Payette's 14 proposed witnesses. It reviewed the Corps' actions based solely on the administrative record and the testimony of William McDonald, the Corps employee who prepared the EA. The court dismissed the suit, holding that the Corps' decision was reasonable.

Payette raises four issues on appeal: (1) whether the Corps' failure to prepare an EIS was reasonable, (2) whether the court erred in holding that the agency's jurisdiction over wetlands in the diversion canal was moot, (3) whether the Corps' permit-granting procedure was flawed for failure to allow adequate public comment and (4) whether the court erred by refusing to allow extra-record evidence. Payette also asks for attorneys fees.

II

A. *Decision Not to Prepare EIS*

NEPA requires federal agencies to prepare a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. ß 4332 (1988). The Corps concedes that the project constitutes a major Federal action. The issue is whether the Corps properly determined that the project will not significantly affect the environment.

***993** [1][2] After the district court's June 1992 order dismissing the action, we adopted a new standard for reviewing an agency's decision not to prepare an EIS. We no longer employ a "reasonableness" standard. In *Greenpeace Action v. Franklin*, 982 F.2d 1342, 1350 (9th Cir.1992), we held that "when a litigant challenges an agency determination on grounds that, in essence, allege that the agency's 'expert review ... was incomplete, inconclusive, or inaccurate,' ... the arbitrary and capricious standard is appropriate." (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77, 109 S.Ct. 1851, 1860-61, 104 L.Ed.2d 377 (1989)). We still must ensure that an agency has taken a "hard look" at the environmental consequences of its action and that its decision is "founded on a reasoned evaluation 'of the relevant factors.' " *Id.* at 1350 (quoting *Marsh*, 490 U.S. at 378, 109 S.Ct. at 1861). If we are convinced that its discretion is truly informed, however, we must defer to that discretion. *Id.*

Payette cites ten bases for its contention that the Corps' decision not to prepare an EIS was erroneous. We reject the contention, but will discuss each basis in turn.

1. Wetlands

[3] Payette contends that the Corps erroneously determined that wetlands will not be affected significantly. The Corps concluded that the mitigation measures required by the permit compensated for any adverse impacts.

We can consider the effect of mitigation measures in determining whether preparation of an EIS is necessary. *Friends of Endangered Species, Inc. v.*

Jantzen, 760 F.2d 976, 987 (9th Cir.1985). If significant measures are taken to " 'mitigate the project's effects,' they need not *completely compensate* for adverse environmental impacts." *Id.* (quoting *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir.1982)).

The Corps verified an environmental consultant's estimate that 69.45 acres of wetlands were within the project area. Without mitigation, 30.99 acres of riparian habitat would be lost. Strategic placement of boulders to raise the river stage and irrigation flows from uphill mitigation lands would reduce the loss to 24.69 acres. To compensate for this loss, the Corps required HBHC to implement a mitigation plan that would create 66.64 acres in new wetlands through use of water channels, grass seeding, and tree and shrub planting. The plan also requires monitoring and supplemental mitigation measures if revegetation goals are not met.

Although the measures may not compensate completely for adverse impacts, they are significant. The Corps' conclusion that wetlands would not be affected significantly was not arbitrary and capricious.

2. Water Quality

[4] Payette asserts that the Corps relied inappropriately on the Idaho Department of Environmental Quality's certification of compliance with state water quality standards. IDEQ granted the certification after HBHC agreed to implement a three-year water quality monitoring program following project construction. If monitoring indicates violations of state standards, HBHC must adopt a mitigation plan. Payette contends that this after-the-fact monitoring cannot supplant before-the-fact evaluation and discussion of mitigation measures. It argues that the project will have a significant impact on water quality due to a decrease in oxygen and increases in temperature, light penetration and aquatic plant stimulation.

The district court noted that although the Corps cannot know exactly how the project will affect water quality, the Corps had reviewed studies attempting to model project impacts. The Corps' reliance on these studies and on a monitoring program that should identify problems before they become serious is not arbitrary and capricious.

