

RECEIVED
FEB 20 2002

ENVIRONMENTAL
HEARINGS OFFICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
)
Appellant,)
)
CITIZENS AGAINST SEA-TAC)
EXPANSION,)
)
Intervenor/Appellant,)
)
v.)
)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY; and)
THE PORT OF SEATTLE,)
)
Respondents.)
_____)

No. 01-160

DECLARATION OF MICHAEL P.
WITEK IN SUPPORT OF ACC'S
RESPONSE TO PORT MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
SEPA ISSUE

(Section 401 Certification No.
1996-4-02325 and CZMA concurrency
statement, issued August 10, 2001,
Related to Construction of a Third
Runway and related projects at Seattle
Tacoma International Airport)

Michael P. Witek declares as follows:

1. I am one of the attorneys for the Airport Communities Coalition. I make this
declaration based on personal knowledge and am competent to do so.

2. Attached to this declaration are true and correct copies of the following documents:

Exhibit A: Cover page, table of contents, executive summary and introduction
to the December 2001, Low Flow Analysis for the Third Runway;

Exhibit B: Page 28, 54 from the Department of Ecology SEPA Handbook
(1998 Ed.) Publication No. 98-114;

AR 003649

DECLARATION OF MICHAEL P. WITEK IN
SUPPORT OF ACC'S RESPONSE TO PORT
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON SEPA ISSUE- 1

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue

HELSELL
Spokane, WA 99201
FETTERMAN
A Limited Liability Partnership

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

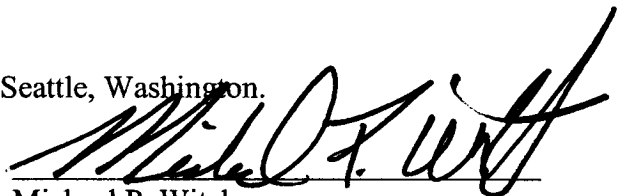
Exhibit C: Port of Seattle's Notice of Appeal of Ecology's 1998 § 401 Certification and Coastal Zone Management Act Concurrence for the Third Runway Project;

Exhibit D: SEPA determination of nonsignificance, dated October 17, 2001, from the Port of Seattle for the TRACON facility; and

Exhibit E: Excerpt from Deposition Transcript of Tom Luster, pp. 62-68.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of February, 2002, at Seattle, Washington.


Michael P. Witek

g:\u\acc\pchb\summary judgment\witek-decl-msjsepa.doc

AR 003650

DECLARATION OF MICHAEL P. WITEK IN SUPPORT OF ACC'S RESPONSE TO PORT MOTION FOR PARTIAL SUMMARY JUDGMENT ON SEPA ISSUE- 2

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue

HELSELL
Spokane, WA 99201
FETTERMAN
A Limited Liability Partnership

1500 PUGET SOUND PLAZA P.O. BOX 21846
SEATTLE, WA 98111-3846 PH: (206) 292-1144

**LOW STREAMFLOW ANALYSIS AND SUMMER LOW FLOW
IMPACT OFFSET FACILITY PROPOSAL**

**SEATTLE-TACOMA INTERNATIONAL AIRPORT
MASTER PLAN UPDATE IMPROVEMENTS**

Prepared for

PORT OF SEATTLE
Seattle-Tacoma International Airport
17900 International Boulevard, Suite 402
Seattle, Washington 98188

Prepared by

PARAMETRIX, INC.
5808 Lake Washington Blvd. NE, Suite 200
Kirkland, Washington 98033-7350

Aqua Terra Consultants
6140 Capital Blvd. SE, Suite D
Tumwater, Washington 98501

Earth Tech, Inc.
10800 NE 8th Street, Seventh Floor
Bellevue, Washington 98004

Foster Wheeler Environmental Corporation
12100 NE 195th Street, Suite 200
Bothell, Washington 98011

HNTB
600 108th Avenue NE, Suite 400
Bellevue, Washington 98004

Pacific Groundwater Group
2377 Eastlake Avenue East
Seattle, Washington 98102

December 2001
556-2912-001 (28B)

AR 003652

CERTIFICATE OF ENGINEER

The technical material and data contained in this document were prepared under the supervision and direction of the undersigned, whose seal, as a professional engineer licensed to practice as such, is affixed below.



Paul S. Fendt

Paul S. Fendt, P.E.

(affix seal here)

AR 003653

TABLE OF CONTENTS

	<u>Page</u>
EXECUTIVE SUMMARY.....	vi
1. INTRODUCTION	1-1
1.1 PURPOSE.....	1-1
1.2 ORGANIZATION OF REPORT.....	1-1
1.3 RELATIONSHIP TO OTHER DOCUMENTS.....	1-1
1.4 PROJECT DESCRIPTION.....	1-3
2. LOW STREAMFLOW ANALYSIS.....	2-1
2.1 APPROACH.....	2-1
2.1.1 Introduction	2-1
2.1.2 Determination of Summer Low-Streamflow Period	2-1
2.1.3 Existing Summer Low Streamflows.....	2-2
2.2 HSPF MODEL CALIBRATION.....	2-2
2.2.1 Overall Model	2-2
2.2.2 Low-Flow Review.....	2-2
2.3 EMBANKMENT MODELING.....	2-6
2.4 NON-HYDROLOGIC IMPACTS.....	2-8
2.4.1 Cessation of Water Withdrawals	2-8
2.4.2 Removal of Septic Tank Discharges.....	2-9
2.4.3 Summary of Non-Hydrologic Impacts	2-10
2.5 SUMMARY OF NET IMPACTS TO CREEKS.....	2-10
2.5.1 Summary of Flow Impacts.....	2-10
2.5.2 Summary of Water Level Impacts.....	2-13
3. MITIGATION PROPOSAL.....	3-1
3.1 INTRODUCTION OF APPROACH.....	3-1
3.2 PERFORMANCE STANDARDS	3-1
3.3 WATER QUANTITY – VAULT SIZING ANALYSIS.....	3-1
3.3.1 Vault Sizing.....	3-2
3.3.2 Vault Fill Time	3-2
3.4 WATER QUALITY DESIGN.....	3-3
3.4.1 Introduction	3-3
3.4.2 Turbidity.....	3-4
3.4.3 Temperature	3-5
3.4.4 Dissolved Oxygen	3-6
3.4.5 Nutrients	3-7
3.4.6 Metals.....	3-8
3.5 ADDITIONAL INFORMATION.....	3-9
3.6 PILOT PROGRAM PROPOSAL.....	3-11
4. OPERATION AND MAINTENANCE PLAN.....	4-1
4.1 PURPOSE AND SCOPE	4-1
4.1.1 Purpose of Plan.....	4-1
4.1.2 Scope of Plan.....	4-1
4.2 FACILITY DESCRIPTIONS	4-1
4.2.1 Facility Design and Operation Concept.....	4-1

TABLE OF CONTENTS (CONTINUED)

		<u>Page</u>
	4.2.2 Facilities Overview	4-1
4.3	FACILITY OPERATION	4-2
	4.3.1 System Schedules	4-2
	4.3.2 Facility-Specific Schedules	4-7
4.4	INSPECTION AND MAINTENANCE	4-7
	4.4.1 Procedures	4-7
	4.4.2 Sediment Removal	4-7
	4.4.3 Schedule	4-10
	4.4.4 Documentation	4-10
	4.4.5 Reporting	4-10
4.5	SAFETY	4-10
5.	MONITORING PLAN	5-1
5.1	WATER QUALITY AND FLOW MONITORING	5-1
	5.1.1 Characterization of Existing/Expected Water Quality	5-1
	5.1.2 Monitoring of Annual Test Releases from the Flow Impact Offset Facility	5-1
	5.1.3 Operational Monitoring	5-2
5.2	BIOLOGICAL MONITORING	5-4
	5.2.1 B-IBI Sampling Protocol	5-4
	5.2.2 Physical Habitat Monitoring Protocol	5-7
5.3	FILL MONITORING, INFILTRATION BMPS, AND INFILTRATION CONTINGENCY MEASURES	5-7
	5.3.1 Existing Fill Quality Control Testing	5-8
	5.3.2 New Infiltration Capacity Testing Protocol for Fill	5-8
	5.3.3 Fill Infiltration Performance Criterion	5-10
	5.3.4 Fill Infiltration BMPs	5-10
	5.3.5 Fill Infiltration Contingency Measures	5-10
5.4	ADAPTIVE MANAGEMENT	5-11
6.	REFERENCES	6-1

APPENDICES

A	HSPF MODELING INFORMATION AND DATA (CONTAINED IN VOLUME 2)
B	EMBANKMENT MODELING REPORT
C	EMBANKMENT INFILTRATION MEMORANDUM
D	NON-HYDROLOGIC IMPACTS SUPPORT DATA
E	HEC-RAS MODELING INFORMATION AND FIELD SURVEY DATA
F	RESERVE STORMWATER RELEASE STORAGE FACILITIES CONCEPT DRAWINGS
G	PHYSICAL HABITAT SURVEY AND MONITORING PROTOCOL FOR WADABLE STREAMS
H	LOW STREAMFLOW FISH BEHAVIOR MEMORANDUM
I	DETERMINATION OF LOW-FLOW QUANTITY IMPACTS AND MITIGATION
J	HSPF INPUT FILES FOR LOW-FLOW VAULT SIZING

LIST OF FIGURES

<u>Figure</u>	<u>Page</u>
2-1 Map of Basins with Gage Locations.....	2-4
2-2 Flow Rate Versus Depth Curve for Miller Creek.....	2-14
2-3 Flow Rate Versus Depth Curve for Walker Creek.....	2-15
2-4 Flow Rate Versus Depth Curve for Des Moines Creek.....	2-16
2-5 Changes in Average Water Depths and Widths Between the 1994 and 2006 2-Year, 7-Day Low Flows (Not Accounting for Low Flow Mitigation).....	2-17
4-1 Low Flow Impact Offset Facilities Locations.....	4-4
4-2 Walker Creek Facilities Annual Schedule.....	4-5
4-3 Des Moines Creek Facilities Annual Schedule.....	4-6
4-4 Inspection and Maintenance Process.....	4-8
4-5 Generalized Inspection and Maintenance Record.....	4-9

