Oral Argument Requested

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and THE PORT OF SEATTLE, Respondents.	PCHB No. 01-160 ACC'S AND CASE'S RESPONSE TO THE PORT OF SEATTLE'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SEPA

I. INTRODUCTION AND SUMMARY OF RESPONSE

The Port's motion for summary judgment on SEPA issues fundamentally misrepresents both the substance of ACC's SEPA issues, and the nature of the SEPA review conducted to date. In particular, the issue before the Board is not whether the Port's FEIS and SEIS were legally inadequate at the time they were adopted in 1996 and 1997, respectively. It is, rather, whether, in light of the current scope of the Port's proposal and the significant new plans it has proposed to accomplish it, Ecology correctly found the Port in compliance with SEPA for purposes of CZMA certification (and Clean Water Act § 401 reasonable assurance).

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Although Ecology's process of concurring on a CZMA certification may itself be categorically exempt from SEPA, the substantive CZMA decision itself is not. Under CZMA, Ecology had to determine whether the Port was in compliance with SEPA.[1] Thus, the SEPA issues raised by ACC arise as one of the several laws which come to bear on the question of CZMA compliance in the parties' Stipulated Issue No. 2:

> Does Ecology's concurrence with the Port's consistency certification, issued pursuant to the Coastal Zone Management Act ("CZMA"), fail to comply with the requirements of the CZMA and Washington's approved Coastal Zone Management Program?

In short, the arguments and authority the Port offers fail to support the dismissal of Agreed Issue No. 14. The Port's arguments succeed only in knocking down a half-dozen straw men that are not at issue.[2]

I. FACTS

A. Projects for Which No SEPA Review Has Been Performed

While the Port has plainly generated a great deal of SEPA-related paperwork, the Port fails to mention the number of significant, updated proposals for which no SEPA review has been conducted, including:

- the Natural Resources Mitigation Plan (November, 2001);
- the Comprehensive Stormwater Management Plan (December, 2000);

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[1] The SEPA Rules also provide that where a project includes both exempt and non-exempt parts, the overall project is not categorically exempt. *See* WAC 197-11-305(b). Here, the Port's Third Runway and Master Plan Update (MPU) JARPA Projects plainly include substantial components that are not categorically exempt, such as an HPA, which is required where, as here, the record reflects that removal of streambed materials and stream channel relocation are involved, per WAC 197-11-835(3).

[2] After three o'clock yesterday, February 19, after the Board required that this response be filed by noon today, the Department of Ecology served a seven-page brief supporting the Port's motion. ACC and CASE have had no opportunity to respond to Ecology's submission, but reserve the right to do so.

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- the Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal (December, 2001).[3]

While earlier versions of some of these were discussed in the Port's 1997 and earlier SEPA documents, the changes have been dramatic. For example, as the record before the Board on the Stay[4] proceeding already reflects, there has been no SEPA review of the Port's latest iteration of a low flow plan. While the Port asserts that the FEIS included a discussion of the plan to mitigate "water quality and hydrology impacts of the project, including peak flow and low flow impacts" (Port at 3), review of the cited text (*see,* Port at 3, n.3, *citing* "FEIS Chap. IV, § 10 (Water Quality and Hydrology)") confirms that the relevant section of the FEIS contains no discussion of the potential environmental impacts of the Port's new plan, first proposed little more than a year ago, to construct a system to store stormwater in vaults for periods of up to nine months and somehow use it to augment summer low flows, as proposed in the December 2001 "Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal." This proposal raises sensitive questions of temperature, pollution, and efficacy -- none of which has been addressed in an EIS.

[3] The cover page, table of contents, executive summary and introduction to the December 2001, Low Flow Analysis for the Third Runway is attached as Exhibit A to the Witek Declaration accompanying this Response.

[4] ACC incorporates that record her by reference, including in particular the Declarations of ACC experts Willing, Lucia and Rozeboom, describing the Port's latest low flow proposed plan and facilities.

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B. STIA Projects for Which the Port Has Issued Determinations of Non-Significance

The Port's SEPA "compliance" over the last five years has largely been through self-issued Determinations of Nonsignificance and Addenda[5] for significant projects. These include:

- South SeaTac Electrical Substation Upgrade;
- Upgrade and Expansion of IWS Lagoon 3;
- Aircraft Hydrant Fueling System;
- North Electrical Substation;
- Temporary Aircraft Parking-Taxiway Stubs;
- Part 150 Noise Compatibility Plan;
- Development of Landscaping Standards; and
- FAA Terminal Radar Approach Control (TRACON) Facility.

See, Feldman Dec. Exh. L, Attachment A at A-1 - A-7; *see also,* October 17, 2001 TRACON DNS (Witek Dec. Exh. D).

