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ENVIRONMENTAL  
HEARINGS OFFICE

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SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY

AIRPORT COMMUNITIES COALITION; and  
CITIZENS AGAINST SEA-TAC EXPANSION NO.

Petitioners,

v.

STATE OF WASHINGTON, POLLUTION  
CONTROL HEARINGS BOARD; STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY; and PORT OF SEATTLE, a  
municipal corporation of the State of  
Washington,

Respondents.

AIRPORT COMMUNITIES COALITION'S  
AND CITIZENS AGAINST SEA-TAC  
EXPANSION'S APPLICATION FOR DIRECT  
REVIEW BY COURT OF APPEALS, AND  
REQUEST PURSUANT TO RCW 34.05.518  
FOR CERTIFICATE OF APPEALABILITY OF  
POLLUTION CONTROL HEARINGS  
BOARD'S ORDER GRANTING STAY

(PCHB No. 01-160)

**I. INTRODUCTION**

Pursuant to RCW 34.05.518, the Airport Communities Coalition ("ACC") and Citizens Against Sea-Tac Expansion ("CASE") hereby apply for direct review by the Washington Court of Appeals, Division II, of the "Order Granting Motion to Stay the Effectiveness of Section 401 Certification" issued by the Pollution Control Hearings Board ("PCHB" or "Board") on December 17, 2001 ("Stay Order"), and appealed to the Superior Court of Thurston County by the Port of Seattle on December 31, 2001. ACC and CASE are also filing a Petition for Review of Agency Action regarding the Stay Order

1 along with this Application for Direct Review. Further, ACC and CASE hereby request that the PCHB  
2 issue a Certificate of Appealability of the Stay Order, pursuant to RCW 34.05.518(3)(b).

## 3 II. APPLICATION FOR DIRECT REVIEW

4 As an initial matter, the statute authorizing the Pollution Control Hearings Board to issue stay  
5 orders also provides for judicial review of those decisions as final decisions under the Administrative  
6 Procedures Act (APA). See RCW 43.21B.320(5) (citing RCW 34.05); see also RCW 34.05.550, RCW  
7 34.05.570(3), and WAC 371-08-415(6). In pertinent part, the statute provides that:

8 Any party or other person aggrieved by the grant or denial of a stay by the hearings  
9 board may petition the superior court for Thurston county for review of that decision  
10 pursuant to chapter 34.05 RCW pending the appeal on the merits before the board.

11 RCW 43.21B.320(5). Here, both the Port and ACC/CASE have exercised the right to judicial review  
12 by filing separate petitions for review.

13 The APA, in turn, authorizes direct appellate review of final decisions of the PCHB and other  
14 specified environmental boards. See RCW 34.05.518. In pertinent part, the APA provides:

15 The final decision of an administrative agency in an adjudicative proceeding under this  
16 chapter may be directly reviewed by the court of appeals . . . if the final decision is from  
17 an environmental board as defined in subsection (3)<sup>1</sup> of this section, upon acceptance by  
18 the court of appeals after a certificate of appealability has been filed by the  
19 environmental board that rendered the final decision.

20 RCW 34.05.518(1) (emphasis added). Under the statute, once a petition for review has been filed with  
21 the Thurston County Superior Court, "a party may file an application for direct review with the superior  
22 court and serve the appropriate environmental board and all parties of record. The application shall  
23

24 <sup>1</sup> RCW 34.05.518(3)(a) provides that, for the purposes of direct review of final decisions of  
25 environmental boards, "environmental boards include those boards identified in RCW 43.21B.005." RCW  
43.21B.005 includes the Pollution Control Hearings Board, whose decision is at issue here.

1 request the environmental board to file a certificate of appealability." RCW 34.05.518(6)(a) (emphasis  
2 added).

3           The APA does not define the term "final decision." However, the Washington Supreme  
4 Court discussed the meaning of the term in the context of Washington's prior version of the  
5 APA in the following illuminating passage:  
6

7           Since there are no Washington cases discussing what is meant by a 'final decision' under  
8 RCW 34.04.130, we feel it appropriate to look to the federal realm for guidance in this  
9 area. Initially, it is noted that whether or not the statutory requirements of finality are  
10 satisfied in any given case depends not upon the label affixed to its action by the  
11 administrative agency, but rather upon a realistic appraisal of the consequences of such  
12 action. Justice Frankfurter stated in *Columbia Broadcasting System, Inc. v. United*  
13 *States*, 316 U.S. 407, 425, 62 S.Ct. 1194, 1205, 86 L.Ed. 1563 (1942), that:

12           The ultimate test of reviewability is not to be found in an over-refined  
13 technique, but in the need of the review to protect from the irreparable injury  
14 threatened in the exceptional case by administrative rulings which attach legal  
15 consequences to action taken in advance of other hearings and adjudications  
16 that may follow, the results of which the regulations purport to control.

15           Thus, administrative orders are ordinarily reviewable when 'they impose an obligation,  
16 deny a right, or fix some legal relationship as a consummation of the administrative  
17 process.'

18 *State Dept. of Ecology v. City of Kirkland*, 84 Wn.2d 25, 29-30, 523 P.2d 1181 (1974) (other citations  
19 omitted).

20           Under the *City of Kirkland* analysis, RCW 34.05.518 authorizes direct appellate review of the  
21 Board's Stay Order, and of the parties' appeal of that administrative agency action. A "realistic  
22 appraisal of the consequences" confirms that direct appellate review is needed to protect from the  
23

24 **AR 005608**



1 An environmental board may issue a certificate of appealability if it finds that delay in  
2 obtaining a final and prompt determination of the issues would be detrimental to any  
3 party or the public interest and either:

4 (i) Fundamental and urgent state-wide or regional issues are raised; or

5 (ii) The proceeding is likely to have significant precedential value.

6 RCW 34.05.518(3)(b); *see also*, WAC 371-08-560.

7 In this case, as discussed below, delay in obtaining a final and prompt determination of the  
8 issues would be detrimental to ACC, CASE and the public interest. Further, this proceeding is likely to  
9 have significant precedential value.

10 **A. Delay in Obtaining a Final and Prompt Determination of the Validity of the Board's Stay**  
11 **Order Would Be Detrimental to ACC, CASE and the Public Interest**

12 Delay in obtaining a final and prompt determination of the validity of the Board's Stay Order  
13 most assuredly would be detrimental to ACC, CASE and the public. Given the importance of the  
14 issues at stake, ACC, CASE and the public are entitled to an efficient and final resolution of the issues  
15 underlying the parties' appeal of the Stay Order. Such resolution will follow from prompt adjudication  
16 of the issues by the Court of Appeals since any decision of the Superior Court in this action will  
17 doubtless be appealed by one party or another to the Court of Appeals on an expedited or emergency  
18 basis. Particularly since the appellate court's review must be based directly on the Board's record and  
19 decision rather than the Superior Court's review,<sup>2</sup> both judicial economy and the public's need for a  
20 prompt and final decision dictate skipping the unnecessary step of obtaining a temporary ruling in the  
21  
22

23  
24 <sup>2</sup> *See, e.g., Plum Creek Timber Co. v. Washington State Forest Practices Appeals Bd.*, 99 Wn. App. 579,  
25 588, 993 P.2d 287 (2000), *citing King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 672,  
860 P.2d 1024 (1993).

1 Superior Court. Prior consideration by the Superior Court will serve only to delay the inevitable  
2 review by the Washington Court of Appeals.

3  
4 In addition, both the Port and ACC/CASE raise issues that warrant Court of Appeals  
5 consideration and resolution prior to any remand to the Board. Delay in obtaining a final and prompt  
6 determination of these issues would be detrimental to ACC, CASE and the public interest. For  
7 example, the Port seeks reversal of the Board's Stay Order based on an allegation that the Board  
8 applied "an erroneous standard of what constitutes a likelihood of success on the merits, and what  
9 constitutes irreparable harm." Port's Petition at 6. The State Pollution Control Hearings Board's expert  
10 interpretation of the stay's standard in its own organic statute should not be overturned until and unless  
11 an appellate court has reviewed the Port's claims and has provided clear direction to the Board.  
12

13 While ACC and CASE support the Board's resolution of the stay issues the Board addressed,  
14 their Petition points out that the Board failed to decide all issues which provided a basis for grant of a  
15 stay. *See* RCW 34.05.570(3)(f). Because these low flow and stormwater pollution issues provide  
16 separate and independent grounds for a stay, and since the appellate court can affirm a decision on any  
17 basis supported by the Board's record,<sup>3</sup> these issues should be resolved without delay and before the  
18 Stay Order is disturbed.  
19

20 Further, ACC/CASE's Petition alleges the Board, in bending over backward to be fair to the  
21 Port, excluded from consideration in ruling on ACC's Motion for Stay evidence of admissions by  
22 Ecology concerning the same issues on which ACC was seeking a stay. Thus, delay in resolving this  
23

24  
25 <sup>3</sup> *See, e.g., Backlund v. University of Washington*, 137 Wn.2d 651, 670, 975 P.2d 950 (1999), *citing*  
*LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

1 important evidentiary issue would also be detrimental to ACC, CASE and the public interest, because  
2 the Stay Order should not be disturbed or remanded until the appellate court determines whether the  
3 evidence was properly excluded. Even in the unlikely event the stay might otherwise be overturned, it  
4 will be necessary to resolve these evidentiary issues since, depending on the resolution, the additional  
5 evidence would preclude reversal of the stay.  
6

7 **B. The Validity of the Stay Order Raises Fundamental and Urgent State-wide or Regional**  
8 **Issues**

9 The statewide and/or regional significance and urgency of the matters on appeal is not disputed.  
10 Indeed, the significance and urgency of the matters on appeal is reflected both in the legal issues at  
11 stake, and in the physical consequences of the Court's rulings.

12 Legally, the matters on appeal involve the very standards with which the Board determines  
13 whether the effectiveness of an agency order may be stayed under WAC 371-08-415. As demonstrated  
14 by the case at bar, the power to issue a stay can be essential to preserving the Board's very ability to  
15 render a meaningful decision on the merits of an appeal. Stay Order at 18. Thus, the legal standard  
16 governing the availability of stays is fundamental to the Board's authority and relevance.  
17

18 There can be no dispute that there is a fundamental and urgent regional interest in clean water.  
19 In adopting the Clean Water Act Congress declared that, "The objective of this chapter is to restore and  
20 maintain the chemical, physical, and biological integrity of the Nation's Waters." 33 U.S.C. § 1251(a).  
21 In implementing the Clean Water Act, our own Legislature declared that it is the policy of Washington  
22 to:  
23

24 [M]aintain the highest possible standards to insure the purity of all waters of the state consistent  
25 with public health and public enjoyment thereof, the propagation and protection of wild life,  
birds, game, fish and other aquatic life, and the industrial development of the state, and to that

1 end require the use of all known available and reasonable methods by industries and others to  
2 prevent and control the pollution of the waters of the state of Washington. Consistent with this  
3 policy, the state of Washington will exercise its powers, as fully and as effectively as possible,  
4 to retain and secure high quality for all waters of the state. The state of Washington in  
5 recognition of the federal government's interest in the quality of the navigable waters of the  
6 United States, of which certain portions thereof are within the jurisdictional limits of this state,  
7 proclaims a public policy of working cooperatively with the federal government in a joint effort  
8 to extinguish the sources of water quality degradation, while at the same time preserving and  
9 vigorously exercising state powers to ensure that present and future standards of water quality  
10 within the state shall be determined by the citizenry, through and by the efforts of state  
11 government, of the state of Washington.

12 RCW 90.48.010.

13 Thus, the urgency of the matters on appeal is beyond dispute.

14 **C. Resolution of the Stay Order Will Have Significant Precedential Value**

15 As discussed above, the issues in the parties' appeals include the legal standard governing the  
16 availability of an administrative stay order, the Board's obligation to address issues placed before it,  
17 and the admissibility of evidence supporting a motion for stay. The prompt and final resolution of each  
18 of these issues by the Court of Appeals will have significant precedential value. This is so not only  
19 because of the considerable number of appeals and related stay motions considered by the PCHB, but  
20 also because the appellate court's construction of the issues on appeal here will apply by analogy to  
21 issues pending before the State's other environmental hearings boards, including the Shoreline  
22 Hearings Board, the Forest Practices Board, and the Hydraulic Appeals Board. See RCW 43.21B.005.

23  
24 **AR 005613**



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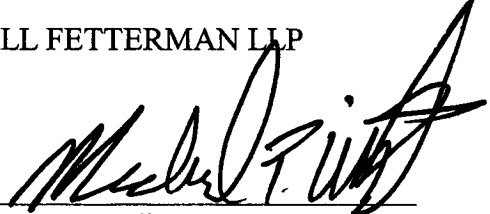
IV. CONCLUSION

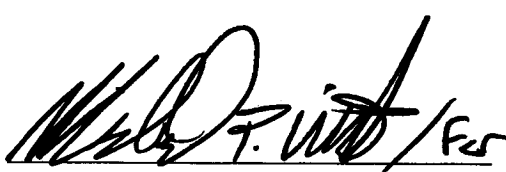
For the reasons set forth above, ACC and CASE respectfully request that the Pollution Control Hearings Board issue a Certificate of Appealability for the Board's Stay Order, and that ACC/CASE's Application for Direct Review be granted.

DATED this 8<sup>th</sup> day of January, 2002.

HELSELL FETTERMAN LLP

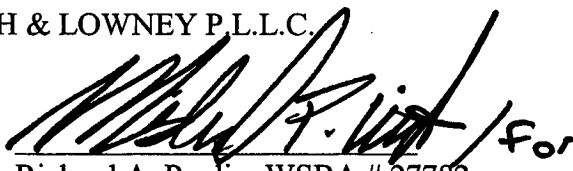
By:

  
Peter J. Eglick, WSBA #8809  
Kevin L. Stock, WSBA #14541  
Michael P. Witek, WSBA #26598  
Attorneys for Respondent  
Airport Communities Coalition

  
Rachael Paschal Osborn  
WSBA # 21618  
Attorney for Respondent  
Airport Communities Coalition

SMITH & LOWNY P.L.L.C.

By:

  
Richard A. Poulin, WSBA # 27782  
Attorneys for Citizens Against Sea-Tac Expansion

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AR 005614

ACC'S/CASE'S APPLICATION FOR DIRECT REVIEW  
OF PCHB'S ORDER GRANTING STAY -- 9

HELSELL  
FETTERMAN  
A Limited Liability Partnership

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

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

AIRPORT COMMUNITIES COALITION; and  
CITIZENS AGAINST SEATAC EXPANSION

Petitioners,

v.

STATE OF WASHINGTON, POLLUTION  
CONTROL HEARINGS BOARD; STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY; and PORT OF SEATTLE, a  
municipal corporation of the State of  
Washington,

Respondents.

NO.

CERTIFICATE OF SERVICE

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

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

On January 8, 2002, I caused to be hand-delivered a true and correct copy of ACC's and CASE's Petition for Review of Agency Action, and ACC's and CASE's Application for Direct Review by Court of Appeals, and Request Pursuant to RCW 34.05.518 for Certificate of Appealability of Pollution Control Hearings Board's Order Granting Stay in the above-captioned case to:

**AR 005615**

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6  
Joan Marchioro  
Thomas Young  
Jeff Kray  
Assistant Attorneys General  
Ecology Division  
2425 Bristol Court SW, 2nd Floor  
Olympia, WA 98502

Linda Strout  
Traci Goodwin  
Port of Seattle, Legal Dept.  
2711 Alaskan Way  
Seattle, WA 98121

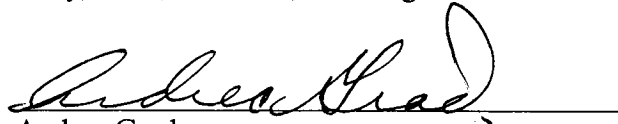
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Roger Pearce  
Steven Jones  
Foster Pepper & Shefelman  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101

Jay Manning  
Gillis Reavis  
Marten Brown LLP  
421 S. Capitol Way, Suite 303  
Olympia, WA 98501

10  
11  
12  
Jean M. Wilkinson  
Assistant Attorney General  
1125 Washington St. S.E.  
Olympia, WA 98504

13  
14  
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is  
true and correct.

15  
16  
DATED this 8th day of January, 2002, at Seattle, Washington.

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Andrea Grad

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**AR 005616**

<b>SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY</b>	
PORT OF SEATTLE,	
vs.	Petitioner,
STATE OF WASHINGTON, POLLUTION CONTROL HEARINGS BOARD, et al.,	
	Respondents.


