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ENVIRONMENTAL
HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Appellant,

v.

DEPARTMENT OF ECOLOGY AND
THE PORT OF SEATTLE,

Respondents.

PCHB Case No. 01-160

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

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Port of Seattle ("Port") requests the Pollution Control Hearings Board to enter judgment in favor of the Port on Agreed Issue No. 14 ("Did Ecology and the Port comply with SEPA?").

ACC claims that Ecology's 401 Certification is invalid because the Port and Ecology failed to comply with the State Environmental Policy Act ("SEPA"). In particular, ACC claims that the environmental impact statements, and other environmental documents, issued for the Port's Master Plan Update development actions by the Port and Federal Aviation Authority ("FAA") are legally inadequate and that a supplemental environmental impact statement must be prepared. Agreed Issue No. 14; Notice Of Appeal, p. 41. With respect to Ecology, ACC claims that Ecology "failed to act" to require the Port to prepare a supplemental environmental impact statement. ACC makes this claim

ORIGINAL

PORT'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON SEPA ISSUE - 1

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1 even though it is clear that Ecology's actions (a 401 certification and a certification of consistency
2 with the Coastal Zone Management Program) are exempt from SEPA's requirements. WAC 197-11-
3 800(10); WAC 197-11-855(3).

4 A review of the extensive environmental review conducted by the FAA and Port will show the
5 substance of ACC's claims have no merit. (Relevant portions of that environmental review are
6 discussed below and attached to the accompanying Declaration of Michael Feldman.) However, the
7 Board does not need to reach the substance of the FAA's and Port's environmental review in order to
8 grant summary judgment on this issue, because the Board lacks jurisdiction to entertain the
9 administrative appeal that ACC seeks to bring. The Board should dismiss Issue No. 14 for six
10 independent reasons.

11 First, because the Board lacks jurisdiction to hear an administrative appeal of the SEPA review
12 conducted by the Port, all claims under Issue No. 14 raised with respect to the Port's SEPA review
13 should be dismissed. The Port has provided its own administrative SEPA appeal procedures (appeals
14 which ACC pursued and lost previously), and only Ecology decisions are subject to Board jurisdiction.

15 Second, because the legal adequacy of the Port's SEPA review was already the subject of an
16 extensive administrative hearing, a Superior Court trial, and an appellate court decision – all of which
17 were decided against the ACC – the ACC is barred from relitigating those claims before the Board.

18 Third, because Ecology's §401 Certification does not contain any administratively appealable
19 SEPA decisions, all claims under Issue No. 14 with respect to the Department of Ecology should be
20 dismissed

21 Fourth, because the Board has no jurisdiction to hear a claim that Ecology allegedly "failed to
22 act" to require additional environmental review from the Port, all claims under Issue No. 14 with
23 respect to the Department of Ecology should be dismissed.

24 Fifth, because the SEPA statute and WAC regulations do not allow any administrative SEPA
25 appeal claiming that "supplemental" SEPA review should be required, all claims under Issue No. 14
26 with respect to Ecology should be dismissed.

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1 Sixth, because Ecology's actions in this case are categorically exempt from SEPA, all claims
2 under Issue No. 14 with respect to Ecology should be dismissed.

3 II. FACTUAL SUMMARY

4 The facts set forth below provide the Board with background on the extensive environmental
5 review performed by the Port and FAA for the Port's Master Plan Update development actions at
6 Seattle-Tacoma International Airport (the "Airport"), including a third runway. Most of these facts are
7 purely background and are not required for the Board to decide this summary judgment motion.
8 Because the Board does not have jurisdiction to review the ACC's SEPA claim in this action, the
9 Board need only review the nature of ACC's claim and the §401 Certification issued by the
10 Department of Ecology, which is categorically exempt from SEPA and which contains no SEPA
11 decisions that would be otherwise appealable to the Board.

