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ENVIRONMENTAL
HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)	
)	PCHB No. 01-133
Appellant,)	
v.)	PCHB No. 01-150
)	
DEPARTMENT OF ECOLOGY and)	AIRPORT COMMUNITIES
THE PORT OF SEATTLE,)	COALITION'S PRELIMINARY
)	LIST OF LEGAL ISSUES, WITNESSES
Respondents.)	AND EXHIBITS
)	

I. LEGAL ISSUES

A. Section 401 Issues

1. Does the Certification fail to provide reasonable assurance that the project will not violate state water quality standards in affected surface waters, pursuant to, *inter alia*, 33 U.S.C. § 1341; 40 CFR § 121.2; RCW Ch. 90.48.080; and WAC Ch. 173-201A?
2. Does the Certification fail to provide reasonable assurance of compliance with water quality standards due to Ecology's failure to require complete data, reports, and plans?
3. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because the certification substitutes future monitoring for current assurance that water quality standards will not be violated?
4. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because the Section 401/404 application and associated public notice lacked sufficient information to generate meaningful comments regarding essential elements of the Third Runway Project?

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Stream Flow/Water Rights Issues

5. Does the Certification fail to provide reasonable assurance that the low flow impacts of the proposed project will be permanently and adequately compensated in violation of, *inter alia*, 33 U.S.C. § 1341; 40 CFR § 121.2; RCW Ch. 43.21C; RCW Ch. 90.03; and RCW Ch. 90.48?

ACC'S PRELIMINARY LIST OF LEGAL
ISSUES, WITNESSES AND EXHIBITS - 1

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ORIGINAL

- 1 6. Does the Certification fail to provide reasonable assurance that flow impacts will be
2 appropriately mitigated because the low flow analysis (to date) rests on inaccurate and
3 incomplete data and assumptions?
- 4 7. Does the Certification fail to provide reasonable assurance of compliance with water quality
5 standards because Ecology failed to required the Port to obtain a water right for flow
6 augmentation?
- 7 8. Does the Project fail to comply with SEPA by failing to analyze the impacts of a water rights
8 application?

9 **Stormwater/Water Quality Issues**

- 10 9. Does the Certification fail to provide reasonable assurance of compliance with water quality
11 standards due to inadequate, *inter alia*, stormwater quality treatment, management of
12 accumulated contaminated sediments in the reserve vaults, aeration, loss of water in transit
13 between stormwater vaults and streams, and mechanisms for metered release (e.g., blocked
14 nozzles)?
- 15 10. Does the Certification fail to provide reasonable assurance of compliance with water quality
16 standards because the plan allows for the discharge of stormwater vault dead storage into Class
17 AA streams?
- 18 11. Does the Certification fail to provide reasonable assurance of compliance with water quality
19 standards because the plan relies for reasonable assurance on monitoring, and /or the
20 monitoring is based on inapposite standards?
- 21 12. Does the Certification fail to provide reasonable assurance of compliance with water quality
22 standards in affected surface waters, because it allows discharge of polluted stormwater during
23 peak flow periods in violation of 33 U.S.C. § 1341; 40 CFR § 121.2; RCW Ch. 90.48; WAC
24 Ch. 173-201A?
- 25 13. Does the Certification fail to provide reasonable assurance of compliance with water quality
standards because the Certification fails to require the Port remedy its current violations of its
NPDES permit?
14. Does the Certification fail to provide reasonable assurance of compliance with water quality
standards because the Certification fails to provide reasonable assurance of compliance with
water quality standards and instead substitutes reliance on current and future NPDES permits?
15. Does the Certification fail to provide reasonable assurance of compliance with water quality
standards because it authorizes a de facto mixing zone in violation of WAC 173-201A-100?

