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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION and CITIZENS AGAINST SEATAC EXPANSION,	)	PCHB No. 01-160
	)	
APPELLANTS,	)	
	)	
v.	)	CASE'S RESPONSE TO ACC'S MOTION FOR SUMMARY JUDGMENT
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and THE PORT OF SEATTLE	)	RE: NECESSARY WATER RIGHT
	)	
Respondents.	)	

Intervenor/appellant Citizens Against Seatac Expansion (CASE) hereby concurs in ACC's Motion for Summary Judgment Regarding the Absence of a Water Right for the Third Runway § 401 Certification, and urges the Board to grant summary judgment in ACC's favor for the reasons discussed below.

**I. ADDITIONAL UNDISPUTED FACTS**

As described in the Port's revised "Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal" ("Low Streamflow Analysis") submitted to Ecology in December, 2001:

The Port's proposal is to collect excess stormwater during the rainy season, store it in underground vaults, and release the stored water continuously into each stream during the designated summer low-streamflow period at a rate equivalent to the calculated summer low-streamflow impact to that stream from planned Port projects. \* \* \*

1  
2 The facility, as designed, consists of two stormwater vaults (one  
3 providing water to offset flow impacts in Walker Creek and one vault  
4 providing water to Des Moines Creek). Each of these vaults stores stormwater  
5 during the rainy season to be released during the summer low-streamflow  
6 periods with features that are unique to low-flow vaults. The extra features  
7 consist of additional outlets and controls, floating discharge structures to  
8 maintain constant discharge rates, varying configurations to manage  
9 sediments, and additional water quality management features (ventilation to  
10 facilitate aeration, provisions for filtration and mechanical aeration of  
11 discharges, and oil/water separation, as appropriate). Generally, water will be  
12 collected beginning in January of each year, and discharged from late July  
13 through October (with discharges continuing through November depending on  
14 the availability of water). Annual facility maintenance will take place in  
15 December of each year.

16 Low Streamflow Analysis at 1-3.

## 17 II. LAW OF SUMMARY JUDGMENT

18 The moving party bears the burden of demonstrating both an absence of any genuine  
19 issue of material fact and entitlement to judgment as a matter of law. Magula v. Benton  
20 Franklin Title Co., 131 Wn.2d 171, 182, 930 P.2d 307 (1997), *citing* Young v. Key  
21 Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In responding to a  
22 properly-supported motion, an adverse party "must set forth specific facts showing that there  
23 is a genuine issue for trial." CR 56(e). The court considers the evidence and all reasonable  
24 inferences therefrom in the light most favorable to the nonmoving party. Magula, 131 Wn.2d  
25 at 182.

## 26 III. ISSUE PRESENTED

Whether the Port must obtain a water right to implement the low stream flow  
conditions in the certification and if so: (a) is there reasonable assurance that § 401 and  
applicable water quality law will not be violated in the absence of such a water right? Acc

1 Motion at 2-3, quoting Supplemental Stipulation Regarding Proposed Statement of Legal  
2 Issues (11/15/01).

#### 3 IV. ARGUMENT

4 There is no material issue of fact respecting the Port's plans to divert and store  
5 stormwater for later use in augmenting stream flows. Accordingly, neither Ecology nor the  
6 Port identified any issues of material fact preventing summary judgment on this issue in  
7 opposing ACC's motion for a stay. *See*, Respondent Department of Ecology's Response to  
8 Appellant's Motion for Stay at 12-16, *and* Port of Seattle's Memorandum Opposing ACC's  
9 Motion for Stay at 12-17. As a result, the only remaining issues are questions of law:  
10 whether the Port must obtain a water right, and whether -- in the absence of such a right --  
11 Ecology can certify reasonable assurance that the Port will be able to mitigate the impacts of  
12 the proposed third runway and related projects and comply with water quality standards in  
13 perpetuity.  
14

15  
16 Both Ecology's and the Port's arguments against the requirement of a water right here  
17 are largely based on the fiction that the Port seeks only to "manage" stormwater. *See*,  
18 Ecology's Response to Stay Motion at 12 (arguing the Port's "low flow mitigation plans differ  
19 only in scale from traditional stormwater management plans"), *and* Port's Memorandum  
20 Opposing Stay at 13 (arguing there is no legal basis for "requiring a water to manage  
21 stormwater.")  
22

23 But the Port's proposal does not merely involve stormwater management. Rather, it is  
24 clear that the Port seeks to manage the levels of Miller and Des Moines Creeks. And it seeks  
25 to do so with waters that it has diverted and stored over a period of many months. Under  
26

1 Washington law, such diversion of waters and application to a beneficial use requires a water  
2 right. See, ACC Memorandum at 8-12.

3 As the Port has no such water right, there can be no assurance that water will be  
4 available for streamflow mitigation purposes in future years. Accordingly, Ecology can not  
5 have reasonable assurance that the proposed third runway project will not result in  
6 impairment of characteristic uses and water quality standards in the future.  
7

8 **V. CONCLUSION**

9 Under the foregoing points and authorities, ACC's motion for summary judgment  
10 should be granted.

11 DATED this 14th day of January, 2002.

12  
13 **SMITH & LOWNEY, P.L.L.C.**

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16 By: 

17 Richard A. Poulin, Of Counsel  
18 WSBA #27782  
19 Attorneys for Petitioner  
20 Eastside Citizens Against Aircraft Noise  
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2 CERTIFICATE

3 I certify that I mailed a copy of CASE's Response to ACC's Motion for Summary Judgment

4 re: Water Right by First Class U.S. mail, postage prepaid, on Monday, January 14, 2002, to:

5 Attorney General, Ecology Division  
6 Joan M. Marchioro, Thomas J. Young, Jeff Kray  
7 P.O. Box 40117  
8 Olympia, WA 98504-0117

Marten & Brown LLP  
Jay J. Manning, Gillis E. Reavis  
421 S. Capitol Way, #303  
Olympia, WA 98501

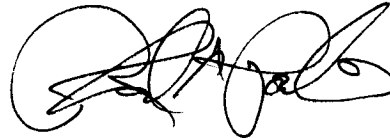
9 Port of Seattle  
10 General Counsel Linda J. Strout  
11 Senior Port Counsel Traci M. Goodwin  
12 2711 Alaskan Way, Pier 69  
Seattle, WA 98121

Foster Pepper & Shefelman PLLC  
Roger A. Pearce, Steven G. Jones  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101-3299

Hellsell Fetterman LLP  
Peter J. Eglick, Kevin L. Stock, Michael W. Witek  
1325 Fourth Avenue, Suite 1500  
Seattle, WA 98101-2509

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

13 DATED this 14<sup>th</sup> day of January, 2002.

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Richard A. Poulin

**AR 005062**

CASE'S RESPONSE BRIEF  
RE: WATER RIGHT- 5

SMITH & LOWNEY, P.L.L.C.  
2317 EAST JOHN STREET  
SEATTLE, WA 98112  
(206) 860-2883