LIST OF TABLES

<u>Table</u>	<u>Page</u>
2-1 Miller Creek at the mouth, 7-day low flows for water-years 1991 through 1996.....	2-3
2-2 Miller Creek at the detention facility, 7-day low flows for water-years 1991 through 1996.	2-3
2-3 Walker Creek at the mouth, 7-day low flows for water-years 1993 through 1996.....	2-5
2-4 Walker Creek near wetland, 7-day low flows for water-years 1991 through 1996.	2-5
2-5 Des Moines Creek at the mouth, June through November 7-day low flows for water-years 1992 through 1996.	2-6
2-6 Des Moines Creek at gage 11c, June through November 7-day low flows for water-years 1991 through 1996.	2-6
2-7 Updated estimate of historic Miller Creek water withdrawals.	2-9
2-8 Active buy-out area septic systems under pre-project conditions.	2-10
2-9 Total net summer low-streamflow impacts.	2-11
2-10 Changes in average water depths and widths between the 1994 and 2006 2-year, 7-day low flows (not accounting for low-flow mitigation).	2-13
3-1 Summer low-flow impact offset maximum vault sizes.	3-2
3-2 Low-flow vault fill time estimates.	3-3
4-1 Summary of low-flow impact offset facilities.	4-3
4-2 Summary of low-flow vaults operating schedules.....	4-7

AR 003656

ACRONYMS AND ABBREVIATIONS

APHA	American Public Health Association
ASTM	American Society for Testing and Materials
BFW	bankfull width
B-IBI	Benthic Index of Biotic Integrity
BMPs	Best Management Practices
BOD	biological oxygen demand
°C	degrees Celsius
cf	cubic feet
cf/d	cubic feet per day
cfs	cubic feet per second
CIP	capital improvement project
cm	centimeters
DBH	diameter at breast height (4.5 ft from the ground)
DNR	Department of Natural Resources
DO	dissolved oxygen
Ecology	Washington State Department of Ecology
EPA	U.S. Environmental Protection Agency
ET	evapotranspiration
ft	feet
GIS	geographic information system
GPS	global positioning system
HSPF	Hydrologic Simulation Program – FORTRAN
IWS	Industrial Wastewater System
LWD	large woody debris
m	meter
mg/l	milligrams per liter
mm	millimeter
NEPL	North Employee Parking Lot
NPDES	National Pollutant Discharge Elimination System
NTU	Nephelometric Turbidity Unit
PAM	polyacrylamide
PIT	Pilot Infiltration Test

AR 003657

Port	Port of Seattle
RCU	riparian condition unit
SMP	Stormwater Management Plan
SSHEAR	Salmonid Screening, Habitat Enhancement, and Restoration
STIA	Seattle-Tacoma International Airport
SWPPP	Stormwater Pollution Prevention Plan
UEBEM	Urban Stream Baseline Evaluation Methodology
USFS	United States Forest Service
WDFW	Washington Department of Fish and Wildlife
WDNR	Washington Department of Natural Resources
WFPB	Washington Forest Practices Board

AR 003658

EXECUTIVE SUMMARY

This report presents the analyses performed to estimate the timing and volume of discharges to local receiving streams and wetlands during low-flow periods from Seattle-Tacoma International Airport (STIA) considering improvements defined in the Port of Seattle's Master Plan Update. This report also presents a Flow Impact Offset Facility Plan, which is the Port's proposal to offset impacts to flows in the receiving waters during annual low-streamflow periods, typically experienced in late summer/early fall. The plan is based on a detailed evaluation of the hydrologic impacts of the proposed third runway embankment and associated non-hydrologic impacts (cessation of water use and removal of septic tanks on properties purchased by the Port) on streamflow in Miller, Walker, and Des Moines Creeks. This report is submitted in response to condition I.1 of the Water Quality Certification (#1996-4-02325 [Amended - 1]) issued by the Washington State Department of Ecology (Ecology) on September 21, 2001. The report builds upon previous reports by Earth Tech (December 2000), Pacific Groundwater Group (June 2000, August 2001), and Parametrix (December 2000, July 2001). Earth Tech, Pacific Groundwater Group, Aqua Terra, HNTB, Foster Wheeler, and Parametrix prepared analyses presented in this report, and Hydrocomp contributed technical review of modeling analyses. Ecology was consulted during the development of the plan to ensure that agency concerns are addressed in this report.

Impacts to streamflow in the three streams were evaluated using a suite of modeling tools. The Hydrologic Simulation Program - FORTRAN (HSPF) was used to develop overall stormwater models of STIA (existing conditions and proposed conditions), as described in the *Comprehensive Stormwater Management Plan* (SMP) (Parametrix 2000a, 2001a). These models were also used to evaluate stormwater flows and volumes in the low-flow analysis. The hydrologic properties of the proposed third runway embankment were modeled using a combination of Hydrus and a finite-difference Slice model. Hydrus was used to simulate the movement of water between the root zone and water table in the proposed embankment, and the Slice model was used to simulate the movement of water through the saturated portion of the proposed embankment. Results of the Hydrus and Slice modeling were incorporated back into the HSPF model to estimate the post-construction flows. By comparing these results to the pre-project conditions, the impacts of the proposed embankment on streamflows were determined. Non-hydrologic impacts were then included in the impacts analysis. Statistical analyses of model output, precipitation, and streamflow data for the available period of record predicted a net low-flow impact to be mitigated during the low-flow offset period. The flow offset to be provided is 0.11 cubic feet per second (cfs) in Walker Creek and 0.08 cfs in Des Moines Creek. The project impact in Miller Creek was completely offset by seepage from the third runway embankments.

The Port's proposal to offset impacts to low streamflow is to detain excess stormwater runoff during the winter and release it to the streams during the predicted annual low-streamflow periods. Vault sizes for the volume of water required to offset the predicted impacts were determined by calculating the volume necessary to fulfill the required mitigation during the 92-day mitigation period for each year in the period of record (1949 to 1995), and selecting the year requiring the largest vault volume as the "worst case" scenario. The resulting volumes of stormwater (18.5 acre-ft¹ for Walker Creek and 13.5 acre-ft for Des Moines Creek) were incorporated into supplemental

AR 003659

¹ A 19.0 acre-ft vault was used for the concept design.

stormwater vaults in each watershed. These volumes of stormwater will be collected during the rainy season, stored, and discharged during the annual low-flow periods at rates equal to the predicted impact in each stream. Several considerations are proposed to be included in the design of these vaults to allow the management of stormwater discharges to offset the predicted low-flow impacts. Additional considerations in the design and operation of the proposed stormwater vaults to improve the water quality of discharges will also be included. An analysis of the availability of stormwater required to fill the vaults showed that even during the driest years in the period of record, enough water can be collected and stored to offset the impacts to streamflow during the annual low-streamflow period.

Key goals and objectives (performance standards) of the proposed Flow Impact Offset Facility include:

- Provide flow at the rates required to offset the predicted impacts of the proposed embankment for the entire annual low-streamflow period each year (approximately 92 days from late July through the end of October).
- Operate and maintain the facility to maintain water quality during the annual low-streamflow periods.
- Design the facility and its operation, monitoring, and maintenance plan so that an adaptive management strategy can be applied.

As stated in Ecology's *Stormwater Management Manual for Western Washington* (Ecology 2001), the objective of stormwater management is to "control the quantity and quality of stormwater produced by new development and redevelopment such that they comply with water quality standards and contribute to the protection of beneficial uses of the receiving waters." Ecology has determined that stormwater management activities in Washington do not require a water right. Since the Port's proposal to offset flow impacts to the receiving waters consists of stormwater management activities, a water right is not required for the Flow Impact Offset Facility.

AR 003660

1. INTRODUCTION

1.1 PURPOSE

The purpose of this report is to evaluate impacts to streamflows in Miller, Walker, and Des Moines Creeks resulting from construction projects included in the Master Plan Update for Seattle-Tacoma International Airport (STIA), and to propose a Flow Impact Offset Facility to mitigate potential impacts during summer low-streamflow periods. Placement of new impervious surfaces and embankment fill, combined with removal of septic tanks and cessation of existing water uses in the embankment area, will impact the timing and amount of groundwater flows to the streams. While these impacts vary seasonally, they are expected to be most significant during late summer/early fall, when streamflows are typically at their lowest. This document presents the analysis that was completed to determine the impacts (both positive and negative) to streamflows, and to propose a facility and management/operation plan to offset those impacts during the annual low-streamflow periods.

1.2 ORGANIZATION OF REPORT

This report is organized into six sections. Section 1 contains an introduction. Section 2 describes the analysis undertaken to determine the impacts to streamflows in each stream. Surface water modeling, embankment modeling, and the effects of "non-hydrologic" impacts are discussed. The proposal for the Flow Impact Offset Facility is described in Section 3, including discussions of vault sizing, water quality management, performance standards, and a pilot program. Section 4 contains the Operation and Maintenance Plan for the Flow Impact Offset Facility. Section 5 contains the monitoring plan, addressing both operation of the facility and its impacts to the streams. References are listed in Section 6.

Ten appendices containing additional technical information are included. Appendix A is contained in Volume 2, and Appendices B through J are located in Volume 1 behind the main text. Appendix A provides HSPF modeling information and data, including low-flow review of the HSPF model calibration, land use tables, and HSPF input files. The technical report describing the embankment modeling analysis is contained in Appendix B. Appendix C provides information on infiltration into the embankment. Data used in the assessment of the non-hydrologic impacts is provided in Appendix D. Appendix E contains HEC-RAS modeling results and stream cross-section field survey data. Concept drawings of the reserved stormwater system (vaults, routing, discharge locations, etc.) are contained in Appendix F. Appendix G presents additional information on physical habitat monitoring protocol in streams. A memorandum on low streamflow fish behavior is provided in Appendix H. Appendix I contains information on the determination of low-flow quantity impacts and mitigation. The HSPF input files for the low-flow vault sizing are provided in Appendix J.

1.3 RELATIONSHIP TO OTHER DOCUMENTS

This report, which replaces and updates the *Low Streamflow Analysis* prepared by Earth Tech, Inc. in December 2000 (Earth Tech, Inc. 2000) and the *Low Flow Analysis Flow Impact Offset Facility Proposal* prepared by the Port of Seattle in July 2001 (Port of Seattle 2001a), is referred to in

AR 003661

Sections 6.2.1 and 7.7.5 of the *Comprehensive Stormwater Management Plan, Master Plan Update Improvements, Seattle-Tacoma International Airport* (SMP; Parametrix, Inc. 2000a, 2001a).