12 A. The Port's and FAA's Final Environmental Impact Statement.

13 In February 1996, the Port and FAA issued a Final Environmental Impact Statement ("FEIS")
14 for the proposed master plan development actions at the Seattle-Tacoma International Airport.¹ The
15 FEIS discussed the impacts of the preferred alternative and a number of other on-site alternatives.
16 Off-site alternatives had already been thoroughly considered in the Flight Plan Environmental Impact
17 Statement issued by the Port and the Puget Sound Regional Council ("PSRC").²

18 The FEIS included a discussion of the stormwater management plan that would be prepared to
19 mitigate water quality and hydrology impacts of the project, including peak flow and low flow
20 impacts.³ The FEIS included a discussion of the fill requirement for the project and the sources of that
21 fill, including off-site borrow pits and on-site borrow sources.⁴ The FEIS also contained extensive
22 analysis of the impacts to area streams and wetlands.⁵

23 ¹ Feldman Dec. ¶2; relevant sections of the FEIS are attached as Exhibit A to the accompanying
24 Declaration of Michael Feldman Supporting Port of Seattle's Motion For Summary Judgment On
SEPA Issue ("Feldman Dec.").

25 ² The summary section of the Final Flight Plan EIS is attached as Exhibit B to the Feldman Dec.

26 ³ Feldman Dec. Ex. A. FEIS, Chap. IV, §10 (Water Quality and Hydrology).

⁴ Feldman Dec. Ex. A. FEIS, Chap IV, §19 (Earth).

⁵ Feldman Dec. Ex. A. FEIS, Chap IV, §11 (Wetlands), §12 (Floodplains), §16 (Plants and Animals –
Biotic Communities).

1 **B. The Port's and FAA's Supplemental Environmental Impact Statement.**

2 After the FEIS was issued, the FAA and Port realized that the growth in air transportation
3 demand was higher than the range of forecasts on which the FEIS had been based. Accordingly, the
4 FAA and Port conducted additional environmental review and published a full Supplemental
5 Environmental Impact Statement ("SEIS").⁶ The SEIS was published in May 1997.

6 The SEIS primarily considered changes to Surface Traffic, Air Quality, Noise, Construction,
7 Biotic Communities, Wetland and Floodplains, and Land Use impacts caused by the changes to the
8 project occasioned by the new forecasts (such as a longer construction schedule and differential timing
9 of the proposed projects).⁷ The additional environmental information about construction impacts
10 discussed the need for project fill and disclosed that the fill would be obtained from both on-site
11 borrow sources on the Port's property and from off-site, permitted fill sources (such as commercial
12 gravel pits).⁸ The SEIS provided additional information about biotic communities, wetlands and
13 floodplains and provided additional information about wetland functions and values. As had the FEIS,
14 the SEIS noted that the exact area of impacted wetlands could change, because the Port did not have
15 access to the private parcels to the west side of STIA, since the condemnation and purchase of those
16 parcels was part of the project for which the environmental review and FAA decisions were being
17 prepared.⁹

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25 ⁶ Feldman Dec. ¶13; relevant sections of the SEIS are attached as Exhibit C to the Feldman Dec.

26 ⁷ Feldman Dec. Ex. C. SEIS, Chapter 1 and Chapter 2.

⁸ Feldman Dec. Ex. C. SEIS Section 5-4.

⁹ Feldman Dec. Ex. C. SEIS Section 5-5.

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1 **C. The FAA's Record of Decision .**

2 On July 3, 1997, the FAA published its Record of Decision for the Master Plan Update
3 Development Actions at the Airport ("ROD").¹⁰ The FAA determined that the environmental review
4 (the FEIS and SEIS) for the project were legally adequate. The FAA also determined that no possible
5 and prudent alternative to the project existed and that every reasonable step had been taken to
6 minimize the project's adverse environmental effects.¹¹ The FAA also determined that the project
7 would conform with applicable air quality standards.¹²

8 ACC appealed the ROD to the Ninth Circuit Court of Appeals. The Ninth Circuit upheld the
9 FAA decision, including the FAA's determination that every reasonable step had been taken to
10 minimize adverse environmental impacts.¹³

