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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

1	AIRPORT COMMUNITIES COALITION,	)	
2		)	PCHB No. 01-160
3		)	
4	Appellant,	)	
5	v.	)	ACC'S REPLY ON MOTION FOR
6		)	SUMMARY JUDGMENT REGARDING
7	STATE OF WASHINGTON,	)	THE ABSENCE OF A WATER RIGHT FOR
8	DEPARTMENT OF ECOLOGY; and	)	THIRD RUNWAY § 401 CERTIFICATION
9	THE PORT OF SEATTLE,	)	
10		)	
11	Respondents.	)	
12		)	

**I. Introduction**

ACC submits this brief in support of its Motion for Summary Judgment Regarding the Absence of a Water Right for Third Runway § 401 Certification, and in reply to the Port's Memorandum in Opposition and Ecology's Response.

**II. Statement of Facts**

**A. The Material Facts Relevant to this Motion Are Not in Issue.**

No genuine issues of material fact are present in this motion. The Third Runway Project will lead to construction of significant amounts of new impervious surfaces, disrupting hydrology in streams adjacent to Sea-Tac Airport. Port Br. at 2. The impacts of this construction include depleting stream flow in at least two streams adjacent to the airport, Des Moines and Walker Creeks, during the summer period. *Id.*

The Port is required to mitigate for these impacts. Second Declaration of Michael P. Witek in Support of ACC's Motion for Summary Judgment (hereinafter "2<sup>nd</sup> Witek Decl."), Exh.

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1 A (Section 401 Water Quality Certification #1996-4-02325, Section I, pp. 22-25 (9/21/01)). In  
2 order to do so, the Port proposes to capture in stormwater vaults approximately 33 acre-feet of  
3 water running off the airport's impervious surfaces. This water will be detained for up to 10  
4 months, treated, and then released via tiny orifices into Des Moines and Walker Creeks. Release  
5 rates will be timed and controlled so that the Port provides specific amounts of water to the  
6 streams at specific times.<sup>1</sup> Port Br., Exh. 1(B) (Low Streamflow Analysis and Summer Low  
7 Flow Impact Facility Proposal, hereinafter "Low Flow Mitigation Plan").  
8

9 **B. Neither Ecology Nor the Port Has Raised Genuine Issues of Material Fact.**

10 If Ecology intended to oppose summary judgment based on a dispute of material fact it  
11 has failed to do so. It references seven documents, including five declarations and two briefs  
12 previously filed in opposition to ACC's motion for stay, in its identification of "the facts relevant  
13 to this motion" ( Ecology Br. at 2), but has not identified any particular fact as material or  
14 disputed. "To withstand a motion for summary judgment, the nonmoving party may not rely on  
15 having its affidavits considered at face value, but must set forth specific facts that sufficiently  
16 rebut the moving party's contentions." *Summit-Waller Citizens Ass'n v. Pierce County*, 77 Wn.  
17 App. 384, 895 P.2d 405. (1995). Ecology has not made this showing.  
18

19 The Port itself, explicitly acknowledging what Ecology implicitly concedes, states that  
20 "since there are no genuine issues of material fact, and the issue is purely one of law, the Board  
21 should resolve this matter on summary judgment." Port Br. at 4. At the same time, it has  
22

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23 <sup>1</sup> ACC in no way concedes the accuracy or adequacy of the Low Flow Technical Analysis and stream flow  
24 mitigation plan. That issue, identified as Issue No. 8 in the Second Pre-Hearing Order (11/26/01) (attaching  
25 Supplemental Stipulation Regarding Proposed Statement of Legal Issues (11/15/01)), is not the subject of this  
motion and does not require resolution in order for the Board to grant summary judgment on the water right issue  
herein.

1 submitted three new declarations and recycled a fourth. Nowhere in its brief does the Port argue  
2 that facts are in issue. Therefore, the Port's inclusion of copious, extraneous factual material  
3 should be disregarded, as inconsistent with the Port's legal position (that there are no material  
4 disputed facts and that summary judgment is appropriate).

5  
6 Further, the Port's declarations are irrelevant to the legal question at hand. The  
7 Declaration of Donald Weitkamp discusses the aquatic health of the streams. But there is no  
8 dispute that the Port must provide mitigation water to offset impacts in the affected streams. The  
9 Declarations of Paul Fendt and Steven Swenson discuss stormwater planning, suggesting that the  
10 Port's low flow mitigation plans are typical stormwater facilities. But there is no disagreement  
11 that the Port is proposing to capture stormwater and detain it in stormwater facilities.

12  
13 Rather, the legal issue before the Board consists of two parts: First, whether the Port's  
14 Low Flow Mitigation Plan requires a water right and, if so, whether "reasonable assurance" of  
15 compliance with water quality standards is possible, absent that water right. The Fendt, Swenson  
16 and O'Brien declarations offer nothing on this point.

### 17 **III. Argument**

#### 18 **A. Introduction.**

19 The term "stormwater management" is repeated, like a mantra, numerous times  
20 throughout the Port and Ecology briefs. Unfortunately, the almost complete reliance by  
21 Respondents on their theory of the issue does not illuminate the question before the Board. The  
22 fact that stormwater is being collected in stormwater vaults, which is not disputed, does not end  
23 the inquiry into whether a water right is required.  
24

25 The key to understanding the Port's obligations in this matter derives not at the top of the

1 project, where rainfall is being managed, but rather at the bottom, where water is being used. It  
2 is the Port's proposed use of water to augment stream flows, a beneficial use recognized under  
3 the water code, that triggers the requirement for a water right.

4 Ecology has an obligation to ensure that any use of the publicly owned waters of the state  
5 is conducted according to the requirements of the water code. RCW § 90.03.010. As analyzed  
6 in Section III.D *infra*, the Port's proposed use of water for low flow augmentation purposes  
7 meets the classic elements of a water right: intent, appropriation, and beneficial use.

