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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Appellant,

v.

DEPARTMENT OF ECOLOGY AND  
THE PORT OF SEATTLE,

Respondents.

PCHB Case No. 01-160

PORT OF SEATTLE'S REPLY  
MEMORANDUM  
SUPPORTING MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT ON SEPA ISSUE

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

In the Port of Seattle's Motion For Partial Summary Judgment On SEPA Issue, respondent Port of Seattle has requested to Board to enter summary judgment on Issue No. 14 ("Did Ecology and the Port comply with SEPA?").

In its motion, the Port pointed out that, because the jurisdiction of the Board is limited and because the SEPA statute allows only limited types of SEPA appeals, (a) the Board did not have jurisdiction to hear any administrative SEPA appeal of Port actions and (b) the Board did not have jurisdiction to hear any administrative SEPA appeal of Ecology action. Ecology's SEPA action was limited to consideration of SEPA conditions in any case because the Port was the lead agency for SEPA purposes.

**ORIGINAL**

**AR 003205**

1 The Port's motion also pointed out that the Port has its own agency administrative appeal  
2 process which requires an aggrieved party to appeal SEPA issues to the Port's independent Hearing  
3 Examiner.<sup>1</sup> In this case, the ACC appealed both the Port's Final Environmental Impact Statement  
4 ("FEIS") and the Port's Supplemental Environmental Impact Statement ("SEIS").<sup>2</sup> The Port's  
5 Hearing Examiner, the King County Superior Court, and the Washington Court of Appeals all found  
6 that the FEIS and the SEIS were legally adequate.<sup>3</sup> For Port SEPA decisions that are not  
7 administratively appealable, governing Port regulations require an aggrieved party to appeal to  
8 Superior Court within 21 days.<sup>4</sup> In this case, the Port made a formal decision on August 13, 2001 that  
9 no further supplemental environmental impact statement under SEPA was required.<sup>5</sup> No party  
10 appealed that decision not to require an additional supplemental EIS. Accordingly, the Port's decision  
11 that no additional supplemental EIS is required is a final administrative decision that cannot be further  
12 collaterally challenged before this Board.

13 In addition, in an order issued August 8, 2001, the FAA determined that no supplemental  
14 environmental impact statement was required for the Port's Master Plan Update development actions  
15 (including the new third runway). Under 49 U.S.C. § 46110, an order of the FAA must be appealed to  
16 the federal circuit court within 60 days after issuance of the order. Like the Port's decision that a  
17 supplemental EIS is not required, the FAA's decision that a new supplemental EIS is not necessary is  
18 a final and unappealable determination which cannot not be appealed.

19 In their response to the Port's motion, appellants Airport Communities Coalition ("ACC") and  
20 Citizens Against Sea-Tac Expansion ("CASE") do not challenge the thrust of the Port's motion. In  
21 fact, appellants admit that no appeal of any Port decision is allowed to this Board.<sup>6</sup> Appellants do not

22  
23 <sup>1</sup> Declaration of Michael Feldman Supporting Port Of Seattle's Motion For Partial Summary Judgment  
On SEPA Issue (Feb. 7, 2002) ("Feldman Dec.") at Exhibit F.

24 <sup>2</sup> Feldman Dec. ¶¶ 6 and 7, Exhibits G, H and I.

25 <sup>3</sup> *Id.*

26 <sup>4</sup> Feldman Dec. at Exhibit F, p. 4 ("Port decisions not subject to administrative appeal under this  
Section may be appealed to the King County Superior Court y application for writ of review by an  
appellant within 21 days of the date the decision was is issued.")

<sup>5</sup> Feldman Dec. ¶ 6 and Exhibit M.

<sup>6</sup> See ACC and CASE's Response at page 7, lines 19 – 20.

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1 address the arguments that the Board lacks jurisdiction to hear administrative SEPA appeals in this  
2 case. Accordingly Issue No. 14 should be dismissed.

3 Instead, appellants claim that they are not really raising a SEPA appeal, but that they can raise  
4 SEPA issues pursuant to Issue No. 2 (whether Ecology's Coastal Zone Management Act consistency  
5 determination was consistent with Washington's Coastal Zone Management Program). The Port  
6 agrees that the Board has jurisdiction to consider whether Ecology's consistency determination  
7 violated the Washington Coastal Zone Management Program. However, when the Board looks at the  
8 issues raised by appellants' in their response (Issue No. 2), it is clear the appellants' position in their  
9 response brief is wrong and that the Board should grant summary judgment that the requirements of  
10 SEPA were complied with in this case, as a matter of law, for three independent reasons:

11 First, SEPA is a procedural statute and does not require any particular substantive result.<sup>7</sup>  
12 Here, the lead agency for the proposal was the Port of Seattle, and the proposed project is to construct  
13 new improvements at Seattle Tacoma International Airport (the "Airport"), including a new runway  
14 and associated taxiways and navigational aids, an extension of an existing runway, runway safety  
15 areas, terminal improvements, parking improvements, an aviation support area, and expanded and  
16 relocated support facilities.<sup>8</sup> The Port issued a Final EIS and a Supplemental EIS on that project.  
17 Further, even after the mitigation plans that appellants are complaining about were well underway in  
18 August 2001, the Port formally determined that no additional supplemental EIS was required.<sup>9</sup> That  
19 decision was a formal, appealable decision of the lead agency, which could be appealed only to King  
20 County Superior Court.<sup>10</sup> Appellants may not collaterally attack that lead agency decision in this  
21 forum, and therefore the SEPA "enforceable policy" of Washington's Coastal Zone Management  
22 Program has been complied with.

23 **AR 003207**

24 <sup>7</sup> *Moss v. Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001) (SEPA does not demand a particular  
25 substantive result in government decision making).

<sup>8</sup> Feldman Dec. Exhibit C (SEIS at page 3 – Fact Sheet).

26 <sup>9</sup> Feldman Dec. Exhibit M (August 10, 2001 Addendum – incorporating FAA's NEPA reevaluation  
and determining that "further supplemental environmental analysis is not required under SEPA").

<sup>10</sup> Feldman Dec. Exhibit F (Port Resolution 3211 at page 4).

1 Second, appellants argument that the scope of the Port's proposal has changed has no merit.  
2 The proposed action has consistently been to build a new runway (including associated taxiways and  
3 navigational aids), extend an existing runway, construct runway safety areas, construct terminal  
4 improvements, construct parking improvements, future construction of an aviation support area, and  
5 the expansion and relocation of Airport support facilities.<sup>11</sup> That proposal has not changed since the  
6 FEIS was issued in 1996, did not change when the Port issued the SEIS in 1997, and has certainly not  
7 changed since the Port's formal determination in August 2001 that a new supplemental EIS is not  
8 required. Accordingly, the factual predicate for appellants' argument is incorrect and their SEPA  
9 claims must be dismissed.

10 Third, the only three elements that appellants complain about are the Natural Resources  
11 Mitigation Plan, the Stormwater Management Plan, and the Low Flow Mitigation Plan. All three of  
12 these plans are not part of the project action, but are mitigation measures designed to mitigate impacts  
13 of the project action. Even though the need for these types of mitigation was discussed at some length  
14 in the FEIS and SEIS and Port Addenda (appellants ignore the extensive appendices to the FEIS and  
15 SEIS), SEPA does not require detailed analysis of mitigation plans. Therefore, for this third,  
16 independent reason, appellants' SEPA claims must be dismissed.

## 17 II. LEGAL ARGUMENT

### 18 A. The ACC's Burden on Summary Judgment.

19 When opposing summary judgment, the opposing party must set forth specific facts showing  
20 that there is a genuine issue of material fact. *Hauber v. County of Yakima*, 107 Wn. App. 437, 448, 27  
21 P.3d 257 (2001). A material fact is one on which the outcome of the issue depends. *Ruff v. King*  
22 *County*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995). Here, there is not a genuine issue of material  
23 fact, and the Board should grant the Port's requested judgment.  
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<sup>11</sup> Feldman Dec. Exhibit C (SEIS at page 3 – Fact Sheet).

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1 **B. ACC Fails to Address the Procedural and Jurisdictional Issues Raised in the Port's**  
2 **Motion.**

3 Appellants' response only addresses the potential for raising SEPA issues tangentially under  
4 Issue No. 2 (Coastal Zone Management Act compliance) and does not address any of the jurisdictional  
5 and procedural arguments about Issue No. 14 – whether there is an administrative SEPA appeal of  
6 Port or Ecology SEPA determinations in this action. For that reason, Issue No. 14 should be  
7 dismissed. As discussed below, appellants' claim that Ecology did not comply with the Coastal Zone  
8 Management Act ("CZMA") and Washington's Coastal Zone Management Program ("CZMP"), when  
9 Ecology determined that the enforceable policies of the CZMP had been complied with by the SEPA  
10 lead agency, is without merit.