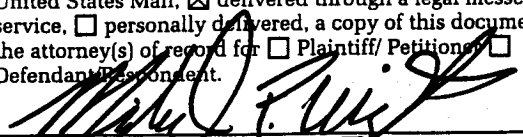
NO. 01-2-02386-9

**CIVIL NOTICE OF ISSUE (NTIS)  
Clerk's Action Required**

**TO: THURSTON COUNTY CLERK** and to all other parties per list on reverse side:

**PLEASE TAKE NOTICE** that an issue of law in this case will be heard on the date below and the Clerk is directed to note this issue on the calendar checked below

**FRIDAY, January 18, 2002, 9:00 a.m. MOTIONS CALENDAR**

Bench/Judge Copies: Deliver to Superior court, Building 2, Rm 150. Filing Deadlines: Friday noon, preceding Friday noted, pursuant to LCR 5(b)(1) & (2) Confirmation: E-mail to <a href="mailto:civlaw@co.thurston.wa.us">civlaw@co.thurston.wa.us</a> , fax to (360)753-4033, or call (360)786-5423 by 12:00 noon three court days prior to the hearing date [LCR 16(f)(2)] Court Address: 2000 Lakeridge Drive SW, Building 2, Olympia, WA 98502.	
<p style="text-align: center;"><b>Civil Motions</b></p> <input type="checkbox"/> Default <input type="checkbox"/> Discovery <input type="checkbox"/> Summary Judgment/Dismissal <input type="checkbox"/> Change Venue <input type="checkbox"/> Continue Trial <input type="checkbox"/> Show Cause <input type="checkbox"/> Present Order <input type="checkbox"/> TRO/Preliminary Injunction <input type="checkbox"/> Contested Probate Motion <input checked="" type="checkbox"/> Other <u>Motion for Consolidation</u>	<p style="text-align: center;"><b>Assigned Judge</b></p> <input type="checkbox"/> Dept. 1 - Judge Daniel Berschauer <input type="checkbox"/> Dept. 3 - Judge Richard A. Strophy <input type="checkbox"/> Dept. 4 - Judge Wm. Thomas McPhee <input checked="" type="checkbox"/> Dept. 5 - Judge Richard D. Hicks <input type="checkbox"/> Dept. 6 - Judge Christine A. Pomeroy <input type="checkbox"/> Dept. 7 - Judge Gary R. Tabor
<p style="text-align: center;"><b>Probate</b></p> <input type="checkbox"/> Petition for Letters of Administration/Guardianship <input type="checkbox"/> Petition for Probate of Will and Letters Testamentary <input type="checkbox"/> Petition to Set aside Property in Lieu of Homestead <input type="checkbox"/> Annual Report of Guardian <input type="checkbox"/> Final Account <input type="checkbox"/> Other _____	<p style="text-align: center;"><b>PRESENTING PARTY:</b></p> Sign:  Print/Type Name: <u>Michael P. Witek</u> WSBA# <u>26598</u> (if attorney) Address: <u>1325 - 4<sup>th</sup> Ave., #1500</u> City, State, Zip: <u>Seattle, WA 98101</u> Attorney for: <u>Respondent Airport Communities Coalition</u> Telephone: <u>(206) 292-1144</u> Date: <u>January 8, 2002</u>
I certify that on January 8, 2002, I <input type="checkbox"/> deposited in the United States Mail, <input checked="" type="checkbox"/> delivered through a legal messenger service, <input type="checkbox"/> personally delivered, a copy of this document to the attorney(s) of record for <input type="checkbox"/> Plaintiff/ Petitioner <input type="checkbox"/> Defendant/Respondent.  Attorney for: <input type="checkbox"/> Plaintiff/Petitioner <input checked="" type="checkbox"/> Def./Respondent	

**AR 005617**

**LIST NAMES, ADDRESSES AND TELEPHONE NUMBERS  
OF ALL PARTIES REQUIRING NOTICE**

<p>Name: <u>Joan Marchioro, Thomas Young, Jeff Krav</u></p> <p>Attorney for: <u>Dept. of Ecology</u></p> <p>WSBA #: <u>19250 / 17366 / 22174</u></p> <p>Address: <u>2425 Bristol Court S.W.</u> <u>Olympia, WA 98502</u></p> <p>Telephone: <u>(360) 586-6770</u></p>	<p>Name: <u>Roger Pearce / Steven Jones</u></p> <p>Attorney for: <u>Port of Seattle</u></p> <p>WSBA #: <u>21113 / 19334</u></p> <p>Address: <u>1111 Third Ave., #3400</u> <u>Seattle, WA 98101</u></p> <p>Telephone: <u>(206) 447-4400</u></p>
<p>Name: <u>Linda Strout / Traci Goodwin</u></p> <p>Attorney for: <u>Port of Seattle</u></p> <p>WSBA #: <u>9422 / 14974</u></p> <p>Address: <u>2711 Alaskan Way, Pier 69</u> <u>Seattle, WA 98121</u></p> <p>Telephone: <u>(206) 728-3206</u></p>	<p>Name: <u>Jav Manning / Gillis Reavis</u></p> <p>Attorney for: <u>Port of Seattle</u></p> <p>WSBA #: <u>13579 / 21451</u></p> <p>Address: <u>421 S. Capitol Way, #303</u> <u>Olympia, WA 98501</u></p> <p>Telephone: <u>(360) 786-1770</u></p>
<p>Name: <u>Richard Poulin</u></p> <p>Attorney for: <u>Citizens Against Sea-Tac Expansion</u></p> <p>WSBA #: <u>27782</u></p> <p>Address: <u>2317 E. John St.</u> <u>Seattle, WA 98112</u></p> <p>Telephone: <u>(206) 860-2883</u></p>	<p>Name: <u>Jean Wilkinson</u></p> <p>Attorney for: <u>Pollution Control Hearings Board</u></p> <p>WSBA #: <u>15503</u></p> <p>Address: <u>1125 Washington St.</u> <u>Olympia, WA 98504</u></p> <p>Telephone: <u>(360) 753-0225</u></p>

AR 005618

The Honorable Richard D. Hicks

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

PORT OF SEATTLE, a municipal corporation of  
the State of Washington,

Petitioner,

v.

STATE OF WASHINGTON, POLLUTION  
CONTROL HEARINGS BOARD; AIRPORT  
COMMUNITIES COALITION; CITIZENS  
AGAINST SEA-TAC EXPANSION; and  
STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondents.

NO. 01-2-02386-9

ACC'S MOTION FOR  
CONSOLIDATION

I RELIEF REQUESTED

Respondent Airport Communities Coalition ("ACC") moves the Court for an order which provides the following relief:

Consolidates for all purposes Thurston County Superior Court Cause No. 01-2-02386-9, which is now pending in this Court, with the petition for review filed January 8, 2002, by the ACC.

ACC'S MOTION FOR  
CONSOLIDATION- 1

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







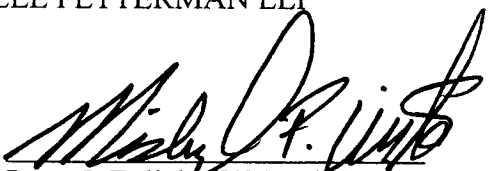
1 thousand pages and it would thus promote judicial economy to have one court review such a  
2 record.

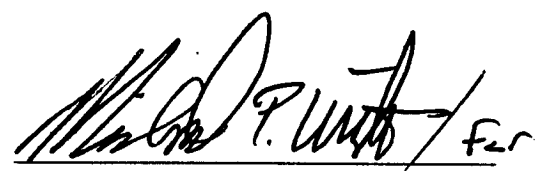
3 VI PROPOSED ORDER

4 A proposed order granting the relief requested accompanies this motion.

5 DATED this 7<sup>th</sup> day of January, 2002.

7 HELSELL FETTERMAN LLP

8  
9 By:   
10 Peter J. Eglick, WSBA #8809  
11 Kevin L. Stock, WSBA #14541  
12 Michael P. Witek, WSBA #26598  
13 Attorneys for Respondent

  
14 Rachael Paschal Osborn  
15 WSBA # 21618  
16 Attorney for Respondent  
17 Airport Communities Coalition

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The Honorable Richard D. Hicks

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JAN - 8 2002

ENVIRONMENTAL  
HEARINGS OFFICE

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

PORT OF SEATTLE, a municipal corporation of  
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STATE OF WASHINGTON, POLLUTION  
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AGAINST SEA-TAC EXPANSION; and  
STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondents.

NO. 01-2-02386-9

DECLARATION OF MICHAEL P.  
WITEK IN SUPPORT OF ACC'S  
MOTION FOR CONSOLIDATION

Michael P. Witek declares:

1. I am one of the attorneys of record for respondent Airport Communities Coalition ("ACC") in the above-captioned action.

2. On September 21, 2001, Ecology issued a revised Certification for the Third Runway Project, Ecology Order No 1996-4-02325 (Amended-1) and ACC filed a Notice of Appeal on October 1, 2001, assigned PCHB Case No. 01-160. The Port of Seattle is a party to the adjudicative proceedings before the PCHB.

DECLARATION OF MICHAEL P.  
WITEK IN SUPPORT OF ACC'S  
MOTION FOR CONSOLIDATION - 1

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

AR 005623

1           3.       On October 15, 2001, after briefing by the parties, the PCHB heard oral argument  
2 on ACC's Motion for Stay of the 401 Certification for the Third Runway Project.

3           4.       On December 17, 2001, the PCHB issued its Order Granting Motion to Stay the  
4 Effectiveness of the Section 401 Certification.

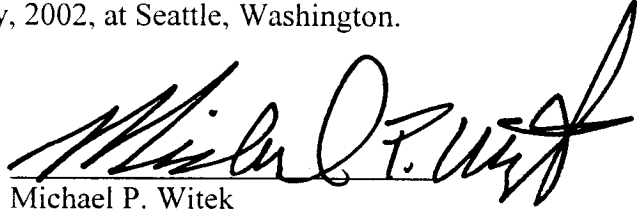
5           5.       The record on review for the Stay is in excess of nine thousand (9,000) pages.

6           6.       The Port of Seattle filed a petition for review of the PCHB's Stay Order on  
7 December 31, 2001. The Port's petition was assigned Thurston County Cause No.01-2-02386-9.  
8 A copy of the Port's petition for review is attached as Exhibit A to my declaration.

9           7.       On January 8, 2001, ACC filed its petition for review of the PCHB's Stay Order.  
10 A copy of ACC's petition for review is attached as Exhibit B to my declaration.

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

13           DATED this   7<sup>th</sup>   day of January, 2002, at Seattle, Washington.

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Michael P. Witek

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HELSELL FETTERMAN LLP

COPY

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

PORT OF SEATTLE, a municipal corporation  
of the State of Washington,

Petitioner,

v.

STATE OF WASHINGTON,  
POLLUTION CONTROL HEARINGS  
BOARD, AIRPORT COMMUNITIES  
COALITION, CITIZENS AGAINST  
SEATAC EXPANSION, and STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY,

Respondents.

No. 01-2-02386-9

PETITION FOR REVIEW OF AGENCY  
ACTION

**1. NAME AND ADDRESS OF PETITIONER**

The petitioner is the Port of Seattle (Port). Its mailing address is: 2711 Alaskan Way,  
Pier 69, P.O. Box 1209, Seattle, WA 98111.

**2. NAME AND ADDRESS OF PETITIONER'S ATTORNEY**

The Port of Seattle is represented by the following attorneys in this matter:

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

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Jay J. Manning  
Gillis E. Reavis  
Marten Brown Inc.  
421 S. Capitol Way, Suite 303  
Olympia, WA 98501

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

**3. NAME AND ADDRESS OF AGENCY WHOSE ACTION IS AT ISSUE**

The Port seeks judicial review of a decision by the Pollution Control Hearings Board (PCHB or Board), whose mailing address is: 4224 6<sup>th</sup> Avenue S.E. Bldg 2, P.O. Box 40903, Olympia, WA 98504-0903.

**4. AGENCY ACTION AT ISSUE**

The Port seeks judicial review of the PCHB's Order Granting Motion to Stay the Effectiveness of Section 401 Certification (Order), a copy of which is attached hereto as Exhibit 1.

**5. PARTIES IN ADJUDICATIVE PROCEEDING**

In addition to the Port, the Washington Department of Ecology (Ecology), the Airport Communities Coalition (ACC) and Citizens Against SeaTac Expansion (CASE) are parties to the adjudicative proceeding in which the PCHB rendered the decision to be reviewed.

**6. FACTS ENTITLING PETITIONER TO JUDICIAL REVIEW**

This petition for review involves the proposed third runway at Seattle-Tacoma International Airport (STIA). The Port of Seattle, which operates the airport, is a special district government established under state law and governed by an elected commission. The Port Commission is elected by the voters of King County.

1 STIA is the primary commercial airport for the Pacific Northwest. It is the only  
2 airport that provides scheduled passenger airline service to the 2.8 million residents in the  
3 four-county Central Puget Sound area. Air travel demand in the region has grown  
4 substantially in past years and long-term expectations are that demand will continue to rise.  
5 In recent years, STIA has come to serve an area with one of the fastest growing economies in  
6 the country, and regional air travel demand is expected to grow commensurately.

7 In the 1980s, the Port determined that the existing airport was not adequate to serve  
8 the regional needs of the Pacific Northwest, in large part due to local weather conditions. The  
9 Federal Aviation Administration (FAA) described the problem as follows in its Record of  
10 Decision approving the Master Plan Update Development Actions:

11 The Puget Sound region of Western Washington is renowned for its poor  
12 weather, characterized by frequent precipitation, clouds and fog. Under FAA  
13 aircraft separation criteria, the two existing Sea-Tac runways are too close  
14 together to permit simultaneous approaches to both runways during much of  
15 this poor weather. Under these weather conditions, therefore, there is but one  
16 usable approach path for aircraft landing at Sea-Tac. A one runway airport  
operates much differently from a multiple runway airport in terms of its ability  
to accommodate aircraft landings during periods of heavy air traffic demand.

17 The Federal Aviation Administration (FAA), the Port and the regional planning  
18 organization, the Puget Sound Regional Council (PSRC), engaged in a number of studies to  
19 evaluate options to address regional air transportation needs. After preparing an  
20 Environmental Impact Statement considering various options, including construction of a new  
21 airport and expansion of existing military air fields, the PSRC ultimately concluded that a third  
22 runway at STIA was both necessary and appropriate. Following this decision, the Port  
23 incorporated the third runway into its Master Plan Update, and gained FAA approval for the  
24 update.

25 The airport improvements described in the Master Plan Update include a new 8,500-  
26 foot parallel runway located west of the two existing runways; a 600-foot extension of  
27

1 Runway 34R; extension of runway safety areas at the ends of the two existing runways:  
2 terminal improvements and expansion including the development of a new terminal, parking,  
3 and access improvements north of the existing terminal; an aviation support area to  
4 accommodate aircraft maintenance and air cargo facilities; and relocation, redevelopment and  
5 expansion of support facilities.

6 Some of the Master Plan Update improvements will require the Port to place a  
7 substantial amount of fill. A small portion of this fill will be located in wetlands that  
8 constitute waters of the United States. This triggers the need for a dredge and fill permit from  
9 the United States Army Corps of Engineers (Corps) pursuant to section 404 of the Clean  
10 Water Act (CWA). 33 U.S.C. § 1344. This permit, referred to as a "404 Permit," in turn,  
11 requires a certification from the State of Washington under section 401 of the CWA, 33 U.S.C.  
12 § 1341(a), that there is reasonable assurance that any discharge from the project will comply  
13 with water quality standards.

14 On October 25, 2000, the Port submitted a revised application, called a Joint Aquatic  
15 Resources Permit Application, for the aspects of the airport expansion subject to the dredge  
16 and fill permitting requirements. In that application the Port certified that the proposed  
17 project complied with water quality standards under section 401 of the CWA.

18 On September 21, 2001, after an extensive review process, Ecology determined it had  
19 reasonable assurance that the project would meet water quality standards, and issued an  
20 amended Water Quality Certification (401 Certification). The 401 Certification includes  
21 numerous conditions designed to ensure that water quality standards will be met in years to  
22 come, including provisions relating to mitigation of natural resource and low streamflow  
23 impacts; prevention and containment of potential spills; monitoring of water quality; and  
24 compliance with water quality permits.

1 ACC filed a timely notice of appeal of the 401 Certification with the PCHB.  
2 Thereafter, ACC brought a motion to stay the effectiveness of the Certification. The PCHB's  
3 enabling statute, RCW 43.21B.320(3), provides as follows:  
4

5 The applicant may make a prima facie case for a stay if the applicant  
6 demonstrates either a likelihood of success on the merits of the appeal or  
7 irreparable harm. Upon such a showing, the hearings board shall grant the stay  
8 unless the department or authority demonstrates either (a) a substantial  
9 probability of success on the merits or (b) likelihood of success on the merits  
10 and an overriding public interest which justifies denial of the stay.

11 The parties to the appeal submitted extensive briefing and supporting materials for the  
12 PCHB's consideration of the stay motion. ACC argued that it was likely to succeed on the  
13 merits of the appeal and that it would suffer irreparable harm if a stay was not granted. The  
14 Port and Ecology responded by arguing that they were likely to succeed on the merits and that  
15 an overriding public interest – the expeditious construction of an important public project –  
16 justified denial of the stay. Moreover, the Port argued that no irreparable harm could result  
17 from issuance of the 401 Certification since the Port cannot fill wetlands without a 404  
18 Permit, which has not been issued. The Port argued that ACC has an adequate remedy in  
19 federal court to challenge filling of the wetlands if the 404 Permit is in fact issued.

20 On December 17, 2001, the PCHB entered an Order Granting Motion to Stay the  
21 Effectiveness of Section 401 Certification (Exhibit 1). The PCHB cited three grounds for its  
22 decision: first, that ACC had shown a likelihood of success on the issue of whether the Port's  
23 proposal to provide wetland buffers is sufficient to mitigate wetland functions and values;  
24 second, that ACC had shown a likelihood of success on the issue of whether the Port's proposal  
25 to mitigate low flow impacts from the project requires a water right; and third, that ACC had  
26 shown a likelihood of success on the issue of whether the criteria for the evaluation of fill to be  
27 used in the construction of the third runway were adequate to prevent the contamination of  
28 wetlands and surface waters. The PCHB also ruled that ACC could suffer irreparable harm if



1 the water quality certification continued in effect during the pendency of the appeal, since the  
2 water quality certification allowed the Corps to issue the dredge and fill permit for the project.

3 The Port now seeks judicial review of the PCHB's Order as provided by RCW  
4 43.21B.320(5):

5 Any party or other person aggrieved by the grant or denial of a stay by the  
6 hearings board may petition the superior court for Thurston county for review  
7 of that decision pursuant to chapter 34.05 RCW pending the appeal on the  
8 merits before the board. The superior court shall expedite its review of the  
9 decision of the hearings board.

### 10 **7. REASONS RELIEF SHOULD BE GRANTED**

11 The Port is entitled to relief because the PCHB committed serious errors in issuing the  
12 Order. Specifically, the PCHB was required to follow the standards prescribed in RCW  
13 43.21B.320(3) for considering a motion for stay. Under this statute, the PCHB must review  
14 the arguments and evidence presented by each party in order to determine which party is  
15 likely to prevail on the merits. Separately, the PCHB must also determine whether the  
16 applicant will suffer irreparable harm, and whether the party resisting the motion for stay  
17 demonstrates an overriding public interest justifying denial of the stay.