8 Ecology's Water Resources Program has already begun to require water rights for the  
9 beneficial use of stormwater. Interestingly, it appears that at least some of the managers within  
10 the Water Resources Program agree with ACC's position that a water right should be required  
11 for the Port's Low Flow Plan. 2<sup>nd</sup> Witek Decl., Exhibit B (excerpts from Ray Hellwig  
12 Deposition). By unilaterally deciding not to require the Port to submit a water right, Ecology's  
13 Section 401 processing unit bypassed the analysis that should have occurred pursuant to  
14 RCW 90.03.010.

15 Ultimately, Ecology may have to establish policy and procedures to govern beneficial use  
16 of stormwater. In the meantime, however, the Department has an obligation to analyze the Port's  
17 proposed use under the applicable statute, RCW § 90.03.010, just as it must analyze potentially  
18 illegal usage of water in order to bring enforcement action. *See, e.g., Kim v. Ecology, supra* (use  
19 of water for commercial greenhouse irrigation did not meet exempt well requirements under  
20 RCW § 90.44.050); *Vanderhouwen v. Ecology, PCHB Nos. 94-108, et al. (1997)* (water use  
21 exceeded quantities authorized under existing rights). The only difference is that in this  
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23  
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1 proceeding, the agency has the opportunity and obligation under the federal Clean Water Act to  
2 conduct its analysis in advance of the illegal use, through the Section 401 certification process.

3 **B. Standard of Review: Summary Judgment Is Appropriate.**

4 Whether a particular statute applies to a particular factual situation is a conclusion of law,  
5 not a finding of fact. *Keyes v. Bollinger*, 31 Wn. App 286, 640 P.2d 1077 (1982). Interpretation  
6 of the provisions of the water code as they apply to the Port's Low Flow Mitigation Plan is a  
7 matter of law and, as such, summary judgment is appropriate. *See Kim v. Ecology*, PCHB No.  
8 98-213, ¶ VI (1999).  
9

10 **C. The Board Has Jurisdiction to Decide the Matter Before It.**

11 The Port argues the PCHB "lacks jurisdiction" to consider whether a water right is  
12 required to implement the proposed low flow mitigation plan. Port Br. at 4-6. The Port asserts  
13 that the Board's authority to review water rights decisions is avoided here because the 401  
14 Certification is "silent on the issue of water rights" (*id.* at 4) -- that is, because Ecology did not  
15 issue an appealable order. Nevertheless, the Port also argues that the Board should give  
16 "substantial weight" to Ecology's implicit decision that a water right is not required. *Id.* at 5 and  
17 6 n.4, *citing* the APA standard of review.  
18

19 As an initial matter, with respect to the Port's plea for deferential review, the Board has  
20 already rejected a similar plea in *Fleming v. State of Washington, Dept. of Ecology*, PCHB No.  
21 93-320, 1994 WL 905610. The Board explained:  
22

23 To the extent that [the Washington Supreme Court's *Bureau of Reclamation* and *Schuh*]  
24 opinions recognize broad discretion by the Ecology concerning the approval of water  
25 rights permits, that discretion is also lodged in the PCHB which has exclusive jurisdiction  
to conduct administrative adjudicative proceedings relating to the grant or denial of water  
right permits.

1 *Fleming*, 1994 WL 905610, citing *Ecology v. Bureau of Reclamation*, 118 Wn.2d 761, 767  
2  
3 (1992), *Schuh v. Department of Ecology*, 100 Wn.2d 180, 183-84 (1983), and RCW  
4 43.21B.110(1)(c).

5 But the Port's arguments are off-point for a more basic reason: the key issue here is the  
6 reasonable assurance determination -- an issue which is squarely and undisputedly within the  
7 Board's jurisdiction. RCW 43.21B.110(1). The issue is not whether Ecology erred in failing to  
8 require the Port to obtain a water right, but whether Ecology erred in finding reasonable  
9 assurance in the absence of such a right. The Port may be correct that the Board may not review  
10 the merits of Ecology's "silent" determination that no water right would be required. But, per  
11 RCW 43.21B.110(1), the Board has a mandate to decide whether the absence of a water right  
12 fatally undermines Ecology's 401 Certification.

13  
14 **D. The Port's Low Flow Mitigation Plan Requires a Water Right.**

15 The Port takes the trouble at several points in its brief to assure the Board that, to its  
16 "knowledge," there are no stormwater plans in Washington requiring a water right. Port Brief at  
17 p. 6, l. 12, p. 8, l. 8. This assertion is not supported by declaration or other factual evidence, and  
18 appears to be nothing more than an attempt by the Port's counsel to testify to the Board.<sup>2</sup> More  
19 to the point, however, ACC is not asserting that the Port's stormwater plan requires a water right.  
20 ACC asserts that the Port's beneficial use of water to create instream flows in Des Moines and  
21 Miller Creeks require water rights. The Port's brief nevertheless follows this pattern throughout,  
22

23 <sup>2</sup> Ecology assures the Board that there are no cases requiring a water right for the collection or diversion of  
24 stormwater, citing *Currens v. Sleek* 128 Wn.2d 858 (1999), and *Island County v. Mackie*, 36 Wn. App. 385 (1984).  
25 Ecology Br. at 6. What Ecology does not say, however, is that these cases do not involve a beneficial "end use" of  
stormwater, nor do they raise the issue of whether a water right would be required in such a circumstance.

1 re-casting ACC's arguments into its own version of reality and then responding to that version.

