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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,  
  
Appellant,  
  
CITIZENS AGAINST SEA-TAC EXPANSION,  
  
Intervenor/Appellant,  
  
v.  
  
STATE OF WASHINGTON DEPARTMENT  
OF ECOLOGY, and THE PORT OF SEATTLE,  
  
Respondents.

NO. 01-160  
  
ACC'S MOTION AND MEMORANDUM  
FOR SUMMARY JUDGMENT  
REGARDING THE ABSENCE OF A  
WATER RIGHT FOR THIRD RUNWAY  
§ 401 CERTIFICATION

**I. INTRODUCTION AND RELIEF REQUESTED**

Pursuant to WAC 371-08-450 and the Pre-Hearing Order filed in this matter, Appellant Airport Communities Coalition ("ACC") hereby moves for summary judgment on the ground that Ecology's § 401 Certification is not based on reasonable assurance that the Port of Seattle ("Port") has legal means to permanently mitigate the low flow impacts of its proposed project. The Section 401 Certification should be invalidated on this ground.

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**ORIGINAL**

1 **II. STATEMENT OF FACTS**

2 On September 21, 2001, the Department of Ecology issued a revised Section 401  
3 Certification to the Port of Seattle for the Port's Master Plan Update of Sea-Tac International  
4 Airport (commonly referred to as the "Third Runway Project"). The Section 401 Certification  
5 contains "Conditions for Mitigation of Low Flow Impacts," approving the Port's low flow  
6 mitigation plan. 401 Cert. at p. 22. The low flow plan contemplates the capture and use of  
7 stormwater to offset the impacts of construction of the Third Runway Project on three local  
8 streams: Des Moines, Miller and Walker Creeks.

9  
10 On December 17, 2001, the Board issued its Order Granting Motion to Stay the  
11 Effectiveness of Section 401 Certification. Among other rulings, the Board found that ACC had  
12 demonstrated a likelihood of success on the issue of whether the Port's aforementioned low flow  
13 mitigation plan requires a water right. Specifically, the Board stated that:

14  
15 The issue of whether a water right is required for stormwater detention structures is a  
16 case of first impression for the Board. The Appellants have shown a likelihood of  
17 success on the merits by showing the low flow augmentation plan is more than just a  
18 system to manage stormwater and as such requires a water right to use the stored water to  
19 maintain sufficient streamflow. The Appellants have shown, absent a water right, the  
20 Port is unable to demonstrate legal means are in place to permanently mitigate the low  
21 flow impacts. Without such means, it is questionable whether Ecology had reasonable  
22 assurances that the water quality standards would not be violated.

23 Order Granting Motion to Stay at p. 14.

24 While the stay motion was pending, the parties herein stipulated to a number of legal  
25 issues to be resolved in this appeal. Among them is Issue No. 9(a), which is stated as "[m]ust the  
Port obtain a water right to implement the low stream flow conditions in the certification and if  
so: (a) is there reasonable assurance that § 401 and applicable water quality law will not be

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1 violated in the absence of such a water right . . . ?” Supplemental Stipulation Regarding  
2 Proposed Statement of Legal Issues (11/15/01).

3 Based on the Board’s Order, ACC brings this motion for summary judgment for  
4 resolution of Stipulated Issue No. 9(a). Appellant offers no new argument or facts for the  
5 Board’s consideration of this matter. The material facts derive from the 401 Certification itself.  
6 Appellant’s argument set forth below merely integrates the argument contained in ACC’s  
7 opening and reply briefs filed in support of its motion for stay. Copies of portions of previously  
8 filed background declarations of ACC’s experts are attached to the Witek Declaration  
9 accompanying this motion for the convenience of the Board. This issue is a purely legal one,  
10 and is appropriate for resolution at summary judgment stage.  
11

12 **III. ISSUE**

13 Whether there is reasonable assurance that the Third Runway and related Master Plan  
14 Improvements will comply with water quality standards, including permanent mitigation of low  
15 flow impacts, when Ecology has not required the Port to obtain a water right to demonstrate the  
16 legal means to permanently mitigate low flow impacts? [No.]  
17

