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FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, v. DEPARTMENT OF ECOLOGY AND THE PORT OF SEATTLE, Respondents.	No. 01-133 No. 01-160 PORT OF SEATTLE'S SUR REPLY MEMORANDUM

ORIGINAL

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None of the new issues regarding the amended §401 Certification supports ACC's stay request.

1. The Requirement of Public Notice, Public Comment or Public Hearing Applies to a New Application, Not an Amendment of a §401 Certification.

ACC claims that the §401 Certification was amended without required public notice and involvement. However, controlling regulations do not require a new public notice, public comment, or public hearing prior to amending a §401 Certification. The regulation cited by ACC only requires public notice and hearing "whenever an *application* for certification required by section 401 of FWPCA is filed with [Ecology]." WAC §173-225-030(emphasis added).[1] Multiple public hearings and opportunities to comment have been provided during Ecology's process. No regulation requires a new public notice, hearing and opportunity to comment when an existing §401 certification is amended.

2. The Amended §401 Certification Complies With 40 CFR §121.2.

ACC asserts that the amended §401 Certification fails to comply with 40 CFR §121 because it lacks a statement that the activity for which the §401 Certification was required will not violate applicable water quality standards. *See* 40 CFR §121.2(a)(3). This is a misstatement of the factual record. As with the original §401 Certification, the amended §401 Certification consists of a letter and an order containing the §401 Certification conditions. That letter clearly states that the projects at STIA will comply with the applicable sections of the Clean Water Act.[2]

3. ACC Continues to Incorrectly Claim That the Existing Airport Will Not Be Retrofitted.

In its argument regarding amended condition J(1)(c), ACC claims that changes to that condition allow the Port to avoid retrofitting the existing stormwater system at STIA. Again, ACC misrepresents the factual record. As made crystal clear in the project Stormwater Management Plan, one hundred percent of the existing airport will be retrofit for stormwater quantity (peak flow control) to mimic pre-development conditions. 2nd Fendt Dec.¶4 & Ex.A. All but 80 acres (out of 540) of the existing airport will be retrofit for stormwater quality controls. 2nd Fendt Dec.¶¶5-8 & Ex.B. Condition J.1 of the amended §401 Certification

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[1] Similarly, Subsection 030(2) provides for comment by "any person desiring to present views *on the application* . . .," and subsection 030(3) authorizes Ecology to hold public hearings *for the application*. (Emphasis added).

[2] Pearce Declaration Ex. A. The first paragraph of the letter states that Ecology "certif[ies] that the work proposed in the Port of Seattle's revised Joint Aquatic Resource Permit Application dated October 25, 2000 . . . *complies with the applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, as amended and other appropriate requirements of state law.*" (Emphasis added).

requires implementation of the SMP, which includes those retrofit requirements. This retrofit of the existing airport is a huge undertaking, and an unparalleled requirement, and will significantly improve stormwater quality at STIA over existing conditions.

4. Further Monitoring of Downslope Wetlands Is Unnecessary.

ACC claims the changes to the "before construction" monitoring condition of downslope wetlands will make performance standards for those wetlands impossible. ACC is completely incorrect for three independent reasons, as explained in detail in the accompanying 2nd Dec. of James C. Kelley, Ph.D. First, there is already more than enough information on the downslope wetlands to evaluate any post-construction changes. Second, the Port will have ample information regarding plant and soil conditions. Plant and soil data are far more useful than hydrologic information because they are free of the short-term variations and aberrant conditions to which hydrologic data is subject. Third, and most significantly, the §401 Certification requires detailed monitoring and periodic delineation of the downslope wetlands. If any problem is observed, the Port is required to take immediate action to assure that the wetlands are healthy and fully functional.

5. ACC's Concerns on Fill Criteria Have No Merit and Completely Fail to Show That Any Adverse Impacts to Water Quality Will Occur.

ACC's attack on the amended §401 Certification's fill criteria is replete with factual errors, misstatements of evidence and obfuscation.[3] In the end, the conclusions reached by ACC and its experts are not based on science but only on the bald assertion that soil meeting the fill criteria "potentially" or "probably" will have some adverse effect on water quality. This falls far short of meeting ACC's burden to show that it will likely prevail at trial on these issues and therefore that a stay is warranted.