2 In order to assess whether a water right is required for the Port's Low Flow Plan, the  
3 Board should review the essential elements of a water right: whether there is an intent to  
4 appropriate for beneficial purpose, whether there is an actual appropriation, and whether there is  
5 beneficial use. *Offield v. Ish*, 21 Wash. 277, 280-81, 57 P. 809 (1899); *In re Alpowwa Creek*, 129  
6 Wash. 9, 13, 224 P. 29 (1924); *Simmons v. Ecology*, PCHB No. 99-099 (2001). The answer to  
7 each of these questions is affirmative.  
8

9 **1. The Port intends to use water.**

10 Intent is a venerable concept in Washington water law, albeit little used in the  
11 contemporary setting of water permit decisions. Prior to enactment of the 1917 surface water  
12 code, courts would examine a water user's intent to determine whether a water right had been  
13 created. This was typically an "after-the-fact" inquiry, the matter usually coming before the  
14 courts in the form of competing claims to the same (limited) source of water. *Offield v. Ish*,  
15 *supra* (reviewing plaintiffs' historic use of water from unnamed tributary to Snake River to  
16 assess whether water right had been established under common law).  
17

18 Upon enactment of the water code, the requirement that water users apply for a water  
19 right effectively satisfied the question of intent. The concept does, however, remain a viable  
20 element of water rights inquiry.<sup>3</sup> As the instant case demonstrates, it is a useful tool for  
21 determining whether a water right is required in circumstances involving new uses of public  
22

23  
24 <sup>3</sup> The question of intent remains a central inquiry in certain water right scenarios, such as analysis of  
25 potential abandonment of a water right, *Okanogan Wilderness League v. Twisp*, 133 Wn.2d 769, 947 P.2d 732  
(1997), or application of the "future determined development" exemption under RCW 90.14.140(2)(c). *Cocking  
Farms v. Ecology*, PCHB No. 93-251 (1994).

1 waters.

2 The Port's Low Flow Mitigation Plan establishes quite clearly that the Port intends to  
3 make beneficial use of state waters. Port Br., Exhibit 1(B). This document provides ample  
4 evidence, from the Port itself, of its proposed use of state waters.

5 The Port's analysis of how much water the mitigation plan will require is set forth in  
6 Section 2 (Low Streamflow Analysis). This section describes the Port's analysis of pre- and  
7 post-project streamflow quantities and the modeled impacts of the Port's new impervious  
8 surfaces, embankment, and "non-hydrologic" factors (e.g., removal of water withdrawals and  
9 septic systems on purchased properties). It concludes that total net low streamflow impacts are a  
10 reduction of 0.11 cubic feet per second (cfs) in Walker Creek and .08 cfs in Des Moines Creek,  
11 and that these impacts will occur in the period July 24 through October 31. *Id.* at 2-11, Table 2-  
12 9.

13 Section 3 of the Low Flow Mitigation Plan sets forth the mitigation proposal. Utilizing  
14 the figures and time periods established in the low streamflow analysis, the Port determines that  
15 its mitigation obligation is 19.0 acre-feet annually in Walker Creek and 13.5 acre-feet annually in  
16 Des Moines Creek. *Id.* at 3-2, Table 3-1. The plan continues with analysis of the time it will  
17 take to capture the required annual quantities, mechanisms for water quality treatment, and other  
18 miscellaneous factors, including location of discharge points, seepage loss, pilot program, etc.  
19 *Id.* at 3-2 to 3-11. The Low Flow Plan also contains chapters addressing operation and  
20 maintenance of the low flow mitigation facilities and future monitoring. *Id.* at Chs. 4, 5.

21 It is clear from the Port's Low Flow Mitigation Plan that the Port plans to capture a  
22 specified quantity of water and release it to streams at specified times and rates. In this respect  
23  
24  
25



1 there is no question about what the Port intends.<sup>4</sup>

2 Armed with such evidence of intent, it is necessary to next consider whether the admitted  
3 use is legally classified as an appropriation for a beneficial use

4 **2. Capture of stormwater is an appropriation under the water code.**

5 The Port argues that its proposed capture of stormwater is not an appropriation of water.  
6 Port Br. at 14. At the same time, it acknowledges that, if a farmer captured stormwater with the  
7 intent of using it to irrigate crops, *that* would require a water right. Port Br. at 8, 12. There is no  
8 legal difference . The Port has in effect admitted that capture of stormwater constitutes an  
9 appropriation under the Water Code, consistent with the statutory requirement that :  
10

11 all waters within the state belong to the public, and any right thereto, or to the use  
12 thereof, shall be hereafter acquired only by appropriation for a beneficial use and  
13 in the manner provided and not otherwise.

14 RCW 90.03.010 (emphasis added).

15 The Port's admission and ACC's legal analysis is supported by practice of Ecology's  
16 Water Resources Program. For example, in his January 8, 2002, deposition, Ray Hellwig,  
17 Director of Ecology's Northwest Regional Office, acknowledged:

18 There was, for example, a situation in eastern Washington where  
19 stormwater had been detained and used in an industrial facility as a cleaning [sic]  
20 tower, and that was beneficial use that triggered a requirement for water right.

21 <sup>4</sup> This intent is confirmed by the Port's past efforts to obtain water to meet its low flow mitigation  
22 obligations. As discussed in ACC's opening brief, the current plan represents the third attempt by the Port to obtain  
23 water supply. The first attempt involved an application submitted by the Port to Ecology's Water Resources  
24 Program to add a purpose to a Tye Golf Course ground water right to support "flow augmentation for Des Moines  
25 Creek." See 2<sup>nd</sup> Witek Decl., Exhibit C (Port of Seattle Application for Change/Transfer (6/22/00)). The second  
attempt was an offer by the Port to purchase water from Seattle Public Utilities. Both failed for various reasons. See  
also (First) Declaration of Michael P. Witek in Support of ACC's Motion for Summary Judgment, Exh. C (excerpts  
from Declaration of Dr. Peter Willing in Support of Motion for Stay (9/12/01)). Clearly, both Ecology and the Port  
have been aware for some time that a water right would be necessary in connection with the Port's stream flow  
augmentation.

