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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

ENVIRONMENTAL
HEARINGS OFFICE

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3	AIRPORT COMMUNITIES COALITION,)	No. 01-133	
4)	No. 01-160	
5	Appellant,)		
6	v.)	ACC'S REPLY MEMORANDUM IN	
7)	SUPPORT OF ITS MOTION FOR A	
8	DEPARTMENT OF ECOLOGY and)	STAY	
9	THE PORT OF SEATTLE,)		
10	Respondents.)	Section 401 Certification No.	
11)	1996-4-02325 and CZMA	
12)	concurrency statement, issued	
13)	August 10, 2001, Reissued September	
14)	21, 2001, under No. 1996-4-02325	
15)	(Amended-1))	

“Our AAG (JM) [Joan Marchioro] has indicated she/the office will support any policy position we choose to adopt, but she is currently advising we require the water right.

* * *

Part of the JM argument is that this “fix” under the 401 triggers the water code, and we need certainty around the “fix” for reasonable assurance.

Also, JM says, unlike a 402 permit, the 401 calls in other state laws to help protect WQ -- this requirement for mitigation may be a key point.”

Ray Hellwig’s April 3, 2001, Notes, DOE Senior Management Team meeting (Ex. A to Eglick Decl).

“Consequently, in drafting a 401 certification, the 401 program must be able to conclude that BMPs will actually result in compliance with WQSs.

Email from Assistant Attorney General Ron Lavigne to Ann Kenny, et al., dated April 30, 1999 (Ex. L to Eglick Decl.).

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I INTRODUCTION

Section 401 of the Clean Water Act requires the state to certify that there is reasonable assurance that a proposal will not result in violation of state water quality standards. The determination of whether an applicant has met this burden must be based on environmental law and science -- not political science. Nor can respondents in an appeal of a 401 certification substitute bulk for a basis for certification. The Amended Certification here cannot be salvaged and a stay avoided by saddling the Board with several thousand pages of documents, many irrelevant. The failure of the Port to meet its burden for 401 certification is evident on the face of the 401 Certification itself, in Ecology's own internal documents, in the expert analyses submitted by ACC scientists which have largely been distorted -- but not rebutted -- by respondents, and in the words of respondents' own declarations. Per WAC 371-08-415, ACC makes a *prima facie* case for a stay in demonstrating either a likelihood of success on the merits or irreparable harm. ACC has demonstrated both. In contrast, respondents have not met the more stringent standard of demonstrating "a substantial probability of success on the merits" (WAC 371-08-415(4)(a)), nor, particularly in this post-September 11 world, have they demonstrated an "overriding public interest which justifies denial of the stay" (WAC 371-08-415(b) (emphasis added)). Because ACC has met its burden on each of the issues raised in support of a stay -- but need only meet its burden on one -- the Board should grant a stay.

ACC'S REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION FOR A STAY - 1

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

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II ARGUMENT

A. Standard and Context of Review

1. This Board Applies Its Expertise in this *De Novo* Appeal.

The Board rules provide, in pertinent part, that appeal “hearings shall be formal and quasi-judicial in nature. The standard of review shall be *de novo* unless otherwise provided by law.” WAC 371-08-485 (emphasis added). In its brief (at p. 4), the Port acknowledges the *de novo* standard of review and cites no statute or rule providing for a different standard, yet still argues based on “rules of construction” that Ecology’s certification is entitled to “great deference” by the Board, citing, among other authorities, *Hillis v. Department of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997), and *Kaiser Aluminum v. Dept. of Ecology*, 32 Wn. App. 399, 404, 647 P.2d 551 (Div. 2 1982). In fact, *Hillis* did not involve Board review at all, and in *Kaiser*, the court did not address Board deference to Ecology, but stated that an interpretation “by the agency which promulgated the regulation initially and concurred in by the Board, is entitled to great weight.” *Kaiser, supra*, at 404 (emphasis added).

The Washington Supreme Court long ago recognized that “PCHB members are qualified in this matter pertaining to the environment,” and “acquire additional expertise in performing their statutory duties.” *Martin Marietta Aluminum v. Woodward*, 84 Wn.2d 329, 332-33, 525 P.2d 247 (1974). It further has long recognized the Board’s purpose is to provide “uniform, independent¹ review” of Ecology actions. *Id.* at 333 (emphasis added).

