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HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

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

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

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

ACC'S MOTION TO SUPPLEMENT  
THE RECORD - 1

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

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

14  
15 This really sucks in that I raised all these issues, but the Port's consultants were unwilling to do  
16 it right, said it didn't matter, and got me to buy into the approach through the facilitated  
17 process.<sup>3</sup>

18 \* \* \*

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

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

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

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

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

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

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

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

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

1 prevail on its assertion that the low flow plan is a speculative and inadequate basis for the 401  
2 Certification. Consideration of this evidence is appropriate and necessary for resolution of the stay  
3 issues. Indeed, the very existence of this new information demonstrates that ACC is correct in its  
4 arguments on the need for a stay.  
5

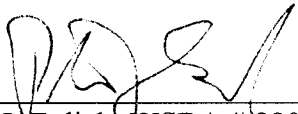
6 Because the Board has not yet ruled on the motion for stay, and because these documents came  
7 into existence *after* briefing and oral argument on October 15, ACC respectfully requests that the stay  
8 motion record be supplemented with the documents attached to the accompanying Grad Declaration.

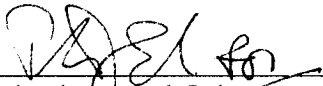
9 DATED this 16<sup>th</sup> day of November, 2001.

10 Respectfully submitted,

11 HELSELL FETTERMAN

12  
13 By:

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