1 2<sup>nd</sup> Witek Decl., Exhibit B (Deposition of Ray Hellwig, January 8, 2002, pp. 260-262).

2  
3 Mr. Hellwig was apparently referring to a recent submittal to the Washington State  
4 Energy Facility Siting Evaluation Council (EFSEC) by Wallula Generation LLC to build a  
5 natural gas-fired power plant. The application indicates that the company intends to capture  
6 stormwater runoff on its 66-acre property and route it to a detention pond where the water will be  
7 collected and directed to the power plant cooling tower basin. The application states that the  
8 Department of Ecology requires that the “beneficial capture and beneficial use of stormwater  
9 must be included in the project water rights request.” 2<sup>nd</sup> Witek Decl., Exhibit D (Wallula Power  
10 Project EFSEC Application, p. 3.3-14).

11  
12 In sum, capture of stormwater, a public resource, does constitute an appropriation. RCW  
13 § 90.03.010. The Department of Ecology’s Water Resources Program acknowledges this as a  
14 matter of practice. It is critical that this Board do so as well.<sup>5</sup>

15 **3. Use of water for instream mitigation purposes is a beneficial use.**

16 (a) Washington law authorizes the creation of instream rights for instream mitigation  
17 purposes.

18 Beneficial use is both the linchpin of Washington water law and the critical issue in this  
19 motion. Ecology agrees, noting in its brief that “[d]ominion and control are not relevant to  
20 whether a water right is needed. The relevant question is whether the water is applied to  
21 beneficial use.” Ecology Br. at 11.

22 Does the use of water for instream mitigation purposes constitute a beneficial use under  
23

24 <sup>5</sup> Ecology’s plea that “it would be unfair to . . . create a new rule of law in this case” (Ecology Br. at 7)  
25 requiring water rights for use of stormwater seems somewhat disingenuous given that the Water Resources Program  
has already decided that water rights are required for the beneficial use of stormwater.

1 the water code, for which a water right can be held and in this case must be required? The  
2 answer, quite simply, is yes. Yet Ecology suggests, surveying the law of several states other than  
3 Washington, that private rights for instream uses are impermissible.<sup>6</sup> Ecology Br. at 4-5. The  
4 Port also asserts that its low flow mitigation plan would not make “beneficial use” of water. Port  
5 Brief at 8.

6  
7 Instream water uses have been recognized in Washington for many years. For example,  
8 instream use of water for non-diversionary stock watering has been accepted for more than a  
9 century. *Dep’t of Ecology v. Abbott*, 103 Wn.2d 686, 698, 694 P.2d 1071 (1985); *In Re Stranger*  
10 *Creek*, 77 Wn.2d 649, 657, n. 2, 466 P.2d 508 (1970) (“[U]tilization of the . . . stream system for  
11 stock watering purposes dated to as early as 1887. The referee finds that in those instances  
12 where the stock drink directly from the stream, rights of a highest priority have been established  
13 for this purpose under the laws and customs recognized in the locality at the time.”).  
14 Hydroelectric generation water rights are another form of long-recognized instream use under the  
15 water code. RCW § 90.54.020(1).  
16

17 Ecology and the Port both cite *Bevan v. Ecology*, PCHB No. 48 (1972), an important  
18 early case granting an instream water right. In *Bevan*, the Board explicitly found that: “Ecology  
19 concedes that the appellant’s research in fish propagation is a beneficial use.” *Id.* at Finding of  
20 Fact IV.  
21

22 More recently, the Legislature has authorized creation of trust water rights, by which

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23 <sup>6</sup> ACC agrees with Ecology that minimum instream flows may only be established by Ecology, through  
24 proper administrative procedure. Ecology Br. at 4, *citing* Ch. 90.22 RCW. Minimum instream flows are generally  
25 applicable minimum levels set for a stream by regulation. RCW § 90.22.010. ACC does not assert that the Port is  
proposing to create a minimum instream *flow*. Rather, the Port is effectively creating an instream *water right*. As  
discussed above, this is a permissible use of water in Washington, provided a water right is obtained.

1 existing offstream appropriations may be converted to instream purposes. RCW 90.42.040; *see*  
2 *also Okanogan Wilderness League v. Ecology and Dungeness River Water Ass'n*, PCHB No. 98-  
3 84 (1999) (approving partial transfer of irrigation water rights into trust to augment flow in  
4 Dungeness River); *Thurlow v. Ecology and Washington Water Trust*, PCHB No. 00-189 (2001)  
5 (Ecology and the Board may not require water right holder to continue offstream use of water  
6 right proposed for transfer to instream purposes).

8 Does mitigation of project impacts constitute a beneficial purpose that supports an  
9 instream water right? Clearly, yes. In *Conifer Ridge Enterprises v. Ecology and Tulalip Tribes*,  
10 PCHB No. 96-11 (1998), the Board approved a stipulation for stream flow augmentation that  
11 looks remarkably similar to the plan proposed by the Port. Conifer Ridge proposed to build and  
12 irrigate a golf course. The water right diversion would deplete flow in Harris Creek, a stream  
13 closed to new appropriations under the same authority that Des Moines, Miller and Walker  
14 Creeks are closed. To offset impacts of its project, Conifer Ridge agreed to allocate a part of its  
15 water right, 75 gallons per minute and 91 acre-feet per year, to augment flows in Harris Creek.  
16 One of the purposes of use of the water right was stream augmentation.