As the Washington State Supreme Court has explained:

¹ The only case cited by the Port involving a 401 certification is *Dept. of Ecology v. PUD No. 1*, 121 Wn.2d 179, 849 P.2d 646 (1993), *aff’d*, 114 S.Ct. 1900 (1994). In that case, the court only mentions deference in the singular context of “the appropriate instream flow rate for the Elkhorn project.” *Id.* at 201.

1 [U]nlike other administrative agencies, Ecology has no adjudicative authority, because the
2 Legislature passed that authority to the Pollution Control Hearings Board. RCW 43.21B.240;
3 .010; .110 .230 The Board hears matters de novo, WAC 371-08-485, allowing Ecology and all
4 other parties to present all relevant information for the Board to make a decision.

5 *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 121, 11 P.3d 726 (2000). The deference
6 which the respondents now demand would be inconsistent with the Board's role. In any event, even if
7 deference applied, it would have its limits, since:

8 an agency's view of the statute will not be accorded deference if it conflicts with the
9 statute . . . Ultimately it is for the court [or, in this case the Board] to determine the meaning
10 and purpose of a statute.

11 *Postema*, 142 Wn.2d at 77.

12 **2. To Be Valid, a 401 Certification Must Be Affirmatively Based on Reasonable**
13 **Assurance that Water Quality Standards Will Not Be Violated.**

14 The federal regulations governing 401 certifications affirmatively require that the agency
15 include: "(3) a statement that there is reasonable assurance that the activity will be conducted in a
16 manner which will not violate applicable water quality standards." 40 CFR § 121.2(a)(3). Yet, no
17 such affirmative statement appears in the Amended Certification. This may well be no accident.

18 Ecology's brief and supporting declarations (*see, e.g.*, Declaration of Kevin Fitzpatrick)
19 consistently shift the statutory burden, and reflect the incorrect view that 401 certification is granted
20 unless it has been proven that water quality standards will be violated. For example, Ecology cites to
21 *Friends of the Earth v. Dept. of Ecology*, PCHB Nos. 87-63 and 87-64 (May 17, 1988), while
22 studiously avoiding mention of *Okanogan Highlands Alliance*, PCHB Nos. 97-146, et al. (January 19,
23 2000) ("*OHA*"), arguing that ACC has not proved that any water quality violations will occur and that

1 mere “fears that we do not know enough” are not sufficient to overcome Ecology’s decision in this
2 case. Ecy. Br. at 4 (citing *Friends of the Earth*, Conclusion of Law VIII).

3 While this argument might make sense in the context of a retrospective federal court lawsuit
4 claiming that an NPDES permit condition had been violated, it is wholly inconsistent with the
5 prospective, preventive anti-degradation purpose of the Clean Water Act’s separate requirement for
6 Section 401 certification. See [First] Declaration of Tom Luster at ¶¶ 21-23; Reply Declaration of
7 Luster at ¶¶ 12-13.

8
9 In fact, neither *Friends of the Earth* nor *OHA* require ACC to prove that water quality
10 violations will occur to prevail. Instead, ACC need only show, by a preponderance of the evidence,
11 that “Ecology did not have ‘reasonable assurance’ that the applicable provisions would not be
12 complied with. The applicable provisions include sections 301, 302, 303, 306 and 307 of the clean
13 water act . . . and state created water quality standards for receiving waters.” *Friends of the Earth*, at
14 Conclusion of Law IV; see also *OHA* at ¶ 63 (citing *Friends of the Earth*).

15
16 In *OHA*, the Board specifically held that the speculative nature of a proposed project’s impacts
17 and mitigation plan are a sufficient basis for denying a § 401 certification:

18 There is significant uncertainty about the characteristics of the pollution, its flow paths, rate of
19 discharge or even the appropriate point of compliance. It is not appropriate to issue a
20 Certification given the lack of information about the extent and fate of contamination from the
21 waste rock facilities. *Barrish & Sorenson Hydroelectric Co., Inc. v. Ecology*, PCHB No. 94-
22 194 (1995). Under these circumstances the more appropriate conclusion is that there is
23 presently no reasonable assurance to support a Sec. 401 Certification.²

24
25 ² *OHA*, ¶ 64 (footnote omitted).