18 **IV. EVIDENCE RELIED UPON**

19 ACC relies upon CR 56 and WAC 371-08-300, the legal authorities cited herein, the  
20 pleadings, declarations, and other documents previously filed in this matter and referenced  
21 herein, and the attachments accompanying this memorandum.  
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1 **V. LEGAL ARGUMENT AND AUTHORITY**

2 **A. The Standard for Summary Judgment.**

3 **1. The General Rule.**

4 The purpose of a summary judgment motion is to avoid a useless trial. *Ad Hoc Coalition*  
5 *for Willapa Bay v. Department of Ecology, et al.*, PCHB No. 00-115, Summary Judgment and  
6 Order of Dismissal, March 14, 2001, p. 3 (pagination from 2001 Westlaw 277875). Summary  
7 judgment is proper where there are no genuine issues of material fact and the moving party is  
8 entitled to judgment as a matter of law. CR 56(c). A summary judgment is considered  
9 appropriate even on “fact-laden” issues when the material facts are not in dispute and reasonable  
10 minds cannot differ with respect to the inferences that can be drawn from those facts.  
11 *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 384, 766 P.2d 1137, *rev. denied*, 112  
12 Wn.2d 1020 (1989). The moving party has the initial burden of showing that there is no dispute  
13 as to any material fact. *Jack and Jason Simmons v. Department of Ecology*, PCHB Nos. 99-099,  
14 99-196, 99-202, 00-110, and 00-175, Order on Summary Judgment, January 30, 2001, p. 4  
15 (pagination from 2001 Westlaw 261325). A material fact is one upon which the outcome of the  
16 litigation depends. *Id.* (citing *Jacobsen v. State*, 89 Wn.2d 104 (1977)).

17 **2. The Respondents’ Burden.**

18 To defeat summary judgment, the non-moving party must “set forth specific facts  
19 showing that there is a genuine issue for trial.” *Ad Hoc Coalition for Willapa Bay, supra*, at pp.

20 3-4. As the PCHB further explained:

21 When a motion for summary judgment is made and supported as provided in this rule, an  
22 adverse party may not rest upon the mere allegations or denials of his pleading, but his  
23 response, by affidavits or as otherwise provided in this rule, must set forth specific facts  
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1 showing that there is a genuine issue for trial. If he does not so respond, summary  
2 judgment, if appropriate, shall be entered against him.

3 *Id.* (quoting CR 56(e)).

4 **B. The Third Runway Low Flow Mitigation Plan Requires a Water Right.**

5 The Section 401 certification process is intended to ensure that, when a developer  
6 proposes a project that (a) requires a federal permit and (b) will harm or alter aquatic resources,  
7 the project will not result in degradation of those resources in violation of state water quality  
8 standards, Ch. 173-201 WAC; 33 U.S.C. § 1341. It is the duty of the Department of Ecology  
9 (“Ecology”) to certify, with reasonable assurance, that water quality standards will not be  
10 violated or to deny certification. 40 CFR § 121.2(a)(3). The “reasonable assurance” standard  
11 requires that Ecology have reasonable certainty that any and all impacts to aquatic resources  
12 caused by a project will be fully mitigated, establishing an important threshold for protection of  
13 Washington’s water resources. *See* RCW 90.54.020(3)(b).

14  
15 In assessing whether a project will comply with state water quality standards, Ecology  
16 must consider several factors. Washington’s water quality standards encompass not only  
17 numeric criteria to control conventional and toxic pollutants, but also require broader protection  
18 of “characteristic uses” of streams, including fish migration, spawning and rearing, recreational  
19 uses, and aesthetics. WAC 173-201A-030(1)(a) and (b). As a result, protection of stream flow is  
20 a critical component of the certification process. Projects that impact stream flow and designated  
21 instream uses are subject to special scrutiny in the permitting process. *Dep’t of Ecology v. PUD*  
22 *No. 1 of Jefferson County*, 121 Wn.2d 179, 187, 849 P.2d 646 (1993), *aff’d*, 511 U.S. 700 (1994).  
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1 Ecology has determined that, absent mitigation, the Port of Seattle's Master Plan Updates  
2 ("Third Runway Project") will degrade stream flow in Des Moines, Miller, and Walker Creeks,<sup>1</sup>  
3 three streams that have been administratively placed in the Green-Duwamish Water Resources  
4 Inventory Area, but which actually are tributary to Puget Sound. Ch. 173-509 WAC.  
5 Specifically, the Third Runway project will deplete stream flow in Des Moines, Miller and  
6 Walker Creeks during the low flow season, June through October. Declaration of William A.  
7 Rozeboom at ¶ 6 (Witek Decl., Ex. A).