18 Conifer Ridge agreed to “provide flow enhancement . . . by means of a pipe designed to  
19 minimize adverse effects on ambient temperature” via “a controlled discharge of 51 acre-feet of  
20 water. . . provided continuously during the period of May 15 through October 31 annually at the  
21 rate of 75 gpm. . . Conifer Ridge will install a continuous totalizing flow meter and pressure  
22 regulating valve to monitor and control the rate of release.” *Id.* at ¶ II.5(a), (c), (e).

24 Unlike the *Conifer Ridge* plan, the Port’s Low Flow Mitigation Plan is not intended to  
25 mitigate for another water right granted to the Port. Instead, its purpose is to mitigate and offset

1 the larger impacts of the Third Runway Project.<sup>7</sup> There is, however, no principled basis to  
2 distinguish between creation of an instream water right to offset impacts of another water right,  
3 and creation of an instream water right to offset impacts of a massive construction project.

4 The Port and Ecology both attempt to distinguish prior Board decisions cited by ACC  
5 involving stormwater mitigation, *Black River Quarry v. Ecology*, PCHB No. 95-56 (1996); *L.G.*  
6 *Design v. Ecology*, PCHB No. 96-20 (1997) and *Auburn School Dist. No. 408 v. Ecology*, PCHB  
7 No. 96-91 (1996). Ecology Br. at 12; Port Br. at 17-18. Those cases involved appeals of  
8 Ecology decisions denying new ground water rights. In each, the appellants proposed to mitigate  
9 the new right by infiltrating stormwater, or taking advantage of previous stormwater  
10 management efforts. The Board rejected the mitigation plans, in part, because the appellants had  
11 no legal right to the water they proposed to capture and beneficially use for mitigation purposes.  
12

13 In contrast, the plan in *Conifer Ridge* was approved because the appellant offered  
14 mitigation water that it had the right to use. Similarly, in *Okanogan Highlands Alliance v.*  
15 *Ecology*, PCHB Nos. 97-146, Summary Judgment on Stipulated Issues Nos. 20, 21 and 22  
16 (10/23/98), the Board ruled that use of water for a mitigation plan required a water right.<sup>8</sup> These  
17

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18  
19 <sup>7</sup> The Port states that the purpose of its stormwater use is to mitigate the impacts of stormwater. Port Brief  
20 at 12, lines 13-15. This is not correct. The purpose of the low flow plan is to mitigate for creation of new  
21 impervious surfaces and massive hydrologic alteration caused by the embankment proposed for the Third Runway  
22 Project. Port Br., Exh. 1(B) at Ch. 2 (low stream flow analysis designed to ascertain impacts from construction  
impacts, the embankment and “non-hydrologic activities”). The Port’s statement that it “merely intends to comply  
with the terms of its NPDES permit and the 401 certification,” *id.* at line 16, begs the question. These permits are  
meant to regulate impacts – it is the impacts that are the basis and focus of the mitigation plan.

23 <sup>8</sup> Ecology is correct that the 1998 partial summary judgment ruling in *OHA* was addressed to the water  
24 right appeal stage of that proceeding. Ecology Br. at 7. Nonetheless, the summary judgment decision does  
25 recognize that instream flow augmentation is a beneficial use that required a water right. *OHA, supra*, at 2. The  
final *OHA* decision, issued in 2000, resolved both the Section 401 and water right appeals. Contrary to Ecology’s  
assertion, the validity of the water rights and streamflow mitigation plan were very much a consideration in the  
Board’s ruling that Ecology lacked reasonable assurance that the Crown Jewel Project would comply with state

1 cases reveal a consistent theme: a project proponent may use water to mitigate or offset the  
2 impacts of the project, so long as they possess the water rights to do so.<sup>9</sup>

3 In sum, mitigation plans that use water require water rights. The state water code  
4 provides at least two mechanisms – private ownership of instream water rights or transfer of  
5 existing rights into trust held by the state – that would allow the Port to meet its mitigation  
6 requirements while satisfying the fundamental premise of state water management, that all water  
7 uses require a permit. RCW 90.03.010.

8  
9 (b) The Port’s use of water is for instream augmentation.

10 The Port argues that because its instream flow augmentation is intended to “mimic” the  
11 natural hydrologic cycle, there is no “use” of water. Port Brief at 8. Similarly, Ecology argues  
12 that the Port’s purpose is nothing more than “drainage” and that therefore there is no beneficial  
13 use. Ecology Br. at 9-11. The Port’s description of its proposed activity is inapt, and Ecology’s  
14 is simply incorrect.

15  
16 The use of water to mimic natural cycles is a beneficial use. In the *Conifer Ridge*  
17 stipulation, the purpose of flow augmentation was to “benefit instream flows and fisheries habitat  
18 in Harris Creek and cause no net detrimental effect to the instream flows of the Snoqualmie  
19 River.” *Conifer Ridge, supra*, at ¶ II.1; *see also OWL v. Dungeness, supra* (purpose of trust  
20 water right was to restore flow in Dungeness River to more natural levels and therefore restore  
21 salmon runs.)

22  
23 water quality standards. *OHA*, Final Findings of Fact, Conclusions of Law and Order, ¶¶ 57-58 (1/1/00).

24 <sup>9</sup>Nothing in the text or history of RCW § 90.03.255 supports the claim (Ecology Br. at 12) that it  
25 constituted a legislative reversal of the Board’s 1996 mitigation decisions. To the extent that the Board and Ecology  
were uncertain about authority to approve mitigation plans, this statute clarifies that they may do so. It does not  
waive the requirement that water users obtain water rights for beneficial use of state waters. See RCW 90.03.010.

