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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

ENVIRONMENTAL
HEARINGS OF

AIRPORT COMMUNITIES COALITION,)

No. 01-133

Appellant,)

No. 01-160

v.)

ACC'S SUR-REBUTTAL IN SUPPORT
OF ITS MOTION FOR A STAY

DEPARTMENT OF ECOLOGY and)
THE PORT OF SEATTLE,)

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))

Respondents.)

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1 Ecology resorts to aspersion rather than information in responding to ACC's Reply, accusing
2 ACC of "misstatement and inaccurate renditions of the record." It fails to identify any, however.
3 Ecology is in denial about the plain meaning of its amended conditions.
4

5 In its Sur-Reply (p. 2) Ecology still maintains "the Port is to use only naturally occurring
6 uncontaminated soils" for fill. It asserts the purpose of sampling is to determine if soils "include
7 naturally occurring contaminants, which would not be unprecedented given [the] geologic history of
8 this region." Ecology fails to explain where in this region "naturally occurring uncontaminated soils"
9 include, for example, up to 2000 milligrams per kilogram ("mg/kg") of chromium (more than 40 times
10 the natural background), 250 mg/kg of lead, and 2000 mg/kg of diesel and heavy oil.¹ Cert. § E.1.(b)
11 (fill criteria limitations). Ecology also ignores the contaminated soils already stockpiled on site from
12 Hamm Creek, the First Avenue Bridge site and the Black River Quarry. First Strand Dec. at ¶¶23-25.
13

14 No matter how much screening and review is performed, there is no reasonable assurance of
15 compliance with water quality standards unless appropriate substantive numeric criteria are imposed
16 and verified with appropriate testing protocols. The Port still asserts (n. 4) that three of the
17 contaminant criteria in the 401 (antimony, selenium and silver) are set at Practical Quantitation limits
18 (PQL). As Dr. Lucia explains in his second declaration (¶¶ 9-11), there are multiple PQL testing
19 methods for many metals, including antimony, selenium and silver, with the 401 relying on the least
20 effective,² rather than on the best available techniques to determine the suitability of imported fill.
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23 ¹ According to DOE Pub. #94-115, the Puget Sound natural background soil concentration for chromium is 48 mg/kg, and
24 24 mg/kg for lead. Of course, there is no natural background concentration for refined petroleum products such as diesel
25 and heavy oil.

² The Port claims that the PQL for antimony is 16 mg/kg, but method 7041 establishes a PQL of 1.5 mg/kg; the Port claims
that the PQL for selenium is 5 mg/kg, but alternative methods establish PQLs of 1mg/kg and .75 mg/kg; the Port claims
that the PQL for silver is 5 mg/kg, but alternative methods establish PQLs of 3.5 mg/kg and .1 mg/kg. The Port's selection

1 Respondents also fail to acknowledge the uncertainty of SPLP. Worse, the 401 explicitly allows the
2 SPLP work plan to be “amended in the future” without limitation.³

3 The Port relies on MTCA where it is advantageous (p. 4), but rejects MTCA sampling
4 protocols, resorting instead to the 401’s Phase 1 and II site assessments. However, a Phase I does not
5 turn any dirt and a Phase II has no specific testing protocol, and thus cannot meet the 95% minimum
6 confidence level identified as the minimum standard by Mr. Kmet.⁴ Strand Sur-Reply Decl. ¶ 8. Good
7 science demands that the Port use more than six samples to characterize every 100, 000 cubic yards of
8 candidate fill. *Id.*⁵

9 The Port’s claim (p. 4) that the amended 401 dispensing with the “surficial third layer”
10 described in the USFWS Biological Opinion (“BO”) will have no effect is disingenuous, as is its claim
11 that the top layer “has very little if anything to do with water quality.” In fact, the BO can be changed
12 through reinitiated consultation (BO at 55), and, as the history of the Amended 401 reflects, the Port is
13 not shy about making such demands. Fill contaminants are a concern as they may directly contaminate
14 wetlands and surface waters through runoff following seasonal rains. First Strand Decl. at ¶ 28.