18 The PCHB failed to meet the requirements of RCW 43.21B.320(3) by applying an  
19 erroneous standard of what constitutes a likelihood of success on the merits, and what  
20 constitutes irreparable harm. In addition, the PCHB did not consider the substantial evidence  
21 and arguments presented by the Port and by Ecology. The PCHB described the standard it  
22 used to resolve the motion for stay as follows:

23 Likelihood of success on the merits means one or both sides have presented the  
24 Board with justiciable arguments for and against a particular proposition.  
25 Likelihood of success on the merits is not a pure probability standard under  
26 RCW 43.21B.320 and WAC 371-08-415(4). *Blohowiak et al. v. Seattle-King*  
27 *County Department of Health*, PCHB No. 99-093 (Order on Motions for  
28 Partial Summary Judgment and Stay, September 28, 1999). This standard does  
not require the moving party to demonstrate that it will conclusively win on  
the merits, but only that there are questions "so serious ... as to make them fair

1 ground for litigation and thus for more deliberative investigation.” *Hamilton*  
2 *Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (C.A. 2d Cir. 1971). The  
3 evaluation of the likely outcome on the merits is based on a sliding scale that  
4 balances the comparative injuries that the parties and non-parties may suffer if  
5 a stay is granted or denied. For example, where the non-moving party will  
6 incur little or no harm or injury if a stay is granted, then the moving party’s  
7 demonstration of likelihood of success need not be as strong as where the non-  
8 moving party would suffer great injury. Federal Practice and Procedure, Wright  
& Miller, SS 2948, Chapter 9, pp. 453-455. The sliding scale used to  
determine the likelihood of success must also take into account the injuries that  
the non-parties may suffer if a stay is granted or denied. *Abbott Laboratories*  
*v. Mead Johnson Company*, 971 F2d 6, 11-12 (C.A. 7<sup>th</sup> Cir. 1992).

9 Order at 3. In applying this standard, the PCHB failed to determine which party was likely to  
10 succeed on the merits, a critical requirement for consideration of a stay under RCW  
11 43.21B.320(3). Contrary to statutory requirements, the PCHB concluded that ACC had  
12 shown it was likely to prevail on the merits simply by presenting a “serious question” for  
13 consideration. The PCHB’s Order provides no analysis or consideration of the evidence and  
14 arguments presented by the Port and Ecology.

15 In applying this standard, the PCHB also blended together its analysis of the parties’  
16 likelihood of success and the equitable considerations relevant to the stay motion. RCW  
17 43.21B.320 requires that these questions be considered separately, and that the PCHB make  
18 separate conclusions regarding each. By failing to follow these requirements, the Board  
19 engaged in unlawful procedure or decision-making, and failed to follow a prescribed procedure.  
20 For the same reasons, the Board’s Order is contrary to law, arbitrary and capricious, and  
21 outside the statutory authority and jurisdiction of the PCHB. These errors entitle the Port to  
22 relief under RCW 34.05.570(3)(b), (c), (d), and (i). The Port therefore requests that this Court  
23 vacate the Order Granting Stay or, in the alternative, remand to the PCHB for further  
24 consideration in light of the proper legal standard.

25 The Port has been substantially prejudiced by the PCHB’s erroneous application of  
26 the legal standard for granting a stay. Under federal law, the Corps has the authority to issue a  
27

1 permit allowing the Port to fill wetlands and that authority remains unrestricted during the  
2 appeal of a water quality certification such as that being considered by the PCHB. In issuing  
3 its decision, the PCHB stated that its grant of a stay would have the effect of preventing the  
4 filling of wetlands, which exceeds the statutory authority granted to the PCHB.

5 The Order Granting Stay stated that “the potential issuance of the §404 permit during  
6 the pendency of this appeal warrants the Board’s determination that failure to stay the  
7 effectiveness of the §401 certification could cause irreparable harm to the wetlands proposed  
8 for filling.” Although the Board acknowledged that “it could be argued that the §401  
9 certification alone cannot result in any actual filling of wetlands until and unless the U.S.  
10 Army Corps of Engineers issues the §404 permit, and thus no irreparable harm can come from  
11 the issuance of the §401 certification alone,” the Board clearly intended its decision to prevent  
12 the Corps from issuing the §404 permit. The PCHB’s action therefore exceeds the PCHB’s  
13 statutory authority and is inconsistent with the authority granted to the Corps by federal law.  
14 While the Port believes that federal law clearly grants the Corps the right to issue a permit to  
15 fill wetlands notwithstanding the stay, as a public agency the Port is mindful of the directives  
16 of other governmental agencies. The Port is therefore prejudiced by the Board’s stay decision,  
17 which assumes an effect on the Corps’ decision-making process that is unsupported by the  
18 law, and which attempts to impose inconsistent directives on the Port. For this reason, the  
19 Port requests that this Court vacate the Order or, in the alternative, remand it to the PCHB for  
20 consideration under the proper legal standard which, the Port believes, should result in denial  
21 of the stay and the elimination of conflicting directives.

## 22 8. REQUEST FOR RELIEF

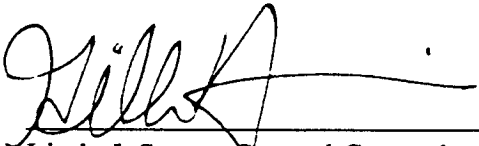
23 The Port requests that this Court vacate the PCHB’s Order Granting Motion to  
24 Stay. In the alternative, the Port requests that the Court set aside the Order and remand the  
25 matter to the PCHB for renewed consideration in accordance with RCW 43.21B.320, and in  
26 order to correct the errors identified in this petition for review. Because this is an  
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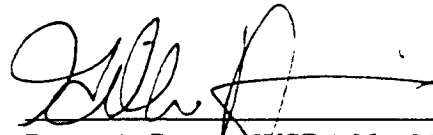
1 important public project of vital interest to the region, and as provided in RCW  
2 43.21B.320(5), the Port furthermore requests that this Court expedite its review of this  
3 matter.

4 Respectfully submitted this 31<sup>st</sup> day of December, 2001.

6 PORT OF SEATTLE

FOSTER PEPPER & SHEFELMAN  
PLLC

7  
8  for:

8  for:

9 Linda J. Strout, General Counsel,

Roger A. Pearce, WSBA No. 21113

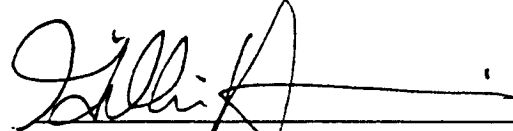
10 WSBA No. 9422

Steven G. Jones, WSBA No. 19334

11 Traci M. Goodwin, Senior Port Counsel,

12 WSBA No. 14974

13 MARTEN BROWN INC.

14  
15 

16 Jay J. Manning, WSBA No. 13579

17 Gillis E. Reavis, WSBA No. 21451

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

AIRPORT COMMUNITIES COALITION; and  
CITIZENS AGAINST SEA-TAC  
EXPANSION

Petitioners,

v.

STATE OF WASHINGTON, POLLUTION  
CONTROL HEARINGS BOARD; STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY; and PORT OF SEATTLE, a  
municipal corporation of the State of  
Washington,

Respondents.

NO.

PETITION FOR REVIEW OF AGENCY  
ACTION

I. NAME AND ADDRESS OF PETITIONERS

1.1. Airport Communities Coalition ("ACC")  
Bob Sheckler, Chair, ACC Executive Committee  
19900 4th Avenue SW  
Normandy Park, WA 98166  
Tel. (206) 870-7836  
Fax (206) 870-3442

1.2 Citizens Against Sea-Tac Expansion ("CASE")  
19900 4th Avenue SW  
Normandy Park, WA 98166  
Phone: 206-824-0805  
Fax: 206-824-3451

**AR 005634**

1  
2 II. NAME AND ADDRESS OF PETITIONERS' ATTORNEYS

3 2.1. Attorneys for Airport Communities Coalition ("ACC")

4 Peter J. Eglick, WSBA No. 8809  
5 Kevin L. Stock, WSBA No. 14541  
6 Michael P. Witek, WSBA No. 26598  
7 HELSELL FETTERMAN LLP  
8 1325 Fourth Avenue, Suite 1500  
9 P.O. Box 21846  
Seattle, WA 98111  
Tel. (206) 292-1144  
Fax (206) 340-0902

10 Rachael Paschal Osborn, WSBA No. 21618  
11 Attorney at Law  
12 2421 West Mission Avenue  
13 Spokane, WA 99201  
Tel. (509) 328-1087  
Fax (509) 328-8144

14 2.2 Attorneys for Citizens Against Sea-Tac Expansion ("CASE"):

15 Richard A. Poulin, WSBA No. 27782  
16 Of Counsel  
17 Smith & Lowney P.L.L.C.  
18 2317 East John Street  
Seattle, WA 98112  
Tel. (206) 860-1394  
19 Fax (206) 860-4187

20 III. NAME AND ADDRESS OF AGENCY WHOSE ACTION IS AT ISSUE

21 ACC and CASE seek judicial review of a decision by the Pollution Control Hearings Board  
22 ("PCHB"), whose mailing address is:  
23  
24  
25

**AR 005635**

1 Office of Environmental Hearings  
2 4224 6<sup>th</sup> Avenue S.E.  
3 Bldg 2, Rowe 6  
4 P. O. Box 40903  
5 Olympia, WA 98504-0903.

6 IV. AGENCY ACTIONS AT ISSUE

7 4.1 ACC and CASE ("Petitioners") seek judicial review of the State Pollution Control  
8 Hearings Board's Order Granting Motion to Stay the Effectiveness of Section 401 Certification (Stay  
9 Order), in *ACC v. Dept. of Ecology and Port of Seattle*, PCHB No. 01-160, dated December 17, 2001,  
10 a copy of which is attached hereto as Exhibit A.

11 4.2 ACC and CASE seek judicial review of the PCHB's Order on Motion to Strike, in *ACC*  
12 *v. Dept. of Ecology and Port of Seattle*, PCHB No. 01-160, dated November 26, 2001, a copy of which  
13 is attached as Exhibit B. The Order removed from the record on review of ACC's stay motion a  
14 document containing admissions by Ecology that ACC's legal position on water rights was correct.

15 4.3 ACC and CASE also seek judicial review of the PCHB's Order On Motion to  
16 Supplement the Record, in *ACC v. Dept. of Ecology and Port of Seattle*, PCHB No. 01-160, dated  
17 December 17, 2001, a copy of which is attached as Exhibit C. This Order denied ACC's motion to  
18 supplement the stay record with documents containing additional admissions by Ecology staff.

19 V. IDENTIFICATION OF OTHER PARTIES

20 5.1 In addition to ACC and CASE, the Washington State Department of Ecology  
21 ("Ecology") and the Port of Seattle ("Port") are parties to the adjudicative proceeding in which the  
22 PCHB rendered the decisions to be reviewed.  
23  
24

25 **AR 005636**





1 State in which the discharge originates or will originate that any such discharge will comply  
2 with the applicable provisions of 1311, 1312, 1313, 1316, and 1317 of this Title.

3 6.5 Thus, pursuant to § 401, the State certifies that a proposed federal action does (or does  
4 not) comply with applicable water quality laws. The underlying federal action at issue here is a permit  
5 to be issued by the United States Army Corps of Engineers ("Corps"), under § 404 of the CWA (33  
6 U.S.C. § 1344), to allow the Port to fill certain wetlands as part of the development of the Third  
7 Runway and other projects at the Sea-Tac International Airport. The Corps will rely upon a § 401  
8 Certification in finding the project meets all applicable federal and state water quality criteria before  
9 issuing a decision on a § 404 permit. 33 U.S.C. § 1341 (d); 33 CFR § 320.4 (d).  
10

11 6.6 The Port of Seattle submitted a revised § 404 permit application to the Corps of  
12 Engineers in the form of a "Joint Aquatic Resources Permit Application" on October 25, 2000, which  
13 also began the § 401 Certification process.

14 6.7 On August 10, 2001, Ecology issued Order No. 1996-4-02325, which included a § 401  
15 Certification for the Third Runway Project. On August 23, 2001, ACC filed its notice of appeal of the  
16 certification to the PCHB, which assigned the matter PCHB Case No. 01-133.  
17

18 6.8 On September 12, 2001, ACC filed its Motion to Stay the Effectiveness of the  
19 Certification. That same day, ACC was served with a copy of the Port's appeal of the certification,  
20 which was filed contemporaneously with a proposed stipulation and agreed order of dismissal  
21 (between Ecology and the Port) modifying the terms of the certification.

22 6.9 After two status conferences, it was agreed that Ecology could rescind the Certification  
23 and that ACC's Motion for Stay would be transferred to a new PCHB case number after any new  
24

25 **AR 005638**

1 certification was issued by Ecology and ACC filed a notice of appeal, incorporating by reference its  
2 previously filed pleadings.

3           6.10 On September 21, 2001, Ecology issued a revised Certification for the Third Runway  
4 Project, Ecology Order No 1996-4-02325 (Amended-1), and ACC again filed a Notice of Appeal on  
5 October 1, 2001, and the new appeal was assigned PCHB No. 01-160.  
6

7           6.11 On October 15, 2001, after briefing by the parties, the PCHB heard oral argument on the  
8 Motion for Stay.

9           6.12 On November 26, 2001, the PCHB issued an Order on Motion to Reconsider Motion to  
10 Strike, a copy of which is attached as Exhibit B. In that Order, the Board made, in effect, an  
11 evidentiary ruling regarding a document obtained by the ACC through the Public Disclosure Act,  
12 RCW 42.17.250 et. seq. ("PDA"). The document in question is a memorandum prepared by Ray  
13 Hellwig, Director of Ecology's Northwest Regional Office, which references advice given by the  
14 Attorney General's Office regarding the need for a water right for the Port's low streamflow mitigation  
15 proposal. The PCHB ruled that the document was privileged and that, "although the privilege can be  
16 waived voluntarily, it is not waived if the mistaken disclosure of the privileged information was  
17 'sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver.'" Order on  
18 Motion to Reconsider Motion to Strike, page 2. A copy of ACC's pleadings on the Motion to  
19 Reconsider the Motion to Strike are attached as Exhibit D.  
20  
21

22           6.13 On December 17, 2001, the PCHB issued an Order on Motion to Supplement the Record,  
23 denying ACC's November 16, 2001, Motion to Supplement the Record on the Stay. In that Motion,  
24 ACC sought to supplement the record on the stay with additional documents obtained under the Public  
25 Disclosure Act, focused on the Port's low stream flow impact analysis and mitigation proposal. A

1 copy of ACC's Motion to Supplement the Record is attached as Exhibit E. The decision grants ACC a  
2 stay on three (3) of the five (5) grounds requested without addressing the remaining two (2) grounds.

3 6.14 Also on December 17, 2001, the PCHB issued its Order Granting Motion to Stay the  
4 Effectiveness of the Section 401 Certification. A copy of the Order Granting Motion to Stay is  
5 attached as Exhibit A. The decision grants ACC a stay on three of the five grounds requested, without  
6 addressing the remaining two grounds.  
7

8 6.15 Pursuant to RCW 34.05.534, ACC has exhausted its administrative remedies pursuant to  
9 the Administrative Procedures Act (Ch. 34.05 RCW), and RCW 43.21B.320 specifically allows for  
10 judicial review of the grant or denial of a stay by the Hearings Board, "pursuant to chapter  
11 34.05 RCW pending the appeal on the merits before the board."  
12

### 13 VII. REASONS RELIEF SHOULD BE GRANTED

14 7.1 ACC would not have submitted this petition for review, but for the fact that the Port of  
15 Seattle has submitted a petition for review, Thurston County Cause No. 01-2-02386-9, and but for the  
16 fact that there is no procedure under the Administrative Procedure Act, Ch. 34.05 RCW ("APA"), for a  
17 cross-appeal. Thus, under the circumstances, ACC is filing this petition in order to fully protect its  
18 interests in the matter.  
19

20 7.2 Petitioners are entitled to relief because the PCHB did not reach all the issues raised in  
21 ACC's Motion for Stay. In granting the Motion to Stay, the PCHB focused on -- and correctly  
22 resolved -- three areas raised by ACC, "wetland mitigation, low flow augmentation, and contaminated  
23 fill criteria." See Order Granting Motion to Stay, p. 6. Perhaps as a result of the depth of the analysis  
24 by the PCHB on these three issues, the PCHB did not address the stormwater pollution and low flow  
25

**AR 005640**

1 analysis issues raised by ACC. Therefore, the PCHB decision, in failing to reach these issues, reflects  
2 an unlawful procedure or decision-making process, erroneously interpreting or applying the law by not  
3 deciding all issues requiring resolution by the Board, inconsistent with Board rules, and/or is arbitrary  
4 and capricious, entitling ACC to relief pursuant to RCW 34.05.570(3)(c), (d), (f), (h) and (i).

5  
6 7.3 ACC is also entitled to relief because the PCHB did not consider all the relevant and  
7 admissible evidence pertaining to the stay motion that was presented to it. In issuing its Order striking  
8 the Ray Hellwig memo obtained under the PDA, and in denying ACC's motion to Supplement the  
9 Record with additional PDA documents regarding the Port's Low Flow analysis and mitigation  
10 proposal, the PCHB engaged in unlawful procedure or decision making process, has erroneously  
11 interpreted or applied the law, has issued an order inconsistent with a rule of the agency, and/or the  
12 order is arbitrary and capricious, entitling ACC to relief pursuant to RCW 34.05.570(3)(c), (d), (h), and  
13 (i). Thus, while ACC believes that the PCHB's Order on Stay is fully supported by the Record, the  
14 Superior Court should also consider the materials excluded by the PCHB which also offer added  
15 justification for the PCHB's Order Granting Stay.  
16

17  
18 **VIII. RELIEF REQUESTED**

19 In light of the foregoing, ACC respectfully requests that the Court grant the following relief:

20 8.1 Enter an order setting aside the PCHB's Order on Motion to Reconsider Motion to  
21 Strike and setting aside the PCHB's Order on Motion to Supplement the Record;

22 8.2 Enter an order affirming the PCHB's Order on Motion for Stay; and  
23  
24  
25

**AR 005641**

1 8.3 Such further relief as the Court deems equitable and just.