1 Ecology's argument, that the Port's low flow mitigation plan is nothing more than a  
2 "drainage" plan, simply does not conform to the undisputed facts as reflected in the Port's own  
3 Low Flow Plan which, allegedly, is the basis for Ecology's 401 decision. The Port's plan is  
4 based on a "detailed evaluation of the hydrologic impacts of the proposed third runway  
5 embankment and associated non-hydrologic impacts (cessation of water use and removal of  
6 septic tanks on properties purchased by the Port) on streamflow in Miller, Walker and Des  
7 Moines Creeks." Port Br., Attachment 1(B) (Low Flow Mitigation Plan at vi). By respondents'  
8 own description, this massive project would have substantial impact on the stream systems. As  
9 discussed in Section III.D(1), *supra*, the Third Runway project would consume over 700 acres,  
10 create over 300 acres of new impervious surfaces with associated stormwater runoff, fill all or  
11 portions of 50 wetlands totaling 18.37 acres and permanently impact an additional 12 wetlands  
12 totaling 2.05 acres. The Port also proposes to fill and move 980 linear feet of Miller Creek itself,  
13 1,290 linear feet of drainage channels in the Miller Creek basin, and 100 linear feet of drainage  
14 channels in the Des Moines Creek basin. The embankment would be constructed with more than  
15 20 million cubic yards of imported fill. This is not "drainage." It is the wholesale re-engineering  
16 of a complex hydrological system on an unprecedented scale that goes well beyond anything that  
17 Ecology has previously permitted.

18  
19  
20 In discussing its theories of "use" versus "management" of stormwater, and the treatment  
21 of those terms under the Water Resources Management Act, Ch. 90.54 RCW, the Port once  
22 again misrepresents ACC's position in this motion. ACC has not suggested that all stormwater  
23 management programs require a water right. *See* Port Brief at p. 12, n. 8. Just the opposite,  
24 ACC has taken pains to point out that it is the essential low flow mitigation elements of the  
25

1 Port's plan that trigger water code requirements.

2 The Port and Ecology both suggest that typical stormwater management goals of  
3 preventing high flows, low flows, and degradation of water quality all constitute "beneficial  
4 uses." From this assertion, they make a leap of logic. The Port argues that requiring a water  
5 right for the use contemplated under the Low Flow Mitigation Plan would mean that all  
6 stormwater management activities would require water rights. Port Br. at 16. Ecology's even  
7 more extreme interpretation would require a water right for any type of activity benefiting stream  
8 flow, including, for example, riparian tree planting. Ecology Br. at 12. These arguments again  
9 ignore the specific activity proposed here. It is not a typical stormwater management activity,  
10 but, rather, the maintenance of specific quantities of water instream at specified times in order to  
11 fulfill the requirements of a mitigation plan to maintain stream flow. Confirming that a water  
12 right is required for this activity does not speak to typical stormwater management practices.

13  
14  
15 **4. Water permitting criteria.**

16 The Port's purported analysis of the criteria for issuance of a water right is flawed for two  
17 reasons. Port Br. at 13. First, one does not look to the criteria for permit issuance to determine  
18 whether a water right is required. The appropriate tests for determining whether a water right is  
19 needed in the first place – intent, appropriation, and beneficial use – are set forth above.  
20 Moreover, as the Port has argued, the Board's task here is not to decide an application that the  
21 Port has failed to submit. It is to determine whether there can be reasonable assurance for a 401  
22 certification in the face of a failure to obtain the necessary water rights.

23  
24 Even assuming that review of the permit criteria is appropriate here, the Port's analysis of  
25 the "availability" and "impairment" criteria for permit issuance is incorrect. As to water



1 availability, the fact that rainfall is always available does not resolve the issue. Port Br. at 13.  
2 Water is always flowing in many rivers and aquifers throughout Washington, (for example, the  
3 Columbia River), but that does not mean that it is “available” for appropriation. *See Postema v.*  
4 *Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P.3d 726 (2000) (analyzing, affirming in  
5 part and reversing in part Ecology’s decisions regarding water availability for groundwater  
6 permits).

7  
8 The Port’s assertion that it is impossible to predict how much water it will use does not  
9 comport with its own evidence.<sup>10</sup> Port Brief at 13. The Port’s Low Flow Technical Analysis  
10 precisely quantifies the amount of water required for its instream flow mitigation plan: an  
11 instantaneous quantity (QI) of 0.11 cfs and annual quantity (QA) of 19.0 acre-feet for Walker  
12 Creek and a QI of .08 cfs and QA of 13.5 for Des Moines Creek. Port Brief, Exhibit 1B at 2-11  
13 (Table 2-9) and 3-2 (Table 3-1). The season of use is July 24 through October 31. *Id.* at 3-1.

14  
15 The Port’s statement that “the amount of stormwater to be managed is the amount that  
16 would fall from the sky,” belies its own analysis and plan that calculate the exact quantities  
17 required for mitigation. The Port’s statement that it could not exceed use of these quantities is  
18 true, but irrelevant. Port Br. at 14-15, note 10. If the Port has underestimated how much  
19 mitigation water it needs (ACC’s contention with respect to Stipulated Issue No. 8), then it must  
20 do what all would-be appropriators do – obtain new rights. Ecology’s 401 permit coordinator  
21 Ann Kenny acknowledged this in her declaration submitted in opposition to ACC’s stay motion,  
22 where she stated that if the Port had inadequate water for low flow mitigation, “[t]he Port’s  
23

24  
25 <sup>10</sup>In any event, water users cannot avoid water permitting requirements simply because they do not know the extent of their use.

1 contingency plan could involve the purchase of water, for example, for use as mitigation.” 2<sup>nd</sup>  
2 Witek Decl., Exhibit E (Declaration of Ann Kenny, ¶ 32, lines 19-20, p. 15).