- 1
- 2 16. Does the Certification fail to provide reasonable assurance of compliance with water quality
- 3 standards because the Port's Comprehensive Stormwater Management Plan (CSMP) does not
- 4 provide appropriate "best management practices"?
- 5
- 6 17. Does the Certification fail to provide reasonable assurance of compliance with water quality
- 7 standards because it fails to require necessary retrofitting of existing stormwater facilities and
- 8 construction of new facilities to handle additional runoff from the additional 300-plus acres of
- 9 impervious surfaces?
- 10
- 11 18. Does the Certification fail to provide reasonable assurance of compliance with water quality
- 12 standards because the CSMP fails to impose "all known available and reasonable treatment
- 13 methods" (AKART) for stormwater discharges, i.e., effluent limitations as required by federal
- 14 law; numerous approvals that defer analysis and monitoring to later dates?
- 15
- 16 19. Does the Certification fail to provide reasonable assurance of compliance with water quality
- 17 standards because it defers assurance of compliance by the Port's proposed massive stormwater
- 18 structures with Dam Safety requirements, in violation of 33 U.S.C. §1341; 40 CFR § 121.2; and
- 19 WAC 173-1175-010, *et seq*?
- 20
- 21 20. Does the Certification fail to provide reasonable assurance of compliance with water quality
- 22 standards because the Port has not conducted subsequent SEPA/NEPA review for the
- 23 Stormwater Management Plan, the Low Streamflow Analysis and Flow Impact Offset Proposal,
- 24 the use of contaminated fill for the embankment, and other documents and proposals reflecting
- 25 newly disclosed impacts?

Fill Criteria/Embankment Issues

- 21 21. Does the Certification fail to provide reasonable assurance of compliance with water quality
- 22 standards because it fails to provide appropriate analysis of the quality and content of ground
- 23 water that will infiltrate through the embankment and Mechanically Stabilized Earth Wall to
- 24 downstream wetlands and surface waters?
- 25
- 26 22. Does the Certification fail to provide reasonable assurance of compliance with water quality
- 27 standards because the ultimate method of determining compliance with fill criteria is inherently
- 28 defective and, further, explicitly subject to post-401 amendment?
- 29
- 30 23. Does the Certification fail to provide reasonable assurance of compliance with water quality
- 31 standards because the Certification fails to incorporate all embankment fill criteria and
- 32 construction methods required in the U. S. Fish and Wildlife Service Biological Opinion?
- 33
- 34 24. Does the Certification fail to provide reasonable assurance of compliance with water quality

standards because the fill criteria contaminant levels exceed natural background and are otherwise not protective of water quality?

25. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because the Certification does not require appropriate sampling?

26. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because the fill criteria violate antidegradation policies of the Clean Water Act and Washington Pollution Control Act?

27. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because it fails to address migration and discharge of groundwater polluted by hazardous substances, originating in and around Sea-Tac Airport, to surface waters as a result of the Third Runway Project?

28. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because it fails to address and provide mitigation for potential failure during seismic events of all or portions of the Mechanically Stabilized Earth wall and embankment structures?

Wetland Issues

29. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because of its failure to address the impacts of in-basin wetland fill and concomitant mitigation activities on water quality in the streams surrounding Sea-Tac Airport?

30. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because the Natural Resources Mitigation Plan fails to ensure adequate and appropriate mitigation for the aquatic resources impacts caused by the Third Runway Project?

31. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because the Third Runway and related improvements will result in a net loss in wetland functionality?

32. Does the Certification fail to provide reasonable assurance of compliance with water quality standards because it does not address cumulative effects of wetlands impacts?

B. CZMA Issues

33. Does the concurrence issued by Ecology pursuant to the Coastal Zone Management Act of 1972, 16 U.S.C. §§1451 to 1464 (“CZMA”), for the Port’s consistency certification fail to comply with procedural and substantive requirements of the CZMA and Washington’s approved Coastal Zone Management Plan (“CZMP”)?