11 **D. The FEIS and SEIS Are Upheld After Appeals to the Port Hearing Examiner, the King
12 County Superior Court, and the Court of Appeals by ACC.**

13 In addition to appealing the ROD, the ACC also appealed the legal adequacy of the FEIS and
14 SEIS to the Port's independent Hearing Examiner.¹⁴ The Port of Seattle has officially adopted
15 administrative SEPA appeal procedures.¹⁵ The Independent Hearing Examiner determined that the
16 environmental review for the Master Plan Update projects was legally adequate.¹⁶ The Examiner's
17 decision was further appealed by ACC to the King County Superior Court. In a detailed decision, the
18 Superior Court upheld the Examiner's decision and determined that the FEIS and SEIS were legally
19 adequate.¹⁷ That Superior Court decision was appealed yet a third time to Division One of the
20 Washington State Court of Appeals. The Court of Appeals upheld the Port's Hearing Examiner and

21 ¹⁰ Feldman Dec. ¶ 4; relevant portions of the ROD are attached as Exhibit D to the Feldman Dec.

22 ¹¹ Feldman Dec. Ex. D. ROD at pp. 20 –21.

23 ¹² Feldman Dec Ex. D. ROD at pp. 37 – 38.

24 ¹³ Feldman Dec. ¶ 5; *City of Normandy Park v. Port of Seattle*, Ninth Court Circuit Case No. 97-70953
25 Memorandum Decision. A copy of the *Normandy Park* decision is attached as Exhibit E to the
26 Feldman Dec.

¹⁴ Feldman Dec. ¶ 6.

¹⁵ Feldman Dec. ¶ 6; a copy of Port Resolution 3211 (adopting administrative appeal procedures
pursuant to SEPA) is attached as Exhibit F to the Feldman Dec.

¹⁶ Feldman Dec. ¶ 6; a copy of the Examiner's Findings, Conclusions and Decision is attached as
Exhibit G to the Feldman Dec.

¹⁷ Feldman Dec. ¶ 7; a copy of the Superior Court's Findings of Fact, Conclusions of Law and Final
Order is attached as Exhibit H to the Feldman Dec.

1 the King County Superior Court and affirmed that the Port's environmental review was legally
2 adequate.¹⁸

3 **E. The Port Conducts Additional Environmental Review of Wetland Impacts.**

4 As new information regarding the Port's Master Plan Update developments has come to light,
5 both the Port and FAA have continued to conduct environmental review of the project's impacts. As
6 part of that hard look, the Port issued a SEPA Addendum on January 24, 2000.¹⁹

7 After publication of the SEIS and FAA approval, the Port acquired the parcels needed for the
8 third runway project. Prior to that time, the Port had been unable to access those parcels and conduct
9 on-the-ground wetland delineations. Those on-the-ground surveys and delineations showed that the
10 project would affect more wetlands than previously estimated. Quantitatively, the impacted wetlands
11 increased from 12.23 acres to 18.33 acres. Qualitatively, however, virtually all the affected wetlands
12 fell into the poor to average categories of wetland functions. Once again, in the interest of an
13 environmental "hard look," the Port completely re-evaluated wetland impacts in light of the refined
14 delineations. The Port concluded that the functions of the additional wetlands were essentially the
15 same as those analyzed in the FEIS and SEIS. The Port's Addendum also concluded that the existing,
16 extensive mitigation commitments will compensate for the adverse impacts to wetland functions.²⁰

17 The Port's January 24, 2000 Addendum also discussed the impact of the development of
18 temporary, construction-only interchanges. Those interchanges were planned in order to decrease
19 truck traffic impacts on surface streets in surrounding communities. To ensure adequate mitigation,
20 the Port also committed to construction of noise attenuation walls along portions of the temporary
21 interchanges, acquisition of residences closest to the interchanges, and sound insulation of affected
22 residences.²¹

24 ¹⁸ Feldman Dec. ¶ 7; a copy of the published opinion of the Washington State Court of Appeals is
25 attached as Exhibit I to the Feldman Dec.