3. Fisheries

[5] Next, Payette argues that the EA did not adequately consider the project's impact on the fishery in the bypass stretch. The Corps concedes that decreased flows ***994** and power turbines will kill fish and that although the power canal will provide run habitat, it will lack other diversity. The Corps' permit, however, requires mitigation measures to compensate for these losses. These measures include (1) a plan to enhance fish habitat in nearby Shaffer Creek, (2) an improved monitoring plan, and (3) additional mandatory mitigation measures if monitoring shows that the mitigation plan has not achieved acceptable results. The measures were strengthened at the insistence of the Fish and Wildlife Service, which approved the project. The Corps' determination that the project would not significantly affect fisheries was not arbitrary and capricious.

4. Endangered Species

[6] Payette contends that the Corps did not evaluate the project's impact on the bald eagles that winter in the project area. We disagree. The Corps, in consultation with the FWS, included two permit conditions designed to protect the eagles and their habitat. First, every five years for the life of the project, HBHC must provide the Corps with a report on the status of the riparian cottonwood forest in the project area. The forest provides eagle habitat. If project impacts prevent the forest from maintaining itself naturally, HBHC must plant cottonwood tubelings as required by the Corps. Second, the permit requires that power transmission lines be designed to minimize shock hazard to bald eagles. Also, the EA notes that "eagles would still be able to use other riparian zones along the Payette River in the immediate vicinity for their wintering activities." We find no fault with the Corps' conclusion that the project would not significantly affect endangered species.

5. Recreation

[7] Payette also contends that the Corps gave insufficient consideration to recreation issues other than those relating to an agreement between HBHC and the Western Wildwater Association. We disagree. Project plans call for these mitigation measures: a boat ramp upstream from the dam, a portage path at the dam, a water bypass for boats and flotation devices and the removal of the diversion bladder to allow jet boats to use the main channel during annual races. In addition, HBHC, in consultation with state resource agencies, will place boulders in the bypass reach to increase the river's

width. All of these mitigation measures are significant. The Corps' conclusion that the project would not significantly affect recreational activities was not arbitrary and capricious.

6. Aesthetics

[8] Payette argues that the Corps did not consider adequately the project's impact on aesthetics, particularly the unsightliness of the reduced water flow in the bypass stretch. Article 29 of HBHC's FERC license requires the company, in consultation with the Idaho Department of Parks and Recreation, to "design the readily visible surface of the project facilities to preserve or enhance the existing visual environment." Pursuant to this requirement, HBHC consultants prepared a "Visual Resources Plan." It calls for revegetation of affected areas with native plant species, installation of troughs to capture runoff for irrigation of replanted areas during droughts, use of earthtones to hide from view the partially-buried powerhouse and grading to restore the natural contours of the landscape. After considering these mitigative measures and the record as a whole, we agree that the Corps did not act arbitrarily and capriciously in determining that the project would not have a significant impact on aesthetics.

7. Icing

[9] Next, Payette maintains that the Corps did not consider adequately the possibility that water diversion would increase the potential for ice formation, ice jams and flooding. The EA acknowledges that potential ice-jam flooding is a risk in that area of the Payette River. The Corps' hydrology branch, however, evaluated the issue and concluded that the project would not result in an increased flood hazard. Upstream, the dam would trap frazil ice (ice crystals formed in turbulent water) causing ***995** ice formation. Although the ice cover would raise the water surface up to eight feet above the normal winter low water mark, the Corps concluded that no damage would occur because the lowest upstream structure is 12 feet above the mark. Although the reduced flow could increase ice formation downstream, it would cause ice jams only rarely.

8. Cumulative Impacts

[10] Corps regulations require it to evaluate a project's cumulative impacts. 33 C.F.R. ß 320.4(a)(1) (1992). The Corps concluded that the project would not have a substantial cumulative impact on the aquatic environment. In doing so, the Corps relied primarily on FERC's analysis of the impact of past and future hydroelectric projects within the Payette River Basin. That analysis, the sole subject of FERC's supplemental EA, concluded that the project would not contribute to cumulative adverse impacts on important resources. We agree with the district court that the Corps sufficiently considered the project's cumulative impacts.

9. Alternatives Analysis

[11] Payette also asserts that the Corps' alternatives analysis was inadequate. Section 404(b)(1) guidelines provide that no dredge-and-fill permit shall be issued "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. ß 230.10(a). "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* ß 230.10(a)(2). NEPA guidelines require an EA to include brief discussions of alternatives. 40 C.F.R. ß 1508.9(b). Agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. ß 4332(2)(E) (1988).