- 1
- 2 34. Does the concurrence issued by Ecology fail to establish the consistency of the Third Runway
- 3 and related projects with the CZMA because Ecology failed to require the Port to provide all
- 4 necessary data and information required by the CZMA consistent with 15 C.F.R. § 930.58(1)-
- 5 (4) and the CZMP?
- 6 35. Does the concurrence issued by Ecology fail to establish the consistency of the Third Runway
- 7 and related projects with the CZMA because it failed to demonstrate consistency of the project
- 8 with the enforceable policies of the CZMP, including the Shoreline Management Act, Ch. 90.58
- 9 RCW (“SMA”)?
- 10 36. Does the concurrence issued by Ecology fail to establish the consistency of the Third Runway
- 11 and related projects with the CZMA because it failed to demonstrate consistency of the project
- 12 with the enforceable policies of the CZMP, including the Clean Water Act, 33 U.S.C. §§1251
- 13 to 1387 (“CWA”), and its State counterpart, Ch. 90.48 RCW?
- 14 37. Does the concurrence issued by Ecology fail to establish the consistency of the Third Runway
- 15 and related projects with the CZMA because it failed to demonstrate consistency of the project
- 16 with the enforceable policies of the CZMP, including the Clean Air Act, 42 U.S.C. §§ 7401 to
- 17 17671 (“CAA”), and its State counterpart, Ch. 70.94 RCW?
- 18 38. Does the concurrence issued by Ecology fail to establish the consistency of the Third Runway
- 19 and related projects with the CZMA because it failed to demonstrate consistency of the project
- 20 with the enforceable policies of the CZMP, including the State Environmental Policy Act, Ch.
- 21 43.21C RCW (“SEPA”)?

22 **C. Section 401 Amendment Issues**

- 23 39. Was the Amended Certification issued in violation of applicable regulations in WAC Chapter
- 24 173-225, including but not limited to WAC 173-225-030(1) (public notice requirements), -
- 25 030(2) (opportunity for public comment), and -030(3) (requirement for departmental
- determination concerning public hearing), and without opportunity for comment by the public
- and agencies with jurisdiction?
40. Is the Amended Certification invalid for failure to comply with applicable federal regulations,
- including but not limited to 40 C.F.R. §121.2(a)3 and §121.2(b)?
41. Is the Amended Certification illegally limited to “Port 404 projects,” and otherwise improperly
- limited in scope (including its geographical, operational, and temporal reach), all in violation of
- Section 401 of the Clean Water Act, by failing to address “direct and indirect, short and long
- term, upstream and downstream, construction and operation” impacts, all of which must be a
- part of the State’s 401 certification review and order?

- 1
- 2 42. Does the Amended Certification illegally allow the Port to unilaterally commence activities
- 3 impacting the waters of the state without Section 401 review and certification?
- 4 43. Does the Amended Certification violate the requirement in WAC 173-201A-160(3)(a) and (b),
- 5 that "violation of water quality criteria shall be prevented"?
- 6 44. Does the Amended Certification impermissibly limit the protections afforded under Section 401
- 7 of the Clean Water Act by stating the 401 conditions will be superseded "by any future
- 8 Ecology-approved NPDES permit for the Seattle-Tacoma International Airport (STIA), ... as
- 9 determined in that permit"? (*See, e.g.*, Amended Certification at p. 4, § 1.f.)
- 10 45. Does the Amended Certification dispense with the requirement for pre-construction hydrologic
- 11 monitoring (underscoring Ecology's failure to require adequate baseline data) and further
- 12 impermissibly reduces monitoring and buffering protection for wetlands, all necessary for
- 13 reasonable assurance that water quality standards will not be violated with regard to wetlands?
- 14 46. Does the Amended Certification further reduce the application of the already-deficient
- 15 conditions (including testing, content and locational criteria) for acceptance of fill in violation
- 16 of the Clean Water Act, eliminating even the pretense of reasonable assurance? (*See, e.g.*,
- 17 Amended Certification at pp. 14-19, Condition E.)
- 18 47. Does the Amended Certification substitute fill criteria and fill acceptance conditions which
- 19 further weaken the inadequate conditions in the original Certification? (*See, e.g.*, Amended
- 20 Certification at pp. 14-19, Condition E.)
- 21 48. Does the Amended Certification render even more illusory and insufficient for reasonable
- 22 assurance the original Certification's purported stormwater retrofit condition? (*See, e.g.*,
- 23 Amended Certification at p. 27, Condition J(2)(a).)
- 24 49. Does the Amended Certification similarly reduce protection even further below the level of
- 25 reasonable assurance in its limitation of prior Condition J(2)(f) concerning overtopping of
- stormwater facilities and in a subtle wording change in Condition K(2), eliminating protection
- from pollution for pond waters?