2 DATED this 7<sup>th</sup> day of January, 2002.

3 Respectfully submitted,

4 HELSELL FETTERMAN LLP

5  
6 By 

7 Peter J. Eglick, WSBA #8809

8 Kevin L. Stock, WSBA #14541

9 Michael P. Witek, WSBA #26598

10 Attorneys for Airport Communities Coalition

11 By 

12 Rachael Paschal Osborn, WSBA #21618

13 Attorney for Airport Communities Coalition

14 SMITH & LOWNEY P.L.L.C.

15 By 

16 Richard A. Poulin, WSBA #27782

17 Attorneys for Citizens Against Sea-Tac Expansion

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24 AR 005642



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POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

HELSELL FETTERMAN LLP

1		)	
2	AIRPORT COMMUNITIES COALITION,	)	
3		)	PCHB 01-160
4	Appellant,	)	
5	v.	)	ORDER GRANTING MOTION TO STAY
6	STATE OF WASHINGTON,	)	THE EFFECTIVENESS OF SECTION 401
7	DEPARTMENT OF ECOLOGY and THE	)	CERTIFICATION
8	PORT OF SEATTLE,	)	
	Respondents.	)	

Appellant Airport Communities Coalition (ACC) filed a motion to stay the effectiveness of § 401 Certification No. 1996-4-02325 issued by the Department of Ecology (Ecology) to the Port of Seattle (Port) on August 10, 2001. As a result of a stipulation between the parties entered by the Board on September 28, 2001, this motion now applies to stay the effectiveness of the re-issued § 401 Certification No. 1996-4-02325 (amended-1) issued by Ecology on September 21, 2001.

The Board, comprised of Kaleen Cottingham (presiding) and Robert V. Jensen, heard oral argument on this motion on October 15, 2001, and reviewed the briefs, declarations and exhibits filed on this motion<sup>1</sup>. Having considered the arguments of the parties and being advised of the merits, the Board enters the following:

---

<sup>1</sup> See attachment A for this list of materials submitted in support or opposition to this motion.

1           This § 401 Certification is a pre-requisite to the issuance of a § 404 permit by the U.S.  
2 Army Corps of Engineers. Water quality certifications are required under the following terms of  
3 section 401 of the Clean Water Act (CWA) (33 U.S.C. 1341):

4           Any applicant for a Federal license or permit to conduct any activity including,  
5 but not limited to, the construction or operation of facilities, which may result in  
6 any discharge into navigable waters, shall provide the licensing or permitting  
7 agency a certification from the State in which the discharge originates or will  
8 originate that any such discharge will comply with the applicable provisions of  
9 1311, 1312, 1313, 1316, and 1317 of this Title.

10           The state thus certifies that a proposed federal action complies with applicable water quality  
11 laws. The federal action at issue here is a permit to be issued under § 404 of the CWA (33 U.S.C.  
12 § 1344) to allow the Port to fill certain wetlands as part of the development of the third runway  
13 and other projects at the SeaTac International Airport. The U.S. Army Corps of Engineers will  
14 rely upon a § 401 Certification in finding the project meets all applicable federal and state water  
15 quality criteria before issuing a decision on a § 404 permit. 33 U.S.C. § 1341 (d); 33 CFR §  
16 320.4 (d).

17           The Board may stay the effectiveness of an order during the pendency of an appeal.  
18 RCW 43.21B.310 and WAC 371-08-415. The party requesting the stay must make a prima facie  
19 case for issuance of the stay by showing either: (1) a likelihood of success on the merits of the  
20 appeal; or (2) irreparable harm. If a prima facie case is made, the Board shall grant the stay  
21 unless Ecology demonstrates either a substantial probability of success on the merits or a  
likelihood of success coupled with an overriding public interest justifying denial of the stay.  
RCW 43.21B.320 and WAC 371-08-415.



1 A stay is akin to a preliminary injunction and is not an adjudication on the merits, but  
2 rather a device for preserving the status quo and preventing irreparable loss of rights before the  
3 judgment. *Textile Unlimited, Inc. v. ABMH and Co., Inc.*, 240 F.3d 781 (9<sup>th</sup> Cir. 2001), citing  
4 *Sierra On-line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9<sup>th</sup> Cir. 1984).

5 Likelihood of success on the merits means one or both sides have presented the Board  
6 with justiciable arguments for and against a particular proposition. Likelihood of success on the  
7 merits is not a pure probability standard under RCW 43.21B.320 and WAC 371-08-415(4).  
8 *Blohowiak et al. v. Seattle-King County Department of Health*, PCHB No. 99-093 (Order on  
9 Motions for Partial Summary Judgment and Stay, September 28, 1999). This standard does not  
10 require the moving party to demonstrate it will conclusively win on the merits, but only that  
11 there are questions "so serious.... as to make them fair ground for litigation and thus for more  
12 deliberative investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (C.A.  
13 2d Cir. 1971). The evaluation of the likely outcome on the merits is based on a sliding scale that  
14 balances the comparative injuries that the parties and non-parties may suffer if a stay is granted  
15 or denied. For example, where the non-moving party will incur little or no harm or injury if a  
16 stay is granted, then the moving party's demonstration of likelihood of success need not be as  
17 strong as where the non-moving party would suffer great injury. *Federal Practice and*  
18 *Procedure, Wright & Miller*, SS 2948, Chapter 9, pp. 453-455. The sliding scale used to  
19 determine the likelihood of success must also take into account the injuries that the non-parties  
20 may suffer if a stay is granted or denied. *Abbott Laboratories v. Mead Johnson Company*, 971  
21 F2d 6, 11-12 (C.A. 7<sup>th</sup> Cir. 1992).

1           The party requesting the stay need only show a likelihood of success on the merits on  
2 one of the issues raised on appeal, not all of the issues raised, in order to meet its burden under  
3 RCW 43.21B.320 and WAC 371-08-415.

4           In determining Appellant's likelihood of success on the merits, the Board looks to the  
5 standards governing issuance of § 401 Certifications. A certification must be based on a valid  
6 finding that "there is a reasonable assurance that the activity will be conducted in a manner  
7 which will not violate applicable water quality standards." 40 CFR § 121.2(a)(3); *PUD No. 1 v.*  
8 *Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994). A § 401 Certification means the state  
9 has reasonable assurance there will be compliance with water quality laws. *Friends of the Earth*  
10 *v. Department of Ecology*, PCHB No. 97-64 (1988).

11           The § 401 Certification also requires reasonable assurance that any impacts to aquatic  
12 resources will be fully mitigated. This requirement is derived from the Washington State anti-  
13 degradation policy:

14                   Waters of the state shall be of high quality. Regardless of the quality of the  
15 waters of the state, all wastes and other materials and substances proposed for  
16 entry into said waters shall be provided with all known, available, and reasonable  
17 methods of treatment prior to entry. Notwithstanding that standards of quality  
18 established for the waters of the state would not be violated, wastes and other  
19 materials in the substances shall not be allowed to enter such waters which will  
20 reduce the existing quality thereof, except in those situations where it is clear that  
21 overriding considerations of the public interest will be served.

19 RCW 90.54.020(3)(b). See: *Okanogan Highlands Alliance et al. v. Department of Ecology*,  
20 PCHB Nos. 97-146, 97-182, 97-183, 97-186, and 99-019 (Final Findings of Fact, Conclusions of  
21 Law and Order, January 19, 2000).

1 In order to overturn a § 401 certification, the Appellant “must establish by a  
2 preponderance of the evidence that Ecology did not have ‘reasonable assurance’ the applicable  
3 provisions [of the Clean Water Act and state water quality standards] would be complied with.”  
4 *Friends of the Earth v. Ecology*, PCHB 87-63 (Final Findings of Fact, Conclusions of Law and  
5 Order at 25 (1988)(majority opinion.)

6 Water quality standards are composed of three elements: numeric criteria for  
7 conventional pollutants and toxic substances, WAC 173-201A-030(1)(c) and WAC 173-201A-  
8 040; narrative criteria protecting beneficial uses of state waters, WAC 173-201A-030(1)(a) and  
9 (b); and an antidegradation standard. RCW 90.54.020(3) and WAC 173-201A-070.  
10 Washington’s water quality standards include procedural and substantive requirements for  
11 determining compliance.

12 The term “reasonable assurance” is not defined in the law nor has the Board defined the  
13 term in any of the previous decisions evaluating reasonable assurance<sup>2</sup>. In such instances, the  
14 board looks to a dictionary to determine a term’s common meaning. *See Development Services*  
15 *of America v. Seattle*, 138 Wn.2d 107, 118 (1999). Webster’s Third New International  
16 Dictionary (1971) defines “reasonable” as “being within the bounds of reason: not extreme: not  
17 excessive and moderate.” It defines “assurance” as “something that inspires or tends to inspire  
18 confidence” and “the quality or state of being sure or certain: freedom from doubt: certainty.”

19  
20 <sup>2</sup> The Board has determined Ecology lacked reasonable assurance in *Okanogan Highlands Alliance et al. v.*  
21 *Department of Ecology*, PCHB Nos. 97-146, 97-182, 97-183, 97-186, and 99-019 (Final Findings of Fact,  
Conclusions of Law and Order, January 19, 2000). The Board has found Ecology had reasonable assurance in  
*Friends of the Earth v. DOE*, PCHB No. 87-63 (1988). A detailed explanation of this standard is found the dissent in  
*Friends of the Earth v Ecology*, at p. 17.

1 Taken together "reasonable assurance" means something is reasonably certain to occur.  
2 Something more than a probability; mere speculation is not sufficient. See *Friends of the Earth*,  
3 PCHB 87-63 at 28.

4 Appellants contend reasonable assurance was not present for this § 401 Certification in  
5 several areas: 1) wetland mitigation; 2) low flow analysis; 3) low flow augmentation plan; 4)  
6 contaminated fill criteria; and 5) stormwater. This decision and order is formatted to parallel the  
7 requirements for granting a stay: Appellant's prima facie case; Respondent's showing of  
8 overriding public interest; and irreparable harm. The Board's decision focuses on three of the  
9 areas raised by Appellants: wetland mitigation, low flow augmentation, and contaminated fill  
10 criteria.

11 A. Appellant's Prima Facie Case

12 1. Wetlands

13 In order to build the third runway, the Port proposes to fill 18.37 acres of wetlands in the  
14 Miller, Walker and Des Moines Creek watersheds, impact an additional 2.05 acres of wetlands  
15 along Miller Creek, and alter the location of a portion of Miller Creek. The mitigation to offset  
16 these impacts is contained in the Natural Resources Mitigation Plan. The mitigation plan was  
17 developed to take into consideration the Federal Aviation Administration's (FAA's) concern for  
18 bird-aircraft strike hazards, as well as the provisions of chapter 90.74 RCW. Ecology developed

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21

1 environmental objectives for the mitigation planning effort that required wetlands impacted be  
2 replaced on a one-to-one basis in-basin<sup>3</sup> and on a two-to-one basis out-of-basin.<sup>4</sup>

3 Off-site mitigation in a watershed is allowed in 33 CFR Part 320.4(r)(1), however  
4 mitigation “shall be required to ensure that the project complies with the § 404 (b)(1)  
5 guidelines.” These guidelines are found at 40 CFR 230.10 *et seq.*

6 Off-site mitigation within the same Water Resource Inventory Area (WRIA)<sup>5</sup> is  
7 addressed by chapter 90.74 RCW. State agencies are directed to consider “innovative mitigation  
8 measures” for infrastructure projects when they “are timed, designed, and located in a manner to  
9 provide equal or better biological functions and values compared to traditional on-site, in-kind  
10 mitigation proposals.” RCW 90.74.005(2). Compensatory mitigation is to occur within a  
11 watershed. RCW 90.74.020(1). The department of Ecology is “not required to grant approval to  
12 a mitigation plan that the department finds does not provide equal or better biological functions  
13 with the watershed or bay.” RCW 90.74.020(2).

14 The Anti-degradation policy does not prohibit all impacts to aquatic resources. Instead,  
15 as applied to wetlands, the policy mandates impacts be avoided, minimized and compensated.

16 *Okanogan Highlands Alliance et al. v. Department of Ecology.* Wetland mitigation is a series of

17 \_\_\_\_\_  
18 <sup>3</sup> For every acre of wetland impacted, one acre must be created, restored or enhanced.

19 <sup>4</sup> Out-of-basin means out of the immediate creek, but within the same Water Resource Inventory Area (WRIA).

20 <sup>5</sup> The state is divided into 62 areas known as Water Resource Inventory Areas (WRIAs). WRIAs are identified by  
21 number and name in WAC 173-500-040. Nearly all natural resource programs utilize WRIAs as indicators of  
watersheds; however, several regulations recognize smaller hydrologically significant watersheds, which are further  
subdivisions of WRIAs. For example, in the context of forest practices, WAC 222-22-020, “watershed  
administrative units” (WAUs) are delineated as subdivisions of WRIAs. These WAUs are “generally be between  
10,000 to 50,000 acres in size and should be discrete hydrologic units.” Further, in the context of declaring a  
drought emergency, Ecology is to recognize individual watersheds which constitute only a portion of a WRIA but  
whose boundaries can be topographically described. WAC 173-166-030.

1 steps that should be taken in sequential order, from avoiding adverse impacts to compensating  
2 and monitoring the impacts. In the context of wetlands, the anti-degradation policy is expressed  
3 in terms of a goal that there be no net-loss of wetlands. In regulating activities impacting  
4 wetlands the department requires a staged analysis and mitigation ratio. *O'Hagen v. DOE*,  
5 PCHB No. 95-25 (1995).

6 When adverse wetland impacts are truly "unavoidable," an applicant is required to  
7 develop a compensatory mitigation plan. This can include creation of a new wetland, restoration  
8 of a former wetland, enhancement of a degraded wetland or some combination of the three. In  
9 some instances, preservation of high quality wetlands and adjacent high quality uplands may be  
10 acceptable as part of an overall mitigation package. See: *Water Quality Guidelines for Wetlands*,  
11 Ecology Pub. #96-06, April 1996 at page 43.

12 Ecology has developed guidelines for mitigation of unavoidable impacts to achieve no  
13 net loss. The guidelines are based on habitat categories. See: *Water Quality Guidelines for*  
14 *Wetlands*, Ecology Pub. #96-06, April 1996; *How Ecology Regulates Wetlands*, Ecology Pub. #  
15 97-112, April 1998; *Wetland Mitigation Replacement Ratios: Defining Equivalency*, Ecology  
16 Pub. No. 92-08, Feb. 1992. The guidelines provide recommended mitigation ratios as follows:

Wetland category	Creation and Restoration	Enhancement
Category 1	6:1	12:1
Category 2 or 3		
Forested	3:1	6:1
Scrub/shrub	2:1	4:1
Emergent	2:1	4:1
Category 4	1.25:1	2.5:1

1 These ratios are general guidelines that are adjusted up or down based on the likelihood of  
2 success of the proposed mitigation and the expected length of time it will take to reach maturity.

3 The Memorandum of Agreement between the Environmental Protection Agency and the  
4 Department of the Army (February 6, 1990 implementing the § 404 guidelines) explains in the  
5 absence of more definitive information on the functions and values of specific wetland sites, a  
6 minimum of 1:1 acreage replacement may be used as a reasonable surrogate for no net loss of  
7 functions and values. Ecology required the Port to provide mitigation of 1:1 in the basin and 2:1  
8 out-of-basin.

9 The mitigation plan for the projects at the Airport provides for 102.27 acres of in-basin  
10 mitigation and 65.38 acres of out-of-basin mitigation, for a total of 167.65 acres of mitigation to  
11 offset the impacts from filling the 18.37 acres. The wetlands being filled by the Port are  
12 classified<sup>6</sup> as follows:

Wetland Category	Total acres filled/eliminated
Category 1	0
Category 2 or 3	
Forested	8.17
Scrub/shrub	2.98
Emergent	5.21
Category 4	2.01
Buffer enhancement	Na
Total	18.37

19  
20 <sup>6</sup> These numbers come by extrapolating figures from the declaration of Katie Walter at p. 4 with those presented in  
21 the declaration of Dyanne Sheldon at p. 9. The reason for the extrapolation is that Ecology did not break down the  
figures by category (1-4) whereas Ms. Sheldon assumed that the emergent category included category 4 wetlands.  
These numbers are slightly different than those put forth in the 1<sup>st</sup> declaration of Amanda Azous at exhibit c, p. 6.  
For consistency, the board chose to use the figures noted above.

1 Using Ecology's guidelines, the following shows the numbers of acres required for  
 2 mitigation:

Wetland Category	Ecology's guideline for creation/restoration	Ecology's guideline for enhancement
Category 1	NA	NA
Category 2 or 3		
Forested	22.71	45.42
Scrub/shrub	6.14	12.28
Emergent	11.26	22.52
Category 4	2.51	5.03
Buffer enhancement	0	
Total	42.62	60.90

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10 The Port's mitigation plan includes the following acres, by wetland category and segregated by  
 11 location:

Wetland Category	Filled wetland acres	Acres of wetlands created or restored	Acres of wetlands enhanced	Acres of buffer enhancement	Total acres
Category 1	0				
Category 2 or 3					
Forested	8.17	25.96			25.96
Scrub/shrub	2.98	9.53	19.54		29.07
Emergent	5.21	5.2			5.2
Category 4	2.01				
Upland Buffer	Na			43.39	43.39
Total Acres	18.37	40.79	19.54	43.39	103.72
Credited Acres	Na	11.79	4.9	7.23	23.92

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19 To determine the mitigation credits for the Port's mitigation plan, the mitigation ratio  
 20 "discounts" are applied to the acres of wetland enhancement, upland buffer enhancement, and  
 21 wetland preservation. The mitigation ratio acreage discounts are as follows:



Type of mitigation	Discount
Wetland creation	1:1
Wetland restoration	1:1
Wetland enhancement	1:2
Wetland preservation	1:10
Buffer enhancement	1:5

Applying the acreage discounts to the Port's mitigation plan shows that the plan

provides 29.82 acre credits for in-basin mitigation and 42.91 credits for out-of-basin mitigation, for a total of 72.73 mitigation acre credits as distributed in the following categories:

Location	Wetland creation	Wetland restoration	Wetland enhancement	Wetland preservation	Upland buffer enhancement	Total
In-basin	0	6.6	21.46	23.55	50.66	102.27
Out-of-basin	29.98	0	19.5	0	15.9	65.38
Total mitigation	29.98	6.6	40.96	23.55	66.56	167.65
Mitigation ratio	1:1	1:1	1:2	1:10	1:5	
In-basin credit	0	6.6	10.73	2.36	10.13	29.82
Out-of-basin credit	29.98	0	9.75	0	3.18	42.91
Total mitigation credit	29.98	6.6	20.48	2.36	13.31	72.73

As noted above, Ecology chose a 1:1 replacement ratio for both wetland creation and wetland replacement despite its own publication (Water Quality Guidelines for Wetlands, Ecology Pub. # 96-06), which indicates "historically a replacement ration of 1:1 was common. In recent years the ratio has increased and seldom is a 1:1 ratio acceptable to any regulatory agency."