First, ACC has hopelessly confused how the fill criteria work. ACC ignores the fact that the 401's narrative criteria (requiring Phase I and Phase II assessments) are designed to limit the sources from which fill can be accepted. If a site is even potentially contaminated based on a Phase I review, a Phase II sampling effort will be performed. §401 §E.1(a). The Phase II is designed to determine whether *any* environmental

[3] ACC's reply brief raises a number of new issues that are unrelated to the changes in the amended 401. One example of these new issues is ACC's misstatements about fill from the Black River Quarry. ACC Mem. p. 31. Although the Port disagrees strongly with ACC's twisting of the facts and erroneous conclusions, the Port does not address those issues in this brief, in compliance with the Board's requirement that this sur-reply address only changes between the two 401 Certifications.

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concerns are present. *Id.* The Port will provide test results to Ecology before accepting any fill. *Id.* To make Ecology's review effective and timely, the Port will fund an additional three to five professional staff at Ecology to oversee implementation of the §401 Certification, including review of fill quality data. Ann Kenny Dec.¶18. This initial screening, plus Ecology's review, should alone be sufficient to provide reasonable assurance.

Second, the 401 Certification goes even further to protect water quality. For the drainage layer cover, the criteria were based on Ecology's accepted three-phase back-calculation model, which calculates, using extremely conservative assumptions, how much of any constituent can be present in soil without causing water quality standards to be exceeded. Gould Dec.¶13.[4] For chromium and diesel, numbers more stringent than the back-calculated figures are based on the terrestrial ecological criteria in WAC 173-340-749. *Id.* For the remaining constituents, most criteria are also either derived from the model or based on Puget Sound background levels. *Id.* ¶14.[5] Some MTCA Method A numbers were used, but only in instances where they were shown by the three-phase model to be protective of water quality. *Id.*¶15; 2nd Gould Dec.¶5.

ACC has yet to offer *any* evidence to rebut the fact that the fill criteria are protective of water quality. ACC's failure to address this central issue with regard to fill criteria—whether water quality will be adversely affected—shows that ACC will certainly not prevail at trial, and therefore cannot prevail on the motion for stay.

ACC's argument boils down to the contention that Ecology lacked reasonable assurance that water quality would be protected because the Port is not required, in all instances, to use "naturally occurring uncontaminated soils." Even on this point, however, which ACC claims is "precisely one of the grounds" for its appeal, ACC's makes inconsistent arguments. For two substances—antimony and arsenic—the 401 Certification *requires* the use of background constituent concentrations, yet ACC criticizes the Port because the three-phase model produces numbers *lower than background.* Rather than provide evidence that there will be any effect on water quality, ACC instead blindly criticizes the numbers chosen in the §401 Certification—even those it elsewhere argues Ecology should adopt.

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[4] The criteria were revised up or down based on background levels or the Practical Quantitation Limits ("PQL"). ACC's contention that "none of the contaminants" are set at PQLs is incorrect. Exhibit 3 to Ecology's November 23, 1993 Technical Memorandum #3 clearly shows that the criteria for antimony, selenium and silver were in fact set at PQLs.

[5] For a complete description of the derivation of all the 401 Certification's criteria, see Exhibit E. to Linn Gould's first declaration.

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ACC complains that the 401 Certification omits the "third layer" described in the F&WS Biological Opinion. This argument overlooks the fact that the Port is required to comply with the terms of the Biological Opinion, even if the 401 Certification does not mention the third layer. 2nd Gould Dec.¶13[6]

ACC also challenges use of the Synthetic Precipitate Leaching Procedure ("SPLP"). Far from being a device to allow the Port to evade the fill criteria, the SPLP is the most direct way to determine whether potential fill material will cause any harm to water quality. Simplified, the test takes actual fill material from a particular source and pours the equivalent of acid rain over it to determine if a particular constituent (in most instances a naturally occurring metal) will leach out of the fill in concentrations that could adversely affect water quality. 2nd Gould Dec.¶7-12. If the constituent passes SPLP, its mere presence poses no threat since it will not significantly mobilize and migrate to groundwater or surface water.

Finally, while ACC complains about Ecology's purported adoption of MTCA standards for fill criteria, ACC itself advocates MTCA procedures on the number of samples it believes are necessary to determine whether proposed fill is "clean." The number of samples needed to show whether a previously contaminated site is "clean," however, has little relevance to how much sampling should be performed at a site that has already been determined, by Phase I and Phase II investigations, to have little risk of contamination. Gould Dec. ¶16.

Respectfully submitted this 9th day of October 2001.

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[6] In fact, Ecology had no reason to incorporate the third layer into the 401 Certification because that layer, which represents the top three feet of the embankment, was developed for the protection of terrestrial plants and animals and has very little, if anything, to do with water quality. 2nd Gould Dec.¶17.

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