The Corps' EA discusses these alternatives: taking no action, increasing bypass flow, relocating the powerhouse, eliminating an excavation section and providing flushing flows to eliminate the riparian habitat loss. The Corps' alternatives analysis satisfies both CWA and NEPA requirements.

10. Corps' Reliance on the FERC EA

[12] Lastly, Payette argues that the Corps improperly relied on FERC's EA and supplemental EA. Both EPA and FWS highlighted inadequacies in the earlier studies, upon which FERC's EAs were based. The Corps responds that it justifiably relied on the FERC documents based on a memorandum of understanding giving FERC lead agency status for environmental matters involving hydroelectric project licensing. Under the memorandum, the Corps must accept FERC's resolution of environmental issues.

We find no error in the Corps' approach. The Corps reviewed the studies and then conducted its own independent analysis of the project's environmental impacts. The Corps responded to FWS and EPA

concerns by requiring HBHC to alter aspects of the project to lessen its impacts and by including specific agency concerns as conditions of the final permit. We also find significant the agencies' approval of the project and their refusal to veto the Corps' decision to issue the permit.

B. *Characterization of Canal Wetlands*

Next, Payette argues that the Corps concluded erroneously that the canal wetlands were not within its jurisdiction for purposes of the ß 404 permit process and, consequently, did not require adequate mitigation for their destruction. The district court found that because project construction had already destroyed the wetlands, the mitigation issue was moot.

1. Mootness

[13] The Corps' "burden of demonstrating mootness 'is a heavy one.' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, **996633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953)). A controversy is moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012, 1015 (9th Cir.1989) (quoting *Northwest Envtl. Defense Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir.1988)). We review de novo questions of mootness. *Williams v. United States General Servs. Admin.*, 905 F.2d 308, 310 (9th Cir.1990).

[14] The district court erred in part in finding this issue moot. Payette sought an injunction to stop the project until the Corps complied with NEPA and the CWA. It did not seek to stop destruction of the wetlands. Rather, it challenged the Corps' determination that the wetlands were not within its jurisdiction. That issue became moot for NEPA purposes, *see Headwaters*, 893 F.2d at 1015, but not for CWA purposes. If the wetlands were within the Corps' jurisdiction, the ß 404 permit might contain insufficient mitigation measures to compensate for wetlands loss.

2. Corps Jurisdiction

[15] The Corps determined that because the canal wetlands were maintained by irrigation water, they were not subject to its jurisdiction. [FN2] Generally, the Corps does not consider "[a]rtificially irrigated areas which would revert to upland if the irrigation ceased" as subject to ß 404 permit requirements. *See* 51 Fed.Reg. 41,217, ß 328.3 (1986) (discussion of public comments and changes accompanying final regulations for Corps regulatory programs). The Corps may, in its discretion and on a case-by-case basis, determine that a body of water within this category is within its jurisdiction. *Id.*

> FN2. The canal has been used as an irrigation canal since power production ended in 1954.

Payette has presented no evidence showing that the canal wetlands would remain wetlands if irrigation stopped. [FN3] The Corps' classification of the wetlands as "non-jurisdictional" was not arbitrary and capricious. *See Citizens for Clean Air v. EPA*, 959 F.2d 839, 844 (9th Cir.1992). We also find it significant that the FERC license requires mitigation for destruction of these wetlands.

> FN3. The record contains a January 1983 letter from Russel Manwaring, an Agriculture Department district conservationist, to Boise Cascade. Manwaring writes that "*parts* of the canal ... are wet throughout the year and may have standing water of up to 3 feet in depth." (emphasis added). He adds that the water comes from "various sources, such as runoff into the canal, springs, and Kennedy's (an individual with water rights to the canal) irrigation water." This does not necessarily contradict the Corps' conclusion that the area would revert to upland if irrigation ceased.

C. *Corps Process*

[16] Payette maintains that the Corps' decision-making process was flawed because the Corps was racing to meet the March 12th construction deadline mandated by HBHC's FERC license. Consequently, Payette asserts, public notice was deficient, the public comment period was inadequate and the Corps abused its discretion by not holding a public hearing. We disagree.