1           It appears from the information presented that the mitigation plan shifts the mitigation  
2 from restoration, creation and enhancement of wetlands to enhancement of upland buffers or to  
3 out-of-basin mitigation. Approximately 1/3 of the mitigation acres are in-basin upland buffers  
4 and approximately 1/3 of the mitigation acres are out-of-basin.

5           Although state law allows Ecology to approve off-site mitigation, it must be within the  
6 same watershed. Compliance with chapter 90.74 RCW does not necessarily result in compliance  
7 with the Clean Water Act. Chapter 90.74 RCW guides Ecology on mitigation, but it does not  
8 override the requirement under federal law that the agency shall grant certification only if it has  
9 reasonable assurance that water quality standards will be met.

10           Appellants have shown a likelihood of success on the merits that out-of-basin  
11 mitigation and upland buffer enhancement may not meet the Federal Clean Water Act standard  
12 of "no degradation of beneficial uses." Appellants have shown a likelihood of success of  
13 showing the current mitigation plan does degrade beneficial uses within the basin proposed for  
14 the filled wetlands.

15           The question of whether out-of-basin mitigation can meet the Clean Water Act  
16 standards is a case of first impression for the Board. Contained within that question is whether a  
17 "WRIA" is the appropriate basin for such analysis.

18           The appellants have shown a likelihood of success on the merits that providing wetland  
19 buffers is insufficient to mitigate wetland functions and values. As a result, the Appellant's have  
20 met their burden of showing likelihood of success that such a plan does not provide reasonable  
21 assurance that water quality standards would not be violated.

1           2. Low Flow Augmentation

2           Protection of streamflow is a critical component of the § 401 certification process.

3           Absent mitigation, Ecology has determined the third runway project will degrade streamflow in  
4           Des Moines, Miller and Walker Creeks. Salmon spawn and rear in all three creeks.

5           The low flow mitigation plan proposes to use impounded stormwater released later in the  
6           year to offset flow reductions caused by an increase in impervious surfaces and other changes at  
7           the airport. This approach is unprecedented in this state.

8           The low flow mitigation plan calls for an impoundment of approximately 46 acre-feet of  
9           water in several stormwater vaults during December through early summer each year. The  
10          stormwater would be detained until stream flows in Des Moines, Miller and Walker Creeks drop  
11          below prescribed levels during the summer months. The detained water would then be released  
12          from the vaults to mitigate the low flows in those creeks caused by the third runway.

13          The appropriation of water for beneficial use requires a water right. RCW 90.03.010.  
14          The Port did not apply for, and Ecology has not granted a water right associated with the low  
15          flow mitigation plan. The Port argues stormwater management does not require a water right  
16          based on a legislative distinction between water use, which requires a water right, and the  
17          management of stormwater, which does not require a water right. The Port argues Ecology has  
18          never required any person to obtain a water right to collect, detain, threat and discharge  
19          stormwater and that RCW 90.54.020 makes a distinction between “uses of water” and “water  
20          management programs.” While the former are declared to be “beneficial” and the latter are

1 declared to "be in the public interest," the legislature did not specifically exempt the latter from  
2 obtaining a permit.

3 To obtain § 401 certification, the Port is required to demonstrate legal and practical  
4 means are in place to permanently mitigate low flow impacts. *Dept. of Ecology v. PUD No. 1 of*  
5 *Jefferson County*, 121 Wn.2d 179, 185-192 (1993), *aff'd*, 511 U.S. 700 (1994).

6 The issue of whether a water right is required for stormwater detention structures is a  
7 case of first impression for the Board. The Appellants have shown a likelihood of success on the  
8 merits by showing the low flow augmentation plan is more than just a system to manage  
9 stormwater and as such requires a water right to use the stored water to maintain sufficient  
10 streamflow. The Appellants have shown, absent a water right, the Port is unable to demonstrate  
11 legal means are in place to permanently mitigate the low flow impacts. Without such means, it is  
12 questionable whether Ecology had reasonable assurances that the water quality standards would  
13 not be violated.

### 14 3. Imported Fill Criteria

15 To provide the site for the third runway, the Port proposes to fill a canyon on the airport's  
16 west side with twenty (20) million cubic yards of fill. Under the fill, the Port will construct a  
17 drainfield to capture and transport groundwater. To ensure the fill material does not contain  
18 toxic materials, which could then be introduced into the waters and wetlands downstream,  
19 criteria were developed. The Port is then required to investigate its fill sources to insure fill  
20 material comes from uncontaminated sources. Because there is no national or state guidance on  
21

1 acceptable fill standards or criteria, Ecology elected to craft conditions for inclusion in the § 401

2 Certificate.

3       The regulations implementing the state's Water Pollution Control Act (chapter 173-201A  
4 WAC) provide "[t]oxic substances shall not be introduced above natural background levels in  
5 waters of the state which have the potential either singularly or cumulatively to adversely affect  
6 characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependent  
7 upon those waters, or adversely affect public health, as determined by the department." WAC  
8 173-201A-040(1). A difference exists between the standards set in the § 401 Certification and  
9 the regulations implementing the Water Pollution Control Act.

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1 The "natural background levels," as well as the limits in the § 401 Certification and the  
 2 quantification limits, are as follows in milligrams per kilogram (mg/kg):

3 Contaminant	§ 401 Certification	Puget Sound 4 Background	Practical 5 Quantification Limits
6 Antimony	16		1.5
7 Arsenic	20	7	1.5
8 Beryllium	0.6	.6	.5
9 Cadmium	2	1	.1
10 Chromium	42/2000	48	.05
11 Copper	36	36	.5
12 Lead	220/250	24	.5
13 Mercury	2	.07	.002
14 Nickel	100/110	48	7.5
15 Selenium	5		.75
16 Silver	5		.1
17 Thallium	2		
18 Zinc	85	85	.03
19 Gasoline	30		
20 Diesel	460/2000		
21 Heavy Oils	2000		

1 As the above chart shows, the § 401 Certification allows, in some cases, fill with  
2 contaminants higher than the natural background level in the Puget Sound region. For example,  
3 the criteria set in the certification allows fill with 2000 mg/kg of chromium and 2 mg/kg for  
4 mercury, while the Puget Sound background level for those contaminants are 48 mg/kg and .07  
5 mg/kg, respectively. Additionally, the fill criteria allows gasoline, diesel and heavy oils, which  
6 are not naturally occurring in the Puget Sound soils.

7 Groundwater will flow through the fill and discharge into streams and wetlands below the  
8 embankment wall. As a result, Appellants have shown a likelihood of success on the merits that  
9 the Port, by relying on fill criteria that in some instances are above natural background levels,  
10 could allow contaminated fill to be used as part of this project. This fill could result in  
11 contaminants percolating through the fill pile into the groundwater, ultimately contaminating  
12 wetlands and surface waters. As such, Appellants have shown a likelihood of success on the  
13 merits that Ecology could not have had reasonable assurance that the water quality standards  
14 would not be violated.

15 **B. Respondent's Showing of Overriding Public Interest**

16 Based on the above prima facie case showing a likelihood of success on the merits, the  
17 Board shall grant the stay unless Ecology demonstrates either a substantial probability of success  
18 on the merits or a likelihood of success coupled with an overriding public interest justifying  
19 denial of the stay. RCW 43.21B.320 and WAC 371-08-415.

20 The Port argues that if the stay were entered, and the Port were unable to continue with  
21 its construction schedule during the pendency of the appeal, the costs would be \$49,000 per day

1 and construction and operation of the new third runway would be delayed for a year. However,  
2 this is premised on the issuance of the §404 permit by the Corps of Engineers. This has not yet  
3 occurred. No evidence was presented to the Board this is imminent or expected to be  
4 affirmatively granted. We can appreciate the potential added expense the port might incur as a  
5 result of our holding, but these inconveniences are far outweighed by the public's interest in  
6 attaining and maintaining an environment consistent with legislatively promulgated goals. See:  
7 *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 852 (1973).

8 Ecology argues the stay would effectively eliminate the screening protocols, which are  
9 being used for all fill being imported onto the project site, not just the material to be used to fill  
10 wetlands. While this is an important consideration, it does not override the public's interest in  
11 assuring the entirety of the project complies with the law.

12 The §401 certification alone does not allow the Port to begin filling the wetlands subject  
13 to the §404 permit. The stay of effectiveness only relates to the §401 certification. Other work  
14 is still on going at the airport and will not be impaired by a stay of this certification. Staying the  
15 effectiveness of this certification until the hearing in March 2002 will assure the Board's ability  
16 to render a meaningful decision on the merits.

17 C. Irreparable Harm

18 The Board relies on the likelihood of success on the merits to grant this stay. It could  
19 be argued the §401 certification alone cannot result in any actual filling of wetlands until and  
20 unless the U.S. Army Corps of Engineers issues the §404 permit, and thus no irreparable harm  
21 can come from the issuance of the § 401 certification alone. However, we note a denial of a §



1 401 water quality certification by the state is binding on the Corps of Engineers. Moreover, the  
2 courts have clearly indicated review should occur as early in the review process as possible, and  
3 bifurcation of review only serves to undermine the review process. Over the years, the  
4 Washington courts have commented on the coercive effect the issuance of a permit for one  
5 segment of a project on the permits for another segment. The Board will avoid its proceedings  
6 becoming suspect for the potential fait accompli that may occur in such situations. See: *Merkel*  
7 *v. Port of Brownsville*, 8 Wn. App. 844, 851 (1973); *Clifford v. City of Renton and The Boeing*  
8 *Co.*, Order Granting Stay, SHB Nos. 92-52 and 92-53.

9       The 18.37 acres of wetlands proposed to be filled by the Port's airport expansion  
10 project are a large percentage of the remaining wetlands in these basins. The loss of these  
11 wetlands without adequate mitigation will alter stream hydrology, diminish habitat and harm fish  
12 communities.

13       Therefore, the potential issuance of the §404 permit during the pendency of this appeal  
14 warrants the Board's determination that failure to stay the effectiveness of the §401 certification  
15 could cause irreparable harm to the wetlands proposed for filling.

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ORDER

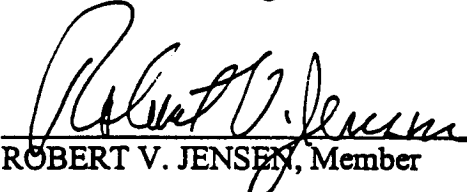
Based on the foregoing, the Board hereby grants Appellant's motion to stay the effectiveness of § 401 Certification No. 1996-4-02325 (amended-1) until the Board renders a decision on this appeal.

SO ORDERED this 17th day of December, 2001.

POLLUTION CONTROL HEARINGS BOARD



KALEEN COTTINGHAM, Presiding



ROBERT V. JENSEN, Member

ATTACHMENT A

1	
2	ACC's Notice of Appeal
3	ACC's Motion for Stay and attached declarations
4	Port's Memorandum Opposing ACC's Motion for Stay
5	Declaration of James C. Kelly, volume 1
6	Declaration of James C. Kelly, volume 2
7	Declaration of James C. Kelly, volume 3
8	Declaration of Paul Fendt, volume 1
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13	Declaration of Paul Schell, James L. Morasch, Alan C. Ralston, Michael Feldman, Michael Cheyne, and Gina Marie Lindsey
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16	ACC's reply brief and Declarations of Amanda Azous, Peter Eglick, Stephen Hockaday, and legislators (Vol. 1 of 2)
17	Declarations of Patrick Lucia, Tom Luster, Mayor Sally Nelson, Robert Olander, William Rozebaum, Robert Sheckler, Dyanne Sheldon, John Strand, Peter Willing, and Greg Wingard (Vol. 2 of 2)
18	Port's Sur-reply
19	ACC's sur-rebuttal
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21	

**EXHIBIT**

**AR 005665**



STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE  
4224 - 6th Avenue SE, Bldg. 2, Rowe Six  
P.O. Box 40903, Lacey, WA 98504-0903

RECEIVED  
NOV 27 2001

November 26, 2001

Peter Eglick  
Kevin Stock  
Helsell Fetterman LLP  
1500 Puget Sound Plaza  
PO Box 21846  
Seattle, WA 98111-3846

Joan M. Marchioro  
Thomas J. Young  
Assistant Attorneys General  
Ecology Division  
PO Box 40117  
Olympia, WA 98504-0117

HELSELL FETTERMAN LLP

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

Linda Strout  
Traci Goodwin  
Port of Seattle  
2711 Alaskan Way  
P.O. Box 1209  
Seattle, WA 98111

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

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

RE: PCHB NO. 01-160  
**AIRPORT COMMUNITIES COALITION v. ECOLOGY and  
THE PORT OF SEATTLE**

Dear Parties;

Attached you will find the Board's order on the motion to reconsider the motion to strike. If you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads "Kaleen Cottingham".

Kaleen Cottingham  
Presiding

KC/P 01-160 ltr  
Cc: Leann Ryser - Ecology

AR 005666

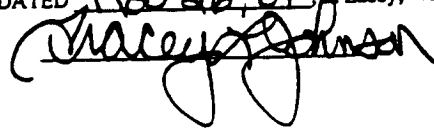


**CERTIFICATION**

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the attorneys of record herein.

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

DATED Nov 26, 01 Lacey, WA.

A handwritten signature in black ink, appearing to read "Tracey Johnson", written over a horizontal line.

RECEIVED

NOV 27 2001

HELLIG PETERMAN LLP

POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

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	)	
AIRPORT COMMUNITIES COALITION,	)	
	)	
Appellant,	)	PCHB 01-160
	)	
v.	)	ORDER ON MOTION TO RECONSIDER
	)	MOTION TO STRIKE
	)	
STATE OF WASHINGTON,	)	
DEPARTMENT OF ECOLOGY and THE	)	
PORT OF SEATTLE,	)	
	)	
Respondents.	)	

On October 10, 2001, the Board granted the Department of Ecology's (Ecology's) motion to strike certain references to a document relied on in the Appellant Airport Communities Coalition (ACC) motion for stay and supportive reply materials. The Appellant has asked the Board to reconsider its ruling on the motion to strike. The Board has granted that request.

The basis for the motion to strike was the attorney-client privileged nature of the communication contained in the document at issue and its inadvertent disclosure. Ray Hellwig, Ecology's NW Regional Director, prepared the document in question as a briefing paper for a senior management team meeting in April 2001. The document contained a reference to advice from an Assistant Attorney General regarding a particular issue. While this issue is part of the appeal before the Board, it is a legal question on which the Board will decide based on the information and briefings put forth by the parties, not based on one party claiming the other party's lawyer is on their side.

1           The initial disclosure request occurred prior to Ecology's decision on the § 401  
2 certification. The document in question was exempted from disclosure partially because it was  
3 attorney-client privileged and partially because it was deliberative and thus exempt for disclosure  
4 until a final decision was made on the certification. Once the decision was made on the § 401  
5 certification, the deliberative process exemption no longer applied and Ecology was required to  
6 disclose the part of the document related to its deliberations. The document was intended to  
7 have certain paragraphs redacted before disclosure, but instead an un-redacted copy was  
8 inadvertently inserted into the packet of documents disclosed as part of fulfilling a public  
9 disclosure request.

10           The Board's earlier order granting the motion to strike was based on the Public  
11 Disclosure Act, Chapter 42.17 RCW, which allows an agency to exempt records from disclosure  
12 if those records would not be available to another party under the rules of pretrial discovery for  
13 causes pending in the superior courts, including attorney-client privileged communications.  
14 RCW 42.17.310(1)(j). Although the privilege can be waived voluntarily, it is not waived if the  
15 mistaken disclosure of the privileged information was "sufficiently involuntary and inadvertent  
16 as to be inconsistent with a theory of waiver." *United States v. Zolin*, 809 F.2d 1141, 1415, 1417  
17 (9<sup>th</sup> Cir. 1987). Ecology met its burden of showing that it intended to redact and not disclose  
18 certain privileged information and as a result Appellants should not be allowed to benefit from  
19 this error.

20           In the earlier order, however, the Board ordered the Appellants to return the attorney-  
21 client privileged document to Ecology and refrain from using the information. Additionally, the



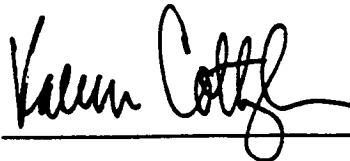
1 Board instructed Ecology to inform the board where in the current submittals reference exists to  
2 this document so that all references to the information can be stricken from the record. This  
3 Board does not have the authority to order the return of a document procured under the Public  
4 Disclosure Act. Therefore, on reconsideration, the order is modified so that the Appellant is to  
5 refrain from using the inadvertently disclosed attorney-client privileged information.

6 ORDER

7 Appellant is to refrain from using the inadvertently disclosed attorney-client privileged  
8 information.

9  
10 SO ORDERED this 26<sup>th</sup> day of November, 2001.

11  
12 POLLUTION CONTROL HEARING S BOARD

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16 KALEEN COTTINGHAM, Presiding

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**AR 005671**



STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE

4224 - 6th Avenue SE, Bldg. 2, Rowe Six  
P.O. Box 40903, Lacey, WA 98504-0903

December 17, 2001

Peter Eglick  
Kevin Stock  
Helsell Fetterman LLP  
1500 Puget Sound Plaza  
PO Box 21846  
Seattle, WA 98111-3846

Joan M. Marchioro  
Thomas J. Young  
Assistant Attorneys General  
Ecology Division  
PO Box 40117  
Olympia, WA 98504-0117

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

Linda Strout  
Traci Goodwin  
Port of Seattle  
2711 Alaskan Way  
P.O. Box 1209  
Seattle, WA 98111

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

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

RE: PCHB NO. 01-160  
**AIRPORT COMMUNITIES COALITION v. ECOLOGY and  
THE PORT OF SEATTLE**

Dear Parties;

Attached you will find the Board's order denying Appellant's motion to supplement the record for its stay motion.

Sincerely,  
  
Kaleen Cottingham, Presiding

KC/P 01-160 ltr

Cc: Leann Ryser - Ecology  
Richard Poulin

AR 005672

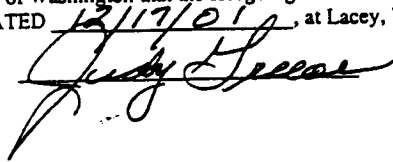


**CERTIFICATION**

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the attorneys of record herein.

