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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

AIRPORT COMMUNITIES
COALITION,

Appellant,

CITIZENS AGAINST SEA-TAC
EXPANSION,

Intervenor/Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY; and
PORT OF SEATTLE,

Respondents.

PCHB No. 01-160

MEMORANDUM IN RESPONSE TO
PORT OF SEATTLE'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON SEPA ISSUE

I. INTRODUCTION

The Department of Ecology ("Ecology"), by and through its counsel, Joan M. Marchioro, Thomas J. Young, and Jeff B. Kray, Assistant Attorneys General, submit this Memorandum in Support of the Port of Seattle's ("Port") Motion for Partial Summary Judgment. Ecology agrees that Agreed Issue No. 14, "Did Ecology and the Port comply with SEPA", is an issue ripe for summary judgment. Because both Ecology and the Port have, as a matter of law, complied with SEPA, Ecology requests that the Pollution Control Hearings Board ("Board") grant the Port's Motion.

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1 The subject of this appeal is Ecology's issuance of Order No. 1996-4-02325
2 (Amended-1) ("Order") granting a 401 water quality certification pursuant to Clean Water Act
3 § 401, 33 U.S.C. § 1341, and a certification of compliance with the Coastal Zone Management
4 Act ("CZMA"), pursuant to CZMA § 307(c)(3), 16 U.S.C. § 1456(c)(3). Ecology issued this
5 Order upon the Port's completion of an Environmental Impact Statement ("EIS"), a
6 Supplemental Environmental Impact Statement ("SEIS"), and also the Port's addition of
7 addenda to address newly discovered information regarding additional wetlands. *See* Feldman
8 Decl., ¶¶ 2,3,8, submitted with the Port's Motion for Partial Summary Judgment on SEPA
9 Issue. The Port, as the lead agency under SEPA, acted in accordance with the substantive and
10 procedural requirements of SEPA. Ecology, as an agency with jurisdiction, issued its Order
11 upon consideration of the environmental impacts evaluated in the Port's SEPA documents.
12 Appellant's claims that the conditions imposed by Ecology in its Order are inadequate are not
13 the subject of this motion and will be addressed at hearing. However, as shown below, claims
14 that the Port and Ecology did not comply with SEPA should be dismissed.

15 II. ARGUMENT

16 The Port is entitled to summary judgment on the issues below. Summary judgment is
17 available to avoid unnecessary trials when there is no genuine issue of material fact. *LaPlante*
18 *v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). In Washington, summary judgment is proper if
19 there is no genuine issue of material fact and the moving party is entitled to a judgment as a
20 matter of law. CR 56; *Van Noy v. State Farm*, 142 Wn.2d 784, 790, 16 P.3d 574, 577 (2001).
21 A material fact is one upon which the outcome of the litigation depends. *Jacobsen v. State*, 89
22 Wn.2d 104, 569 P.2d 1152 (1977).

23 A. The Port's Actions Are In Compliance With SEPA

24 SEPA was adopted to identify and evaluate significant adverse environmental impacts
25 of governmental actions. RCW 43.21C.031. This is achieved through statutory requirements
26 of a threshold determination and an EIS, if necessary. RCW 43.21C.031,.033. Because a

1 project may require permits or approvals from several agencies, known as "agencies with
2 jurisdiction" under WAC 197-11-714(3), SEPA rules establish a "lead agency" to comply with
3 SEPA's procedural requirements in order to prevent duplication of SEPA procedures. See
4 WAC 197-11-922 through -940. Under SEPA, a lead agency is directed to evaluate the
5 impacts of a proposal and make a threshold determination of significance ("DS") or of
6 non-significance ("DNS"). WAC 197-11-050. If the proposal may have probable significant
7 impacts, an EIS is required. RCW 43.21C.031; WAC 197-11-360.

8 In this case, the Port, as lead agency, made an initial DS and subsequently issued an
9 FEIS in 1996 and an SEIS in 1997. Airport Communities Coalition ("ACC") appealed both of
10 these documents and the state Court of Appeals rendered a final binding decision. *Des Moines*
11 *v. Puget Sound Regional Council*, 108 Wn. App. 836, 988 P.2d 27; Feldman Decl., ¶ 7, Ex. I.
12 Therefore, to the extent Appellant is arguing that the Port's actions with regard to these
13 environmental documents failed to comply with SEPA, Ecology agrees with the Port that these
14 claims are barred by the doctrine of collateral estoppel and are outside the Board's jurisdiction.
15 Collateral estoppel bars the relitigation of issues actually and necessarily determined, to
16 prevent the burdens of repetitious litigation. *Stevedoring Services of America v. Eggert*, 129
17 Wn.2d 17, 40, 914 P.2d 737, 749 (1996).