1. Public Notice

The public notice provided "sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment" as required by Corps regulations. 33 C.F.R. ß 325.3(a). It described the project, discussed wetlands impacts and fish habitat mitigation, and notified the public of the Corps' intent to consult with other agencies regarding potential effects on endangered species, cultural resources and water quality.

2. Public Comment Period

The Corps filed the notice on December 18, 1991, and, at the request of agencies and interested individuals, subsequently extended the public comment period from January 17 to January 31, 1992. This six-week period provided sufficient time for interested parties to comment.

3. Public Hearing

The Corps' ß 404 permit regulations require it to hold a public hearing, upon proper ***997** request, "unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing." [FN4] 33 C.F.R. ß 327.4(b).

> FN4. NEPA regulations require agencies to hold a public hearing when required by statutes applicable to the agency. 40 C.F.R. ß 1506.6(c).

The Corps received more than 250 requests for a hearing. District Engineer Volz denied one saying, "Many technical issues have been raised ... and to hold a public hearing or to further extend the comment period is not considered warranted to gather more technical data." He noted that public meetings held by HBHC and several governmental bodies and the Corps' notice adequately informed the public. Volz concluded that a hearing would be useful only as a forum to enable project proponents and opponents to air their views. He also concluded that because the Corps was aware of strong support on both sides, a hearing was unnecessary.

In light of the facts identified by Volz and his thorough analysis of all the relevant factors, we hold that the Corps did not abuse its discretion in denying requests for a public hearing.

D. *District Court Exclusion of Extra-Record Evidence*

[17] Finally, Payette argues that the district court erred by refusing to admit its experts' testimony and affidavits regarding the project's effects on water quality, fisheries, bald eagles, recreation and aesthetics. We review for abuse of discretion the court's decision to exclude evidence. *Roberts v. College of the Desert*, 870 F.2d 1411, 1418 (9th Cir.1988).

Generally, review of agency action, including review under NEPA, is limited to the administrative record but may be expanded beyond the record if necessary to explain agency decisions. *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir.1988). When a failure to explain action frustrates judicial review, the reviewing court may obtain from the agency, through affidavit or testimony, additional explanations for the agency's decisions. *Id.* The extra-record inquiry is limited to determining whether the agency has considered all relevant factors and has explained its decision. *Id.* The district court may also look outside the record when the agency has relied on documents not in the record and when supplementing the record is necessary to explain technical terms or complex subject matter. *Id.*

The court excluded the testimony of 13 of Payette's 14 proposed witnesses but allowed William McDonald, the Corps employee who wrote the document, to testify about the agency's review of HBHC's application. The court did not abuse its discretion in excluding the proffered evidence. Much of it addressed concerns that the same witnesses had already raised during the public comment period. The administrative record sufficiently explained the Corps' decision and showed that the agency considered the relevant factors. No additional information was necessary for the court's review.

III

We conclude that the district court did not err in dismissing this action. It did err in holding that whether the Corps had jurisdiction over the canal wetlands was moot. Because the Corps' decision that the wetlands were non- jurisdictional was not arbitrary and capricious, however, we need not remand for further proceedings.

We AFFIRM the district court on all issues except

the mootness issue on which we REVERSE. Because Payette and Idaho Rivers are not prevailing parties, we deny their request for attorneys fees.

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ORIGINAL

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION and CITIZENS AGAINST SEA-TAC EXPANSION, Appellants, v. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, and THE PORT OF SEATTLE, Respondents.	PCHB No. 01-160 CERTIFICATE OF SERVICE

I am employed with the law firm of Marten Brown Inc., whose address is 421 Capitol Way S., Suite 303, Olympia, Washington 98501; I am not a party to the cause; and I am over the age of eighteen years. I further declare that on the date hereof I served a copy of:

Prehearing Brief of Port of Seattle
Certificate of Service

by personally hand delivering same on this day to:

Pollution Control Hearings Board
4224 6th Avenue SE
Row 6, Bldg. 2, MS 40903
Lacey, WA 98504

and to: Washington State Attorney General's Office
Ecology Division
2425 Bristol Court SW, 2nd Floor
Olympia, WA 98504-0117

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed at Olympia, Washington, this 12th day of March 2002.

Julie Banting

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