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

DATED 12/17/01, at Lacey, WA.

A handwritten signature in cursive script, appearing to read "Judy Greene", written over the date line of the certification.

AR 005673

POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

DEC 18 2001

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3 AIRPORT COMMUNITIES COALITION, )  
4 Appellant, ) PCHB 01-160  
5 v. ) ORDER ON MOTION TO SUPPLEMENT  
6 STATE OF WASHINGTON, ) THE RECORD  
7 DEPARTMENT OF ECOLOGY and THE )  
8 PORT OF SEATTLE, )  
Respondents. )

9 On November 16, 2001, the Airport Communities Coalition (ACC) filed a motion to  
10 supplement the record on its motion for stay. On November 26<sup>th</sup>, the Port of Seattle (Port) filed  
11 its response indicating its opposition or alternatively to further supplement the record. On  
12 November 28<sup>th</sup>, ACC filed its reply.

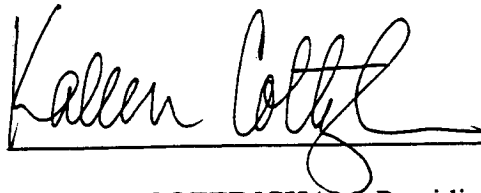
13 The motion to stay the effectiveness of the re-issued § 401 Certification No. 1996-4-  
14 02325 (amended-1) issued by the Department of Ecology was heard by the Pollution Control  
15 Hearings Board on October 15, 2001. The record before the Board as of the hearing was as  
16 noted in attachment A appended to this order. The Board has reviewed the voluminous record.  
17 The Board's decision and order on the motion were nearly complete by the time the motion to  
18 supplement the record was received by the Board. The motion was fully briefed and argued to  
19 the Board. Reopening the record would not have provided the Board new information. To  
20 reopen the record this late in the process would only have eroded the orderly process set forth in  
21 the pre-hearing order. As such, the Board denies the motion to supplement the record.

ORDER

Appellant ACC's motion to supplement the record on its motion for stay is denied.

SO ORDERED this 17<sup>th</sup> day of December, 2001.

POLLUTION CONTROL HEARING S BOARD



KALEEN COTTINGHAM, Presiding

ATTACHMENT A

1	
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18	Port's Sur-reply
19	ACC's sur-rebuttal
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21	

**EXHIBIT D**

**AR 005677**





including on the water right question. Port Br. at 4. In Reply, ACC quoted to the Board a document released by Ecology itself, giving the benefit of the Ecology Attorney General's expertise on the issue. Now, based on an incomplete description of how the document was released, Ecology asks this Board not only to strike the document, but to require ACC to return it based on attorney-client privilege. As will be discussed in detail below, the document should not be stricken because it was not inadvertently disclosed. Even if inadvertently disclosed, it should not be stricken because its disclosure by the client has waived any pretense to privilege. Further, the matters allegedly subject to the privilege are waived when they are at issue in the litigation itself. Finally, Ecology's demand that the Board "order" return of a document obtained pursuant to a public disclosure request (prior to the pendency of any appeal) has no basis in the law or the Board's jurisdiction, and would be futile, in any event.

## II BACKGROUND FACTS

For the better part of three years, one of the stumbling blocks which the Port has failed to address in its third runway application has been the absence of a guaranteed source of water to address diminution in stream flow as a result of the Port's projects. After various zigs and zags (as described in the First Declaration of Peter Willing at ¶ 8-12), Ecology and the Port resorted several months ago to reliance on a new, untested proposal for dedicating captured stormwater to address low flow. *See* Second Luster Decl. at 35. As with other significant changes in the Port's plans, this was not announced publicly. ACC only became aware of it through public disclosure documents. ACC then submitted comments, through Rachael Paschal Osborn, an attorney expert in water rights law, pointing out that the Port's proposal for appropriation and dedication of stormwater, in perpetuity, for this function, required a water right.

The April 3, 2001, typewritten memorandum and handwritten notes (prepared by Ray Hellwig) which are now the subject of Ecology's Motion to Strike were originally released to ACC in redacted form several months ago with the notation "Deliberative" written across the top of each page by Mr.

ACC'S OPPOSITION TO ECOLOGY'S  
MOTION TO STRIKE, MOTION TO RESCIND EX  
PARTE ORDER AND FOR RECONSIDERATION  
AND REQUEST FOR HEARING - 2

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

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

AR 005679

Hellwig. Declaration of Andrea Grad in Support of ACC's Opposition to Ecology's Motion to Strike Attorney-Client Privileged Documents at ¶ 5. In their redacted form, the notes read as a one-sided case against requiring a water right, concluding one page with the statement "Rachael P.'s arguments are full of holes."

Months later, on the same day that Ecology issued its August, 2001, 401 decision, ACC submitted a public disclosure request to Ecology for all documents which had previously been withheld as deliberative. *See* Grad Decl., ¶ 6. Ann Kenny, Ecology's lead staffperson assigned to the 401, then replied:

I have Deliberative documents that can be released to you in response...as soon as they are photocopied.

I will ask all others involved in the project to compile all previously withheld documents for release. It may take a week or two to get everything gathered up but we will send you what we have when it becomes available.

Email exchange between Ann Kenny and Andrea Grad, dated August 10, 2001 (copy attached as Exhibit A to Grad Decl.). Subsequently, Ecology transmitted to ACC a packet of documents previously withheld, including Mr. Hellwig's typewritten memorandum with annotations labeled "deliberative," but with the previously redacted portions now disclosed.<sup>2</sup> This was not surprising because deliberative materials may not be withheld under the Public Disclosure Act once a decision has issued and because, without the redacted material, it was impossible to understand the deliberative process which led to Ecology's 401 decision. This is best understood by looking at the center of the memorandum, where seven lines had been redacted. These seven lines were followed by the word "**But**," after which the memorandum laid out the argument against requiring a water right. The fully

---

<sup>2</sup> Mr. Hellwig's Declaration omits this part of the chronology, not acknowledging ACC's explicit subsequent request for previously withheld deliberative material and Ecology's positive response, clearly stating its understanding that it would be releasing previously withheld materials.

disclosed document contains the counterpoint argument supporting requiring a water right, attributed to Joan Marchioro, the Ecology Assistant Attorney General assigned to the third runway project.<sup>3</sup> The disclosure confirmed what the 401 suggested: that Ecology had taken a “policy position” not to demand a water right, although the Water Code -- including its requirement for a water right -- is actually triggered by the Port’s 401 proposal.

In defending this “policy position” before the Board, respondents claimed reasonable assurance under, *inter alia*, the Water Code -- and in terms suggesting that ACC’s appeal grounds on water rights represented an extreme position inconsistent with deference to Ecology’s expertise.<sup>4</sup> Despite respondents’ placement of these points at center stage of their defense, Ecology now seeks to unring the bell on its disclosure of documents which undercuts them and which demonstrate that respondents’ characterizations were less than candid.

---

<sup>3</sup> The portions Ecology disclosed in August stated:

Our AAG (JM) has indicated she/the office will support any policy position we choose to adopt, but she is currently advising we require the water right.

She has presented several logical arguments to support her advice, but clearer answers are needed for a few key questions.

\* \* \*

Part of the JM argument is that this “fix” under the 401 triggers the water code, and we need certainty around the “fix” for reasonable assurance.

Also, JM says, unlike a 402 permit, the 401 calls in other state laws to help protect WQ -- this requirement for mitigation may be a key point.

Where we have direct authority under 401 to protect flows -- under the 402, flows are protected by indirect authority i.e., as a result of actions driven by provision of the permit -- e.g., land use planning strategies

\* \* \*

JM/401 look at any other applicable law including water code

April 3, 2001, Hellwig notes at pp. 1-2.

<sup>4</sup> Ecology continued this tack in its Sur-Reply to ACC’s Motion for Stay, saying little on the merits, but instead attacking ACC as continuing “to rest its case on misstatement and inaccurate renditions of the record.” Ecology Sur-Reply at pp. 1-2.

ACC’S OPPOSITION TO ECOLOGY’S  
MOTION TO STRIKE, MOTION TO RESCIND EX  
PARTE ORDER AND FOR RECONSIDERATION  
AND REQUEST FOR HEARING - 4

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

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

## II ARGUMENT AND AUTHORITY

In light of the full story of Ecology's intentional disclosure of previously withheld documents (see Declaration of Andrea Grad filed herewith) --not provided in Ray Hellwig's declaration -- and without an evidentiary hearing, the Board cannot conclude that the material in question here was inadvertently disclosed. Even if inadvertent disclosure were proven, there is no Washington rule or law which supports Ecology's demand that the documents be stricken from the Board record -- and no jurisdiction in the Board to order their return.

The Washington Supreme Court has held that attorney-client privilege is not absolute:

Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and may thus be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather it is limited to the purpose for which it exists.

*Dietz v. Doe*, 131 Wn.2d 835, 843, 935 P.2d 611 (1997); *see Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968). The *Dietz* court also noted that any privilege which exists can be waived, including by the client, as occurred here in Ecology's post-decision production of a document it had previously withheld. *Id.* at 850.<sup>5</sup> While Ecology's brief does not acknowledge it, the treatise which it cites on Washington practice, Tegland, Washington Practice, Vol. 5A, §501.22 (2001) actually states that even if a disclosure is inadvertent, "the traditional rule, at least, is that the privilege is waived..."<sup>6</sup>

The Washington Supreme Court has spoken on the issue of waiver and exceptions to the privilege in *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990).<sup>7</sup> *Pappas* reaffirmed that the

---

<sup>5</sup> In October, 1998, a proposal was placed before the WSBA Board of Governors to adopt a proposed formal opinion calling for the return of "inadvertently disclosed material." The Board did not adopt it.

<sup>6</sup> The treatise then provides, in footnote 17, citations to McCormick on Evidence, to a Michigan Law Review article, and to six cases finding automatic waiver in an inadvertent disclosure. It then acknowledges that "many courts have held to the contrary" and provides three case citations.

<sup>7</sup> Ecology cites *Pappas*, in passing, but only for the proposition that the attorney-client privilege extends to documents. Ecology Br. at p. 3, ln. 3.

attorney-client privilege was not absolute and was subject to several “notable exceptions.” *Id.* at 204. The Washington Supreme Court in *Pappas* relied on *Hearn v. Rhay*, 68 FRD 574, (ED Wash. 1975), and utilized its “test to determine whether the facts in a given case support an implied waiver of the attorney-client privilege.” *Id.* at 198. In *Hearn*,<sup>8</sup> the District Court had raised an affirmative defense relying on their “good faith” and “on advice of their legal counsel.” *Pappas, supra*, at 207 (describing *Hearn* at 577). The *Hearn* court ordered disclosure because, *inter alia*, “the asserting party put the protected information at issue by making it relevant to the case.” *Pappas, supra*, at 207, quoting *Hearn, supra*, at 581. .

Rejecting criticism of the *Hearn* test, the Washington Supreme Court held in *Pappas*:

While it is true that the attorney-client privilege is statutory in nature, it is also true that this court has held that the privilege itself should be strictly limited for the purpose for which it exists. *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968).

*Id.* at 208.

Here, ACC alleged that there could not be reasonable assurance for Ecology’s decision dispensing with the requirements of the water code with regard to the Port’s low flow plan. Ecology and the Port led off their responses with pejoratives (“radical,” “creative”) to the effect that ACC’s arguments were beyond the legal pale, claiming reasonable assurance for this aspect of the decision. The Port played the “deference card,” demanding that the Board give deference to Ecology’s expertise, as articulated, *inter alia*, in Ecology’s brief. Ecology now seeks to suppress information which it earlier released which undercuts the defenses which respondents asserted. Per the Washington Supreme Court in *Pappas*, the attorney-client privilege is not meant to protect in such circumstances.<sup>9</sup>

---

<sup>8</sup> *Hearn* is not cited at all by Ecology in its motion.

<sup>9</sup> Evidence of action contrary to counsel’s advice was also relied upon in *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998). There, the Washington Supreme Court held that the City had acted irrationally in refusing to issue permits, a “departure from the mandatory legal process.” *Id.* at 971. The Court concluded that “the irrationality is further

Ecology's reliance on *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), is inapposite. *Zolin*, although decided prior to the Washington Supreme Court's decision in *Pappas*, was not relied upon by our court in that case. *Zolin* is not controlling authority.

Further, Ecology cites *Zolin* as holding "that the attorney-client privilege was not waived if the mistaken disclosure of the privileged information was '...sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver.'" Ecology Motion at 3, quoting *Zolin, supra*, 809 F.2d at 1417. In fact, the *Zolin* court's description of the law in this area is considerably fuller and less favorable to Ecology, regardless of the mixed outcome of the *Zolin* case itself. It states the basic rule that, "The voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege." *Zolin* at 1415. It further states that, "Moreover, when the disclosure of a privileged communication reaches a certain point, the privilege may become extinguished even in the absence of a wholly involuntary delivery." *Id. (citing In Re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege.").

Here, while Ecology has presented the Board with an artfully worded declaration by Ray Hellwig suggesting that Ecology's disclosure of the redacted portion of the document in question was inadvertent, the declaration leaves out some important facts about the process which suggest that the Department's disclosure was voluntary, with the Department only now reconsidering because its attorneys are embarrassed in light of their arguments to this Board.

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dramatized by the overt rejection of advice from the City's own attorney in favor of a defiant course of action well summarized by the comment." *Id.* Here, Ecology rejected advice that the law required a water right, instead adopting a "policy position" which would leave ACC no option but to file an appeal. Now, in response to ACC's appeal, Ecology and the Port seek to argue reasonable assurance, deference and the like while suppressing evidence by which its lack of reasonable assurance is "dramatized by the overt rejection of advice from the [Department's] own attorney."

ACC'S OPPOSITION TO ECOLOGY'S  
MOTION TO STRIKE, MOTION TO RESCIND EX  
PARTE ORDER AND FOR RECONSIDERATION  
AND REQUEST FOR HEARING - 7

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

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

**AR 005684**

Ecology also quotes the 1989 edition of the Epstein treatise, The Attorney-Client Privilege and the Work-Product Doctrine, (at p. 65) for the proposition that, as Ecology puts it, “a majority of state and federal courts have rejected the traditional rule that inadvertent disclosure waives the attorney-client privilege.” Ecology Motion at 3. Of course, the question for this Board, a creation of the Washington Legislature, and subject to Washington law, is what the rule is in Washington, not what the rule is in other jurisdictions, and not what the Board would fashion were it an appellate court of general jurisdiction.

Further, while ACC counsel have not been able to check the 12-year-old second edition of the Epstein treatise cited by Ecology, the current and largely rewritten year 2001 fourth edition is available. It suggests that Ecology’s claim of a majority rule is not correct. Per the 2001 edition, there are three lines of reasoning around the country: one a “strict accountability” approach, akin to the “traditional” approach (holding a waiver in all circumstances cited in the Washington Practice treatise, *supra*; a middle ground approach, applying a “balancing test”; and a “lenient” approach. *Id.* at 309-29.

Significantly, the current version of the Epstein treatise confirms that there is a distinction between documents allegedly inadvertently produced by a “sending lawyer” and ones disclosed by the client itself, as was the case here. The quote from the 1989 treatise (at p. 3) which Ecology offers the Board appears to be a predecessor of the 2001 Epstein treatise’s comment “in the discovery context” (not in the context of prior production by a government agency pursuant to a public disclosure request) of the following:

In the course of document production and discovery, an attorney is invariably an intermediary between the client and the disclosure. The question arises regarding what effect should be given to that inadvertent or careless disclosure. Early on, the courts took a strict approach to any inadvertent disclosure. It would appear that a large number of recent cases are coming to the view expressed in the 1989 second edition of this treatise: Where the disclosure resulted because of the attorney’s negligence and not that of the client, the *client’s* privilege should not necessarily be deemed to have been relinquished. The more frequent rationale now appearing



in the cases is that the negligence-free client should not be expected to bear the burden of a careless attorney by the global loss of the privilege. Nor should a court necessarily make every privileged document turned over by a careless attorney in the course of discovery admissible at trial.

2001 Edition at 316-318 (emphasis added).

Even if the portion of the treatise cited by Ecology, as updated in the treatise's current version, were to be applied in Washington, it would do Ecology no good in this instance. The disclosure here did not come from Ecology's attorney. It came from Ecology itself, as Mr. Hellwig's declaration affirms. It came prior to this litigation, in response to a public disclosure request which explicitly asked for materials which had previously been withheld. Whether client negligence was involved or the client just decided that the document should no longer be withheld, as was decided in the case of many others,<sup>10</sup> the disclosure did not involve attorney negligence, and therefore does not fall within the treatise's discussion or the rule Ecology now seeks to rely on.

Finally, Ecology has asked this Board to order return of the documents in question. Ecology cites no authority for this request. Respectfully, the Board has no jurisdiction to enter such an order. RCW 43.21B.110. Documents obtained pursuant to a public disclosure request (and prior to pendency of any appeal before the Board) do not fall within the Board's purview. If the Board were to rule otherwise, then it would invite an avalanche of such requests (and of counterpoint requests by ACC seeking to enforce the Public Disclosure Act before this Board) in this case, and in others. What happens in the "outside world" with a document disclosed by Ecology pursuant to a request under RCW Ch. 42.17 is not within the Board's appellate jurisdiction.<sup>11</sup>

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<sup>10</sup>For example, ACC's Reply on the Stay also includes on its cover page a quote from AAG Ron Lavigne from another public disclosure document released by Ecology many months ago. Ecology has not moved to strike it or claimed inadvertent disclosure.

<sup>11</sup>In any event, such an order would be futile. When PDA materials are received by ACC, they are routinely shared with other interested groups and members of the public (which has saved Ecology countless hours by avoiding duplicative PDA requests by such parties, as Ecology well knows). Further, when filed, the brief and attachments in this case were circulated

ACC'S OPPOSITION TO ECOLOGY'S MOTION TO STRIKE, MOTION TO RESCIND EX PARTE ORDER AND FOR RECONSIDERATION AND REQUEST FOR HEARING - 9	HELSELL FETTERMAN LLP 1500 Puget Sound Plaza 1325 Fourth Avenue Seattle, WA 98101-2509	Rachael Paschal Osborn Attorney at Law 2421 West Mission Avenue Spokane, WA 99201
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**CONCLUSION**

For all the reasons discussed above, the Board's *ex parte* Order should be rescinded, reconsideration, if necessary, should be granted, and Ecology's motion should be denied.