26 ¹⁹ Feldman Dec. ¶ 8; a copy of the January 24, 2000 SEPA Addendum is attached as Exhibit J to the
Feldman Dec.

²⁰ Feldman Dec. Ex J.

²¹ *Id.*

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1 The Port has conducted further environmental review of other project elements as additional
2 information has been developed – including a May 2000 Addendum regarding the proposed 67-acre
3 wetland mitigation site near the Green River in Auburn.²²

4 **F. The FAA Conducts Additional Environmental Review and Determines No Supplemental
5 EIS Is Required.**

6 In response to suggestions that another supplemental environmental impact statement might be
7 required based on refinements to the Master Plan Update developments, on August 8, 2001, the FAA
8 issued a formal Environmental Reevaluation in a revised Record of Decision.²³ The FAA
9 Reevaluation discussed changes to noise, land use, air quality, and surface traffic. The FAA's
10 Reevaluation also included a July 20, 2001 FAA reevaluation of impacts to impacts to wetlands,
11 endangered and candidate species of flora and fauna (including salmon), other flora and fauna
12 (including aquatic resources in area creeks), and avian species.²⁴

13 With respect to wetlands, the FAA concluded that the newly-identified wetlands are of the
14 same general significance as the wetlands identified in the SEIS. The FAA also found that the
15 hydrologic functions that affect habitat and hydrologic conditions in both on-site and off-site locations
16 were not different from the SEIS evaluation.²⁵

17 With respect to impacts to endangered or candidate species (including salmon) and aquatic
18 resources, the FAA Reevaluation relied on the extensive Biological Opinion developed by the United
19 States Fish and Wildlife Service. The FAA concluded that there would be no adverse habitat impacts,
20 and that the impacts to water quality, hydrology, and aquatic habitat were all adequately disclosed in
21 the FEIS and SEIS.²⁶

22 ²² Feldman Dec. ¶ 8; a copy of the May 5, 2000 Addendum regarding the Auburn mitigation site is
24 attached as Exhibit K to the Feldman Dec.

25 ²³ Feldman Dec. ¶ 9; a copy of the FAA's Environmental Reevaluation is attached as Exhibit L to the
26 Feldman Dec.

²⁴ Feldman Dec. Ex. L.

²⁵ Feldman Dec. Ex. L. FAA Reevaluation, Appendix B at pp. 10 – 11.

²⁶ Feldman Dec. Ex. L.

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1 In conclusion, the FAA issued a formal, appealable order that preparation of a new
2 supplemental environmental impact statement was not warranted.²⁷ Neither the ACC nor any other
3 party appealed that FAA order.²⁸

4 On August 10, 2001, the Port formally adopted those portions of the FAA Reevaluation on
5 which the Port had not already issued supplemental environmental review.²⁹ Neither the ACC nor any
6 other party has appealed the Port's decision that an SEIS is not required.³⁰

7 **G. Ecology's §401 Certification Does Not Contain Any Substantive or Procedural SEPA
8 Decision.**

9 In September 2001, Ecology issued its Amended §401 Certification and Coastal Zone
10 Management Act certification, which has been appealed to the Pollution Control Hearings Board.³¹
11 The §401 Certification contains over 30 pages of mitigating conditions, based on Ecology's authority
12 under the Federal Water Pollution Control Act, the state clean water statute, and regulations adopting
13 state water quality standards. Nowhere in the §401 Certification does Ecology impose any conditions
14 based on the SEPA. Nowhere in the §401 Certification does Ecology make any SEPA procedural
15 determination.

16 **III. LEGAL ARGUMENT**

17 **A. The Board's Review on Summary Judgment.**

18 This is a motion for summary judgment brought pursuant to WAC 371-08-300 and CR 56.
19 Summary judgment is appropriate where there are no genuine issues of material fact and the moving
20 party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the
21 outcome of the issue depends. *Ruff v. King County*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995).