II. POTENTIAL WITNESSES

ACC may call the following as witnesses at the hearing on the merits of this matter. This list is preliminary and may be amended as further information is obtained. ACC reserves the right to modify this list in response to issues, witnesses or exhibits disclosed in discovery or proposed or raised by the

1 Port or Ecology. ACC further reserves the right to call all witnesses listed by other parties or who have or
2 will submit testimony, written or oral, in this appeal.

3 **Department of Ecology Personnel:**

4 Ann Kenny
5 Ray Hellwig
6 Kevin Fitzpatrick
7 John Drabek
8 Erik Stockdale
9 Ching-Pi Wang
10 Jeannie Summerhays
11 Tom Fitzsimmons
12 Gordon White
13 Bob Barwin
14 Chung Ki Yee
15 Steve Alexander
16 John Wietfeld
17 Roger Nye
18 Dave Garland
19 Nancy Groves
20 Curt Hart
21 Pete Kmet
22 Dan Swenson
23 Steven Hirschey
24 Joan Marchioro

25 **Port of Seattle Personnel:**

Elizabeth Leavitt
Gina Marie Lindsay
Paul Agid
Wendy Clement
Keith Smith
Michael Cheyne
Jay Manning

Other Persons:

Tom Luster, former Dept. of Ecology employee
Kelly Whiting, King County DNR

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1 David Masters, King County DNR
2 Parametrix personnel, including but not limited to Jim Kelley, Paul Fendt
3 Kate Snider and any other Floyd & Snider personnel who participated in facilitated meetings
4 between the Port and Ecology
5 Shannon & Wilson personnel, including but not limited to Katie Walter, Sam Casne and Leslie
6 Regier

7 **ACC Expert Witnesses:**

8 Amanda Azous, Azous Environmental Sciences
9 Dyanne Sheldon, Sheldon & Associates
10 Bill Rozeboom and/or Malcolm Leytham, Northwest Hydraulic Consultants
11 Dr. Peter Willing, Water Resources Consulting, Inc.
12 Dr. John Strand, Columbia Biological Assessments
13 Dr. Patrick Lucia and/or Dr. Ed Kavazanjian, GeoSyntec Consultants
14 Dr. Stephen Hockaday, Pacific Aviation Consulting, Inc.
15 Greg Wingard, Waste Action Project
16 Bob Olander, City Manager, City of Des Moines

17 **II. POTENTIAL EXHIBITS**

18 ACC may introduce the following or portions thereof as exhibits at the hearing on the merits of
19 this matter. ACC reserves the right to modify this list in response to issues, witnesses or exhibits
20 proposed or raised by the Port or Ecology.

- 21 1. Documents (including drafts, finals, and correction/replacement portions) submitted to
22 Ecology by the Port or its contractors (e.g., Parametrix, Hart Crowser) and/or reviewed by and/or
23 allegedly relied upon by Ecology in its review of the Port's application for its 401 certification
- 24 2. Documents generated by the King County Department of Natural Resources pursuant to
25 its review of successive iterations of the Port's Stormwater Management Plan, obtained by ACC pursuant
to public disclosure requests;
3. Ecology memos, emails and meeting notes, obtained by ACC pursuant to public
disclosure requests;
4. Correspondence (including letters, memos and emails) between Ecology and the Port or its
contractors, obtained by ACC pursuant to public disclosure requests;
5. Documents generated by the Governor's Office, the State Office of Community Trade,