DATED this \_\_\_\_\_ day of October, 2001.

HELSELL FETTERMAN LLP

By:

\_\_\_\_\_  
Peter J. Eglick, WSBA #8809  
Kevin L. Stock, WSBA #14541  
Michael P. Witek, WSBA #26598  
Attorneys for Appellant

\_\_\_\_\_  
Rachael Paschal Osborn  
WSBA # 21618  
Attorney for Appellant

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\_\_\_\_\_  
by ACC staff to ACC member officials (spread among five cities and one school district), experts, and members of the public who typically request them. They are subject to public disclosure by the cities and are matters of public record and are now and have been within the public domain.

ACC'S OPPOSITION TO ECOLOGY'S  
MOTION TO STRIKE, MOTION TO RESCIND EX  
PARTE ORDER AND FOR RECONSIDERATION  
AND REQUEST FOR HEARING - 10

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

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

**AR 005687**

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**AR 005688**

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

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2		
3	AIRPORT COMMUNITIES COALITION, )	
4	)	PCHB No. 01-160
5	Appellant, )	
6	)	ACC'S MOTION TO SUPPLEMENT
7	v. )	THE RECORD ON ITS MOTION FOR
8	)	STAY
9	STATE OF WASHINGTON, )	
10	DEPARTMENT OF ECOLOGY; and )	
11	THE PORT OF SEATTLE, )	
12	)	
13	Respondents. )	

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14 Pursuant to WAC 371-08-450 and the Board's Pre-Hearing Order (10/30/01), the Airport  
15 Communities Coalition (ACC) seeks an order allowing supplementation of the evidentiary record  
16 supporting ACC's motion for stay of the 401 Certification. This motion is based on the information set  
17 forth below and in the accompanying Declaration of Andrea Grad in Support of ACC's Motion to  
18 Supplement the Record on Its Motion for Stay (Grad Decl.) and exhibits thereto.

19 On November 5, 2001, ACC sent a routine public record request to the Department of Ecology  
20 seeking copies of all recent documents pertaining to the Third Runway Project. Grad Decl., ¶ 3. On  
21 November 7 and November 9, 2001, attorneys for ACC received from Ecology copies of several  
22 documents pertaining to the revised low flow analysis being prepared by the Port of Seattle in support  
23 of the Section 401 Certification issued by Ecology on September 21, 2001. *Id.* These documents start  
24 chronologically with a letter from Port water resources manager Keith Smith to Ecology 401 permit  
25 coordinator Ann Kenny (dated 10/24/01) requesting an extension of the deadline established in the 401  
for submission of a completed revised low flow analysis (Grad Decl., Ex. A). They continue with an

1 email (dated 10/25/01) concerning the issues raised by the Port's request from Kelly Whiting, the King  
2 County hydrologist contracted to review the Port's low flow documents for Ecology, to Ann Kenny,  
3 Ecology's lead staff on the Port's 401 application (Grad Decl., Ex. B). Also included in the  
4 disclosures are: draft meeting notes (dated 10/30/01) prepared by Kate Snider, a meeting facilitator,  
5 concerning a meeting among Port and Ecology representatives and technical experts to discuss the  
6 situation, with suggested edits to the notes by King County's Kelly Whiting (Grad Decl., Ex. C)<sup>1</sup>; and  
7 a written review of the Port's low flow analysis by Port consultant Dr. Norman Crawford (Grad Decl.,  
8 Ex. D).

9  
10 None of these documents were in existence at the time of briefing and oral argument on the  
11 motion for stay. They contain admissions of serious and substantial problems with the low flow  
12 analysis and mitigation plan incorporated into the Section 401 Certification. As the email from King  
13 County's Mr. Whiting<sup>2</sup> to Ecology's Ann Kenny states:  
14

15 This really sucks in that I raised all these issues, but the Port's consultants were unwilling to do  
16 it right, said it didn't matter, and got me to buy into the approach through the facilitated  
17 process.<sup>3</sup>

18 \* \* \*

19 I strongly feel that the Port should have had their independent review done before they made  
20 their "final" mitigation proposal. I strongly feel that there are important legal questions that

21 <sup>1</sup> ACC has not yet received the final version of the 10/30/01 meeting notes from Ecology, so it is  
22 unknown whether Mr. Whiting's proposed changes were incorporated, or whether there were other  
23 changes.

24 <sup>2</sup> Mr. Whiting was the witness Ecology chiefly relied upon in its response to low flow issues raised in  
25 ACC's motion for stay. See Decl. of Kelly Whiting (10/1/01) and Ecology's Response to Appellant's  
Motion for Stay at pp. 10-12).

<sup>3</sup> The "facilitated process" to which Mr. Whiting refers is a process in which a meeting "facilitator"  
paid for by the Port convenes meetings in which Port and Ecology personnel and contractors discuss  
issues and purportedly reach resolutions, which are then memorialized in "meeting notes" prepared by  
the Port's paid facilitator.

1 need to be answered on reopening impact/mitigation issues after permit issuance. I strongly  
2 feel that the Port should be addressing all comments, not just those made by their hired  
3 “independent” reviewer. I strongly feel the Port should be prepared to make a presentation as  
4 to how all comments received on their current low flow proposal are being addressed in their  
5 proposed revised report prior to any formal submittal.

6 Grad Decl., Ex. B (emphasis added).

7 In short, the Port has now admitted to significant errors in its low flow modeling. Ex. A, B, C.  
8 The Port’s own reviewer (Dr. Crawford) recommends substantial alterations to the modeling for the  
9 Port’s low flow analysis. Ex. D. The Port is unable to meet the deadlines set forth in the Section 401  
10 Certification for provision of low flow reports to Ecology and has sought an extension of time for its  
11 submittals. Ex. A. Finally, and importantly, in response to these events, Ecology is now considering  
12 altering the mitigation requirements for the low flow plan. Ex. C.

13 These documents are highly relevant to one of the key issues ACC has placed before the Board  
14 in its motion for stay, i.e., whether the Port’s low flow mitigation plan is so inaccurate and incomplete  
15 that Ecology does not and could not have had reasonable assurance that water quality standards will  
16 not be violated. *See* ACC’s Memorandum in Support of Its Motion for Stay at pp. 10-13 and ACC’s  
17 Reply Memorandum in Support of Its Motion for Stay at pp. 15-22.

18 The Board has authority to allow a party to supplement the record. *See, e.g., M/V An Ping 6 v.*  
19 *Ecology*, PCHB No. 94-118, Order Denying Motions for Reconsideration (1995). Here, the documents  
20 were only just received by ACC and were created after the filing of briefs/exhibits and oral argument  
21 on the stay. These documents contain admissions that the low flow technical analysis and mitigation  
22 plan are still evolving, that serious errors permeate the analysis upon which Ecology based its 401  
23 Certification, and that there is little if any recourse for interested agencies (or the public) to participate  
24 as changes are made by the Port. These admissions could not be more germane to whether ACC will  
25

1 prevail on its assertion that the low flow plan is a speculative and inadequate basis for the 401  
2 Certification. Consideration of this evidence is appropriate and necessary for resolution of the stay  
3 issues. Indeed, the very existence of this new information demonstrates that ACC is correct in its  
4 arguments on the need for a stay.

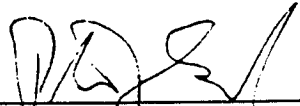
5  
6 Because the Board has not yet ruled on the motion for stay, and because these documents came  
7 into existence *after* briefing and oral argument on October 15, ACC respectfully requests that the stay  
8 motion record be supplemented with the documents attached to the accompanying Grad Declaration.

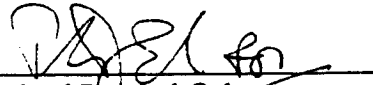
9 DATED this 16<sup>th</sup> day of November, 2001.

10 Respectfully submitted,

11 HELSELL FETTERMAN

12  
13 By:

14   
Peter J. Eglick, WSBA # 8809  
Kevin L. Stock WSBA # 14541  
Michael P. Witek, WSBA #26598  
Attorneys for Appellant

15   
Rachael Paschal Osborn  
WSBA #21618  
Attorney for Appellant

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**AR 005692**

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, )

No. 01-160

Appellant, )

DECLARATION OF ANDREA GRAD  
IN SUPPORT OF ACC'S MOTION TO  
SUPPLEMENT THE RECORD ON ITS  
MOTION FOR STAY

v. )

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

(Section 401 Certification No.  
1996-4-02325 and CZMA concurrency  
statement, Issued August 10, 2001,  
Reissued September 21, 2001, under No.  
1996-4-02325 (Amended-1))

Respondents. )  
\_\_\_\_\_ )

Andrea Grad declares as follows:

1. I am over the age of 18, am competent to testify, and have personal knowledge of the facts stated herein.

2. I am a paralegal with the law firm of Helsell Fetterman LLP, which represents the Airport Communities Coalition in this matter.

3. On November 5, 2001, I submitted a routine Public Disclosure Act request to the Department of Ecology's Northwest Regional Office. On November 7, 2001, I received from

Sarah Wright at Ecology's NWRO several short documents, via fax. I was out of the office on

DECLARATION OF ANDREA GRAD IN  
SUPPORT OF ACC'S OPPOSITION TO  
ECOLOGY'S MOTION TO STRIKE - 1

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

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

AR 005693



1 Friday, November 9, 2001, and Monday, November 12, 2001. On Friday, November 9,  
2 Ecology's NWRO made available to us some 651 pages of PDA documents, and another Helsell  
3 Fetterman paralegal had these documents picked up by messenger in my absence. On Tuesday,  
4 November 13, and ensuing days, I reviewed the new documents.  
5

6 4. Attached hereto are true and correct copies of several of the documents we  
7 received from Ecology's NWRO on November 7 and November 9, 2001:

8 a. Letter dated October 24, 2001, from Port water resources manager Keith  
9 Smith to Ecology 401 permit coordinator Ann Kenny, Re: Low Streamflow Analysis and  
10 Summer Low Flow Impact Offset Facility Proposal, Water Quality Certification #1996-4-02325  
11 (Amended-1) (Exhibit A);  
12

13 b. Email dated October 25, 2001, at 4:55 p.m., from Kelly Whiting to Ann  
14 Kenny and Ray Hellwig, Re: Pre Low Flow Meeting Briefing (Exhibit B);

15 c. Email dated October 31, 2001, at 2:43 p.m., from Kelly Whiting to  
16 Kathryn Snider, Re: DRAFT Low Flow Analysis Meeting Notes from October 30, 2001,  
17 attaching "401 Permit -- Post-Issuance Clarification, Sea-Tac International Airport, Third  
18 Runway, Draft Meeting Notes, Low Flow Analysis," dated October 30, 2001, prepared by Kate  
19 Snider, Floyd Snider McCarthy, Inc. (Exhibit C); and  
20

21 d. Notes on HSPF Modeling of Miller, Walker and Des Moines Creeks,  
22 Hydrocomp, Inc., with handwritten notation at top: Norm Crawford: Recommendations to POS,  
23 Received: 10/30/01 (Exhibit D).  
24

25 DECLARATION OF ANDREA GRAD IN  
SUPPORT OF ACC'S OPPOSITION TO  
ECOLOGY'S MOTION TO STRIKE - 2

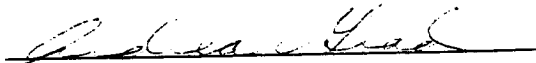
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1500 Puget Sound Plaza  
1325 Fourth Avenue  
Seattle, WA 98101-2509

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

**AR 005694**

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

3 DATED this 16<sup>th</sup> day of November, 2001, at Seattle, Washington.

4  
5   
6 Andrea Grad

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25 DECLARATION OF ANDREA GRAD IN  
SUPPORT OF ACC'S OPPOSITION TO  
ECOLOGY'S MOTION TO STRIKE - 3

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

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

AR 005695



Port of Seattle

October 24, 2001

Ms. Ann Kenny  
Department of Ecology  
Northwest Regional Office  
3190 160<sup>th</sup> Avenue SE  
Bellevue, WA 98008-5452

RECEIVED  
OCT 26 2001  
DEPT OF ECOLOGY

RE: Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal, Water Quality Certification #1996-4-02325 (Amended-1)

Dear Ms. Kenny:

The Port of Seattle is working to finalize the Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal required by the referenced Water Quality Certification for the Seattle-Tacoma International Airport Master Plan Update. In order to meet the 45-day schedule set forth in Section I.1 of the certification, the report needs to be submitted to Ecology on or before November 5, 2001.

While revising the HSPF/Hydrus/Slice models to implement the changes required in section I.1.c.i of the certification, an error was discovered in how the data is transferred between the Slice and HSPF models. Specifically, the HSPF model has a default function that assumes the input is in daily units, and automatically converts the input to hourly units. When the output from the Slice modeling was transferred to HSPF, the modeler manually applied the conversion. Therefore, the conversion was applied twice, and the effect was that the modeled embankment flow was 1/24 of what it should have been. The results of this error are that the impacts to Miller and Walker Creeks were overestimated. The actual impacts to summer low flow will be less than previously thought, and the facilities proposed to offset the impacts can be reduced in size. It is important to note that the error is limited to data handling between the models. The basic modeling approach, the calibration, and the underlying assumptions are still valid and will not be changed as this error is corrected.

In order to assure that the Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal accurately predicts the impacts and proposes appropriate facilities to offset the impacts, we need to re-work the analysis to correct the error. If other errors or inconsistencies in the modeling are detected, we will bring them to your

Seattle-Tacoma  
International Airport  
P.O. Box 68727  
Seattle, WA 98168 U.S.A.  
TELEX 703433  
FAX (206) 431-5912

**EXHIBIT A**

AR 005696



October 24, 2001  
Page 2

attention for possible resolution. This work will require additional time beyond the current submittal date of November 5, 2001. Therefore, pursuant to Section C.4 of the Water Quality Certification, the Port is requesting an extension of the specified submittal deadline for the Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal. We request that the date be extended to November 21, 2001.

Please call me at 206/988-5528 if you would like to discuss this request.

Sincerely,



Keith R. Smith  
Water Resources Manager

xc: Elizabeth Leavitt, Traci Goodwin, Laurie Havercroft, POS  
Paul Fendt, Parametrix  
Kate Snider, Floyd Snider McCarthy  
Jay Manning, Marten Brown

AR 005697

**Kenny, Ann**

---

**From:** Whiting, Kelly [Kelly.Whiting@METROK.C.GOV]  
**Sent:** Thursday, October 25, 2001 4:55 PM  
**To:** Kenny, Ann; Hellwig, Raymond  
**Subject:** Pre Low Flow Meeting Briefing

Ann/Ray -

I got the pre-meeting briefing from Joe this AM. This was expected per Kate's latest e-mail message. Here is my take on what was discussed,

Hydrocomp (Norm Crawford) was hired to do an "independent" review. Their general finding was that they didn't like the approach used. For example,

They wanted the impervious area runoff (run-on onto filter strips) to be modeled in HSPF prior to generating input to embankment model. This was my comment. However, I doubt that it was documented in the sketchy facilitated meeting notes. The issue is discussed somewhat in my comments, and was definitely discussed in great detail during the facilitated meetings. Joe had provided information stating that the approach used was conservative, and that the filter strips could handle all of the run-on from the runways with hourly timesteps. Apparently, now when they look at it, 27% of the runoff from the runways is not able to infiltrate into the filter strips. This really sucks in that I raised all these issues, but the Port's consultants were unwilling to do it right, said it didn't matter, and got me to buy into the approach through the facilitated process.

The new runs were done using hourly timesteps. This has same history as above. I requested/expected they do it that way, but instead they ran it using daily timesteps. During review, I asked why and what difference it makes, and the response was that even with hourly timesteps the embankment would effectively handle all flows generated from both pervious and impervious surfaces. I don't understand why when it is analyzed now, there is 27% of the runway runoff that does not infiltrate.

Apparently when the embankment flows were reapplied to HSPF, there was an important "flag" that was left blank. I had reviewed and verified the scale factor used to convert the daily data into hourly data. However, the default for the flag was that HSPF would automatically divide daily data into hourly timesteps. This reportedly resulted in the factor of 24 being applied twice during the re-insertion of the embankment flows. This involves an HSPF default setting that the modeler (and myself) did not know would automatically apply scale factors. All the checks made to verify that mass balance had not been violated were done before HSPF mixed the embankment flows with the other hydrologic flows in the basin. Therefore, all appearances were that mass balance had been preserved. It is difficult to perform the mass balance check after the embankment flows have been added back in with the rest of the basin, which is where the problem reportedly occurred.

The new model was run with a wet up period. This was an issue which came up after the previous modeling work was completed. I support the use of a wet up period, due to the short period of record being used to assess embankment affects. Otherwise, HSPF spends a significant portion of the first year filling up the empty storages.

Hydrocomp indicated that water lost from the embankment toe drain should not be sent to active groundwater, but rather should be sent directly to stream. Reportedly they feel that sending the water lost through the till layer to active groundwater is overly attenuating flows. Currently, I do not buy into this approach. I requested a copy of the Hydrocomp report, but Joe doesn't know if one exists. He is getting his directions via Parametrix. Joe believes that there is a good chance that the impact will turn into a summer low-flow surplus under the revised modeling approach.

Apparently, Walker creek embankment discharges are going to be considered now. Just prior to submitting their current report, the Port chose to not include contributions from the embankment in the Walker Creek model. I assumed the reason for the removal was related to the apparent overestimation of Walker Creek embankment areas. Joe was not sure if the embankment area discrepancies have been resolved. Apparently,

AR 005698

**EXHIBIT B**

11/6/2001

this determination remains with the embankment model which is being rerun now.

I asked if my comments, and other relevant public comments, are being addressed in the revised work. Joe was not aware of anything being done to address any comments other than those by Hydrocomp. I would expect that the Hydrocomp comments will be provided to us at the meeting, but they probably won't.

