

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. 01-2-00358

**PETITION FOR REVIEW OF AGENCY
ACTION**

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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
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PETITION FOR REVIEW OF AGENCY ACTION

PAGE 1

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12
13 **3. NAME AND ADDRESS OF AGENCY WHOSE ACTION IS AT ISSUE**

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

17 **4. AGENCY ACTION AT ISSUE**

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

21 **5. PARTIES IN ADJUDICATIVE PROCEEDING**

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

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

26 This petition for review involves the proposed third runway at Seattle-Tacoma
27 International Airport (STIA). The Port of Seattle, which operates the airport, is a special
28 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
8 In the 1980s, the Port determined that the existing airport was not adequate to serve
9 the regional needs of the Pacific Northwest, in large part due to local weather conditions. The
10 Federal Aviation Administration (FAA) described the problem as follows in its Record of
11 Decision approving the Master Plan Update Development Actions:

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

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

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

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
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. 7th 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**

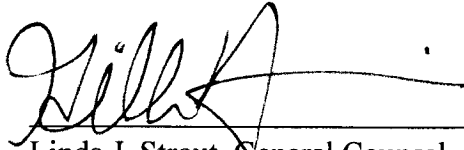
23 The Port requests that this Court vacate the PCHB’s Order Granting Motion to
24 Stay. In the alternative, the Port requests that the Court set aside the Order and remand the
25 matter to the PCHB for renewed consideration in accordance with RCW 43.21B.320, and in
26 order to correct the errors identified in this petition for review. Because this is an
27

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 31st day of December, 2001.
5

6 PORT OF SEATTLE

FOSTER PEPPER & SHEFELMAN
7 PLLC

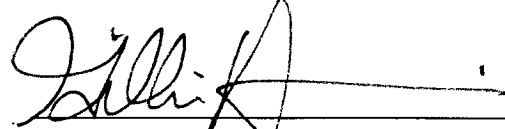
8  for:

9  for:

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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Appellant,

v.

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

Respondents.

)
)
) PCHB 01-160
)
) ORDER GRANTING MOTION TO STAY
) THE EFFECTIVENESS OF SECTION 401
) CERTIFICATION
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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 motion¹. Having considered the arguments of the parties and being advised of the merits, the Board enters the following:

¹ 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.

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

15 The Board may stay the effectiveness of an order during the pendency of an appeal.
16 RCW 43.21B.310 and WAC 371-08-415. The party requesting the stay must make a prima facie
17 case for issuance of the stay by showing either: (1) a likelihood of success on the merits of the
18 appeal; or (2) irreparable harm. If a prima facie case is made, the Board shall grant the stay
19 unless Ecology demonstrates either a substantial probability of success on the merits or a
20 likelihood of success coupled with an overriding public interest justifying denial of the stay.
21 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 (9th Cir. 2001), citing
4 *Sierra On-line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th 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. 7th 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 assurance². 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 ² 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
19
20
21

1 environmental objectives for the mitigation planning effort that required wetlands impacted be
2 replaced on a one-to-one basis in-basin³ and on a two-to-one basis out-of-basin.⁴

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)⁵ 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 ³ For every acre of wetland impacted, one acre must be created, restored or enhanced.

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

20 ⁵ 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 classified⁶ 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

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⁶ These numbers come by extrapolating figures from the declaration of Katie Walter at p. 4 with those presented in 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 1st 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

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

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, treat 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
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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
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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):

Contaminant	§ 401 Certification	Puget Sound Background	Practical Quantification Limits
Antimony	16		1.5
Arsenic	20	7	1.5
Beryllium	0.6	.6	.5
Cadmium	2	1	.1
Chromium	42/2000	48	.05
Copper	36	36	.5
Lead	220/250	24	.5
Mercury	2	.07	.002
Nickel	100/110	48	7.5
Selenium	5		.75
Silver	5		.1
Thallium	2		
Zinc	85	85	.03
Gasoline	30		
Diesel	460/2000		
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.

1 ORDER

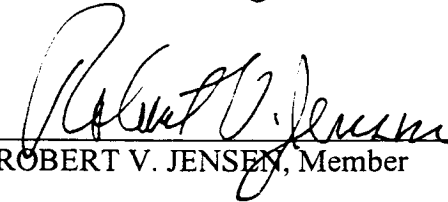
2 Based on the foregoing, the Board hereby grants Appellant's motion to stay the
3 effectiveness of § 401 Certification No. 1996-4-02325 (amended-1) until the Board renders a
4 decision on this appeal.

5 SO ORDERED this 17th day of December, 2001.

6 POLLUTION CONTROL HEARINGS BOARD

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8 KALEEN COTTINGHAM, Presiding

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10 ROBERT V. JENSEN, Member
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ATTACHMENT A

1	ACC's Notice of Appeal
2	ACC's Motion for Stay and attached declarations
3	Port's Memorandum Opposing ACC's Motion for Stay
4	Declaration of James C. Kelly, volume 1
5	Declaration of James C. Kelly, volume 2
6	Declaration of James C. Kelly, volume 3
7	Declaration of Paul Fendt, volume 1
8	Declaration of Paul Fendt, volume 2
9	Declaration of Paul Fendt, volume 3
10	Declaration of Donald E. Weitkamp, PhD
11	Declaration of Elizabeth Clark, John J. Strunk, C. Linn Gould, Joseph Brascher, and Linda R.J. Logan, PhD
12	Declaration of Paul Schell, James L. Morasch, Alan C. Ralston, Michael Feldman, Michael Cheyne, and Gina Marie Lindsey
13	Declaration of Steven G. Jones
14	Ecology's Response to ACC's motion for stay and attached declarations
15	ACC's reply brief and Declarations of Amanda Azous, Peter Eglick, Stephen Hockaday, and legislators (Vol. 1 of 2)
16	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)
17	Port's Sur-reply
18	ACC's sur-rebuttal
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ENVIRONMENTAL
HEARINGS OFFICE

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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, and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

No.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 31st day of December, 2001, served a copy of:

1. Petition for Review of Agency Action; and
2. Certificate of Service

on the following persons, in the manner indicated:

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Thomas J. Young
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CERTIFICATE OF SERVICE

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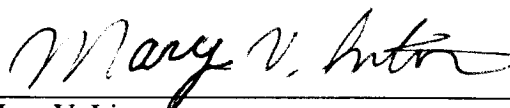
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