9 Des Moines, Miller and Walker Creeks are classified as Class AA waters under state  
10 water quality standards, and for good reason. Cert. at § A.1., p. 2. According to ACC consultant  
11 Dr. John Strand, an expert fisheries biologist who has studied the three streams:

12 Both coho and chum salmon are known to spawn and rear in Miller Creek, Walker  
13 Creek, and Des Moines Creek. (Hillman et al. 1999). Chinook salmon frequent the  
14 outfalls of Miller and Des Moines Creeks in Puget Sound during their outmigration  
15 (Parametrix 2000a). Both the Miller Creek and Des Moines Creek Watersheds are  
16 also exploited by resident cutthroat trout (Parametrix (2000a); Miller Creek may  
17 include an anadromous race of cutthroat trout. Warm water fish species including  
18 yellow perch, black crappie, largemouth bass, and pumpkinseed sunfish have been  
19 found in the upper reaches of both watersheds (Parametrix 2000b). Prickly sculpin,  
20 three-spined stickleback, and crayfish also occur throughout each watershed  
21 (Parametrix 2000b).

22 Declaration of Dr. John Strand ("Strand Decl.") at ¶ 7 (Witek Decl., Ex. B). If flows in the  
23 affected streams fall below target levels, impacts to anadromous as well as resident fish species  
24 will likely occur over the entire length of the streams. Strand Decl. at ¶ 33 (Witek Decl., Ex. B).  
25 Such flow depletion will impair characteristic uses of these streams, including their ability to

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<sup>1</sup> See, e.g., Memorandum from Ray Hellwig to Tom Fitzsimmons dated August 13, 2001 (Ex. F to 1st Eglick Decl. in Support of Motion for Stay, filed with the Board on September 12, 2001).

1 support life stages of salmonids and resident fish populations. *Id.* Such uses in the affected  
2 Class AA streams are protected under Washington state water quality standards. WAC 173-  
3 201A-120(6) and -140(21).

4           The aquatic impacts caused by the Third Runway Project will result from radical  
5 alterations to the hydrology of the watersheds and stream systems encompassing Sea-Tac  
6 Airport. The predicted changes to stream flow will result from the large increase in impervious  
7 surfaces (i.e., new runways and taxiways), expansion of the airport's industrial wastewater  
8 system (IWS), and associated long-term land use changes in the basin. Rozeboom Decl. at ¶ 5  
9 (Witek Decl., Ex. A). Without permanent and effective mitigation, hydrologic changes directly  
10 attributable to Third Runway project construction will degrade water quality and impair the  
11 characteristic uses of Des Moines, Miller and Walker Creeks, in violation of state and federal  
12 law. RCW 90.48.080; 33 U.S.C. § 1341.

13  
14  
15           To obtain § 401 certification, the Port is therefore required to demonstrate that legal and  
16 practical means are in place to permanently mitigate low flow impacts. *PUD No. 1 of Jefferson*  
17 *County, supra*, 121 Wn.2d at 185-192; *Okanogan Highlands Alliance, et al. v. Department of*  
18 *Ecology, et al.*, PCHB No. 97-146, Summary Judgment on Stipulated Issues Nos. 20, 21 and 22  
19 at p. 2 (10/23/98) ("*OHA*"); *PUD No. 1 of Pend Oreille County v. Department of Ecology*;  
20 PCHB No. 97-177, Amended Summary Judgment (10/15/98), *appeal pending*, Washington  
21 Supreme Court Docket No. 70372-8. More specifically, in order to satisfy Section 401  
22 Certification requirements, the Port must deliver specific amounts of water to specific streams at  
23 specific times.  
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1           The Port's low flow mitigation proposal, which is unprecedented, calls for impoundment  
2 of approximately 46 acre-feet of water in several stormwater vaults during the period from  
3 December through early summer each year. The stormwater would be detained until stream  
4 flows in Des Moines, Miller and Walker Creeks dropped below prescribed levels (predicted to  
5 occur between June and August) and then released from the vaults to compensate for the  
6 diminution in flow attributable to Third Runway construction and operations. Cert. at § I.1.(e),  
7 p. 24. These facts are not in issue.

