

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Appellant,

v.

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

Respondents.

PCHB No. 01-160

SECOND PRE-HEARING  
ORDER

I. LEGAL ISSUES

The parties were directed by the original pre-hearing order to meet and seek agreement on the proposed legal issues to be considered by the Board in this appeal. If the parties were unable to reach complete agreement on the legal issues, the parties could file a proposed list of agreed issues together with any issues for which there is no agreement. The parties were then given until **November 15, 2001**, to file their objections to the issues proposed separately by other parties.

On November 16, 2001, the parties filed a supplemental stipulation regarding proposed statement of legal issues. In that stipulation, 21 issues are set forth for the Board's consideration. The Board hereby accepts these 21 issues as the issues of the case. The stipulation is attached to and made a part of this order.

In addition to the 21 stipulated issues, three other issues are in dispute. The Board has reviewed the proposals and countervailing arguments and renders the following decision. The following additional issue, numbered 22, will be included as part of the case:

1           22. Did Ecology have reasonable assurance that § 401 and applicable water quality  
2 laws would not be violated when it relied on a stormwater detention system that  
3 may require future compliance with dam safety regulations (chapter 173-175  
4 RCW) and may require a dam safety permit prior to commencing construction?

5           The Appellant's have proposed two additional issues that are too vague at this time to be  
6 included. The parties are encouraged to discuss ways to draft an issue related to the relationship  
7 between on-going construction and the §401 certification, but it needs to be not so open ended.  
8 The Board is uncertain as to the purpose of the final issue proposed by the Appellants and  
9 therefore would require additional justification and drafting to be willing to consider it.

## 10   **II. SITE VISIT**

11           The Board has scheduled time for a site visit prior to the start of the hearing. The site  
12 visit is scheduled for **Friday, March 1, 2002, at 10:30 a.m.** The Board requests that  
13 Respondent Port of Seattle make arrangements for the tour, after conferring with the other  
14 parties. The site visit will be the opportunity for the Board to see the areas proposed not only for  
15 the expansion of the third runway, but associated mitigation areas and surrounding related  
16 streams and wetlands. The site visit will not be an opportunity for the parties to present evidence  
17 or discuss issues with the Board. The participation by all parties will be limited to no more than  
18 two representatives from each party, including counsel.

## 19   **ORDER**

20           This order supplements the original pre-hearing order. Both of these pre-hearing orders  
21 shall govern the proceedings, unless subsequently modified by order of the Board for good cause  
upon a party's motion or the Board's volition.

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

2  
3 **POLLUTION CONTROL HEARINGS BOARD**

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6 

7  
8 **KALEEN COTTINGHAM,**

9 Presiding

Received by FAX

11-15-01

RECEIVED

NOV 16 2001

ENVIRONMENTAL  
HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,	)	
	)	PCHB No. 01-160
Appellant,	)	
	)	SUPPLEMENTAL STIPULATION
v.	)	REGARDING PROPOSED STATEMENT
	)	OF LEGAL ISSUES
STATE OF WASHINGTON,	)	
DEPARTMENT OF ECOLOGY; and	)	
THE PORT OF SEATTLE,	)	
	)	
Respondents.	)	

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Pursuant to the Pre-Hearing Order dated October 30, 2001, as amended orally on November 1, 2001, the parties stipulated to three proposed legal issues for the Board's consideration on November 2, 2001. Subsequently, on November 14, 2001, the parties reached agreement upon 18 additional proposed legal issues. As a result of this additional agreement, there remain only three legal issues separately proposed by ACC and one legal issue separately proposed by the Port.

For the Board's convenience, this Supplemental Stipulation includes the agreed issues from November 2, 2001 and the agreed issues from November 15, 2001. The remaining legal issues separately proposed by ACC and the Port are set forth in attached Exhibit A.

ORIGINAL

AR 006104

**Agreed Issues from November 2, 2001**

1. Did Ecology violate applicable law pertaining to public and agency notice, hearing, comment and modification regarding the original 401/404 application and Amended Certification?
2. Does Ecology's concurrence with the Port's consistency certification, issued pursuant to the Coastal Zone Management Act ("CZMA"), fail to comply with the requirements of the CZMA and Washington's approved Coastal Zone Management Plan?
3. Do the stated limitations on the temporal, operational, and geographic scope of the Certification, including its limitation to "Port 404 projects," violate the requirements of Section 401 of the Clean Water Act and applicable state water quality law?

**Agreed Issues from November 14, 2001**

4. Is there reasonable assurance that the Third Runway and related projects, for which a Clean Water Act Section 401 ("§ 401") certification is required ("Third Runway Project"), will not violate § 401 and applicable water quality law?
5. Must there be reasonable assurance that a proposed project will not violate § 401 and applicable water quality law when a § 401 Certification is issued?
6. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the Certification relies on data, reports, and plans that were not in being at the time of issuance of the Certification?
7. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if (1) the Certification relies on future monitoring; or (2) if the Certification fails to require adequate pre-construction monitoring?
8. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of low flow impacts (with the identified mitigation) of the Third Runway Project?
9. Must 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 violated in the absence of such a water right; and
  - (b) Is there reasonable assurance that § 401 and applicable water quality law will not be violated in the absence of review of a water right application under the State Environmental Policy Act ("SEPA")?