15 Wetland scientist Amanda Azous points out regarding wetlands and the change in Condition
16 D.1.g that Ecology’s Stockdale relies in his new declaration not on wetland hydrological data at all, but
17 on “well log data from the Borrow 4 area.” Azous Sur-Reply Decl., ¶ 5; *see* ¶ 6. What actual wetland
18 monitoring data actually exists is sparse to begin with, and “none of the monitoring stations are located
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22 of PQLs for antimony (16 mg/kg), silver (5 mg/kg) and selenium (5 mg/kg) is telling, given that the standard advocated by
23 Mr. Kmet would have required maximum soil concentrations of 5 mg/kg for antimony, 2 mg/kg for silver, and .3 mg/kg for
24 selenium.

24 ³ Cert. § E.1.(b)

25 ⁴ *See* Kmet Comments on 401 sampling, attached as Exhibit C to Dr. Lucia’s first declaration.

⁵ Pete Kmet, Ecology’s Toxics Cleanup Program senior environmental engineer, advises that, even for “native borrow pits,”
a minimum of 10 samples should be required. First (Reply) Lucia Decl., ¶ 40, Ex. C (Kmet email dated 9/11/2000).

1 in wetland areas the Port plans to fill, which, in the near term, include the eastern lobe of Wetland 18,
2 and Wetlands 19 and 20.” *Id.* at ¶ 7. Azous again notes that each “provides critical seepage flows to
3 remaining wetlands and Miller Creek that remain unmonitored.” *Id.* As she summarizes:

4 the small quantity of data gathered, the fact that the Port began monitoring wetlands *after* it
5 began construction and the complete lack of monitoring in wetlands that will be filled before
6 PCHB can hear the merits of 401 appeal provide no reasonable assurance the hydrologic
7 performance standards agreed to by Ecology will protect remaining beneficial uses.

8 *Id.* at ¶ 9. The Amended 401 conditions permit the Port, even more than before, to cook the books on
9 maintaining the hydrologic regime for wetlands. If the earlier condition were retained, requiring pre-
10 construction data, the Port could have been required to gather such data before it commenced any work
11 authorized under the 401⁶.

12 Respondents’ wetlands declarants have crossed the line from science to advocacy, refusing to
13 acknowledge basic concepts utilized for two decades in wetlands study. Azous ¶¶ 12, 13 (normal
14 rainfall year; typical season for wetland hydrology). As both Azous and Sheldon note,⁷ respondents’
15 wetlands consultants speak to the Board as if unaware of published guidelines emphasizing the need to
16 establish pre and post-construction hydrology. *Id.* ¶ 17.⁸

17 Finally, the Port does not really address the core stormwater issues. The Amended 401 retrofit
18 standard, “to the extent practicable,” still “leaves it up for future definition at the Port’s convenience.”
19

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22 ⁶ “Dr. Kelley does not explain the how hydrologic data collected from wetlands with watersheds that change each month
23 can be reliable nor does he explain how it can be used to establish criteria to protect wetland functions.” *Id.* at ¶ 10.

24 ⁷ See Sheldon’s new declaration, attached.

25 ⁸ Guidelines published by DOE WDFW, USACE, USFWS, and EPA agree that:

The water regime is the single most important variable in establishing or maintaining a functioning wetland, and it is extremely important to understand how water will be provided to your mitigation site. A thorough understanding of the seasonal variability in water flows, water volumes, and residence time is needed. [Id. at ¶ 17; see ¶ 5.]

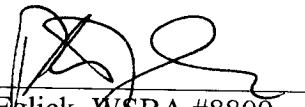
1 Willing Sur-Reply Decl. at ¶ 3.⁹ Of the Port's four BMPs referred to by Mr. Fendt, three are from the
2 King County Basic Menu, meant to address only sediment control. Willing ¶ 4. If the Manual had
3 actually been followed, King County Large Site drainage review requiring enhanced water quality
4 treatment would have been required. Rozeboom Reply Decl. ¶ 6.


5
6 ACC need not establish beyond a reasonable doubt that water quality violations will occur. It
7 need only show an absence of reasonable assurance that water quality violations will not occur. It has
8 done so.

9 DATED this 10 day of October, 2001.

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23 ⁹ Paul Fendt argues in his latest declaration that retrofit is impracticable because of service interruptions. No
24 documentation is provided for this belated claim, but it is suggestive of how the Port can be expected to exploit the
25 Amended 401 language. Similarly, Mr. Fendt's claims regarding the cost-prohibitive nature of retrofit are neither
supported, nor is there any indication that these costs were weighed against the cost to water quality of not requiring them.
See Fendt Decl. ¶ 6.