The Clean Water Act Section 401 water quality certification was issued by the Department of Ecology on August 10, 2001, and amended on September 21, 2001, subsequent to the submittal of the July 2001 Low Flow Analysis/Flow Impact Offset Facility Proposal (Water Quality Certification #1996-02325 [Amended - 1]). The amended certification required the submittal of a revised Low Flow Analysis/Flow Impact Offset Facility Proposal addressing a number of issues listed in Section I of the amended certification. Additional model runs were required to address some of these issues. During the additional modeling, some errors in data handling were detected. While corrections of these errors do not change the modeling approach, the underlying assumptions, or the calibration, they do impact the results of the modeling analysis. Discussions were held between the Port, its consultants, Ecology, and King County to discuss the errors and their resolution, which are summarized below:

1. Different models were used to simulate different parts of the hydrology of the embankment area. This required data to be transferred back and forth between the different models. In one data transfer, a conversion factor (from daily to hourly flows) was inadvertently applied twice. The result was that modeled flow from the embankment was 1/24 of what it should have been. This error was corrected by applying the conversion factor once in the revised modeling.
2. In another data transfer, an incorrect file ("daily AGWO") was used, where another file ("hourly AGWT") should have been used. This error was corrected by transferring the correct file.
3. When the original model was developed, a number of alternatives to model the impervious areas tributary to the filter strips on top of the proposed embankment were considered. With the change implemented in No. 2 above, a more direct way to model this area became possible. In the original modeling, rainfall on the pervious area was "scaled up" to address the impervious area and flow to the filter strips. In the revised modeling, flow to the filter strips will be calculated based on the "AGWT" and "SURO" time series data.
4. In the original modeling, a two-dimensional version of the Hydrus model was used to calculate one-dimensional (vertical) flows through the proposed embankment. Since the revised modeling results in more water flowing through the embankment, a one-dimensional version of Hydrus was used because it is better able to simulate the more varied saturation conditions.
5. In the original modeling, infiltration from infiltration basins was not simulated because it was negligible. In the revised modeling, more water is available to the infiltration basins; therefore, this flow is no longer negligible. The revised modeling will simulate and document this flow, which will be routed to the groundwater component of the HSPF modeling.
6. In the original modeling, all groundwater from pervious areas in the SDS5, SDS6, and SDS7 basins was inadvertently routed to Des Moines Creek in the pre-developed

conditions model. In the post-developed conditions model, groundwater from these areas was correctly routed to Walker Creek. This error was corrected by routing the groundwater in these areas to Walker Creek in the pre-developed conditions model.

An additional revision to the modeling was discussed with Ecology and King County, but was not incorporated into the revised model. This revision involved routing the “seepage to till” component of the embankment flow directly to the stream. The group concluded that the existing approach was a more accurate way to model this flow component.

1.4 PROJECT DESCRIPTION

The Port’s proposal is to collect excess stormwater during the rainy season, store it in underground vaults, and release the stored water continuously into each stream during the designated summer low-streamflow period at a rate equivalent to the calculated summer low-streamflow impact to that stream from planned Port projects. The summer low-streamflow impacts in each stream were determined through detailed modeling analyses. The summer low-streamflow periods were determined through statistical analyses of modeled streamflow from the calibrated HSPF models and consultations with biologists on the effects of low-streamflow periods on stream biology.

The facility, as designed, consists of two stormwater vaults (one vault providing water to offset flow impacts in Walker Creek and one vault providing water to Des Moines Creek). Each of these vaults stores stormwater during the rainy season to be released during the summer low-streamflow periods with features that are unique to low-flow vaults. The extra features consist of additional outlets and controls, floating discharge structures to maintain constant discharge rates, varying configurations to manage sediments, and additional water quality management features (ventilation to facilitate aeration, provisions for filtration and mechanical aeration of discharges, and oil/water separation, as appropriate). Generally, water will be collected beginning in January of each year, and discharged from late July through October (with discharges continuing through November depending on the availability of water). Annual facility maintenance will take place in December of each year.

AR 003663

EXHIBIT

AR 003664



SEPA HANDBOOK

Revised 1998

Prepared by:

Washington State Department of Ecology
Environmental Coordination Section

Publication # 98-114



AR 003665

State Environmental Policy Act Handbook

Washington State Department of Ecology
Publication # 98-114

September 1998

Shorelands and Environmental Assistance Program
Gordon White, Program Manager

For additional copies, contact:

Environmental Coordination Section
Shorelands and Environmental Assistance Program
Washington State Department of Ecology
PO Box 47703
Olympia, WA 98504-7703
(360) 407-6924

or visit our website at:

<http://www.wa.gov/ecology>

AR 003666

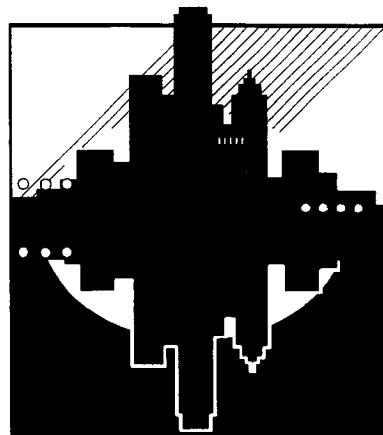
An addendum is appropriate when a proposal has been modified, but the changes should not result in any new significant adverse impact. They can also be used if additional information becomes available that does not change the analysis of likely significant impacts or alternatives in the original SEPA document.

The lead agency is encouraged to distribute the addendum to affected agencies and to interested persons. Distribution is required for an addendum to a draft EIS, and for an addendum to a final EIS if the addendum is issued prior to an agency action on the proposal⁵⁰. Addendums do not require a comment period.

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

2.7.4. Planned Actions

Cities and counties planning under GMA may also wish to consider using the Planned Action process, described on page 70. The impacts of the planned action are evaluated in an EIS (done for a comprehensive plan, subarea plan, or master plan resort, etc.) The planned action is then defined by an adopted agency ordinance or resolution. When a project is proposed as a planned action, environmental review consists of verifying that the proposal meets the requirements of the planned action ordinance or resolution, ensuring that the EIS evaluated all likely significant adverse impacts associated with the proposal, and applying mitigation identified in the EIS. When a proposal qualifies as a planned action, no new EIS or threshold determination is required, as the procedural aspects of SEPA have already been completed. If a proposal has any probable significant adverse impacts not addressed in the EIS, it is not a planned action.



⁵⁰ WAC 197-11-625

- An agency with jurisdiction concludes its comments on the draft EIS were not adequately addressed in the lead agency's final EIS⁹⁰. In this case, the agency with jurisdiction must prepare the supplemental EIS at their own expense.

3.6.1. Tips:

- To facilitate review and the comparison of options, it is helpful for the supplemental EIS to use the same organization and format as the original EIS.
- When a supplemental EIS is being prepared after the 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. The agency preparing the document should notify all agencies with jurisdiction that a supplemental EIS is being prepared.



⁹⁰ WAC 197-11-600 (3) (c)

EXHIBIT C

AR 003669

RECEIVED
AUG 19 1998
ENVIRONMENTAL
HEARINGS OFFICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE POLLUTION CONTROL HEARINGS BOARD

PORT OF SEATTLE, a Washington municipal corporation,

Appellant,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,
an agency of the State of Washington,

Respondent.

No.

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR HEARING ON THE WASHINGTON STATE DEPARTMENT OF ECOLOGY'S CONDITIONAL CERTIFICATION UNDER SECTION 401 OF THE CLEAN WATER ACT AND CONCURRENCE WITH THE PORT'S CERTIFICATION OF CONSISTENCY WITH THE COASTAL ZONE MANAGEMENT PLAN

TO: THE POLLUTION CONTROL HEARINGS BOARD, STATE OF WASHINGTON AND TO THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY

The Port of Seattle ("Port") appeals the Washington State Department of Ecology's ("Ecology") Conditional Certification under Section 401 of the Clean Water Act and Concurrence with the Port's Certification of Consistency with the Coastal Zone Management Act (Order #96-4-02325).

I. APPEALING PARTY

Appealing Party:

Port of Seattle
P.O. Box 68727
Seattle, WA 98168-0727
Telephone: (206) 728-3193
Facsimile: (206) 431-4458

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR HEARING ON THE DEPARTMENT OF ECOLOGY'S §401 CERTIFICATION AND CZMP CONCURRENCE - I

50037849.02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

ORIGINAL

AR 003670

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Representative:

Barbara Hinkle, Senior Environmental Specialist
Port of Seattle
P.O. Box 68727
Seattle, WA 98168-0727
Telephone: (206) 439-6606
Facsimile: (206) 248-6876

Counsel for Appellant:

Linda J. Strout, General Counsel, Port of Seattle
Traci M. Goodwin, Senior Port Counsel, Port of Seattle
P.O. Box 1209
Seattle, WA 98111
Telephone: (206) 728-3702
Facsimile: (206) 728-3205

J. Tayloe Washburn
Steven G. Jones
Thomas M. Walsh
Foster Pepper & Shefelman PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Telephone: (206) 447-4400
Facsimile: (206) 447-9700

II. IDENTIFICATION OF PARTIES

The parties to this appeal are the Port, and the respondent, Ecology.

III. ORDER

A copy of the Ecology's July 20, 1998 Order #96-4-02325 and the letter transmitting that Order ("Order") are attached as Exhibit "A" to this Appeal. A copy of the Port's JARPA Application is attached as Exhibit "B".

IV. REQUEST FOR HEARING

The Port makes a request for a formal hearing on its appeal.

V. GROUNDS FOR APPEAL

A. Introduction and Summary of Appellant's Position

The Port's purpose in obtaining the Board's review of the challenged conditions in Ecology's Order is not to reduce the real level of environmental protection sought by Ecology. Instead, the

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR HEARING ON THE DEPARTMENT OF ECOLOGY'S §401 CERTIFICATION AND CZMP CONCURRENCE - 2

10037849 02

**FOSTER PEPPER & SHEFELMAN
PLLC**

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

1 Port seeks to eliminate, modify, refine or clarify elements of the Order which, as presently
2 articulated, are vague, unsubstantiated, wasteful, without proper legal foundation, or unfair and,
3 consequently, unlawful, unjust, or unconstitutional. Certain conditions reflect an overbroad
4 interpretation of Ecology's authority. Others apply laws and regulations to the facts of the Port's
5 application in an unjust and arbitrary manner. Finally, Ecology has imposed certain requirements
6 based on broad assertions of authority which are unsupported by the applicable laws and regulations.

7 The core of the Clean Water Act ("CWA") is a system of permits called the National
8 Pollutant Discharge Elimination System (NPDES), which regulates the discharge of pollutants into
9 waters of the state. The Port's request for a §401 certification presents a unique situation when
10 compared with most §401 certifications. This is because the airport is already regulated under a 50-
11 page NPDES permit issued under the CWA and the Washington Water Pollution Control Act, a
12 permit which addresses most, if not all, of the present and future water quality issues at the airport.
13 All NPDES permits must be conditioned to meet water quality standards. The §401 Certification is
14 a process used to certify compliance of water quality standards for projects involving a federal
15 license or permit. Thus, both the NPDES permit and the §401 Certification are designed to achieve
16 the same goal: compliance with water quality standards. Given this fact, many of the additional
17 requirements added in the Order are unnecessary and duplicative.