1 and Economic Development (CTED), and other state office or agencies, obtained by ACC pursuant to
2 public disclosure requests;

3 6. Documents generated by the U.S. Army Corps of Engineers pursuant to its review of the
4 Port's application for a Section 404 permit for the Third Runway and related Master Plan Update projects,
5 obtained by ACC pursuant to the Freedom of Information Act;

6 7. Documents generated by Pacific Groundwater Group in connection with its review of
7 certain aspects of the Port's proposals;

8 8. Documents generated by Shannon & Wilson pursuant to its contract with Ecology to
9 review aspects of the Port's proposals relating to wetlands;

10 9. Regulatory or reference documents relied upon or referred to by the Port or Ecology and/or
11 applicable by law or standard practice to elements of the Port's proposal, including for example the King
12 County Surface Water Design Manual;

13 10. Final written comments, testimony by, and documents identified by ACC and by experts
14 working on behalf of ACC pursuant to review of the Port's proposals and of documents such as those
15 listed above;

16 11. Water Resources documents relating to instream flow augmentation for various projects;

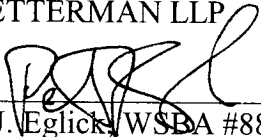
17 12. Documents from WRATS database for WRIA 9;

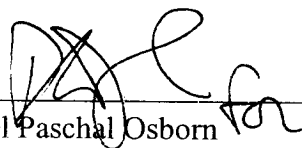
18 13. Other documents and publications related to the subject matter of this appeal.

19 DATED this 10 day of October, 2001.

20 HELSELL FETTERMAN LLP

21 By:

22 
Peter J. Eglick, WSBA #8809
Kevin L. Stock, WSBA #14541
Michael P. Witek, WSBA #26598
Attorneys for Appellant

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Attorneys for Appellant

24 **AR 006423**

25 ACC'S PRELIMINARY LIST OF LEGAL
ISSUES, WITNESSES AND EXHIBITS - 9

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AIRPORT COMMUNITIES COALITION,)
Appellant,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY; and)
THE PORT OF SEATTLE,)
Respondents.)

No. 01-133
No. 01-160

CERTIFICATE OF SERVICE

(Section 401 Certification No.
1996-4-02325 and CZMA concurrency
statement, issued August 10, 2001,
Reissued September 21, 2001, under No.
1996-4-02325 (Amended-1))

I, Michelle Isaacson, an employee of Helsell Fetterman LLP, attorneys for the Airport
Communities Coalition, certify that:

I am now, and at all times herein mentioned was, a resident of the State of Washington, and
over the age of eighteen years.

On October 10, 2001, I caused to be delivered a true and correct copy of Airport
Communities Coalition's Preliminary List of Legal Issues, Witnesses and Exhibits, to the
following people by the means specified below:

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Rachael Paschal Osborn
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CERTIFICATE OF SERVICE - 1

ORIGINAL

AR 006424

1 Joan M. Marchioro
2 Thomas J. Young
3 Assistant Attorneys General
4 Ecology Division
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6 Olympia, WA 98502
7 **Via Facsimile & Federal Express**
8 **Priority Overnight**

Linda J. Strout, General Counsel
Traci M. Goodwin, Senior Port
Counsel
Port of Seattle
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Seattle, WA 98121
Via Legal Messenger

7 Roger A. Pearce
8 Steven G. Jones
9 Foster Pepper & Shefelman PLLC
10 1111 Third Avenue, Suite 3400
11 Seattle, WA 98101
12 **Vial Legal Messenger**

Jay J. Manning
Gillis E. Reavis
Marten & Brown LLP
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Via Legal Messenger

11 I certify under penalty of perjury under the laws of the State of Washington that the
12 foregoing is true and correct.

13 DATED this 10th day of October, 2001, at Seattle, Washington.

14
15 
16 _____
Michelle Isaacson

17 g:\lu\acc\pchb\certserv-witness-101001.doc

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CERTIFICATE OF SERVICE - 2

AR 006425