3 The Port finally argues that water permit impairment analysis is impossible, and that it  
4 “does not understand” how the water it proposes to place into Walker and Des Moines Creek  
5 could be impaired. Port Br. at 14 and note 11. Again, the Port muddles its analysis. Absent a  
6 water right, there would be no legal bar to a circumstance in which the water the Port is so  
7 assiduously working to put into the streams could be removed by others when, for example,  
8 current stream closures are modified. *See* Section IV, *infra*. Water rights issued to the Port for  
9 augmentation to Des Moines and Walker Creeks would prevent that removal, providing a basis  
10 for enforcement action. Determination of impairment and protection of senior rights is a primary  
11 purpose of the water permitting process. *OHA* (2000), *supra*, at ¶ 61; RCW § 90.03.290(3); *see*  
12 *also* Section IV, *infra*.

13  
14  
15 **E. The Port’s Low Flow Mitigation Plan Scheme Uses Stormwater, But Is Not a**  
16 **Stormwater Management Activity.**

17 The Port has seized on a term used in ACC’s opening brief, that the proposed capture of  
18 stormwater for the low flow plan is not a “typical” stormwater management regime and, clinging  
19 to it like a life raft, offers 22 pages of declaration testimony from Paul Fendt and Steven  
20 Swenson to the effect that the Low Flow Plan is indeed “typical.” This testimony does not raise  
21 genuine issues of material fact and is, essentially, irrelevant. Similarly, Ecology argues that the  
22 Port’s stormwater management and low flow plans do not “differ in kind.” Ecology Br. at 11-12.

23 In legal analysis of whether Ecology could have reasonable assurance in the absence of a  
24 water right for the Port’s Low Flow Plan, it is critical to focus on exactly what the Port is  
25

1 proposing to do.<sup>11</sup> Despite the vague generalities contained in the Port's declarations and  
2 arguments, the plan itself is clear. There is no disagreement that it is to capture stormwater in  
3 vaults, detain it, treat it and release it in precise quantities to augment streamflow during  
4 specified times and rates. See Port Br., Exh. 1(B).

5  
6 ACC does not disagree with the Port that stormwater management plans may utilize  
7 "infiltration" activities designed to offset low stream flow impacts attributable to impervious  
8 surfaces. Nor does ACC disagree that the Port's Comprehensive Stormwater Management Plan  
9 (CSMP) utilizes "infiltration" activities as part of its stormwater management process. The  
10 Port's distinct Low Flow Mitigation Plan, however, does not involve infiltration, and there is  
11 good reason why. Infiltration cannot accomplish the task that the Section 401 certification  
12 requires of the Port, that is, to put water into **streams** -- Des Moines and Walker Creeks -- at  
13 **specified times and rates**.

14  
15 The December 21, 2001, deposition testimony of Ecology's own stormwater expert,  
16 Edward O'Brien, sheds light on the difference. He testified that infiltration is used as a primary  
17 stormwater management mechanism to offset low flow impacts caused by impervious surfaces,  
18 but that infiltration does not (cannot) provide targeted flow rates for specific streams:

19 Q: Can you control the timing of the flow from infiltration facilities to  
20 the stream?

21 A: Can you control the timing of the flows. To a limited extent . . .  
22 . . . but you don't have so much control that you meter it out as  
some exactly targeted flow rate, probably.

23  
24 <sup>11</sup> The Port conjures dramatic consequences -- "an administrative nightmare" and "disastrous results" -- if  
25 water rights are required for the Low Flow Mitigation Plan. Port Br. at 6, 15. This assumes that the Board would  
not limit its decision requiring water rights to cases where, consistent with Ecology policy, all necessary elements  
are present, i.e., the capture of stormwater and the intentional application of that water to beneficial use. There is no  
reason to believe that this Board would be careless in spelling out its decision.

1 2<sup>nd</sup> Witek Decl., Exhibit F (Deposition of Edward O'Brien, pp. 30-31 (12/21/01)). In other  
2 words, the usual stormwater infiltration methods do not and cannot address the problem which  
3 the Port's Low Flow Plan is supposed to "solve," and cannot provide the certainty and precision  
4 required by the Port's Section 401 mitigation obligations.  
5

6 Mr. O'Brien's testimony confirmed that the Port overstates the "typicality" of its low  
7 flow activities, acknowledging that he had never heard of a low flow mitigation plan of the type  
8 proposed by the Port:

9 Q: Have you heard of the use of a large detention facility to detain  
10 stormwater and meter it out months later for a low flow mitigation?  
Have you ever encountered that?

11 A: I haven't personally encountered that, no.

12 *Id.* at p. 32. The Port's Mr. Swenson also acknowledges that he has never encountered a plan  
13 like that proposed by the Port. Professing a "general understanding" of the Port's stormwater  
14 system, Mr. Swenson describes it as "unique." Port Br., Exh. 5 (Swenson Decl. at ¶¶ 15, 20).  
15

16 While the Port's consultants talk theoretically about wet vaults and "slow" filtration,  
17 none of them has identified an actual stormwater plan that proposes to create an instream flow  
18 right in the manner proposed here. The line has been crossed between stormwater management  
19 techniques and activities implicating water rights.

20 The Port's statement that its system was designed in accordance with the King County  
21 Surface Water Design Manual, as if proving that its low stream flow plan is contemplated in the  
22 County's Manual, is misleading. Port Br. at 7. Because the Low Flow Plan involves capture and  
23 detention of stormwater, King County reviewed the plan for **design** compliance. However, the  
24 King County Manual does not contain standards for low flow mitigation plans, a point made on  
25

1 several occasions by Kelly Whiting, the King County stormwater reviewer on contract to  
2 Ecology. For example, in his August 3, 2001 comments on the July 2001 version of the low  
3 flow plan, he notes that “the 1998 King County Surface Water Design Manual (KCSWDM) does  
4 not include performance standards for low flow mitigations.” 2<sup>nd</sup> Witek Decl., Exhibit G (King  
5 County Department of Natural Resources, Review Comments on the Low Flow Impact Analysis,  
6 p. 1, July 2001).