18 However, to the extent that the Appellant's issue regarding SEPA compliance centers
19 on the Port's decision not to require an additional SEIS, that issue has not been actually
20 litigated. Ecology does not agree with the Port that the decision not to issue an SEIS is not an
21 appealable decision. As shown below, though, claims that the Port incorrectly decided not to
22 issue an SEIS are time barred, and alternatively, are not brought in the proper forum.

23 SEPA anticipates situations where new information may be provided and authorizes the
24 agency to determine whether an SEIS is necessary or whether the impacts are already
25 adequately addressed in other documents:

26 Any agency acting on the same proposal shall use an environmental document
unchanged, except in the following cases: ... (b) For DNSs and EISs, the

1 preparation of a new threshold determination or supplemental EIS is required if
2 there are: ... (ii) New information indicating a proposal's significant adverse
3 environmental impacts... A new threshold determination or SEIS is not required
4 if probable significant adverse environmental impacts are covered by the range
5 of alternatives and impacts analyzed in the existing environmental documents.

6 WAC 197-11-600(3). On August 10, 2001, the Port concluded that there were no significant
7 adverse environmental impacts identified from the new information presented. Feldman Decl.,
8 ¶ 10, Ex. M at 5. The Port's decision not to issue an SEIS is a decision that the new
9 information does not adversely impact the environment. The decision, therefore, is essentially
10 a DNS threshold determination as to this new information. See Lori Ann Terry, *SEPA: A
11 Proposed Standard for Judicial Review of Agency Decisions to Require Preparation of a
12 Supplemental Environmental Impact Statement*, 15 U. Puget Sound L. Rev. 957, 962 (1992).
13 Here, the Port established procedures for administrative appeal of its SEPA decisions in
14 Resolution 3211 adopted in 1996. Feldman Decl., ¶ 6, Ex. F. In this Resolution, the Port
15 provided for the appeal of a mitigated DNS threshold determination. *Id.*, Ex. F at 1. Ecology
16 contends that the provisions allowing for appeals of mitigated DNS threshold decisions include
17 appeals of DNS threshold decisions as well. Because the Port's decision was essentially a
18 DNS, it was subject to appeal under the Port's adopted appeal process. This process provides
19 that an appeal of the Port's decision must be brought within 15 days of the decision. *Id.*, Ex. F
20 at 2. Appellant's failure to timely appeal the decision bars it from raising the issue here. The
21 Port's decision became final on August 27, 2001 and should not be disturbed.

22 Alternatively, SEPA decisions for which the Port's administrative appeal process is not
23 available are properly brought in superior court. The Port's Resolution provides that any
24 decision not appealable under its procedures, may be brought in superior court within 21 days.
25 *Id.*, Ex. F at 4; See also *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 26, 33, 785
26 P.2d 447 (1990) (holding because no administrative appeal was available for a decision not to
issue SEIS, the claim that the decision was incorrect was properly before the court). Because

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1 Appellant here failed to timely appeal the Port's decision to the superior court, the Port's
2 decision became final on August 31, 2001.

3 Appellant alleges that the Port failed to comply with SEPA. To the extent Appellant's
4 SEPA compliance claims involve decisions regarding the Port's initial environmental
5 evaluation, Ecology agrees these claims are barred. These claims have already been raised or
6 should have been raised in the subsequent appeal of those decisions. To the extent that
7 Appellant's SEPA compliance claims involve the Port's decision not to issue an SEIS because
8 the new information did not have adverse environmental impacts beyond those identified in the
9 original FEIS and SEIS, Ecology does not agree that these claims are not appealable.
10 However, these claims are barred, nonetheless, because the decision was not appealed within
11 the timeframe established in the Port's appeal procedures.

12 **B. Ecology's Actions Are In Compliance With SEPA**

13 SEPA was adopted to fill gaps that may exist in other regulations applicable to a
14 proposal by ensuring environmental review and then allowing an agency to condition or deny a
15 proposal based upon that review. *Bellevue Farm Owners Ass'n v. Shorelines Hearings Board*,
16 100 Wn. App. 341, 353-4, 997 P.2d 380 (2000). While SEPA provides substantive authority to
17 agencies to condition or deny proposals, it is primarily a procedural statute:

18 SEPA is essentially a procedural statute to ensure that environmental impacts
19 and alternatives are properly considered by the decisionmakers. It was not
20 designed to usurp local decisionmaking or to dictate a particular substantive
21 result.

22 *Id.* at 354 (citing *Save our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 371, 662
23 P.2d 816 (1983)).