8           The Port's low flow mitigation proposal is an appropriation of public waters for a  
9 beneficial use, and therefore requires a water right. RCW 90.03.010, 90.03.290; *and see*  
10 *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000). The Port,  
11 however, has failed to obtain either a new right or transfer of an existing right. This omission  
12 raises a purely legal question for the Board's resolution: whether a water right is required for the  
13 Port's low flow mitigation plan in order for Ecology to certify, with reasonable assurance, that  
14 impacts to state aquatic resources will be fully mitigated as required by state water quality law.

15           The requirements for a water right are founded in the state water code. All waters of the  
16 state are owned by the public and their use for beneficial purposes requires a water right. RCW  
17 90.03.010. When the Port collects water from its runways and other impervious surfaces it is  
18 collecting water that is publicly owned. When it detains this water in a complex system for the  
19 purpose of augmenting stream flow, it becomes a functional appropriation, for a beneficial  
20 purpose, that triggers water code requirements. RCW 90.54.020(1). Beneficial uses of water are  
21 defined to include "fish and wildlife maintenance and enhancement, . . . and preservation of  
22 environmental and aesthetic values, and all other uses compatible with the enjoyment of the  
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1 public waters of the state[.]” *Id.* The Port’s low flow mitigation plan meets all classic  
2 requirements for a water right: the stormwater diversion and impoundment system and the  
3 subsequent application of water to a beneficial use converts the Port’s stormwater storage from  
4 the mere "management" of stormwater to appropriation requiring a water right.  
5

6 The purpose of a water right in this instance is to protect from impairment by others the  
7 instream flows in Des Moines, Miller and Walker Creeks that the Port is required to create as a  
8 part of its mitigation obligation. Cert. at § I, p. 22. Instream flow protection is recognized as a  
9 beneficial use in Washington. RCW 90.54.020(3)(a). Further, the public interest in the  
10 protection of the affected streams is expressed generally in RCW 90.54.010, and .020(3), and  
11 more specifically in the Green-Duwamish Instream Resources Protection Program, WAC Ch.  
12 173-509, which is designed to “retain perennial rivers, streams, and lakes in the Green-  
13 Duwamish drainage basin with instream flows and levels necessary for preservation and  
14 protection of wildlife, fish, scenic, aesthetic and other environmental values . . . and to preserve  
15 water quality.” WAC 173-509-010.  
16

17 The Board has previously ruled that the capture, storage and release of water as  
18 mitigation for impacts to stream flow in the context of a § 401 certification requires a water right.  
19 *OHA, supra*, at 2 (“The Board concludes that documented water right changes should be  
20 approved and issued for implementing the post-reclamation portion of the streamflow mitigation  
21 plan. Water right changes should be issued to clearly record the right and priority of water  
22 necessary to implement the plan.”). Similarities between the gold mine proposal in *OHA* and the  
23 Third Runway project are striking. Like the Crown Jewel mine in *OHA*, the Third Runway  
24

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1 would permanently alter the hydrology of streams draining the area. These changes would  
2 deplete flow in streams that are closed to new water rights. See WAC 173-509-040(1).

3 In *OHA*, the applicant held water rights that were deemed acceptable for both existing  
4 mitigation and future conversion to instream uses (although the summary judgment ruling did  
5 not insulate the applicant from an ultimately adverse decision invalidating those water rights). In  
6 contrast, the Port does not possess water rights that can be converted to stream flow  
7 augmentation, now or in the future. Indeed the Port has previously proposed, but then discarded,  
8 at least two schemes to transfer water rights to serve its mitigation plan. Declaration of Peter  
9 Willing at ¶ 8-11 (Witek Decl., Ex. C).