22 ²⁷ *Id.*

23 ²⁸ Under 49 U.S.C. § 46110, an order of the FAA must be appealed to the federal circuit court within
24 60 days after issuance of the order. Because the FAA Reevaluation was issued August 8, 2001, the
25 FAA's decision that a new SEIS is not necessary is a final and unappealable determination.

26 ²⁹ Feldman Dec. ¶ 10; a copy of the Port's Addendum 4 is attached as Exhibit M to the Feldman Dec.
Addendum 4 provided additional environmental information regarding proposed Borrow Site 3 and
proposed Borrow Site 4 on Port property and formally adopted and incorporated the FAA's NEPA
Reevaluation Document.

³⁰ Appeals of any Port decision not to require an EIS must be made to the Superior Court.

³¹ Feldman Dec. ¶ 11; a copy of the 401 Certification is attached as Exhibit N to the Feldman
Declaration.

1 ACC cannot avoid summary judgment by raising non-material factual issues. Rather, ACC must show
2 that there is a genuine dispute regarding a factual issue that is material to the dispositive legal issues
3 presented below.

4 **B. The Board Has Limited Administrative Appeal Jurisdiction.**

5 The Pollution Control Hearings Board is an administrative review board and has only the
6 jurisdiction conferred by its authorizing statute. *Okanogan Wilderness League, Inc. v. Town of Twisp,*
7 *Inland Foundry Co. v. Spokane County Air Pollution Control Authority*, 98 Wn. App. 121, 124, 989
8 P.2d 102 (1999) (PCHB lacked jurisdiction to hear challenge to rule promulgated by air pollution
9 control authority).

10 The enabling act that creates and defines the jurisdiction of the PCHB is RCW Chap. 43.21B.
11 Under that controlling statute, the Board “shall only have jurisdiction” to decide limited types of
12 agency decisions. RCW 43.21B.110(1) (emphasis added). The Board’s jurisdiction includes permits
13 and certificates issued by the Department of Ecology,³² and other decisions of Ecology which
14 “pursuant to law must be decided as an adjudicative proceeding under 34.05 RCW.”³³

15 With respect to its jurisdiction, the Board itself has held that the Board’s enabling act does not
16 give the Board authority to hear claims that Ecology failed to act. *Weyerhaeuser v. Tacoma-Pierce*
17 *County Department of Health*, PCHB No. 99-067 (1999) (Order on Motions to Dismiss) (appeal of a
18 state agency's failure to act must be initiated in the Superior Court, not before the Pollution Control
19 Hearings Board). As discussed in more detail below, Ecology’s 401 Certification in this case did not
20 contain any appealable SEPA decision. Moreover, any ACC claim that Ecology failed to act is not
21 appealable to the Board.

22 Similarly, nothing in the Board’s enabling act gives the Board authority to hear appeals of
23 decisions made by the Port of Seattle. See RCW 43.21B.110. As discussed in more detail below, the
24 ACC’s claim that the Port is required to prepare a supplemental EIS is not appealable to the Board for
25 three independent reasons (1) because the Board does not have jurisdiction to hear appeals from Port

26 ³² RCW 43.21B.110(1)(c).

³³ RCW 43.21B.110(1)(h).

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1 of Seattle decisions, (2) because controlling statute does not permit administrative appeals claiming
2 that a supplemental EIS is required, and (3) because the ACC is collaterally estopped from relitigating
3 the adequacy of the Port's environmental review.

4 **C. Controlling State Statute Strictly Limits Administrative SEPA Appeals.**

5 The State Environmental Policy Act only authorizes limited types of administrative SEPA
6 appeals.

7 First, with respect to the substance of any SEPA decision, SEPA allows an administrative
8 appeal "to the legislative authority of the acting local governmental agency" of decisions to condition
9 or deny a proposal by a nonelected official. RCW 43.21C.060.

10 Second, with respect to any procedural aspect of a SEPA decision, SEPA allows that an agency
11 "may" provide for administrative appeals of SEPA procedures. WAC 197-11-680(3)(a).³⁴ The only
12 types of these procedural appeals that are allowed are:

- 13 • appeal of a final threshold determination – a Determination of Significance (DS) or a
14 Determination of Nonsignificance (DNS);
- 15 • appeal of a final Environmental Impact Statement (EIS).