18 Many conditions also exceed Ecology's authority or impose unachievable or unduly costly
19 mitigation measures. The broad legal issues raised by the Order are set forth below. This Appeal
20 then identifies the specific factual and legal problems raised by each disputed condition. Finally, the
21 Port identifies the specific language changes that should be made to each condition in order to
22 achieve the statutory water quality goal in a manner that avoids the problems identified in the present
23 Order.

24
25
26
PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 3

10037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003672

1 **B. Certain Conditions Imposed In the §401 Certification and CZMP Concurrency Exceed Ecology's Jurisdiction and the Scope of Its Regulatory Authority.**

2 Ecology acted unjustly and unlawfully by imposing conditions in the Order that exceed its
3 statutory authority and the applicable regulations. Those conditions imposed by Ecology that
4 regulate non-point source discharges, mandate expensive technology without any corresponding
5 environmental benefit, ignore existing Best Management Practices ("BMPs") and/or impose
6 requirements that have little or no relationship to the project proposed by the Port should be
7 invalidated by the Board. Such conditions exceed Ecology's jurisdiction and regulatory authority
8 under the federal CWA, the Washington Water Pollution Control Act and both the applicable
9 regulations and case law.

10 **C. The Order Impermissibly Regulates Non-Point Source Discharges and Non-Industrial Stormwater.**

11 Ecology's Order purports to regulate "all stormwater discharges from Sea-Tac International
12 Airport." The Ninth Circuit has recently held that §401 certifications apply only to *point source*
13 discharges; accordingly, the §401 certification process does not regulate non-point sources. Thus, to
14 the extent Ecology's Order attempts to regulate non-point source discharges, such regulation is
15 unlawful. Moreover, only point source discharges of stormwater *associated with industrial activity*
16 are regulated under the CWA. Regulation of non-industrial stormwater is beyond the scope of
17 Ecology's authority and, accordingly, unjust and unlawful.

18 **D. Certain Conditions Mandate Expensive "Solutions" Without Identifying a Problem and Without Adequate Engineering Analysis to Support the Efficiency of the Required "Remedies."**

19 A number of Ecology's conditions purport to remedy problems which have either not been
20 adequately identified, or, which are broader in scope and not created by the project improvements
21 proposed by the Port. In other instances, Ecology's conditions fail to identify engineering support
22 for the implicit conclusion that the expensive "remedy" mandated by Ecology will actually solve an
23 identified problem. The conditions imposed by Ecology will require the Port to spend tens of
24 millions of dollars to remedy unidentified or undocumented problems. Current technology does not
25
26

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 4

50037849.02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003673

1 sustain Ecology's position that the "remedies" selected by Ecology and imposed on the Port in its
2 Order will in fact solve any problems or accomplish the stated goal of improving environmental
3 quality. Ecology has failed to follow its own regulations and state law in imposing Conditions A1,
4 B1, B4a, B5, B5a, B5b, C4, C4a, C4b, C4d, C4e, D1, E1, E2, E7, and F1.

5 **E. Ecology Has Exceeded Its Statutory Authority In Imposing Several Conditions, Because**
6 **the Requisite Nexus Does Not Exist Between the Problems Identified and the Solutions**
7 **Imposed.**

8 In a number of instances, Ecology has imposed regulatory conditions that bear little
9 relationship to the problems identified. Other conditions go far beyond the impact that would be
10 created by the proposed project improvements; in fact, in some instances it appears that Ecology is
11 attempting to impose on the Port the duty to provide solutions to regional problems whose scope far
12 exceeds the impacts of the Port's project. The absence of the requisite nexus between the problems
13 identified and the solutions imposed affects Conditions A1, B1, B4a, B5, C4d, C4e, E1, E2, and
14 G8c.

15 **F. Ecology Has Imposed Certain Conditions Without First Undertaking the Necessary**
16 **Regulatory or Rule-making Steps.**

17 Ecology has imposed certain conditions without first undertaking the necessary regulatory or
18 rule-making processes. For example, Ecology has chosen not to promulgate comprehensive state
19 stormwater regulations. Yet, in its Order, Ecology regulates the Port's stormwater far more
20 stringently than is authorized by the applicable federal stormwater regulations. In doing so, Ecology
21 generally relies on WAC 173-201A (state water quality standards), but has ignored the
22 "implementation" portion of that regulation, which states that, for stormwater, implementation of
23 water quality standards occurs through BMPs. This is consistent with the EPA's most recent policy
24 document acknowledging that, for stormwater, the implementation of BMPs is the most appropriate
25 method to comply with water quality standards.

26 Ecology has unreasonably and unjustly predicated its mandated stormwater treatment on
unknown "contaminants" in Miller and Des Moines Creeks that allegedly have "levels of

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 5

20037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-467-4400

AR 003674

1 contaminants above state water quality criteria" that "prevent some characteristic uses of Class AA
 2 waterbodies from being met". See Order at 10, Condition No. C4. Ecology has not, however,
 3 identified either the "contaminants" or the "characteristic uses." Moreover, Ecology has not
 4 undertaken a §303(d) listing or promulgated total maximum daily loads ("TMDL's") for any
 5 contaminants which might be "treated" by the selected technology. Under these circumstances,
 6 Ecology's mandated stormwater treatment is unjust, unreasonable and in excess of its statutory
 7 authority. Such requirements are imposed, for example, by Condition Nos. A1, C4, C4a, C4b and
 8 C4d.

9 **G. The Conditions Imposed in the Order Violate the Port's Rights to Substantive Due
 10 Process, Equal Protection and Rights Protected Under Chapter 64.40 RCW.**

11 Insofar as the conditions imposed in the Order require the Port to undertake actions which:
 12 (1) exceed Ecology's regulatory authority, (2) go beyond the proposed improvements identified in
 13 the Project, or (3) attempt to solve regional problems by imposing the burden of solving those
 14 problems solely on the Port, the Port's rights to substantive due process and equal protection have
 15 been violated. Moreover, such conditions may unconstitutionally take property without just
 16 compensation. In addition, these same facts support a claim that the conditions are arbitrary,
 17 capricious, or in excess of legal authority, and entitling the Port to recover damages, attorneys fees
 18 and costs under Chapter 64.40 RCW and other applicable law.¹

19 **VI. STATEMENT OF FACTS**

20 **A. Background Facts**

21 The Port has proposed construction of improvements at Seattle-Tacoma International Airport
 22 ("STIA") which include: (1) an 8,500-foot parallel third air-carrier runway west of the two existing
 23 runways; (2) excavation of fill material from borrow sources on airport property; and (3) a South
 24 Aviation Support Area to accommodate aircraft line maintenance and air cargo facilities. These

25 ¹ The Port recognizes that some of the legal claims identified in this appeal may be beyond the jurisdiction of the Board.
 26 However, they are identified at this point in an abundance of caution in order to preserve the Port's right to raise them in
 an appropriate forum at an appropriate time.

1 improvements are part of a larger set of construction and development activities included in the
2 Port's Master Plan Update for Seattle-Tacoma International Airport, adopted by the Port and
3 approved by the Federal Aviation Administration in 1997. (These improvements are collectively
4 referred to herein as the "Project").

5 The purposes of the Project are to: (1) improve the poor weather airfield operating capability
6 in a manner that accommodates aircraft activity with an acceptable level of aircraft delay; and
7 (2) provide efficient and flexible facilities to accommodate future aviation demands.

8 On December 18, 1997, the Port filed a request with Ecology for a water quality certification
9 for the Project under 33 U.S.C. §1341, FWPCA §401. See Exhibit B. On July 20, 1998, Ecology
10 issued an Order to the Port in response to the Port's §401 certification request. The Order also
11 constituted Ecology's response to the Port's certification of consistency with Washington's Coastal
12 Zone Management Plan ("CZMP"). In the Order, Ecology granted the Port's request for a §401
13 certification. Ecology also concurred with the Port's certification of consistency with Washington's
14 CZMP.

15 While Ecology granted the Port's request for a §401 certification, it imposed a number of
16 conditions that are unlawful because they exceed Ecology's authority. These conditions will
17 increase the cost of the Port's proposed project by tens of millions of dollars without providing any
18 significant environmental protection. Ecology also imposed requirements which go far beyond the
19 scope of the proposed improvements outlined in the Port's Project. In some instances Ecology
20 required the Port to solve regional problems involving many jurisdictions by imposing regulatory
21 conditions on the Port alone. In other instances, the requisite nexus between the problem identified
22 and the regulatory solution imposed simply did not exist. In addition to acting beyond its statutory
23 and regulatory authority, Ecology's imposition of such conditions violates the Port's rights to
24 substantive due process and equal protection.

25
26
PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 7

50037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003676

SEP 14 98 MON 04:04 PM

SMITH WNEY

FAX: 2066243670

PAGE 9

1 The Port appeals the conditions in the Order specified in this Notice of Appeal and requests
 2 that the Board invalidate the Order and direct Ecology to issue a new Order consistent with the relief
 3 requested in Section VII of this appeal. Additionally, to the extent that Ecology's concurrence with
 4 the Port's certification of consistency with Washington's CZMP is based on the challenged
 5 conditions, the Port also appeals those CZMP conditions.

6 On July 17, 1998, the Port appealed Ecology's objection to the Port's certification of
 7 compliance with the Coastal Zone Management Act ("CZMA"). (Port of Seattle v. Dept. of
 8 Ecology, PCHB Appeal No. 98-105). Under the CZMA, any applicant for a federal permit
 9 "affecting any land or water use or natural resource of the coastal zone" of a state with an approved
 10 coastal zone management plan is required to provide "certification that the proposed activity
 11 complies with the enforceable policies of the state's approved program and that such activity will be
 12 conducted in a manner consistent with the program." 16 U.S.C. §456(c)(3)(A). The state is then
 13 obligated to either certify or object to this assertion of consistency by the applicant. Id. The federal
 14 permitting agency may not grant the permit for which certification is required without this
 15 concurrence by the state.

16 On June 18, 1998, Ecology objected to the Port's certification of consistency with the CZMP
 17 based on insufficient time to review the application. The Port appealed this objection of consistency
 18 with the CZMP in Appeal No. 98-105, filed with the Board on July 17, 1998. In its July 20, 1998
 19 Order, Ecology reversed its position. In the Order, Ecology stated that the Port's proposed
 20 improvements at STIA were consistent with the CZMP, provided that the conditions outlined in the
 21 Order were met by the Port.