10  
11 The *OHA* summary judgment decision was consistent with earlier Board decisions  
12 addressing mitigation for water rights usage. As a part of the “statewide” water right appeals in  
13 the mid-90’s, several appellants proposed various mitigation activities to offset the impacts that  
14 would occur if they were granted new groundwater rights. Activities such as septic recharge,  
15 vegetation loss, and capture and release of stormwater were rejected by the Board because the  
16 applicants, like the Port, proposed to use water that did not belong to them. *Black River Quarry*  
17 *v. Department of Ecology*, PCHB No. 96-56, Final Findings of Fact, Conclusions of Law and  
18 Order (11/15/96), *aff’d on other grounds sub nom Postema v. Pollution Control Hearings Board*,  
19 142 Wn.2d 68 (2000); *L.G. Design, Inc. v. Department of Ecology*, PCHB Nos. 96-20 and 96-25,  
20 Order on Motion for Summary Judgment (2/5/97); *Auburn School District No. 408 v.*  
21 *Department of Ecology*, PCHB No. 96-91, Final Findings of Fact, Conclusions of Law and Order  
22 (12/20/96); *Manke Lumber Co. v. Department of Ecology*, PCHB No. 96-102, *et seq.*, Final  
23 Findings of Fact, Conclusions of Law and Order (11/1/96).  
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1 In *L.G. Design*, the Board explicitly held that “a water right applicant is not entitled to  
2 mitigation credit for proposals involving the capture and diversion of stormwater runoff from  
3 impervious surfaces.” *L.G. Design, supra*. Similarly, in *Auburn School District*, the Board  
4 confirmed that a project proponent may not use stormwater for stream flow enhancement absent  
5 a water right. The Board stated “[t]hat water . . . belongs to the public and is subject to the right  
6 of prior appropriators.” *Auburn School District, supra*, at Conclusion XII.  
7

8 The rationale for requiring a water right stems from the fact that the Port’s mitigation  
9 plan is not a typical stormwater detention project. Under the plan the Port would, every year,  
10 impound significant quantities of stormwater in special “reserve” vaults, for months at a time, in  
11 order to release it during late summer. This proposal differs from traditional stormwater projects  
12 in several respects: the length of time the stormwater will be detained, the type of treatment the  
13 stormwater will receive, and the precise, prolonged and exacting release rates. Further, the  
14 purpose of the Port’s low flow mitigation plan is not to ameliorate peak flows, the usual goal of  
15 stormwater detention (including the Port’s separate Comprehensive Stormwater Management  
16 Plan for the Third Runway Project), but to provide perpetual mitigation for permanent water  
17 quality degradation. These factors distinguish the Port’s proposal from routine stormwater  
18 facilities, including other such facilities at Sea-Tac Airport, and amount to a difference in *kind*,  
19 not just in degree.  
20

21  
22 There is no conflict between stormwater management goals, e.g., RCW 90.54.020(11),  
23 and the permitting requirements of the state Water Code, RCW Ch. 90.03. It is possible to  
24 manage and use water at the same time; stormwater management and water code requirements  
25 are not mutually exclusive. Moreover, public policy favors requiring a water right in this

1 situation. If stormwater were available as an unpermitted source of water supply, prospective  
2 water users around the state would simply install stormwater basins to obtain unregulated water  
3 for irrigation, industrial and other purposes.

4 Finally, where the Water Code and the Water Pollution Control Act both apply, both  
5 must be used. Ecology must protect water quality using all appropriate requirements of state  
6 law. 33 U.S.C. § 1341(d); *Ecology v. PUD No. 1, supra*, 121 Wn.2d at 192. The water right  
7 permitting provisions, RCW 90.03.010 and .290, are such requirements and must be  
8 implemented here.  
9

10 The problem presented here – permanent impacts versus transient solutions – goes to the  
11 heart of the reasonable assurance standard required for § 401 certification. Ecology cannot  
12 certify compliance with water quality standards if the Port has not demonstrated a permanent and  
13 legal source of augmentation water to offset low flow impacts. *Ecology v. PUD No. 1, supra*.  
14 Absent the legally required water right, there can be no assurance that stream flows in Des  
15 Moines, Miller and Walker Creeks will be protected for the life of the Third Runway Project.  
16

## 17 **VI. CONCLUSION**

18 For the foregoing reasons, ACC respectfully request that the PCHB enter an Order on  
19 Summary Judgment finding and concluding that there is no reasonable assurance of compliance  
20 with water quality standards for the Third Runway Project where there is no water right  
21 demonstrating the legal means to permanently mitigate low flow impacts, vacating the § 401  
22 Certification, and denying certification on that ground.  
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A proposed Order is attached.

DATED this 4 day of January, 2002.

HELSELL FETTERMAN LLP

By:

  
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