8 In sum, the Port is simply wrong in its arguments that its Low Flow Mitigation Plan is  
9 nothing more than a routine stormwater management technique. Ultimately, however, it doesn't  
10 matter. As set forth in Section III.D, *supra*, review of the stormwater control aspects of the Low  
11 Flow Plan is not the relevant inquiry. Even the capture of stormwater requires a water right if  
12 the end use is “beneficial,” a proposition which the Port concedes. Port Br. at 8, 12. Here the  
13 focus of the inquiry, as Ecology agrees, is whether the precisely timed release of exacting  
14 quantities of water to augment streamflow pursuant to a mitigation plan is a beneficial use.  
15 Ecology Br. at 11. If yes, then water rights are required. And if water rights are required, there  
16 can be no reasonable assurance in their absence that the characteristic uses of Des Moines and  
17 Walker Creeks will be protected.

#### 19 IV. Reasonable Assurance

##### 21 A. There Can Be No Reasonable Assurance, Absent a Water Right.

22 The Port's need for water rights for its Low Flow Mitigation Plan assumes a new  
23 dimension in the context of the Section 401 Certification. Looking at it from the water user's  
24 perspective, it would seem foolish for the Port not to obtain the certainty and security that water  
25 rights provide.

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1 From the public perspective, the issue is much more problematic. It is no longer a matter  
2 of the Port's "ox getting gored" if someone attempts to appropriate the Port's mitigation water.  
3 The public interest is involved. Specifically, the security and certainty that water rights provide  
4 are basic necessities in determining whether there can be "reasonable assurance" that  
5 characteristic uses in Des Moines and Miller Creeks will be maintained.  
6

7 Notwithstanding Ecology's assertion that the stream closures provide adequate assurance  
8 for Section 401 purposes, it is possible that these closures will be altered in the future. Ecology  
9 Br. at 3-4. The statute authorizing Ecology to adopt stream closures specifically contemplates  
10 amendments to the closure rules. RCW § 90.54.040(1), (2). Even more likely, the recently  
11 enacted watershed planning statute specifically authorizes amendments to minimum streamflow  
12 and closure regulations. RCW § 90.82.080. A water right must be in place to assure that, in the  
13 event of future amendment, the Port's mitigation water, required in perpetuity, is protected.<sup>12</sup>  
14

15 Ultimately, there can be no reasonable assurance under § 401 in the absence of required  
16 water rights. If the Third Runway Project is built, there will be no going back: impacts of new  
17 runways and taxiways, the embankment, and other land use changes will be irrevocable. It is not  
18 disputed that these impacts will deplete flow in Des Moines and Walker Creeks, nor that these  
19 impacts must be mitigated. 2<sup>nd</sup> Witek Decl., Exhibit A (Section 401 Cert., § I).  
20

21 In order to prevent violation of water quality standards, it is imperative that Ecology  
22 require compliance with all reasonable legal means within Ecology's control. Cf. 50 C.F.R.  
23

---

24 <sup>12</sup> Ecology argues that water rights would not provide additional reasonable assurance because they would  
25 not prevent future appropriations should the stream closures be lifted. Ecology Br. at 6. This argument makes no  
sense. Quite the contrary, water rights issued to the Port for stream flow augmentation purposes would require  
protection from impairment if (or when) future water permit applications are processed. RCW § 90.03.290(3).

1 402.02 (defining “reasonable and prudent alternatives” under the Endangered Species Act to  
2 include alternative actions “that can be implemented consistent with the scope of the Federal  
3 agency's legal authority and jurisdiction.”). Ecology must set forth within the Certification “any  
4 other appropriate requirement of State law.” 33 U.S.C. § 1341(d). Grant of certification here in  
5 the absence of water rights is a serious dereliction of Ecology’s duties. *See, e.g., Skokomish*  
6 *Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 95, 982 P.2d 1189 (Div. 2 1999) (finding  
7 Ecology’s refusal to exercise duties under Coastal Zone Management program arbitrary and  
8 capricious). Further, it makes it impossible for Ecology to find, with reasonable assurance, that  
9 water quality standards would be complied with for the life of the project, that is, in perpetuity.


11 **V. CONCLUSION**

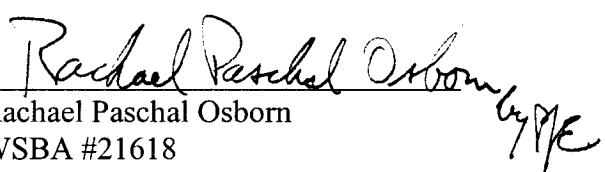
12 There is no material dispute. The 401 certification which is the subject of the appeal  
13 relies on a Low Flow Mitigation Plan which freely acknowledges what the Port proposes. The  
14 question is purely one of law: does the Port’s proposal require a water right and, if so, can there  
15 be reasonable assurance without one? Ecology should have required the Port to produce a water  
16 right. Without it, there cannot be reasonable assurance that the characteristic uses of the affected  
17 streams will not be degraded, in violation of state water quality standards. Summary judgment is  
18 appropriate for this issue.

19 DATED this 22 day of January, 2002.

20 HELSELL FETTERMAN LLP

21 By:

22   
23 Peter J. Eglick, WSBA #8809  
24 Kevin L. Stock, WSBA #14541  
25 Michael P. Witek, WSBA #26598  
Attorneys for Appellants

  
Rachael Paschal Osborn  
WSBA #21618  
Attorney for Appellants

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

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

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