22 In this appeal, the Port is challenging many of the conditions in the Order. To the extent that
 23 Ecology's concurrence with the Port's certification of consistency with the CZMP is based on the
 24 conditions set forth in the Order, the Port also appeals those conditions. The Port continues to
 25 maintain that its proposed improvements to STIA are consistent with the CZMP.

26

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
 HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
 CERTIFICATION AND CZMP CONCURRENCE - §

50037849 02

FOSTER PEPPER & SHEFELMAN
 PLLC
 A PROFESSIONAL LIMITED LIABILITY COMPANY
 1111 THIRD AVENUE, SUITE 3400
 SEATTLE, WASHINGTON 98101-3299
 206-447-4400

AR 003677

SEP-14-98 MON 04:04 PM

SMITH NEV

FAX 2066243670

PAGE 9

1 **B. Ecology's Role in the §401 Certification and CZMP Concurrency Process**

2 The Project involves expansion of a facility that is already regulated under an *existing*
3 NPDES permit. The Port's NPDES permit regulates all point source discharges to surface waters of
4 the state. All NPDES permits must be conditioned to meet water quality standards. The Port's
5 existing NPDES permit *already covers* the construction of the third runway, and, when the third
6 runway is completed, that NPDES permit also will cover the operation of third runway.

7 Ecology's role in the §401 Certification process is limited to certifying project compliance
8 with state water quality standards. In this regard, the Ninth Circuit recently has clarified that the
9 only discharges a state can regulate in a §401 certification are *point source* discharges. Because the
10 Port's NPDES permit already regulates all point source discharges at the airport and because future
11 NPDES permits will continue to do so, Ecology should simply have conditioned its §401
12 Certification on meeting existing and future NPDES permit conditions. Instead, Ecology went far
13 beyond its statutory and regulatory authority by imposing a number of unjust and unreasonable
14 conditions.

15 The particularized grounds for appeal with respect to individual conditions imposed in the
16 Order are outlined below. The reference numbers and page numbers of the various conditions track
17 the reference numbers used by Ecology in the Order. Section VII of this appeal, which outlines the
18 relief requested, provides the specific revisions in each disputed condition required to comply with
19 applicable law.

20 **C. Particularized Facts Relied Upon to Support Grounds for Appeal**

21 **1. A1, p. 3: No Impairment of Water Quality**

22 Ecology acted unlawfully by conditioning its §401 Certification on the "applicable state
23 water quality standards," without defining what those standards are. Under WAC 173-201A-160(3),
24 the Port's activities are either governed under its existing NPDES permit, or, if that permit is not
25 applicable, then Ecology must use BMPs as the primary means of implementing water quality
26 standards. Instead of relying on the existing NPDES permit or BMPs, the Order imposes technology

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 9

50037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003678

SEP-14-98 MON 04:05 PM

SMITH WNEY

FAX:2066243679

PAGE 10

1 requirements that go *beyond* BMPs and in fact go *beyond* all known, available and reasonable
2 methods of treatment ("AKART"), is unjust and unlawful because it exceeds Ecology's regulatory
3 authority.

4 As was noted above, the Port already operates under an existing NPDES permit conditioned
5 to meet water quality standards. The Port's NPDES permit contains a statement in the Permit Fact
6 Sheet that the permit meets applicable water quality standards. Significantly, when the proposed
7 Project improvements are completed, those improvements will also be regulated under the Port's
8 NPDES permit.

9 Ecology has not yet promulgated specific, comprehensive stormwater regulations. Under
10 *federal* CWA regulations, only point source discharges of stormwater associated with industrial
11 activity are regulated.

12 There are no federal effluent guidelines or limitations for airport activity. There are no
13 production processes or manufacturing activities at STIA that generate "industrial processed" water.
14 The only water discharged by the Port at STIA is stormwater. To the extent that stormwater comes
15 in contact with maintenance equipment or deicing products, it is deemed "associated with industrial
16 activity" under federal regulations. But the discharges from STIA are very different from the
17 discharges from a typical industrial operation.

18 In addition, Ecology has not undertaken a §303(d) listing for either Des Moines or Miller
19 Creeks for any contaminants except fecal coliform.² As a result, Ecology has not adopted a TMDL
20 for any "contaminant" that would be affected by the technology selected. Under these
21 circumstances, the Board should order Ecology to revise the condition to state that compliance with
22 reasonable BMPs constitutes compliance with water quality standards or to state that substantial
23 compliance with the Port's NPDES permit constitutes compliance with water quality standards.

24

25 ² The Port acknowledges that Des Moines Creek is listed on the 303(d) list for fecal coliform, but none of the expensive
26 stormwater "treatment" mandated by Ecology would do anything to "treat" fecal coliform, which can only be treated
through disinfection.

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 10

30037849 02

**FOSTER PEPPER & SHEFELMAN
PLLC**

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

SEP-14-98 MON 04:05 PM

SMITH WNE7

FAX: 2066249670

PAGE 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

2. B1, pp. 3-4: Mitigation of Impacts on Aquatic Resources

This condition lists the documents that describe required mitigation measures. It is unjust and unlawful to the extent that Ecology imposes on the Port the duty to implement mitigation identified in the proposed Des Moines Creek Basin Plan ("Plan"). The proposed Plan is a cooperative effort between the Port and neighboring cities to undertake basin-wide planning and protection of the Des Moines Creek watershed. While the Plan is final, the feasibility/preliminary engineering report for the Plan is not finalized. Furthermore, there are many requirements of the Plan that envision regional solutions to regional problems. However, in its Order, Ecology appears to place sole responsibility on the Port to implement these solutions. To the extent that Ecology is incorporating the entirety of the Des Moines Creek Basin Plan into Condition B1, the condition is also unlawful as it imposes mitigation for impacts beyond the Project improvements for which certification is sought; it is unjust because it lacks a nexus between the Port's proposed improvements and the regional solutions outlined in the Des Moines Creek Plan.

3. B3, pp. 1, 5-6: Restrictive Covenant on Buffer Areas

Ecology's proposed deed restriction is unlawful because it contains no exceptions for (a) navigational aids; (b) utility work; (c) security fences; (d) vegetation and wildlife management; (e) environmental study and monitoring; (f) stormwater detention and drainage; (g) Des Moines Creek crossings or (h) roadway safety improvements. The buffer provisions exceed Ecology's authority to condition the §401 certification. Finally, to the extent the proposed deed restriction applies to the airfield within the STIA, such a restriction is preempted by federal law.

4. B3b, p. 16: Restrictive Covenant Conditions for Specific Mitigation Sites

In this condition, Ecology has attempted to regulate beyond its prescribed authority and mandate mitigation through restrictive covenants that exceed the level allowed under a §401 Certification. For example, the types of development identified in this condition, (stormwater

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR HEARING ON THE DEPARTMENT OF ECOLOGY'S §401 CERTIFICATION AND CZMP CONCURRENCE - 11

50037849.02

**FOSTER PEPPER & SHEFELMAN
PLLC**

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003680

SEP-14-98 MON 04:06 PM

SMITH WNEY

FAX: 2066243670

PAGE 13

1 **6. B5, pp. 9-10: Regional Detention Facility**

2 With this condition, Ecology appears to require the Port to construct a regional stormwater
3 detention facility ("RDF"), ostensibly in conjunction with the implementation of the Des Moines
4 Creek Basin Plan. As written, the Order is ambiguous on this point; to the extent that the language is
5 construed to require the Port to construct the RDF, this condition is unlawful since there is currently
6 no finalized plan in place with respect to Des Moines Creek. This fact also precludes
7 implementation of RDF construction as the "preferred alternative" under the Des Moines Creek
8 Basin Plan. In fact, there is no "preferred alternative" with respect to the design or configuration of
9 the proposed RDF in the Des Moines Creek Basin Plan.

10 This condition also exceeds Ecology's regulatory authority by requiring construction of an
11 RDF for basin-wide improvements, a condition that goes far beyond the impacts of the proposed
12 improvements at STIA and the legal authority of Ecology in reviewing a §401 certification and the
13 Port's certification of consistency with the CZMP.

14 Finally, the size of the RDF area required by this condition is excessive and actually creates
15 issues with respect to the operation of STIA such as emergency response and wildlife attractants.

16 Given the fact that a feasibility study is now underway to determine, among other things, the
17 needed size of the future RDF, it is inappropriate for Ecology to specify construction of an RDF that
18 is "approximately 240 acre-feet," as was done in Condition B5b.

19 **7. C4, p. 10. "Excessively High Levels of Contaminant" In Des Moines and Miller**
20 **Creeks.**

21 This condition is purportedly based on the fact that, in Ecology's opinion, "[b]oth Des
22 Moines Creek and Miller Creek have been identified as having excessively high storm flows and
23 levels of contaminants above state water quality criteria." As has previously been noted, Ecology
24 has not undertaken a §303(d) listing for either Des Moines or Miller Creeks and no TMDL has been
25 promulgated for any "contaminant." As a result, this condition lacks any basis in fact. Additionally,
26 because there are no existing contaminant levels identified, there is no means by which the Port can

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 13

100778-09.02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003681

SEP 14 98 MON 04:07 PM

SMITH, NEV

FAX: 2066243670

PAGE 14

1 meet any condition based on those "levels." In effect, the Port has been assessed a waste load
2 allocation without any corresponding TMDL process. As such, the imposition of this condition is
3 unjust and unlawful.

4 **8. C4a, pp. 10-11: Stormwater Detention**

5 **a. Regulation without prerequisite rulemaking or promulgation of**
6 **regulations**

7 The enforcement mechanisms in Condition C4a are unlawful and/or unreasonable for several
8 reasons. First, Ecology never has promulgated specific, comprehensive stormwater regulations. The
9 implementation portion of WAC 173-201A (Surface Water Quality Standards) recognizes that, for
10 stormwater, the implementation of those water quality standards is achieved through BMPs. This is
11 consistent with the most current EPA stormwater guidance, which recognizes *that implementation of*
12 *BMPs is the appropriate method of complying with water quality standards due to the intermittent*
13 *nature and variability of stormwater.*

14 In its General Permit for Stormwater Associated with Industrial Activity, Ecology has
15 recognized that the development of a Stormwater Pollution Prevention Plan and implementation of
16 available and reasonable BMPs constitutes AKART and compliance with water quality standards.
17 (Fact Sheet to General Stormwater Industrial Permit, page 11). The Board has recently
18 acknowledged the validity of the BMP approach to stormwater management. As has been noted
19 above, non-point sources cannot be regulated in a §401 Certification.