> The TRACON facility for which the Port issued a DNS is described as consisting of:
>
> A 2-story 50,000 square foot building, parking for about 150 cars, internal access roads, emergency generator, guard house, and landscaped grounds. These uses will occupy about 9 acres of the 19-acre site.

Witek Dec. Exh. D, at 1. A few bare-bones "addenda" (a handful of pages) have also been issued, with the longest one reserved for the Auburn "mitigation" site located several miles away form the area where the Port's proposals would be constructed.

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[5] Copies of three of these Addenda are attached to the Declaration of Michael Feldman as Exhibit J (January 24, 2000, Addenda regarding impacts of temporary construction of SR 509 interchange); Exhibit K (May 5, 2000, Addendum regarding Auburn wetland mitigation site), and Exhibit M (Addendum #4, regarding Borrow Source Areas 3 and 4, dated August 10, 2001).

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Ironically, this pretense of compliance has been carried out for only some projects, while others (including ones with obvious potential impacts such as the low flow facility and plan) have been ignored as topics for SEPA review. Instead, they have been treated as topics for lengthy "reports" to DOE which avoid any of the SEPA procedures for public comments on drafts, issuance of a final requiring response to comments and the like. This is directly contrary to SEPA's purpose.

C. Lack of SEPA Analysis of Cumulative Impacts

The Port's SEPA analyses have not addressed the cumulative impacts likely to result from its new and radically modified proposals, to be implemented along with and as part of the proposed Third Runway and Master Plan Update proposals. This is readily confirmed from the Port's own documents submitted in support of its motion. For example, the FEIS chapter on hydrology devotes a mere three paragraphs to its discussion of cumulative impacts. FEIS at IV.10.16. The discussion does not identify a single additional project or quantify any additional impacts. FEIS at IV.10.16.

Similarly, the FEIS chapter on wetlands devotes just one paragraph to its discussion of cumulative impacts (FEIS at IV.11.5), while the FEIS chapter on earth devotes a single paragraph to its discussion of cumulative impacts. *Id.* at IV.19.18. Neither paragraph identifies a single additional project or quantifies any additional impacts. *Id.* at IV.11.5, IV.19.18.

II. LAW OF SUMMARY JUDGMENT

> Summary judgment will be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the burden of demonstrating there is no genuine dispute as

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to any material fact. All facts and reasonable inferences are considered in a light most favorable to the nonmoving party.

City of Lakewood v. Pierce County, 144 Wn.2d 118, 125, 30 P.3d 446 (2001) (citations omitted). "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) (citations omitted). The trial court must deny summary judgment if the evidence and inferences create any question of material fact. Bishop v. Jefferson Title Co., 107 Wn.App. 833, 841, 28 P.3d 802 (2001) (citations omitted).

Since ACC and CASE are the "non-moving party," the law requires that all facts and reasonable inferences therefrom be considered in the light most favorable to ACC and CASE. As discussed further below, the evidence and reasonable inferences confirm the existence of genuine issues of material fact precluding summary judgment here.

III. ARGUMENT

A. The Board Has Jurisdiction to Determine Whether the Port's Proposal Is Consistent with the Laws Enforced Under Washington's Coastal Zone Management Program, which Includes SEPA

The PCHB unquestionably has "jurisdiction to hear and decide appeals from" decisions of the Department of Ecology including "the issuance, modification, or termination of *any* permit, certificate, or license by the department[.]" RCW 43.21B.110(1), (c) (emphasis added). This broad and unqualified language easily includes the department's issuance of the CWA section 401 Certificate and CZMA concurrency decision at issue here.[6] *See, e.g.,* Okanogan

[6] There's no question that the Board has jurisdiction over an appeal of the Department's Coastal Zone Management Act concurrence. The Port itself, in PCHB No. 98-105/98-150, appealed the CZMA concurrence for the 1998 401 Certification and CZMA concurrence for the Third Runway Project.

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Highlands Alliance v. Washington State Department of Ecology, "Final Findings of Fact, Conclusions of Law and Order," PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019 (2000 WL 46743 at *18) (holding the Board has jurisdiction pursuant to Chapter 43.21B RCW to consider appeals of Ecology decisions including the adequacy of mitigation plans and the issuance of section 401 certifications pursuant to Chapter 43.21B RCW).

ACC has appealed both the 401 certification and Ecology's CZMA concurrence for the Third Runway Project. In determining whether or not Ecology appropriately issued the CZMA concurrence, the Board must look to whether the Port's Third Runway Project is consistent with the enforceable policies of Washington's Coastal Zone Management Program. *See* Managing Washington's Coast - Washington's Coastal Zone Management Program, Department of Ecology Publication Number 00-06-029 (February 2001) (the "CZMP"). Those enforceable policies including the Shoreline Management Act, Ch. 90.58 RCW ("SMA"); the Clean Water Act, 33 U.S.C. §§1251 to 1387 ("CWA"), and its State counterpart, Ch. 90.48 RCW; the Clean Air Act, 42 U.S.C. §§ 7401 to 17671 ("CAA"), and its State counterpart, Ch. 70.94 RCW; and the State Environmental Policy Act, Ch. 43.21C RCW ("SEPA"). CZMP, pp. 97, 100-101.