16 WAC 197.11.680(30)(iii). Administrative appeals alleging that the agency must conduct a
17 supplemental EIS are not allowed.

18 The administrative SEPA appeal that ACC attempts to bring against both the Port and Ecology
19 is not allowed by these controlling regulations and statutes. To the extent ACC is claiming that
20 Ecology failed to substantively condition or deny the 401 Certification, any such administrative appeal
21 may only be brought before "the legislative authority of the acting local governmental agency." (In
22 addition, as discussed above, ACC may not bring any appeal complaining of Ecology's failure to act.)
23 To the extent that ACC is claiming that Ecology or the Port failed to take conduct a supplemental EIS,
24 no such administrative appeal is allowed by controlling regulations. WAC 197-11-680(3)(a)(iii).

25 ³⁴ See RCW 43.21C.075(3) (specifying required procedures "if an agency has a procedure for appeals
26 of environmental determinations") (emphasis added); RCW 43.21C.075(4) (requiring exhaustion of
administrative SEPA appeals "if an agency has an administrative appeal procedure") (emphasis
added).

1 **D. The Board Lacks Jurisdiction to Hear An Appeal of the Port's SEPA Review.**

2 In Agreed Issue No. 14, the ACC attempts to have the Board resolve the following issue: "Did
3 Ecology and the Port comply with SEPA?"

4 As shown in the factual background discussion above, the Port was the SEPA lead agency³⁵
5 and published a lengthy and detailed FEIS on the Master Plan Update development actions, which
6 include the actions for which a 404 permit (and consequently a 401 certification) is required. The Port
7 also published a Supplemental EIS regarding the Master Plan Update development actions. The ACC
8 appealed the legality of the FEIS and SEIS to the Port's Independent Hearing Examiner because the
9 Port has established an administrative SEPA appeal process. The Hearing Examiner determined the
10 FEIS and SEIS were legally adequate. The Hearing Examiner's decision was upheld by both the King
11 County Superior Court and the Washington State Court of Appeals.

12 More recently, both the Port and FAA formally determined that no supplemental EIS was
13 required for the Master Plan Update development actions, and no one (including ACC) appealed those
14 determinations. However, the Board does not need to consider the substance of the Port's thorough
15 environmental review, because there are two independent reasons why the Board does not have
16 jurisdiction to hear an administrative appeal of the Port's SEPA compliance.

17 First, the Board only has jurisdiction to review orders and certifications issued by the
18 Department of Ecology. RCW 43.21B.110. Nothing in the Board's enabling statute allows the Board
19 to review the SEPA procedures and decisions of the Port of Seattle. *Id.*

20 Second, ACC's claim is that the Port should be required to prepare a supplemental
21 environmental impact statement. The controlling SEPA regulations and statutes only allow three types
22 of SEPA administrative appeals (appeals to a legislative body of a decision imposing SEPA
23 conditions; appeals of a threshold determination – a DNS or DS, and appeals of a final EIS). RCW
24 43.21C.060; WAC 197-11-680. Even those administrative appeals are only allowed if the agency

25 ³⁵ For proposals initiated by a governmental agency, such as the Port's Master Plan development
26 actions, the governmental agency is required to be the SEPA "lead agency." WAC 197-11-926. The
"lead agency" (also known as the "responsible official") is the agency responsible for comply with
SEPA's procedural requirements. WAC 197-11-758.

1 specifies by rule, ordinance or resolution that the administrative appeals procedure is available. WAC
2 197-11-680(3)(a)(i). Neither the Port nor Ecology has specified by rule, ordinance or regulation any
3 appeal of 401 applicants, independent SEPA review.