20 This condition also is unlawful because Ecology has imposed an extraordinarily expensive
21 technology requirement without any underlying engineering analysis. It is therefore impossible to
22 know if compliance with the applicable conditions would have any environmental benefit. The
23 requirement violates both state and federal law.

24 Finally, Ecology has acted unlawfully by imposing this condition without first undertaking a
25 §303(d) listing process to identify contaminants and setting TMDL's for specific contaminants.
26 Because Ecology has not gone through the §303(d) listing process and identified a problem before

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 14

50037848.02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003682

SEP-14-98 MON 04:07 PM

SMITH RNEY

FAX: 2066240670

PAGE 15

1 imposing a solution, the condition exceeds Ecology's regulatory authority and, accordingly, is unjust
2 and unlawful.

3 **b. Regulation In Excess of Permissible Authority**

4 Condition C4a is also unlawful because it is imposed with respect to "all stormwater
5 discharges" from STIA. (Emphasis supplied). Such regulation exceeds Ecology's authority of
6 current law since non-point source discharges are not regulated under a §401 water quality
7 certification.

8 This condition also is unlawful in that it regulates Port conduct unrelated to the proposed
9 Project. The condition, as written, would require retrofitting the *entire airport*, even though most
10 elements of such a sweeping requirement would have no connection with the proposed Project. In
11 addition, the retrofitting of the entire STIA is required to meet the standard of predevelopment
12 conditions, namely, "till pasture." Such a condition is unattainable as a practical matter because
13 there is no way to determine what the level of stormwater detention was under the "till pasture"
14 standard.³

15 The detention standards described in this condition appear to be the Level 2 standard from
16 the King County Design Manual. Yet King County has not designated the Des Moines Creek and
17 Miller Creek watersheds as requiring the Level 2 level of protection, and it did not identify this level
18 of protection in the recently completed (1997) basin plan. In fact, this alternative was considered in
19 the Des Moines Creek Basin Plan and dismissed in favor of the RDF.

20 The purpose of the Des Moines Creek Basin Plan is to determine the level of protection and
21 the standards that should be applied to protect the resource. Under the Plan, after extensive analysis
22 the selected alternative was to require future development in the watershed to comply with the basic
23 standards of the King County Design Manual, and to use the RDF to account for the limitation of
24 those standards and to retrofit existing impacts. Constructing the RDF, retrofitting to

25 _____
26 ³ Construction at STIA began in 1942. Thus, retrofitting to "predevelopment conditions" would require the Port to
achieve detention that was prevalent at that time.

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 15

10037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003683

SEP-14-98 MON 04:08 PM

SMITH WNEY

FAX: 2066243670

PAGE 16

1 predevelopment conditions, *and* using the Level 2 standard would require mitigation of all watershed
2 impacts twice at a significant cost, but without a significantly increased level of environmental
3 protection.

4 In addition, storm water discharges associated with industrial activities are already regulated
5 under the Port's existing NPDES permit, which is conditioned to meet water quality standards.

6 Finally, the conditions imposed by Ecology also violate the constitutional substantive due
7 process and equal protection limitations because they are excessively burdensome and
8 discriminatorily imposed.

9 **9. C4b, pp. 11-12: Stormwater Discharges**

10 Once again, Ecology has imposed a condition requiring "All stormwater discharges from
11 SeaTac to be in compliance with the surface water regulations of 173-201A." (Emphasis supplied).
12 As already has been noted above with respect to Condition C4a, such a requirement is unjust and
13 unlawful because it: (1) goes beyond the scope of current legal authority; (2) attempts to impose
14 regulation beyond the scope of the improvements for which the certification is sought;
15 (3) is duplicative of regulation already contained in the existing NPDES permit; (4) was issued
16 without the prerequisite identification and rulemaking processes; and (5) lacks underlying
17 engineering analysis, and thus violates AKART.

18 Because the discharges that would be controlled by this condition already are governed by
19 the Port's NPDES permit, the existing BMPs required by that permit are the appropriate methods of
20 control. Furthermore, because Ecology never has promulgated specific stormwater regulations, the
21 federal regulations defining industrial activity supply the standard and would justify controlling only
22 those *point source* stormwater discharges that are associated with "industrial activity," as defined by
23 those regulations. Any attempt to regulate beyond the scope of the applicable regulations is
24 excessive and, accordingly, unjust and unlawful.

25
26
PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 16

50037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003684

SEP-14-98 MON 04:00 PM

SMITH WNEY

FAX: 2066243670

PAGE 17

1 **10. C4d, p. 12: Collection of 1.3 Inches of Stormwater Runoff**

2 Ecology has required the detention of 1.3" of runoff for the *entire airport* following any
3 "anti-icing/deicing event." The cost of this requirement alone will run into tens of millions of
4 dollars. Yet Ecology has mandated that the Port incur this cost notwithstanding the fact that: (1)
5 Ecology is aware that a study of whether there is any actual impact to receiving waters from deicing
6 agents contained in stormwater runoff is underway; and, (2) there is insufficient data to justify any
7 imposition of conditions.

8 The Port believes this condition is premature given the lack of data demonstrating impact on
9 receiving water from deicing activities on the runways and taxiways. The Port recently implemented
10 a number of BMPs to improve the quality of the discharge from existing runways and taxiways,
11 including constructing expensive snow storage facilities. This condition amounts to a technology
12 determination that exceeds AKART, without the requisite engineering analysis to support the
13 determination. The incremental environmental benefit conferred far exceeds the cost of the
14 technology.

15 Imposition of conditions without an adequate basis in engineering, or where the cost of the
16 improvement is completely unrelated to any yet to be determined benefit is arbitrary and capricious
17 and, therefore, violates the Port's rights under Chapter 64.40 RCW. It also violates AKART, since
18 the mandated approach is neither "reasonable" nor "available."

19 **11. C4e, p. 12: Receiving Water Monitoring Plan**

20 This condition requires a change from end-of-pipe monitoring (which is currently the
21 requirement of the NPDES permit) to a "receiving water" monitoring plan. This condition is
22 unlawful and unjust because it goes beyond the scope of permissible regulation of non-point source
23 discharges, as elaborated above.

24 Any current and future point source discharges of stormwater associated with industrial
25 activities will be subject to NPDES permitting. Thus, to the extent that Ecology requires reasonable
26 assurance that BMPs are effective, those assurances will be incorporated into NPDES permits. In

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 17

50037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003685

SEP-14-98 MON 04:09 PM

SMITH WNEY

FAX: 2066243670

PAGE 13

1 any event, requiring monitoring "immediately downstream from each stormwater discharge point"
 2 exceeds the monitoring requirements of the CWA in several respects. First, only point sources
 3 discharges are regulated. Second, applicable regulatory guidance recognizes that it is unnecessary to
 4 monitor each point source discharge to obtain representative monitoring. For outfalls that are
 5 "substantially equivalent," only one discharge point is necessary. Third, any monitoring plan should
 6 include a dilution zone, which is entirely appropriate after implementation of BMPs.

7 Finally, the inclusion of penalties is inappropriate. As discussed above, compliance with
 8 BMPs must constitute compliance with standards. The Port should not be forced to implement
 9 technology Ecology selects, yet be subject to penalties if that technology does not meet water quality
 10 standards. In many instances the technology selected by Ecology has not been demonstrated to solve
 11 the problem. Such uncertainty calls into serious question whether or not this technology would
 12 constitute AKART.

13 **12. D1, p. 13: Requirement For Groundwater Study and Execution of An Agreed**
 14 **Order by December 15, 1998.**

15 Condition D1 makes a voluntary Groundwater Study being conducted under a MTCA
 16 Agreed Order a binding requirement under the Order. This binding requirement exceeds Ecology's
 17 statutory authority under a §401 Certification, does not have adequate nexus with the Project
 18 proposed by the Port, and is thus unjust and unlawful.

19 Even if the MTCA STIA Groundwater Study is deemed to be an appropriate part of
 20 Ecology's review and authority under §401 or the CZMP, the December 15, 1998 timeline has
 21 already been acknowledged by Ecology staff to be unrealistic and unachievable. The Port is not
 22 capable of achieving this deadline because it has been waiting for some time the Responsiveness
 23 Summary from Ecology, a task that is wholly in the control of Ecology.

24
 25
 26

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
 HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
 CERTIFICATION AND CZMP CONCURRENCE - 13

50037849 02

**FOSTER PEPPER & SHEFELMAN
 PLLC**

A PROFESSIONAL LIMITED LIABILITY COMPANY
 1111 THIRD AVENUE, SUITE 3400
 SEATTLE, WASHINGTON 98101-3299
 206-447-4400

AR 003686

SEP-14-98 MON 04:09 PM

SMITH XNEY

FAX: 2066249678

PAGE 19

1 **13. E1, p. 13-14: Protection From Construction Impacts**

2 Condition E1 duplicates the existing NPDES permit and potentially exposes the Port to
3 double regulatory penalties with no corresponding environmental benefit. As already has been
4 noted, such duplication is excessive regulation and, accordingly, unlawful and unjust.

5 **14. E2, p. 14: Regulation of Uplands**

6 Ecology's conditions are unlawful because Ecology has attempted to impose regulatory
7 restrictions on "uplands." These uplands are not wetlands or "waters of the State"; accordingly,
8 there is no §401 certification required with respect to those uplands. Any attempt by Ecology to
9 regulate with respect to this property is beyond Ecology's regulatory jurisdiction.

10 **15. E7, pp. 14-15: Fill Standards**

11 This condition requires that fill used in the project be evaluated by a process previously
12 agreed to by the Port; however, the condition significantly changes a key provision of that process in
13 a manner that exceeds Ecology's authority and is based on vague and open-ended criteria.

14 By prior agreement, the Port has committed to evaluating the environmental conditions of fill
15 material brought in for use in the project. The environmental criteria (contaminant concentration
16 levels) in the agreement are the MTCA Method A standards, a very specific set of quantified
17 concentration levels that the state has accepted as being conservatively suitable to support human
18 residential activity. MTCA contaminant cleanup levels are accepted statewide as the defining
19 standard for appropriate use of fill materials. Condition E7 substitutes for this specific, published,
20 and universally accepted set of criteria a vague standard that cannot be easily measured and which
21 provides no level of certainty for the Port as it conducts its Project. The condition requires that the
22 Port demonstrate that fill brought to the site "does not contain toxic materials in toxic amounts."
23 This substitution puts the Port in perpetual risk of either violation of a vague and unspecified
24 condition, or, at very least, having to defend and argue the qualifications of each and every source of
25 material. As such, this condition is unjust and unlawful, and should be deleted.