11 **C. ACC's Alleged SEPA Appeal Under the Coastal Zone Management Act Has No Merit.**

12 Under the CZMA, an applicant for a federal permit that could affect land or water use in the  
13 coastal zone must certify to the federal agency that the activity complies with the "enforceable  
14 policies" of the state's coastal zone management program. 16 U.S.C. §1456(c)(3)(A). Enforceable  
15 policies are legally binding state policies that are enforceable through constitutional provisions, laws,  
16 regulations, land use plans and ordinances and otherwise, by which that state exerts control over  
17 private and public land and water uses in the coastal zone. 16 U.S.C. §1453(6a). The state agency  
18 (here, Ecology) then notifies the federal agency whether it concurs or disagrees with the applicant's  
19 certification. *Id.*

20 In complying with the Coastal Zone Management Act, the state of Washington drafted a  
21 Coastal Zone Management Program. In the CZMP, the state of Washington chose to rely on existing  
22 state environmental laws, rather than draft new coastal zone protection. CZMP at p. 97. In the  
23 CZMP, the Washington enforceable policies include the Shoreline Management Act, all local  
24 shoreline master programs throughout the state, the Clean Water Act, the State Environmental Policy  
25 Act, the Energy Site Evaluation Council law, and the Ocean Resources Management Act.  
26

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1 Incorporation of those existing state laws into the state's CZMP necessarily included the  
2 entirely of this state's SEPA law – including the lead agency rules and the provisions allowing for lead  
3 agency's to allow for administrative appeals of agency decisions.

4 **1. The CZMA and CZMP Do Not Allow ACC to Collaterally Attack Final,  
5 Unappealed Lead Agency SEPA Decisions.**

6 Clearly, the state's entire SEPA law is incorporated into the Washington CZMP as one of the  
7 "enforceable policies" and that includes all the rules and regulations regarding which agency is the  
8 lead agency for SEPA purposes. Here, the proposed improvements at the Airport are a proposal by a  
9 governmental body and the Port is the lead agency pursuant to the SEPA Rules. WAC 197-11-926.  
10 The Washington courts have also made it clear that SEPA is a procedural statute and does not require  
11 any particular substantive result. *Moss v. Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001).

12 In this case, the lead agency for the project was the Port of Seattle. The proposed project is  
13 clearly described in the Port's FEIS and SEIS as the construction of new improvements at the Airport,  
14 including a new runway and associated taxiways and navigational aids, an extension to an existing  
15 runway, runway safety areas, terminal improvements, parking improvements, an aviation support area,  
16 and expanded and relocated support facilities.<sup>12</sup> The Port issued a Final EIS and a Supplemental EIS  
17 on that project. Those SEPA documents were appealed by the ACC, and both the Port's independent  
18 Hearing Examiner and the Washington courts upheld the legal adequacy of the Port's environmental  
19 review.

20 Although the plans to mitigate the impacts of the new paving and the wetland filling were  
21 discussed in the FEIS and SEIS, those mitigation plans were refined further as additional information  
22 was obtained. However, after the Natural Resources Mitigation Plan, the Stormwater Management  
23 Plan, and the Low Flow Mitigation Plan were well underway in August 2001, both the FAA and the  
24 Port formally reviewed the proposed project and determined that no additional supplemental EIS was  
25 required.<sup>13</sup> That Port decision not to perform a second supplemental EIS was a formal, appealable

26 <sup>12</sup> Feldman Dec. Exhibit C (SEIS at page 3 – Fact Sheet).

<sup>13</sup> Feldman Dec. Exhibit M (Port's August 10, 2001 Addendum – incorporating FAA's NEPA reevaluation and determining that "further supplemental environmental analysis is not required under

1 decision of the lead agency. Pursuant to Port Resolution 3211, that decision could be appealed within  
2 21 days to King County Superior Court.<sup>14</sup> Because appellants did not appeal that Port decision, it is a  
3 final, administrative decision that cannot now be collaterally attacked before this Board.

4 In appellants' response, they confuse the SEPA compliance for the Master Plan Update  
5 development actions (which included the FEIS, SEIS and several substantive SEPA Addenda) with a  
6 number of other projects at the Airport which are not part of the Master Plan Update development  
7 actions (such as substation improvements, IWS lagoon upgrades, temporary taxiway stubs, the  
8 ongoing Part 150 noise compatibility programs, etc.). Appellants' confusion seems to be created  
9 because the FAA mentions these independent projects in an attachment to the FAA's August 2001  
10 Environmental Reevaluation.<sup>15</sup> The FAA mentioned those projects in the context of its overall review  
11 of Airport activities. All those Port projects are independent from the Master Plan Update  
12 development actions, which include the third runway and other elements for which a §404 permit is  
13 needed from the U.S. Army Corps of Engineers. And at least one of the projects mentioned is not  
14 even a Port project – the Terminal Approach Control radar facility (TRACON) which is an  
15 independent FAA project.<sup>16</sup>

16 The Port's proposed project has not expanded since the FEIS was issued in 1996.  
17 Accordingly, Ecology's concurrence that the enforceable policy of SEPA has been complied with is  
18 correct and is unassailable. ACC and CASE may not collaterally attack that agency decision in this  
19 forum after failing to appeal the lead agency's decision in the first instance.