4 In addition, to those two jurisdictional reasons, ACC is estopped from re-litigating the
5 adequacy of the Port's environmental review. The doctrine of collateral estoppel prevents "the endless
6 relitigation of issues already actually litigated by the parties and decided by a competent tribunal."
7 *Reninger v. State Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). Collateral estoppel
8 applies when there are identical issues, final judgment, identical parties, and no injustice in applying
9 the doctrine. *Id.* Here, the ACC claims that the Port's environmental review is legally inadequate.
10 That issue was fully litigated by the ACC, against the Port, before the Port's independent Hearing
11 Examiner, before the King County Superior Court, and before the Washington State Court of Appeals,
12 all of which ruled against the ACC.³⁶

13 The ACC is not permitted to relitigate that SEPA issue before the Pollution Control Hearings
14 Board. Accordingly, ACC is collaterally estopped from raising the legal adequacy of the Port's SEPA
15 review those issues before the Board.

16 For all the reasons discussed above, the ACC's claim in Issue No. 14 seeking to
17 administratively appeal the Port's SEPA review should be dismissed.

18 **E. The Board Lacks Jurisdiction to Hear An Appeal of Ecology's SEPA Review.**

19 Just as it lacks jurisdiction to entertain an administrative appeal of the Port's SEPA
20 compliance, the Board likewise lacks jurisdiction to review SEPA claims against the Department of
21 Ecology. The Board should dismiss Issue No. 14 for four, independent reasons.

22 First, the actions taken by Ecology are categorically exempt from SEPA. Ecology's grant or
23 denial of a water quality certification under the Federal Clean Water Act is categorically exempt from
24 SEPA's requirements. WAC 197-11-800(10). Likewise, Ecology's grant or denial of a certification
25 of consistency pursuant to the federal Coastal Zone Management Act is categorically exempt from

26 ³⁶ *Normandy Park v. Port of Seattle*, Ninth Circuit Case No. 97-70953 Memorandum Decision; *see*
Ninth Circ. Rule 36-3 (unpublished opinions may be cited for collateral estoppel purposes).

1 SEPA's requirements. WAC 197-11-855. This is not surprising because, when Ecology issues a §401
2 or CZMA certification, Ecology is not the agency that issues the substantive permit for the action.
3 Accordingly, ACC's SEPA claim against Ecology must be dismissed.

4 Second, the Board's enabling act only grants it jurisdiction to review orders issued by Ecology.
5 RCW 43.21B.110. Here, the Ecology actions which the Board has authority to review (the §401 and
6 CZMA certifications) did not contain any SEPA decisions. The Board cannot reach outside the
7 Ecology decision at issue and review something that Ecology did not decide in that decision. For this
8 second reason, ACC's SEPA claim against Ecology must be dismissed.

9 Third, the Board has been clear in its own cases that it lacks jurisdiction to review claims that
10 Ecology "failed to act." *Weyerhaeuser v. Tacoma-Pierce County Department of Health*, PCHB No.
11 99-067 (1999) (no jurisdiction to hear claim alleging failure to revoke solid waste permit); *Ortman v.*
12 *Ecology*, PCHB 99-115 (Order Granting Summary Judgment, Feb. 15, 2000) (no jurisdiction to hear
13 claim alleging failure to act on NPDES permit application). In this case, ACC argues either that
14 Ecology failed to require the Port to prepare a supplemental EIS or that it failed to impose SEPA
15 conditions on the Port's proposed project. Under the limited jurisdiction granted to the Board in RCW
16 43.21B.110, the Board lacks jurisdiction to resolve this type of "failure to act" claim.

17 Fourth, the SEPA statute and controlling WAC regulations do not allow the kind of
18 administrative appeal that ACC seeks to bring before the Board. With respect to potential SEPA
19 conditions, SEPA only allows an appeal to "a local legislative body" when a nonelected official
20 imposes conditions on a proposal subject to SEPA. RCW 43.21C.060; WAC 197-11-680(2). Because
21 the Board is an administrative tribunal – not a local legislative body – no such appeal is available here.
22 With respect to ACC's claim that a supplemental EIS should have been required, the controlling WAC
23 regulations only allow appeals of a final threshold determination or a final EIS. WAC 197-11-
24 680(3)(a)(iii). An administrative appeal of a claim that a supplemental EIS should be required is not
25 allowed under controlling law. For this fourth reason, ACC's SEPA claim should be dismissed.