24 The Port, as lead agency in this case, is responsible for the procedural requirements of
25 SEPA. WAC 197-11-050(2). Ecology has no procedural responsibilities in this case and uses
26 the SEPA environmental review to inform its decision-making. While Ecology may condition
or deny the proposal based on this information, SEPA does not dictate a particular substantive
result. The conditions Ecology imposes or does not impose do not result in a lack of SEPA

1 compliance. Appellant's issues as to whether conditions in Ecology's 401 certification were
2 adequately protective of the environment are not the same as whether Ecology is in compliance
3 with SEPA.¹ Furthermore, Appellant's issue as to whether Ecology agreed the project
4 complied with SEPA sufficient to issue the CZMA certification is, likewise, not the same
5 question as whether Ecology complied with SEPA. Therefore, Ecology is in compliance with
6 the requirements of SEPA as a matter of law and summary judgment should be granted to the
7 Port on this issue.

8 To the extent that the Appellant, as the Port suggests, may argue that Ecology
9 improperly failed to require the Port to issue an SEIS, Ecology agrees with the Port that this
10 claim is not appealable to the Board. The Board does not have jurisdiction to hear claims that
11 Ecology failed to act. *Weyerhaeuser v. Tacoma-Pierce County Department of Health*, PCHB
12 No. 99-067 (1999) (Order on Motions to Dismiss); *Ortman v. Ecology*, PCHB No. 99-115
13 (2000) (Order Granting Summary Judgment). Furthermore, SEPA does not require or even
14 allow Ecology to require a lead agency to complete an SEIS. This is a procedural decision of
15 the lead agency. Ecology has the ability to assume lead agency status within 14 days of the
16 issuance of a DNS or Mitigated DNS ("MDNS") by a lead agency. WAC 197-11-948(1). This
17 provision does not govern the issue because the Port did not issue a DNS or MDNS, but
18 instead issued a DS and subsequent EIS. The Port's decision not to issue an SEIS is a
19 procedural decision. Any alleged failure of Ecology to require the Port to issue an SEIS is not
20 a violation of SEPA.

21 Furthermore, Ecology agrees with the Port that the actions taken by Ecology, that are
22 subject of this appeal, are set forth as categorical exemptions under SEPA. WAC
23 197-11-800(10); WAC 197-11-855(3). However, Ecology disagrees with the contention that
24 this exemption means that SEPA claims may not be raised here. Under SEPA, when an
25

26 ¹ As stated earlier, these issues are not the subject of this appeal and will be addressed in subsequent proceedings.

1 exempt proposal is part of a series of related actions, some of which are not exempt, the
2 proposal is not exempt. WAC 197-11-305. The point is moot because an environmental
3 analysis has been undertaken and Ecology used that analysis in its decision making. While the
4 fact that actions taken by Ecology are exempt does not mandate the dismissal of any SEPA
5 claims, it does highlight that the actions taken by Ecology, while part of a larger project, do not
6 themselves cause adverse environmental impacts; both the 401 certification and the CZMA
7 certification are prerequisites necessary for further federal action. As shown above, Ecology
8 has complied with SEPA even though the actions taken are categorically exempt.


9 Ecology had no procedural duties under SEPA. Furthermore, Ecology's use of the
10 Port's SEPA documents to issue the 401 and CZMA certifications is consistent with SEPA.

11 III. CONCLUSION

12 For the foregoing reasons, Ecology agrees that the Port is entitled to summary judgment
13 as a matter of law on the issue of whether the Port and Ecology complied with SEPA.
14 Ecology, therefore, respectfully requests the Board grant the Port's Motion.

15 DATED this 19 day of February, 2002.

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17 Attorney General

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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
IN AND FOR THE STATE OF WASHINGTON**

AIRPORT COMMUNITIES COALITION,

PCHB No. 01-160

Appellant,

CERTIFICATE OF SERVICE

CITIZENS AGAINST SEA-TAC
EXPANSION,

Intervenor/Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY; and
PORT OF SEATTLE,

Respondents.

Pursuant to RCW 9A.72.085, I certify that on February 19th, 2002, I caused to be served, Memorandum in Response to Port of Seattle's Motion for Partial Summary Judgment on SEPA Issue, and this Certificate of Service, in the above-captioned matter to be served upon the parties herein, as indicated below:

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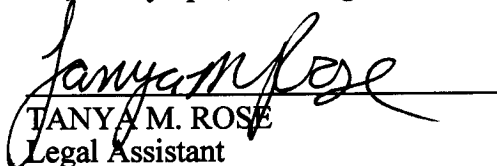
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20 the foregoing being the last known business addresses.

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

23 DATED this 19th day of February, 2002, in Olympia, Washington.

24 
25 TANYA M. ROSE
Legal Assistant

26 AR 003717