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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

AIRPORT COMMUNITIES
COALITION,

Appellant,

v.

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

Respondents.

PCHB No. 01-133
PCHB No. 01-160

DEPARTMENT OF ECOLOGY'S
SUR-REPLY TO THE ACC'S
MOTION FOR A STAY

INTRODUCTION

Pursuant to the Agreed Order Re Recission of 401 Certification entered by the Board on September 21, 2001, the Department of Ecology (Ecology) submits this sur-reply brief. As per that order, the sur-reply confines itself to responding to the new issues raised in the ACC's reply brief.

If a determination by Ecology that, in issuing a 401 Certification, it has reasonable assurance that water quality standards will be met by the proposed project could be rebutted by misstatements and misconstruing the record, then the ACC would be entitled to its stay. However, as this Board has indicated in its prior 401 Certification decisions, much more is needed to overcome Ecology's finding of reasonable assurance. Addressing the new issues it asserts are created by the Amended 401 Certification, the ACC continues to rest its case on

1 misstatement and inaccurate renditions of the record. The Board should deny the ACC's
2 request for a stay of the Amended 401 Certification.

3 **ARGUMENT**

4 **A. The Amended 401 Certification Does Not Lessen The Protectiveness Of The**
5 **Acceptable Fill Criteria.**

6 The ACC asserts that the addition of a provision in Condition E, which sets forth the
7 protocols that the Port of Seattle (Port) must follow when selecting fill material for placement
8 in the Third Runway embankment, lessens the stringency of that provision. However,
9 consistent with the allegations in its opening brief, the ACC simply ignores the language in
10 Condition E and the process established for screening fill for use at the airport. As described
11 in detail in Ecology's response brief, the Port is to use only naturally occurring
12 uncontaminated soils. The Port must sample those soils to determine if they include naturally
13 occurring contaminants, which would not be unprecedented given geologic history of this
14 region. If the testing indicates that the naturally occurring contaminants are above the criteria
15 set forth in Condition E (1)(b), the Port may elect to subject the fill to a Synthetic
16 Precipitation Leaching Procedure (SPLP). The purpose of the SPLP is to determine if the
17 constituent could become mobilized if it comes into contact with either surface or subsurface
18 water.

19 To support its claim that the addition of the SPLP further undermines Condition E, the
20 ACC again elects to ignore the plain language of the condition. In its brief, the ACC asserts
21 that the Port has broad latitude to accept and use fill that contains constituents that exceed the
22 stated criteria. *See* ACC's Reply at 30. That is patently not true. The Port must follow in
23 sequence the protocols established in Condition E. Moreover, contrary to the ACC's claims,
24 Ecology is not required to accept fill that has been subjected to SPLP testing. Under
25 Condition E (1)(b), if the Port seeks to use such fill material, it must submit to Ecology the
26 SPLP test results at least ten days prior to proposed fill placement. Condition E (1)(b) further

1 provides that “[a]s per Condition E.1.(a), Ecology reserves the right to disapprove the use of
2 fill analyzed under the SPLP method.” The inclusion of the use of the SPLP method in
3 Condition E. does not lessen Ecology’s determination that it has reasonable assurance that
4 water quality standards will be met regarding the fill material being imported by the Port. The
5 ACC’s arguments to the contrary should be rejected.

6 **B. Change To Condition D (1)(g) Reflects Hydrologic Data Already Collected By**
7 **Port.**

8 The ACC wrongly asserts that under Condition D (1)(g) hydrologic monitoring will
9 commence with the issuance of the 401 Certification and that the change to the condition in
10 the Amended 401 Certification means that less hydrologic data will be provided. In fact, the
11 Port has been monitoring the area, including wetlands, downgradient of the embankment since
12 at least March of 2000. Second Declaration of Erik Stockdale (Sec. Stockdale Dec.) at ¶ 3,
13 Exhibit 1.

14 The ACC also wrongly asserts that the change to Condition D (1)(g) will not allow the
15 development of hydrologic performance standards. In making that assertion, the ACC
16 completely ignores the fact that performance standards for this aspect of the project are
17 already set forth in the Natural Resources Mitigation Plan (NRMP). Sec. Stockdale Dec. at
18 ¶ 4. As stated in Ecology’s response brief, the NRMP includes strict performance standards,
19 contingency measures and monitoring requirements that ensure that the wetland mitigation
20 will be properly implemented.

21 The modification to Condition D (1)(g) does not undermine the sufficiency of the
22 NRMP, nor Ecology’s reasonable assurance that water quality standards will be met with
23 respect to wetlands. The ACC is not likely to succeed on the merits of this issue. The Board
24 should deny the request for a stay.

25 **AR 006653**
26

1 **CONCLUSION**

2 The new issues raised by the ACC in its reply brief provide no additional support for
3 its request for a stay. As amply demonstrated in its response brief, Ecology had, and
4 continues to have, reasonable assurance that water quality standards will be met by the Port's
5 proposed project. The ACC is not likely to succeed on the merits of the issues it raises.
6 Ecology requests that the Board deny the ACC's motion for stay .

7 DATED this 9th day of October, 2001.

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26 **AR 006654**