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

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[1]. 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.

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

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

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

The Board may stay the effectiveness of an order during the pendency of an appeal. RCW 43.21B.310 and WAC 371-08-415. The party requesting the stay must make a prima facie case for issuance of the stay by showing either: (1) a likelihood of success on the merits of the appeal; or (2) irreparable harm. If a prima facie case is made, the Board shall grant the stay 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.

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

Likelihood of success on the merits means one or both sides have presented the Board with justiciable arguments for and against a particular proposition. Likelihood of success on the merits is not a pure probability standard under RCW 43.21B.320 and WAC 371-08-415(4). *Blohowiak et al. v. Seattle-King 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 it will conclusively win on the merits, but only that there are questions "so serious.... as to make them fair ground for litigation and thus for more deliberative investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (C.A. 2d Cir. 1971). The evaluation of the likely outcome on the merits is based on a sliding scale that balances the comparative injuries that the parties and non-parties may suffer if a stay is granted or denied. For example, where the non-moving party will incur little or no harm or injury if a stay is granted, then the moving party's demonstration of likelihood of success need not be as strong as where the non-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).

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

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

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

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

RCW 90.54.020(3)(b). See: *Okanogan Highlands Alliance et al. v. 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).

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

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

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

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[2] The Board has determined Ecology lacked reasonable assurance in *Okanogan Highlands Alliance et al. v. 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.

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

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

A. Appellant's Prima Facie Case

1. Wetlands

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

environmental objectives for the mitigation planning effort that required wetlands impacted be replaced on a one-to-one basis in-basin[3] and on a two-to-one basis out-of –basin.[4]

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

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

The Anti-degradation policy does not prohibit all impacts to aquatic resources. Instead, as applied to wetlands, the policy mandates impacts be avoided, minimized and compensated. *Okanogan Highlands Alliance et al. v. Department of Ecology.* Wetland mitigation is a series of

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

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

[5] The state is divided into 62 areas known as Water Resource Inventory Areas (WRIAs). WRIAs are identified by 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.

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

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

Ecology has developed guidelines for mitigation of unavoidable impacts to achieve no net loss. The guidelines are based on habitat categories. See: *Water Quality Guidelines for Wetlands*, Ecology Pub. #96-06, April 1996; *How Ecology Regulates Wetlands*, Ecology Pub. # 97-112, April 1998; *Wetland Mitigation Replacement Ratios: Defining Equivalency*, Ecology 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

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

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

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

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

[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.

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

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

The Port's mitigation plan includes the following acres, by wetland category and segregated by 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 Scrub/shrub Emergent	 8.17 2.98 5.21	 25.96 9.53 5.2	 19.54 	 	 25.96 29.07 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

To determine the mitigation credits for the Port's mitigation plan, the mitigation ratio "discounts" are applied to the acres of wetland enhancement, upland buffer enhancement, and 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."

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

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

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

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

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

2. Low Flow Augmentation

Protection of streamflow is a critical component of the § 401 certification process. Absent mitigation, Ecology has determined the third runway project will degrade streamflow in Des Moines, Miller and Walker Creeks. Salmon spawn and rear in all three creeks.

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

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

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

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

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

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

3. Imported Fill Criteria

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

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

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

The "natural background levels," as well as the limits in the § 401 Certification and the 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		

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

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

B. Respondent's Showing of Overriding Public Interest

Based on the above prima facie case showing a likelihood of success on the merits, the Board shall grant the stay 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.

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

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

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

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

C. Irreparable Harm

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

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

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

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

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

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