The Port attempts to avoid this obvious basis for jurisdiction in part by characterizing the SEPA issue as a challenge to the Port's actions. (Port at 2, 9-10.) But ACC is not asking the Board to hear an appeal of any decision made by the Port of Seattle. Rather, the Board must determine whether, *because there was not SEPA compliance,* Ecology's CZMA concurrency determination and 401 Certification are invalid. The Board plainly has jurisdiction under RCW Chapter 43.21B over these SEPA-based claims, and to conduct a hearing on them as part of the overall trial on the merits set to commence in one month.

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B. The Port's Third Runway Project Is Not Categorically Exempt and Significant Portions of the Proposal Have Been Segmented or Subject to No SEPA Review

The Port makes much of the fact that the actual decisions made by Ecology, the 401 Certification and CZMA Concurrency orders, are "categorically exempt" from SEPA compliance. *See* Port at 2, 12-13, *citing* WAC 197-11-800(10) and 855(3)). However, ACC is not arguing that the process by which Ecology issues a certification is subject to SEPA review. Rather, the Board, in reviewing the certification for error, must determine whether Ecology was correct that SEPA compliance had occurred. Here, it is apparent that the underlying proposal (the Third Runway and Related Master Plan Update Projects) is subject to SEPA review, that significant new information regarding the impacts of the project has been generated since the SEIS, and that such information has not been subjected to proper review under SEPA.

Under SEPA, a development proposal may not be segmented for purposes of environmental review. Merkel v. Port of Brownsville, 8 Wn. App. 844, 850-852, 509 P.2d 390 (Div. II 1973) (SEPA violated by division of a proposed development project into wetland and upland segments, circumventing environmental review of the entire project). Parts of proposals which are "related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document." WAC 197-11-060(3)(b). Phased review of a project is clearly inappropriate where it would serve only to avoid discussion of cumulative impacts. WAC 197-11-060(5)(d)(ii). *Indian Trail Property Owners Association v. City of Spokane*, 76 Wn. App. 430, 443, 886 P.2d 209 (Div. 3 1994).

Here, as noted above, a number of significant elements of the Port's current project have either been subjected to no SEPA review, or have been "addressed" only in Determinations of

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Nonsignificance or bare-bones addenda. The Port plays a word game, characterizing some of its new plans and proposals as "mitigation," as if this insulates them from environmental review under SEPA. Ecology's own SEPA Handbook implicitly rejects this:

> When a supplemental EIS is being prepared after a final EIS is issued, agencies with jurisdiction should consider waiting to issue permits until after the final supplemental EIS is issued. Although the SEPA Rules do not address this, the additional analysis, changes to the proposal, or new mitigation may be relevant to other agencies' decisions.

Ecology SEPA Handbook (1998 Ed.), Publication #98-114, at p. 54.[7] This suggests that the proper procedure here would have been for the Port to address its new plans and proposals in a supplemental EIS, and provide it to Ecology before a decision was made on the CZMA certification. Instead, the Port has submitted non-SEPA "impact analyses" to Ecology after Ecology's decision was made, with no pre-decision public review or comment or draft before it is placed into final.

A supplemental impact statement is called for when "there are substantial changes so that the proposal is likely to have significant adverse impacts . . . [or there is] new information indicating a proposal's probable significant adverse impacts." WAC 197-11-600(4)(d). Rather than issue an additional SEIS, the Port has segmented environmental review through determinations of nonsignificance and by the issuance of four separate addenda. Again, Ecology's SEPA Handbook admonishes that:

> Addendums are not appropriate if the changes or new information indicates any new or increased significant adverse environmental impact.

[7] *Cf.* WAC 197-11-330(5) (even proposals for pollution prevention may have significant impacts). *See also* excerpt from transcript of deposition of Tom Luster, discussing concerns regarding failure to address cumulative impacts and impacts of mitigation (Witek Decl., Ex. E).

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SEPA Handbook, at p. 28 (emphasis in original). This avoidance of discussion of cumulative impacts is not permitted under SEPA. *See e.g., Indian Trails Property Owner's Association v. City of Spokane*, 76 Wn. App. 430,443, 886 P.2d 209 (1994) (noting that phased review is inappropriate where it results in the avoidance of discussion of cumulative impacts).