20 **2. ACC's Factual Arguments About the Scope of SEPA Analysis Are Demonstrably**  
21 **Incorrect.**

22 Appellants argue that the scope of the Port's proposal has changed. This argument is without  
23 merit. The proposed action has consistently been to build a new runway (including associated

24 SEPA"); Feldman Dec. Exhibit L (FAA's August 8, 2001 Environmental Reevaluation and Record of  
25 Decision determining that "A second supplemental EIS would not show significantly different impacts  
of the Project").

26 <sup>14</sup> Feldman Dec. Exhibit F (Port Resolution 3211 at page 4).

<sup>15</sup> Feldman Dec. Exhibit L.

<sup>16</sup> *Id.* at Attachment A

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1 taxiways and navigational aids), extend an existing runway, construct runway safety areas, construct  
2 terminal improvements, construct parking improvements, future construction of an aviation support  
3 area, and the expansion and relocation of Airport support facilities.<sup>17</sup> That proposal has not changed  
4 since the FEIS was issued in 1996, did not change when the Port issued the SEIS in 1997, and has  
5 certainly not changed since the Port's formal determination in August 2001 that a new supplemental  
6 EIS is not required. Accordingly, the factual predicate for appellants' argument is incorrect and their  
7 SEPA claims must be dismissed.

8 Appellants' claim that there were only scant paragraphs mentioning stormwater mitigation,  
9 natural sources mitigation and groundwater mitigation are also incorrect. The FEIS contained a  
10 detailed draft of a natural resources mitigation plan showing the general approach to mitigation for  
11 wetland filling impacts.<sup>18</sup> The FEIS also contained studies of groundwater and surface water impacts  
12 to the area creeks, including suggested mitigation for potential low flow impacts and detention  
13 volumes for peak flow impacts.<sup>19</sup> Thus, even though not required by SEPA for mitigation plans,  
14 significant information about impacts and potential mitigation was included in the FEIS.

15 **3. ACC's Legal Argument About SEPA Review of Mitigation Measures Is Legally**  
16 **Faulty.**

17 In appellants' response, the only three elements that appellants complain about are the Natural  
18 Resources Mitigation Plan, the Stormwater Management Plan, and the Low Flow Mitigation Plan.  
19 These three plans are all mitigation measures, which are designed to lessen the impacts of the Airport  
20 construction. Even if appellants could collaterally challenge the lead agency's decision not to perform  
21 an SEIS at this late date, and they cannot, SEPA does not require detailed analysis of mitigation plans.  
22 *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn. App. 439, 447 – 448, 832 P.2d 503  
23 (1992) (a fully developed plan detailing what steps will be taken to mitigate adverse environmental

24 <sup>17</sup> Feldman Dec. Exhibit C (SEIS at page 3 – Fact Sheet).

25 <sup>18</sup> Declaration of Roger Pearce Supporting Port of Seattle's Motion for Partial Summary Judgment on  
26 SEPA Issue ("Pearce Dec.") at Exhibit A, which is FEIS Appendix A (Natural Resource Mitigation  
Plan).

<sup>19</sup> Pearce Dec at Exhibits B and C, which are portions of FEIS Appendix G (Hydrologic Modeling  
Study) and FEIS Appendix Q (Water Studies).



1 impacts is not required); WAC 197-11-440(6) (an EIS is not required to analyze mitigation measures  
2 in detail unless they involve substantial changes to the proposal). Here, the mitigation plans for the  
3 Port project do not make substantial changes to the proposal. As discussed above, the proposal has  
4 been essentially unchanged since 1996. Because SEPA does not require discussion of mitigation plans  
5 in the detail claimed by appellants, the enforceable policies of SEPA (a procedural statute) were met in  
6 this case.

#### 7 IV. CONCLUSION

8 For the reasons stated above, and for the reasons set forth in the Port's motion and in Ecology's  
9 Memorandum In Response, the Port respectfully requests the Board enter the requested partial  
10 summary judgment.

11  
12 Respectfully submitted this 25<sup>th</sup> day of February 2002.

13  
14 PORT OF SEATTLE

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**AR 003213**