I did not raise a lot of questions during this call. I just tried to understand what is being done (revised modeling is already partially complete). They apparently are not looking for our buyoff on their revised approach. I strongly feel that the Port should have had their independent review done before they made their "final" mitigation proposal. I strongly feel that there are important legal questions that need to be answered on reopening impact/mitigation issues after permit issuance. I strongly feel that the Port should be addressing all comments, not just those made by their hired "independent" reviewer. I strongly feel the Port should be prepared to make a presentation as to how all comments received on their current low flow proposal are being addressed in their proposed revised report prior to any formal submittal. These comments may raise additional questions as to how the Port's proposal fits within the ongoing permit process.

Sincerely,

-- Kelly.

**Kelly R. Whiting, P.E.**  
King County Department of Natural Resources  
Water and Land Resources Division  
Engineering Studies and Standards

Address: King Street Center  
201 S. Jackson St., Ste. 600  
Seattle, WA 98104-3855

Mail Stop: KSC-NR-0600  
PH: (206) 296-8327  
FX: (206) 296-0192  
EMAIL: [kelly.whiting@metrokc.gov](mailto:kelly.whiting@metrokc.gov)  
WEB: <http://dnr.metrokc.gov/wlr/dss/>

AR 005699

11/6/2001

**Kenny, Ann**

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**From:** Whiting, Kelly [Kelly.Whiting@METROK.C.GOV]  
**Sent:** Wednesday, October 31, 2001 2:43 PM  
**To:** Kathryn Snider  
**Cc:** Kenny, Ann; Masters, David  
**Subject:** RE: DRAFT Low Flow Analysis Meeting Notes from October 30, 2001

Attached are a few comments and follow-up related to Walker Creek embankment areas.  
Please contact me if you do not intend to include a suggested edit.

-- Kelly.

-----Original Message-----

**From:** Cheryl Blaser [mailto:cherylb@fsmseattle.com]  
**Sent:** Wednesday, October 31, 2001 9:54 AM  
**To:** Ann Kenny (E-mail); Kelly R. Whiting (E-mail); David Masters (E-mail); 'lisa.m.scott@NWS.usace.army.mil'; Keith Smith (E-mail); 'kordick.r@portseattle.org'; Paul Fendt (E-mail); Joe Brascher (E-mail); 'kristanovich@fwenc.com'; Charles (Pony) Ellingson (E-mail); Kathryn Snider  
**Subject:** DRAFT Low Flow Analysis Meeting Notes from October 30, 2001

<<Low Flow errors mtg 103001draft.doc>>

All - attached are draft notes from the low flow meeting held yesterday.  
Please review these notes carefully and contact Kate Snider with any comments to the notes by Tuesday noon, 11/6/01. Kate will then finalize the notes. Kate would like to appeal to Paul, Joe, Pony and Kelly to assist in making the modeling vocabulary more accurate wherever necessary. Thank you

Cheryl Blaser  
Floyd Snider McCarthy, Inc.  
83 South King Street  
Suite 614  
Seattle, WA 98104  
Voice: 206.292.2078  
Fax: 206.682.7867  
cherylb@fsmseattle.com

AR 005700

**EXHIBIT C**

# 401 Permit – Post-Issuance Clarification Sea-Tac International Airport, Third Runway

## DRAFT MEETING NOTES

### LOW FLOW ANALYSIS

October 30, 2001  
8:30 – 11:30

These meeting notes have been prepared by Kate Snider, Floyd Snider McCarthy, Inc.

#### ATTENDEES

Ann Kenny, Dept. of Ecology  
Kelly Whiting, King County  
David Masters, King County  
Lisa Scott, Corps of Engineers  
Keith Smith, Port of Seattle  
Robin Kordick, Port of Seattle  
Paul Fendt, Parametrix  
Joe Brascher, Aquaterra  
Pony Ellingson, Pacific Groundwater Group  
Felix Kristanovich, Foster Wheeler  
Kate Snider, Floyd Snider McCarthy

#### MEETING SCOPE AND AGENDA

Work is underway by the Port of Seattle to revise the Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal per 401 Permit conditions. In the process of preparing the revised document, Port of Seattle consultants identified errors in the low streamflow modeling that require correction in the revised document, and that will affect the conclusions of the low streamflow analysis.

This meeting was called by the Port to allow the Port consulting team to explain the modeling errors and revisions that will be made to correct the errors.

#### DESCRIPTION OF ERRORS AND ASSOCIATED REVISIONS

##### 1. Conversion factor error in embankment fill input to HSPF:

When output from the embankment modeling was input to HSPF, an error of 1/24<sup>th</sup> magnitude was made. Conversion of daily output to hourly output was occurring twice – once by the modeler (Joe Brascher, Aquaterra) and once automatically within the HSPF program. This error affects all areas where embankment discharge is input to low streamflow analysis. The error has been corrected in revised modeling which shows the contribution of flow from the embankment fill to low stream flow is now 24 times the previous value.



2. Incorrect input files for embankment modeling:

In the previous modeling, Aquaterra gave Pacific Groundwater Group daily "AGWO" files as input to the embankment modeling. Instead, hourly "AGWI" files should have been provided.

3. Revised approach to modeling of impervious area at embankment filter strips:

The error listed above in #2 has a level of significance that has led the modelers to propose more direct modeling of the impervious area that runs off to filter strips at the top of the embankment. In 401 permit decision-making discussions between the Port, King County and Ecology, several alternatives were discussed for how to model the impervious area tributary to the filter strips. It was decided then that rainfall on the pervious area of the embankment would be "scaled up" to address the impervious area. With the revision in embankment modeling input files to hourly "AGWI" files, more direct modeling of the impervious area and filter strips will be performed by the Ports consulting team.

In this more direct modeling, Aquaterra will give Pacific Groundwater Group the "AGWI" time series data for the pervious embankment, and "SURO" time series data for impervious areas on the embankment, both on a per-acre basis. Pacific Groundwater will calculate the total impervious area and total filter strip area for each basin. Then, both "AGWI" and "SURO" time series data will be added on an hourly basis to compute total water available to the filter strips. Peak flows to the filter strips that are greater than the infiltration capacity of the filter strips will be categorized as surface runoff, and not used in Hydrus. Flows less than the infiltration capacity of the filter strips will be input to Hydrus.

It was noted by King County that all areas included in the embankment model should be removed from the HSPF stream model. ~~in revision to the modeling, it is important to verify the length of embankment modeled.~~ The King County reviewer has questioned the length of the embankment modeled relative to the point on the SMP grading plans where the embankment transitions to on-grade or cut. The length of the embankment question was resolved during post meeting discussions. However, a remaining comment is that approximately 8 acres of the Walker Creek embankment (approximately 16 acres total) appears to be included in both the Hydrus embankment model and the HSPF stream model. The Port's consultants will further investigate this remaining comment.

4. Use of "1-d" version of Hydrus:

The revised approach for modeling of filter strips listed above in #3 requires Pacific Groundwater Group to use a 1-dimensional version of the Hydrus model, rather than the 2-d version of the model used previously. The 2-d version of the model used previously is not able to handle variability of wetness and saturated conditions associated with the revised input files described above.

5. Modeling of discharge from infiltration basins:

The revised approach to the embankment modeling listed above in #3 results in a more significant surface water runoff component from the embankment. To model more closely the full water balance, revised low streamflow analysis modeling will now model and document water infiltrated from the infiltration basins that receive surface water runoff in the Miller Creek basin. A time series of embankment surface water runoff will be provided by Pacific Groundwater Group to Aquaterra for this work. The water

infiltrating from the infiltration basins will be routed to the groundwater component of HSPF modeling. Water infiltrating from the infiltration basins was ignored in previous modeling, because surface water runoff from the embankment was negligible in previous modeling.

#### 6. Predeveloped Conditions for SDS-5,6&7 in DesMoines Creek Basin:

In previous modeling, all groundwater from pervious areas in SDS-5,6 & 7 in the 1994 pre-developed conditions was inaccurately routed to DesMoines Creek. In reality, groundwater from significant portions of these basins flows to Walker Creek. Post-developed 2006 conditions did not route this groundwater to DesMoines.

For revised modeling, the predeveloped conditions for the DesMoines creek basin will include accurate routing for SDS-5,6 & 7.

### QA REVIEW OF LOW FLOW MODELING BY HYDROCOMP

Following discovery of the 1/24<sup>th</sup> conversion error in HSPF, the Port submitted the entire low flow modeling package to Norm Crawford, of Hydrocomp, for an independent round of review. Dr. Crawford is one of the people who developed the HSPF model. Dr. Crawford prepared a memo documenting his review, including recommendations for revision.

Adjusted approaches listed above as numbers 3, 5 & 6 are consistent with Dr. Crawford's memo.

Additionally, Dr. Crawford made a recommendation that the "seepage to till" output component of embankment modeling be routed directly to the Creek, rather than to "AGWO".

The Port, with concurrence from Ecology and King County at today's meeting, decided not to adopt this recommendation. Approach to handling the "seepage to till" component of embankment modeling will not be changed. The rationale for this decision is that:

- There is no clear error or problem in the previous modeling that requires correction.
- Any approach has associated potential modeling uncertainty. The approach used by the Port team to date is conceptually sound and does not need to be changed.
- There is no clear reason to route groundwater directly to the stream.

### MEETING CONCLUSIONS

- The revisions to the low streamflow analysis described in these meeting notes will be made to correct errors in the previous modeling.
- All revisions required by 401 permit conditions and these additional revisions will be included in the revised Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal, meeting the requirements defined by the 401 permit.
- Very clear documentation and rationale for all changes must be included in the revised deliverable to Ecology, with appropriate and thorough backup. The acceptability of revised

modeling will be based on Ecology review of the final Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal.

- Ecology is separately considering a request from the Port for extension of the schedule for submittal of this 401 permit deliverable.

**From:** Whiting, Kelly  
**Sent:** Wednesday, October 31, 2001 11:46 AM  
**To:** Paul Fendt (E-mail); Joe Brascher (E-mail)  
**Cc:** Masters, David; Ann Kenny (E-mail); Keith Smith - POS (E-mail)  
**Subject:** Correction/Resolution of County Review Comment  
**TO:** Paul Fendt, Joe Brascher  
**CC:** David Masters, Ann Kenny, Keith Smith

**RE:** Review Comment concerning size of Walker Creek Embankment

This e-mail is in response to a question raised yesterday concerning one of my review comments. The comment tried to compare the embankment footprint to the SMP grading and conveyance plans. The reason for the comparison was that only 8 acres of embankment was removed from the HSPF model but 16 acres of embankment was simulated in the embankment model. There is still an inconsistency in the handling of basin areas that remains unresolved. However, the comment's conclusion that the embankment footprint included cut areas was incorrect. When I did the review, I had used the scale indicated on the grading plans when actually the plan sheets had been reduced by 50%. It was a coincidence that along the 3rd runway, measured from the Walker/Miller basin divide, that the length of the embankment is 50% of the distance to the end of the runway. And it is coincidence that there is a 40' cut near the end of the runway that is located (proportional to the length of the runway) in the same location as a 40 foot fill area near the southern end of the embankment (proportional to the length of the embankment). It would be very helpful if the map showing the embankment footprint included surface and groundwater basin lines.

**Comment Resolution:**

1. The Walker Creek embankment area needs to be fully removed from the HSPF models. The amount not yet removed is equal to the difference between the acres modeled in the Hydrus/Slice and the acres removed from the HSPF Walker Creek surface water basin. If this area is located in the non-contiguous groundwater area, the corresponding acres need to be removed from the Walker creek model. If any portion of the simulated embankment is located within the Des Moines Creek groundwater basin, then those acres need to be removed from the Des Moines Creek model.

-- Kelly.

**Kelly R. Whiting, P.E.**  
King County Department of Natural Resources  
Water and Land Resources Division  
Engineering Studies and Standards

Address: King Street Center  
201 S. Jackson St., Ste. 600  
Seattle, WA 98104-3855

Mail Stop: KSC-NR-0600  
PH: (206) 296-8327  
FX: (206) 296-0192

EMAIL: [kelly.whiting@metrokc.gov](mailto:kelly.whiting@metrokc.gov)  
WEB: <http://dnr.metrokc.gov/wlr/dss/>

AR 005705

AR 005706

Norm Crawford: Recommendations  
to POS

Received:  
10/30/01

## Notes on HSPF Modeling of Miller, Walker and Des Moines Creeks:

### Linkages between HSPF and Hydrus/Slice

The land surface surrounding the new runways and taxiways at Seatac is modeled as outwash grass, a type of pervious land segment (PERLAND). The active runoff flowpaths for outwash grass are surface runoff and groundwater; interflow is not modeled. Surface runoff is small and has previously been neglected. The only significant active flowpath is groundwater.

The impervious surfaces of the new runways and taxiways can be modeled as an HSPF impervious land segment (IMPLAND). Surface runoff from the runways and taxiways flows into swales where infiltration into the fill will occur. This infiltration can be added to the percolation below the root zone (AGWI) found by modeling the land surrounding the new runways and taxiways as outwash grass with a DEEPR parameter of zero. Any surface runoff from the pervious land should be accounted for and sent to the proper flowpath.

Percolation from the pervious land below the root zone and infiltration of surface runoff from the impervious land are input to Hydrus. This inflow to Hydrus accounts for actual evapotranspiration from the pervious land and actual evaporation from impervious surfaces. The Hydrus inflows move vertically and are attenuated and delayed by amounts approximately proportional to the depth of the fill before it reaches a cell in the Slice model.

The Slice model handles lateral flow toward the toe of the new fill in the drain layer and in the soils that overlie the Vashon till, and calculates flux through the Vashon till into underlying Vashon advance soils. The Slice model includes an assumption in each cell for the elevation of the water table relative to the Vashon till layer. The water table in a cell may be;

- (i) above the surface of the Vashon till.
- (ii) below the Vashon till
- (iii) within the Vashon till

If the water table is above the surface of the Vashon till, no seepage occurs through the till — there is no hydraulic gradient across the till. If the water surface is below the Vashon till, seepage through the till is proportional to the hydraulic gradient across the till, which will include any water depth in the soils or drain layer above the till. If the water surface is within the Vashon till seepage through the till calculated as in (ii) but is reduced by one-half.

The water table elevation in each Slice model cell is fixed, invariant in time.

AR 005707

**EXHIBIT D**

The following are a summary of recommendations for additional runs of HSPF and Hydrus/Slice. Most of these recommendations have been discussed with the modelers who are doing the runs.

- 1) Calculate the runoff (SURO) from the impervious surfaces within the new fill areas with an HSPF IMPLAND segment. This will properly account for surface retention and actual evaporation from the runways/taxiways.
- 2) Calculate the infiltration (AGWI) into the pervious areas surrounding the new runways and taxiways with an HSPF PERLAND segment for outwash grass with a DEEPFR parameter of zero.
- 3) Use the combined impervious surface runoff (1) and pervious active groundwater inflow (2) to represent the percolation below the root zone. This is the input to Hydrus.
- 4) Account for any surface runoff (SURO) from the outwash grass PERLAND segment. This surface runoff may be small but its fate should be included for completeness.

(steps 5 and 6 are identical to prior model runs)

- 5) Hydrus moves water vertically into the Slice cells, delaying and attenuating the AGWI flux and infiltrating runoff from impervious surfaces.
- 6) Slice moves water laterally to the toe of the fill (or to the last active cell that is down gradient) as 'groundwater outflow' to a stream, and moves water across the Vashon till as 'till seepage' where the hydraulic gradient across the till allows.

(steps 7 and 8 differ from prior model runs)

- 7) Reduce the till seepage by 0.33 (multiply by 0.67) to account for inactive groundwater recharge (DEEPFR).
- 8) Sum the groundwater outflow and the reduced till seepage. Return this combined flow to the stream without additional routing (INFLOW IVOL).

In step 7), any losses to inactive groundwater must occur at depth in the Vashon advance formation. It is reasonable to believe that the fraction of inflow to the Vashon advance formation that is lost to inactive groundwater will be the same after construction of the fill as that found prior to construction of the fill.

In step 8), a choice must be made for handling flows that will return to stream channels. Till seepage in the Slice model is not delivered to the toe of the fill, but occurs along the cross-section. It can be argued that attenuation of till seepage will occur as water is moving toward the toe of the fill. A groundwater element for outwash grass with the calibrated recession constant was used in prior runs to attenuate till seepage.

There are two contrary arguments to this approach. First, if attenuation is occurring in the Vashon advance formation then the water table elevation in this formation would be time variable. The fixed water table elevations used in the Slice model to calculate till seepage

AR 005708

and groundwater outflow above the till would be incorrect. Second, the fill cross-section is man-made. Flowpaths in the fill are very different than the flowpaths calibrated in HSPF. There is no basis for assuming that a calibrated recession rate for active groundwater outflow from outwash grass is applicable to the groundwater flowpath within the Vashon advance formation.

Time delay and attenuation in the fill is calculated by Hydrus. When the Hydrus outflows are used in the Slice model, the presence of the drain layer limits the hydraulic gradient across the Vashon till and further attenuates the flow entering the Vashon advance formation. Adding still more attenuation through HSPF groundwater storage in the Vashon advance formation will not greatly change the timing of groundwater outflow from this formation to streams.

Given the Slice model assumption of a fixed water table in the Vashon advance formation, it is more reasonable to move water to the toe of the fill without further attenuation, i.e. return the till seepage direct to the stream.

#### Additional Issues

- 9) The pervious land areas given in the Miller/Walker Creek Master Area Table master tables do not correspond with the areas in the HSPF input files for the 1994 condition at Miller and Walker Creeks and for the future scenario at Walker Creek. There are no 1994 calibration values in this spreadsheet. These differences should be reconciled.
- 10) The Hydrus/Slice model calculates runoff from an area of 128 acres (Miller 111.67 acres, Walker 16.33 acres). An area of 124.27 acres was removed from HSPF (116.22 acres Miller, 8.05 acres Walker). Even if the distribution of the areas between Walker and Miller is different due to the different future and 1994 basin boundaries, the total area should be equal.
- 11) Future base flows from the SDW1A infiltration (Reach 47, 2<sup>nd</sup> outlet) and SDW1B flow splitter (Reach 47, 2<sup>nd</sup> outlet) are lost in the HSPF model. These flows should be re-infiltrated to a pervious land segment as active groundwater inflow and returned to the creek. The input file should be changed to include these flows.

All other HSPF setups have checked out. Tracey is currently checking the full water balance in Des Moines and expects to finish this task by Oct 3<sup>rd</sup>.

Norm Crawford

AR 005709