C. ACC Is Not Collaterally Estopped from Raising New SEPA Issues

The Port's collateral estoppel argument (Port at 2, 12) depends on Board acceptance of the concept that the Port may change its plans and proposals over a five-year period while ACC may not question such changes under SEPA because the SEPA documents of five years ago were deemed adequate at the time. ACC does not seek to relitigate any matter previously adjudicated, but to address whether the Ecology certification may stand in light of new plans and impacts disclosed in the last five years (some in the last five months). As Ecology implicitly concedes (Ecology Brief at 3), the doctrine of collateral estoppel does not apply because no court or reviewing authority has previously considered the issues raised in this appeal.

According to the Washington Supreme Court, collateral estoppel requires:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Hadley v. Maxwell, 144 Wn.2d 306, 311-12, 27 P.3d 600 (2001), *quoting* Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wn.2d 413, 418, 780 P.2d 1282 (1989) (additional citations omitted). These standards are clearly not met here. The Port's resort to them suggests its concern that the PCHB not reach the merits of what the Port has done (or not done) under SEPA in the last five years.

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The Port's implicit assertion that ACC seeks to relitigate the adequacy of the Port's six year old FEIS and the 1997 SEIS and FSEIS borders on the frivolous. ACC's appeal of the 401 Certification and CZMA decision raises new issues which have never been adjudicated, and which rely on facts not even in existence at the time of issuance of the last EISes.

D. Ecology's 401 Decision and CZMA Concurrency Decision Are Appealable Here

The Port next argues there is no administrative appeal mechanism authorizing the Board's review of ACC's SEPA issues. (Port at 10.) The Port further suggests that the Board cannot hear appeals involving SEPA because it is not a "legislative authority[.]" *See,* Port at 10, *citing* RCW 43.21C.060. As an initial matter, the Port quotes SEPA out of context. Section 060 provides that *when* a governmental action "is conditioned or denied by a nonelected official of a local governmental agency," *then* "the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals." RCW 43.21C.060 (emphasis added).[8] The Port's distortion of this section to apply here is revealing of the paucity of authority for its position. As noted above, there is authority in the Port's own prior actions for appeal of the merits of an Ecology CZMA certification to the Board. The Port itself did so in 1998 concerning the third runway.

[8] While the SEPA rules define the term unqualified "agency" to mean "any state or local governmental body" (*see,* WAC 197-11-714), the quoted text plainly uses the more specific phase "local governmental agencies" to refer to local governmental agencies -- not to the Department of Ecology. *See,* WAC 197-11-762 (defining "Local agency").

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Nothing in SEPA precludes such an appeal.[9] Indeed, the Battle Mountain Gold case provides direct precedent. *See* Okanogan Highlands Alliance, "Supplemental Order on Petition for Reconsideration," (2000 WL 194022). In that reported decision, the PCHB addressed outstanding legal issues, including whether Ecology complied with SEPA in approving a streamflow mitigation plan, whether Ecology was required to prepare a supplemental EIS, and whether the SEPA Addendum issued by Ecology about a month before it issued the 401 Certification "adequately complied with the procedural requirements of SEPA[.]" *Id.*, 2000 WL 194022 at *1, *and see,* Okanogan Highlands Alliance, "Final Findings of Fact, Conclusions of Law and Order," 2000 WL 46743 at 11-12, ¶¶ 31-32. In its Supplemental Order, the Board ruled that Ecology was permitted there to adopt addenda to the final EIS (rather than a supplemental EIS), but further held that the EIS addenda were inadequate. Okanogan Highlands Alliance, 2000 WL 194022 at *2. "In short," the Board held, "the addenda fail to provide sufficient information to satisfy the fundamental SEPA policy of fully informed decisions affecting the environment." *Id.* That is precisely the case here for the Port's slew of self-serving DNSes and skeletal addenda.

E. ACC Does Not Argue that Ecology "Failed to Act" -- Rather, Ecology's CZMA Action Was in Error

ACC does not argue that Ecology "failed to act." (MSJ at 1-2) For example, ACC is not asserting that Ecology was required to assume lead agency status, as it is authorized to do under

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[9] "SEPA creates no express mechanism for appeal; rather, it overlays and supplements existing authority." South Hollywood Hills Citizen Ass'n for Preservation of Neighborhood Safety and the Environment v. King County, 33 Wn.App. 169, 173, 653 P.2d 1324 (1982), *rev'd on other grounds*, 101 Wn.2d 68 (1984), *citing,* Department of Natural Resources v. Thurston County, 92 Wn.2d 656, 601 P.2d 494 (1979); Polygon Corp. v. Seattle, 90 Wn.2d 59, 578 P.2d 1309 (1978).

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WAC 197-11-948, given the Port's abuse of its DNS determinations. Rather, once again, because the Port did not comply with SEPA, and Ecology's concurrence in the Port's CZMA certification and 401 certification were therefore invalid.

IV. CONCLUSION

For all the reasons discussed above, in the attachments, and as reflected in the Stay record incorporated here by reference, the Port's motion should be denied.

DATED this 20th day of February, 2002.

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