**AR 006105**

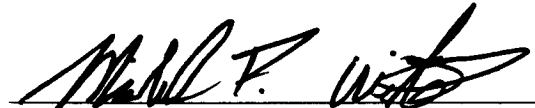
10. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of the stormwater impacts (with the identified mitigation) of the Third Runway Project?
11. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if discharges from the airport have violated water quality standards or the Port's NPDES (§ 402) permit?
12. May a certification of reasonable assurance that § 401 and applicable water quality law will not be violated be based upon current and future NPDES (§ 402) permits?
13. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the certification authorizes a mixing zone without compliance with applicable procedural and substantive requirements for authorization of such a zone?
14. Did Ecology and the Port comply with SEPA?
15. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of the embankment and fill criteria, including:
  - (a) the method of determining compliance with the fill criteria;
  - (b) embankment and wall construction specifications; and
  - (c) groundwater discharges from the embankment and Mechanically Stabilized Earth ("MSE") wall.
16. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of the possibility of MSE wall and embankment failure?
17. Is there reasonable assurance that potential migration and discharge of existing groundwater pollutants originating from the airport (with the identified mitigation) will not violate § 401 and applicable water quality law?
18. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the Port is in violation of the terms of the MTCA Agreed Order for SeaTac International Airport (Ecology Order No. 97TC-N122, dated 5/15/99)?
19. Is there reasonable assurance that § 401 and applicable water quality law will not be violated as a result of wetland fill, stream alteration and identified mitigation activities?
20. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the Certification does not address water quality impacts to Gilliam Creek?

**AR 006106**

21. Is there reasonable assurance that § 401 and applicable water quality law will not be violated where the Certification allows future amendment of its terms "by any future Ecology-approved NPDES (§ 402) permit for the Seattle-Tacoma international Airport (STIA) . . . as determined in that permit"? (See, e.g., amended Certification at P. 4, § 1.f.)

STIPULATED TO this 15 day of November, 2001.

HELSELL FETTERMAN LLP



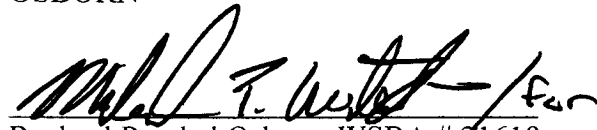
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Attorneys for Appellant ACC

FOSTER PEPPER & SHEFELMAN



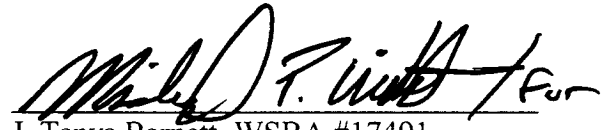
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Attorneys for Respondent Port of Seattle

LAW OFFICES OF RACHAEL PASCHAL  
OSBORN



Rachael Paschal Osborn, WSBA # 21618  
Attorney for Appellant ACC

MARTEN BROWN INC.



J. Tanya Barnett, WSBA #17491  
Attorneys for Respondent Port of Seattle

*Email Authorization attached.*

CHRISTINE O. GREGOIRE, ATTORNEY  
GENERAL



Thomas J. Young, WSBA #17366  
Joan M. Marchioro, WSBA #19250  
Attorneys for Respondent Department of Ecology

**AR 006107**

**EXHIBIT A**  
**ISSUES PROPOSED SEPARATELY BY PARTIES**

**Issues Proposed Separately by ACC**

1. Is there reasonable assurance that § 401 and applicable water quality law will not be violated where determination of compliance with dam safety requirements is deferred? [former ACC Issue 11]
2. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the Port has commenced activities impacting waters of the state prior to § 401 certification of the Third Runway project? [former ACC Issue 18]
3. Is there reasonable assurance that § 401 and applicable water quality law will not be violated if the Certification violates the requirements of WAC 173-201A-160 regarding implementation of the water quality standards for nonpoint source and stormwater pollution? [former ACC Issue 19]

**Issues Proposed Separately by Port**

1. Whether requiring facilities subject to dam safety regulations (Chapter 173-175 WAC) to obtain a dam safety permit prior to commencing construction provides reasonable assurance that water quality standards will be met? [former Port Issue 2]

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**AR 006108**



**Witek, Michael P.**

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**From:** Witek, Michael P.  
**Sent:** Thursday, November 15, 2001 1:26 PM  
**To:** 'Marchioro, Joan (ATG)'; 'Tanya Barnett'  
**Cc:** Steve Jones; Roger Pearce  
**Subject:** RE: Port comments on stipulation

The edits are acceptable to ACC. I will sign for Port and Ecology and Fax and Mail to Board and all parties.

thank you

Mike

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

**From:** Marchioro, Joan (ATG) [mailto:JoanM2@ATG.WA.GOV]  
**Sent:** Thursday, November 15, 2001 1:25 PM  
**To:** 'Tanya Barnett'; Witek, Michael P.  
**Cc:** Steve Jones; Roger Pearce  
**Subject:** RE: Port comments on stipulation

The edits are fine with me. If those edits are acceptable to the ACC, I have no objection to Mike signing the stipulation for Ecology. Thanks, Joan

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

**From:** Tanya Barnett [mailto:tbarnett@martenbrown.com]  
**Sent:** Thursday, November 15, 2001 1:17 PM  
**To:** Mike Witek; Marchioro, Joan (ATG)  
**Cc:** Steve Jones; Roger Pearce  
**Subject:** Port comments on stipulation

Mike and Joan, I'm attaching the draft stipulation that Mike sent out today with just a few minor edits (shown in redline). If these changes are acceptable to everyone, we suggest that Mike sign the stipulation on behalf of the Port. Please let me know if any of the edits are not acceptable.

Thanks.

--

Tanya Barnett  
tbarnett@martenbrown.com

Marten Brown Inc.  
421 South Capitol Way, Suite 303  
Olympia, Washington 98501

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**AR 006109**