26
PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 19

50037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003687

SEP-14 98 MON 04:10 PM

SMITH WNEY

FAX: 2066243670

PAGE 20

1 Condition E7c goes further, indicating that, without established justification or rationale,
2 Ecology may add "[a]dditional conditions or corrective actions" based on its review of the fill
3 material evaluation documentation. There is no statement of the standards for Ecology's review, the
4 specific conditions on which Ecology would impose additional requirements, or the nature and
5 extent of the additional requirements.

6 **16. F1, p. 15: Emergency/Contingency Measures**

7 Condition F1, while referring to emergency/contingency measures, does not take account of
8 the potential emergencies that could occur at STIA at some point. If they do occur, there will very
9 likely be violations of this condition as presently worded, due to Ecology's failure to take these
10 contingencies into account. There is no allowance for emergency measures that mandate the use of
11 firefighting foam, which could result in a potential environmental impact. This condition completely
12 ignores the very real possibility that an airplane crash, landing emergency, or vehicle fire could
13 occur at the airport. In any of these situations, the public's safety must come first. In such
14 emergencies, the Port has no alternative but to employ such measures, notwithstanding the fact that
15 they may result in violation of applicable regulations and permits. Ecology's condition makes no
16 accommodation for this reality in the operation of STIA.

17 Finally, the requirement that a detailed written report be submitted within five days is
18 unachievable, since the Port cannot obtain lab results necessary to comply with this condition in such
19 a short time. By failing to acknowledge these realities facing the Port in its operation of STIA, this
20 condition is unreasonable, unlawful and unjust.

21 **17. G8c, p. 18: Failure to Process Additional Applications**

22 Ecology has mandated that if, in its sole determination, the Port is out of compliance with
23 any of the conditions imposed in the Order, "no additional applications from the Aviation Division
24 of the Port for water quality certification will be reviewed until the existing non-compliance is
25 resolved to the satisfaction of Ecology." As has been noted repeatedly above, many of the
26

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 20

10037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003688

SEP-14-98 MON 04:10 PM

SMITH WNEY

FAX: 2066243670

PAGE 21

1 conditions imposed by the Order either violate existing law, or are based on an analysis that makes
 2 the conditions either impossible or impracticable to achieve. In the face of such conditions, holding
 3 any future application for certification hostage is completely unjustified, and accordingly unjust and
 4 unlawful. Refusal to process applications exceeds the scope of Ecology's enforcement authority
 5 because it imposes a penalty, as well as being grossly disproportionate to any potential violation.

6 **18. Unrealistic and Unachievable Deadlines for Port Plans and Reporting**

7 The Order contains numerous deadlines, including several deadlines that expire 30 days after
 8 issuance of the Order. The Order also contains provisions that would allow the imposition of
 9 monetary sanctions for failure to comply with these deadlines. For the reasons stated in part in this
 10 Appeal, many, if not all of these deadlines are unrealistic and unachievable in the time frame
 11 imposed. While the Port has complied with the 30-day deadlines and will continue to the best of its
 12 ability to meet with the other deadlines contained in the Order, this compliance does not alter the fact
 13 that the deadlines are unrealistic. In many instances Ecology itself is in possession of information
 14 which is required to be included in a product delivered by the Port.

15 **VII. RELIEF REQUESTED**

16 Based on the allegations outlined above, the Port requests the following relief:

- 17 1. For a formal hearing on its appeal;
- 18 2. For an order invalidating or modifying conditions imposed by the Department of
 19 Ecology in the Order, as follows:

20 **Condition A1:** Specify that compliance with reasonable BMPs constitutes compliance
 21 with water quality standards or that compliance with the Port's NPDES permit constitutes
 compliance with water quality standards. Delete the last paragraph of this condition.

22 **Condition B1:** Revise this condition to include a provision that the Port will be
 23 required to continue to participate in the development of the feasibility and preliminary design
 24 studies associated with the Des Moines Creek Basin Plan, but that the Port will only be required to
 25 take such action in connection with that Plan as is agreed to by all participants in the planning
 process and to assist in implementing such conditions as are ultimately specified by feasibility and
 preliminary design studies associated with that Plan.

26 PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
 HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
 CERTIFICATION AND CZMP CONCURRENCE - 21

50037849 02

**FOSTER PEPPER & SHEFELMAN
 PLLC**

A PROFESSIONAL LIMITED LIABILITY COMPANY
 1111 THIRD AVENUE, SUITE 3400
 SEATTLE, WASHINGTON 98101-3299
 206-447-4400

AR 003689

SEP-14-98 MON 04:11 PM

SMITH WNEY

FAX: 2066243670

PAGE 22

1 **Condition B3a and Condition B3b:** Allow exceptions for: (1) navigational aides; (2) utility
2 work; (3) security fences; (4) vegetation and wildlife management; (5) environmental study and
3 monitoring (6) stormwater detention and drainage; (7) creek crossings; (8) trails; and (9) roadway
4 safety improvements.

5 Allow stormwater facilities and trails in outer 50 feet of buffer without further approval by
6 Ecology;

7 Delete required approvals for modifications to S. 154th crossing.

8 **Condition B4a:** Delete the specific performance standards for flow augmentation and
9 revise this condition to rely on the feasibility study to determine implementation and operation of the
10 system.

11 Delete the requirement of a trust fund.

12 **Condition B5:** Delete the requirement that the Port construct the RDF and substitute
13 the requirement that the Port participate in the continued feasibility and preliminary design process
14 associated with the Des Moines Creek Basin Plan, as outlined above with respect to Condition B1.

15 **Condition C4:** Delete Condition C4's preliminary paragraph (which appears prior to
16 Condition C4a).

17 **Condition C4a and Condition C4b:** Delete conditions C4a and C4b and substitute a
18 requirement that the Port comply with current BMPs with respect to stormwater detention as
19 currently defined in The Preliminary Comprehensive Stormwater Management Plan for Seattle-
20 Tacoma International Airport Master Plan Improvements (July 1998).

21 **Condition C4d:** Delete Condition C4d.

22 **Condition C4e:** Delete Condition C4e and substitute a condition that the Port shall
23 develop a plan to monitor the effectiveness of BMPs that are implemented in connection with the
24 §401 certification.

25 **Condition D:** Delete Condition D; in the alternative, if found to be within Ecology's
26 authority, revise the timeline contained in this condition to an achievable date.

Condition E1: Delete Condition E1 and substitute a requirement that the Port
continue to comply with the terms of its NPDES permit.

Condition E2: Delete the words "and upland vegetation" from Condition E2.

Condition E7: Revise this condition by deleting the words "toxic materials in toxic
amounts" and substituting the words "material that exceeds MTCA Method A standards for soil
contamination."

Condition E7b: Revise this condition by deleting the words "contain toxic materials in
toxic amounts" and substituting the words "exceed MTCA Method A standards for soil
contamination."

Condition E7c: Delete Condition E7c.

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 22

10037849 02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

AR 003690

SEP-14-98 MON 04:12 PM

SMITH WNEY

FAX: 2066249670

PAGE 23

1 **Condition F1:** On the second bullet point in Condition F1, delete the word
2 "immediately" and substitute the words "as soon as is practicable"; delete the words "within 24
3 hours" and substitute the words "as soon as is practicable."

3 On the third bullet point in Condition F1, delete the words "within five days" and substitute
4 the words "as soon as is practicable".

5 **Condition G8c:** Delete Condition G8c.

6 3. For a declaratory order pursuant to WAC 371-08-355(1) addressing the correct
7 applicability of the water quality regulations to the facts of the Port's application;

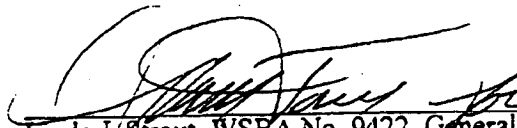
8 4. For an order to Ecology directing revision of the Order in a manner consistent with
9 the Board's opinion in this matter;

10 5. For an award of damages and attorney fees and costs pursuant to RCW 64.40 and
11 other applicable law;

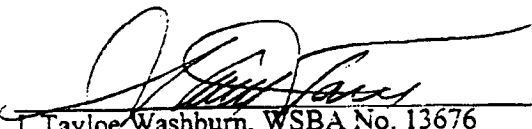
12 6. For such other relief as the Board deems just and equitable.

13 Respectfully submitted this 19th day of August 1998.

14 PORT OF SEATTLE

15 
16 Linda J. Strout, WSBA No. 9422, General Counsel,
17 Traci M. Goodwin, WSBA No. 14974, Senior Port Counsel
18 Attorneys for Appellant
19 Port of Seattle

20 FOSTER PEPPER & SHEFELMAN PLLC

21 
22 J. Tayloe Washburn, WSBA No. 13676
23 Steven G. Jones, WSBA No. 19334
24 Thomas M. Walsh, WSBA No. 6053
25 Attorneys for Appellant
26 Port of Seattle

PORT OF SEATTLE'S NOTICE OF APPEAL AND REQUEST FOR
HEARING ON THE DEPARTMENT OF ECOLOGY'S §401
CERTIFICATION AND CZMP CONCURRENCE - 23

50037849.02

FOSTER PEPPER & SHEFELMAN
PLLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-3400

AR 003691

EXHIBIT

AR 003692

SEPA DETERMINATION OF NON-SIGNIFICANCE (DNS) OF PROPOSED ACTION*FAA Terminal Radar Approach Control (TRACON) Facility
Seattle-Tacoma International Airport*

The Port of Seattle has completed an environmental analysis, including review of pertinent and available environmental information and preparation of an Environmental Checklist for the following proposal:

Description of the Proposed Action: The Port of Seattle plans to lease a 19-acre site to the FAA for the development of a terminal radar approach control (TRACON) facility. The FAA will construct, own and operate the facility. The existing TRACON is located in the Sea-Tac Airport main terminal. The TRACON will be expanded and modernized at the new location. Air traffic controllers working at the TRACON track all aircraft within 60 miles of Sea-Tac Airport.

The proposed TRACON consists 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. The remaining 10 acres of the site consist of wetlands and a proposed and a 100-foot wide buffer adjacent to the wetland that will remain undeveloped.

Project Location: The proposed TRACON location is a 19-acre site on the east side of Des Moines Memorial Way between South 160th Street and South 164th Street. Access to the site is from South 160th Street off of Des Moines Memorial Way.

Lead Agency: Port of Seattle (POS SEPA No. 01-19)

Determination: This environmental evaluation has been prepared following the provisions of the Washington State Environmental Policy Act (SEPA) under Chapter 43.21C, Revised Code of Washington (RCW), Chapter 197-11, Washington Administrative Code (WAC), and Resolution 3028, Port of Seattle SEPA Policies & Procedures. As lead agency, the Port has determined that the proposal will not have a probable significant adverse impact on the environment. Therefore, an Environmental Impact Statement (EIS) is not required under RCW 43.21C.030(2)(c).