26 **G. The Coastal Zone Management Act Does Not "Create" an Administrative SEPA Appeal.**

1 The Port expects ACC to argue that the requirements of the Coastal Zone Management Act
2 (CZMA) mean that the Board can review any provision of SEPA, the Shoreline Management Act, the
3 Clean Air Act or the Clean Water Act. The CZMA does not sweep that broadly.

4 Under the CZMA, an applicant for a federal permit that could affect land or water use in the
5 coastal zone must certify to the federal agency that the activity complies with the “enforceable
6 policies” of the state’s coastal zone management program. 16 U.S.C. §1456(c)(3)(A). Enforceable
7 policies are legally binding state policies that are enforceable through constitutional provisions, laws,
8 regulations, land use plans and ordinances and otherwise, by which that state exerts control over
9 private and public land and water uses in the coastal zone. 16 U.S.C. §1453(6a). The state is required
10 to notify the federal agency whether it concurs or disagrees with the applicant’s certification. *Id.*

11 Many states have enacted an actual permitting scheme for their coastal zone management
12 program. *See, e.g.,* Hawaii Revised Statutes Ch. 205A; *Young v. Planning Commission of County of*
13 *Kaua’I*, 974 P.2d 40 (Haw. 1999) (explaining permit system adopted as Hawaii coastal zone
14 management program). The State of Washington, however, has adopted a unique approach. In the
15 Washington Coastal Zone Management Program (CZMP), the state of Washington chose to rely on
16 existing state environmental laws, rather than draft a new, all-encompassing piece of legislation aimed
17 as coastal protection. CZMP at p. 97. Thus, the Washington enforceable policies include the
18 Shoreline Management Act, all local shoreline master programs throughout the state, the Clean Water
19 Act, the State Environmental Policy Act, the Energy Site Evaluation Council law, and the Ocean
20 Resources Management Act.

21 Incorporation of those existing state laws into the state’s CZMP necessarily included in the
22 state’s CZMP the limitations on administrative appeals that are contained in SEPA and the WAC
23 regulations adopted pursuant to SEPA. Therefore, the requirement that SEPA substantive conditions
24 can only be appealed to local legislative bodies, and the provisions limiting SEPA administrative
25 appeals to appeals of threshold determinations and final EISs (no administrative appeal of claims that
26 an SEIS should be required) are also necessarily part of the state’s CZMP.

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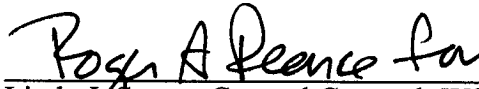
1 Accordingly, Ecology's concurrence that the Port had complied with the enforceable policies
2 of the CZMP (including SEPA) does not "create" a new administrative appeal of the Port's SEPA
3 review.

4 **IV. CONCLUSION**

5 For all the reasons stated above, the Port respectfully requests the Board enter summary
6 judgment dismissing Agreed Issue No. 14.

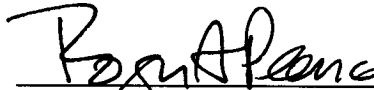
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8 Respectfully submitted this gh day of February 2002.

9 PORT OF SEATTLE

10 

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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. PCHB 01-160

CERTIFICATE OF SERVICE

Holly Simmelink, Certified PLS, certifies that, on February 8, 2002, I filed/served the following documents on the following persons by the means specified below:

1. Port of Seattle's Motion for Partial Summary Judgment on SEPA Issue; and
2. Declaration of Michael Feldman Supporting Port of Seattle's Motion for Partial Summary Judgment on SEPA Issue.

AR 003771

ORIGINAL

CERTIFICATE OF SERVICE - 1

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

Executed this 8th day of February 2002, at Seattle Washington.


Holly Simmelink, Certified PLS

AR 003772