Supporting Information: Information used to reach this determination, and applicable State laws and Port of Seattle policies, regulations and procedures, are available for public review at the Port of Seattle office at: (1) Engineering Services Department, Second Floor Bid Counter, Pier 69, 2711 Alaskan Way in Seattle or (2) Port of Seattle office, 17900 International Blvd., Suite 301 in the City of SeaTac. Any questions relating to this determination or to the proposed action should be referred to David McCraney, Environmental Program Manager, Port of Seattle, P.O. Box 1209, Seattle, WA 98111, Tel: 206-728-3193.

Public & Agency Comment: No action will be taken on this proposal until 5:00 PM on October 31, 2001, 2001 during which time public and agency comments will be received by the Port. Following the fourteen day review period, the Port will (1) formally adopt this Determination of Non-Significance; or (2) clarify or revise the proposal; or (3) complete additional environmental analyses, as appropriate. Public and agency comments will be received by the Port until October 31, 2001. Comments are also received on the Port of Seattle electronic mail Internet address at SEPA.p@portseattle.org. Provide your mailing address when submitting comments to the electroic mail Internet address. The Port will work with citizens and organizations who have submitted comments to attempt to resolve environmental issues or questions. Please refer questions and comments about this determination or the proposal to David McCraney at the telephone and address above.



POS SEPA No. 01-19
October 17, 2001
Page 2

Appeals: This SEPA DNS determination may be appealed by filing a writ of review in King County Superior Court within twenty-one (21) days of the date the Port formally adopts this determination pursuant to Port of Seattle Resolution No. 3211.

Clear it for me

Michael Feldman
Director, Aviation Facilities
Port of Seattle, SEPA Responsible Official
October 17, 2001

AR 003694

EXHIBIT

AR 003695

1 got smaller and smaller. Do you remember a statement
2 to that effect?

3 A. I do.

4 Q. Can you tell me what you recall about
5 elements that may have been removed from the scope of
6 that project over time?

7 A. Well, the proposal for a 404 and 401 was
8 related to the Sea-Tac master plan expansion, which
9 included a number of different elements. The shorthand
10 has been the third runway. That's been used a lot, but
11 there's actually a number of elements besides that.
12 The south aviation support area, I believe, was a part
13 of the proposal, various upgrades to other parts of the
14 airport, runway safety areas, that sort of thing.

15 During the course of our review, as we were
16 trying to determine the full extent of the proposed
17 project and its elements, we discussed changes to the
18 Port's stormwater system, its industrial wastewater
19 system, changes related to navigation equipment needed,
20 as well as wetland or other mitigation requirements
21 near the airport. I think there were probably a few
22 other elements, but those are the ones that come to
23 mind right now.

24 Q. I want to get into some of those in a little
25 bit. I think my question was more directed to the size

1 or scope of the the project itself and whether or not
2 it's your testimony that you believe that the matters
3 under consideration, the projects under consideration
4 with regard to that 401 application got smaller as time
5 went on apart from the issues that you mentioned, the
6 scope or size of the project.

7 A. The scope of the review of the project was --
8 got smaller as time went on; for instance, the need to
9 do a cumulative impact evaluation. At one point, I
10 think originally the Port hadn't anticipated, for
11 instance, that the change to the IWS system would be
12 included in Ecology's review. For some period of time,
13 I did review that change as part of this proposal, but
14 I believe that's since largely dropped out of the
15 review.

16 Q. And what do you base that on?

17 A. The 401 that was issued back in September and
18 also some of the discussions in the various
19 declarations and depositions and also some of the
20 information in the stormwater plan that's been
21 presented by the Port, also some of the modeling
22 discussions.

23 Q. So is it your belief, then, that certain
24 issues related to the IWS are no longer being
25 considered as a part of the cumulative impacts for the

1 Third Runway Project as a whole?

2 MR. EGLICK: Objection as to the form of the
3 question.

4 A. I would say that if they are being
5 considered, it depends on elements of review that have
6 not yet occurred, and some of those elements should
7 have occurred as part of the 401 determination.

8 Q. (BY MR. REAVIS) So as I understand that
9 answer, then, you're saying that while they might
10 possibly be still on the radar screen for Ecology, they
11 have dealt with that by requiring future submittals to
12 address those issues?

13 MR. EGLICK: Objection as to the form of the
14 question.

15 Q. (BY MR. REAVIS) Is that a fair
16 characterization of your answer?

17 A. Could you repeat the question, please?

18 MR. REAVIS: Would you read that back,
19 please?

20 (The reporter read back as requested.)

21 MR. REAVIS: Let me rephrase that. Maybe a
22 better objection would be vague.

23 MR. EGLICK: That's part of the form, isn't
24 it?

25 MR. REAVIS: Yeah, true.

1 Q. (BY MR. REAVIS) Let me see if I can
2 paraphrase your answer, and tell me if this is correct.
3 As I understood your last answer, what you were saying
4 was Ecology has decided to deal with certain issues
5 concerning the IWS by requiring future submittals to
6 address some of those issues, correct?

7 A. Yes.

8 Q. So you're not necessarily saying that Ecology
9 has decided that those IWS issues are irrelevant or
10 beyond the scope of their review, but they have decided
11 to deal with them in a manner that requires future
12 submittals?

13 A. Well, I wouldn't characterize it that way. I
14 guess until those future submittals come in and Ecology
15 weighs in on them, we won't know whether or not, for
16 instance, the IWS issue is resolved adequately, and
17 that would apply to pretty much any of the future
18 submittals that the 401 requires.

19 Q. Well, whether or not it's resolved adequately
20 in your words, what I'm trying to figure out is whether
21 you're saying that Ecology has taken certain parts of
22 the project or certain issues and simply said those are
23 beyond the scope of our review here, we're not even
24 going to consider issues that were previously included
25 within the first JARPA applications that's Exhibit 208.

1 MR. EGLICK: Objection as to the form of the
2 question. Just to give you some feedback if you want
3 it, Gil, it's because you're talking about what scope
4 of review, but you're not saying scope of review of
5 what. 401? IWS? Some other permit?

6 Q. (BY MR. REAVIS) Let me be a little bit more
7 specific, because this all comes from a statement in
8 your declaration, so I want to go ahead and have those
9 marked, both declarations.

10 MR. SMITH: Counsel, we've been going for
11 about two hours. If you could find an appropriate time
12 to take a break any time soon, that would be good.

13 MR. REAVIS: Why don't we do that.

14 (Recess taken.)

15 (Deposition Exhibit Nos. 209 and 210 were
16 marked for identification.)

17 Q. (BY MR. REAVIS) Let me show you a couple of
18 exhibits that were marked during the break. Can you
19 confirm for me that Exhibit 209 is a copy of the first
20 declaration that you submitted in this case in
21 connection with the stay order?

22 A. It looks like the one.

23 Q. And is Exhibit No. 210 the second or reply
24 declaration you submitted in connection with that same
25 motion?

1 A. Correct.

2 Q. Now, the question that I was trying to get to
3 a minute ago comes from a statement on page 8 of your
4 reply declaration, which is Exhibit 210. If you look
5 at line 15, the sentence reads, "In actuality, however,
6 as time went on, the scope of Ecology's review and
7 eventual issuance of the 401 certification was
8 continually reduced, generally after discussions with
9 the Port about their difficulties in complying with
10 various requirements of the project review, and
11 generally despite recognition of the regulations and
12 legal decisions cited above."

13 And maybe my question was asking you
14 something different, but can you tell me what was it
15 about the scope of Ecology's review that was being
16 continually reduced?

17 A. Originally you'd asked about the scope as
18 reflected in the Exhibit 208, the JARPA from December
19 of '96, and I would have to go through this and look at
20 each specific element to compare that statement with
21 what was in the JARPA.

22 The statement in my declaration reflected
23 primarily later determinations by Ecology of how large
24 the project was and what aspects of the facility under
25 review should or shouldn't be included and the

1 development of various mitigation scenarios and both
2 the impacts of those mitigation elements and subsequent
3 causes of other areas of concern that may come out of
4 the mitigation elements, also changes in the cumulative
5 impacts associated with this proposal.

6 Q. But you're not saying in that statement that
7 the scope of the project as reflected in the JARPA has
8 been reduced by Ecology or by the Port over time?

9 A. Well, I would have to look at the description
10 of the project in this JARPA and also in the subsequent
11 applications to look at what elements were and weren't
12 included in each one.

13 Q. And those would be the sources for
14 determining what the scope of the project was that was
15 under review for Ecology, correct, the JARPA that
16 supports the application for a 404 permit?

17 A. Those would describe the proposed project.
18 Ecology's review would include determining the direct
19 and indirect impacts associated with the proposed
20 project, and the scope of those impacts as they relate
21 to the project have changed quite a bit over time.

22 Q. So you believe that there may be certain
23 impacts from the project that are no longer under
24 consideration by Ecology in connection with the 401
25 application?

RECEIVED
FEB 20 2002

ENVIRONMENTAL
HEARINGS OFFICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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.)
 _____)

No. 01-160

CERTIFICATE OF SERVICE

I, Rachel Parks, an employee of Helsell Fetterman LLP, attorneys for the Airport
Communities Coalition, certify that:

I am now, and at all times herein mentioned was, a citizen of the United States, a resident of
the State of Washington, and over the age of eighteen years.

On February 20, 2002, I caused to be hand-delivered by special messenger ACC's and
CASE's Response to the Port of Seattle's Motion for Partial Summary Judgment Re: SEPA and
Declaration of Michael P. Witek in Support of ACC's and CASE's Response to Port Motion for
Partial Summary Judgment on SEPA Issue to:

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

CERTIFICATE OF SERVICE - 1

ORIGINAL

AR 003703

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Joan Marchioro
Thomas Young
Jeff Kray
Assistant Attorneys General
Ecology Division
2425 Bristol Court S.W., 2nd Floor
Olympia, WA 98504

Linda Strout
Traci Goodwin
Port of Seattle, Legal Dept.
2711 Alaskan Way, Pier 69
Seattle, WA 98111

Jay Manning
Gillis Reavis
Marten & Brown LLP
1191 Second Avenue, Suite 2200
Seattle, WA 98101

Roger Pearce
Steven Jones
Foster Pepper & Shefelman
1111 Third Avenue, Suite 3400
Seattle, WA 98101

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20 day of February, 2002, at Seattle, Washington.

Rachel Parks

Rachel Parks

G:\LU\ACCPCHB\CERTSERV-022002

CERTIFICATE OF SERVICE - 2

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 003704