1 There are obvious similarities between the instant § 401 appeal and *OHA*. In *OHA*, the Battle
2 Mountain Gold company proposed the creation of a 116-acre open-pit mine 800 feet deep and 350 feet
3 below the water table on Buckhorn mountain. *OHA*, ¶ 35. Creating the mine would have been an
4 irreversible act resulting in “re-plumbing a watershed” (*OHA*, ¶ 58), with water treatment facilities
5 requiring perpetual maintenance and upkeep. *OHA*, ¶ 40.
6

7 Similarly, the third runway project would irreversibly re-plumb three watersheds associated
8 with Des Moines, Miller and Walker Creeks. The Port’s analysis of these impacts and its proposals for
9 mitigating them, involving massive detention, treatment and low-flow mitigation facilities requiring
10 perpetual maintenance and upkeep, are in significant respects unproven and incomplete. There is
11 significant uncertainty about the level, extent and fate of contamination of the more than 20 million
12 cubic yards of fill which the Port would introduce, and serious questions about the degradation caused
13 by discharges from the project.³
14

15 **B. A Stay of the Certification Is Necessary to Preserve the Ability of the Board to Issue a**
16 **Meaningful Decision on the Merits**

17 Under the Clean Water Act, the Army Corps of Engineers (“Corps”) relies upon a 401
18 Certification that the project meets all applicable federal and state water quality criteria in issuing a
19 decision on a § 404 permit. 33 U.S.C. § 1341(d); 33 CFR § 320.4(d) (Eglick Decl., Ex. B)

20 Nonetheless, the Port and Ecology argue that ACC is not irreparably harmed because the Certification

21 _____
22 ³ *Friends of the Earth*, cited by Ecology, presents a significant contrast. There, the Navy proposed to dispose of
23 contaminated dredge material for the Everett homeport by using a Revised Application Deep Confined Aquatic Disposal
24 (“RADCAD”) site. Because this disposal method was a “pioneering effort,” the 401 certification required the project to
25 take place in phases. *Friends of the Earth* at Finding of Fact XXI. Phase I would serve as a smaller scale pass/fail test, and
the success of phase I was a prerequisite to phase II. *Id.* There is no similar pass/fail test for construction of the third
runway embankment. While some future testing and monitoring is required, much of it is unspecified and post-
construction, offering no prior assurance akin to the phase I pass/fail test in *Friends of the Earth*.

1 does not, itself, authorize actions absent issuance by the Corps of the § 404 permit. This argument
2 ignores the fundamental purpose of a stay, “to prevent irreparable injury so as to preserve the court’s
3 ability to render a meaningful decision on the merits.” *United Food & Commercial Workers Union v.*
4 *Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 348 (6th. Cir. 1998) (emphasis added; copy
5 attached as Ex. C to Eglick Decl.). In this case, only by granting a stay can the Board preserve its
6 ability to render a meaningful decision on the merits of the 401 Certification. Absent a stay, if the
7 Corps issues a Section 404 approval for the project before the Board has reached the merits, and a
8 preliminary injunction is sought, the Port would undoubtedly argue based on 33 CFR 320.4(d)⁴ that the
9 court could not address a state’s Section 401 issues within an action to enjoin a Section 404 decision.⁵
10 Thus, the issues in this appeal of the 401 Certification are significantly broader than considerations
11 under Section 404, and, in effect, include all applicable federal and state water quality laws. *PUD*
12 *No. 1 v. Washington Dept. of Ecology, et al.*, 511 U.S. 700, 712 (1994) (Eglick Decl., Ex. D).

13
14 Section 401’s role is key: it “offers a veto power to states with water quality-related concerns
15 about licensing activities of various federal agencies, including . . . [the] Corps of Engineers . . .”
16 *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (Eglick Decl., Ex. E) (citing 2 W. Rodgers, Jr.

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20 ⁴ 33 CFR 320.4(d) states, in pertinent part:

21 (d) Water quality. ... Certification of compliance with applicable effluent limitations and water quality standards
22 required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to
23 water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises
24 of other water quality aspects to be taken into consideration.

25 Ex. B to Eglick Decl.

⁵ If successful, the Port would then commence filling wetlands, mooted any Board decision on the merits of the 401
Certification. That is why Port counsel chose their words carefully with the Board in telephone conferences concerning the
possibility of a stipulation on a stay. The Port was willing to agree not to undertake some activities for a few weeks, but
would not stipulate to a stay of the 401 because that would delay issuance of the Section 404 permit. If the Corps issues a
404 permit, the Port is sure to argue that the Corps’ permit renders the Board’s review entirely moot.

ACC’S REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION FOR A STAY - 6

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 006743

1 Environmental Law: Air and Water, § 4.2, at 26 (1986)). The Board must stay the effectiveness of the
2 401 Certification if it is to retain this very meaningful role for Washington.

3 In support of its argument that a Board stay would have no effect upon issuance of a 404
4 permit, the Port (at p. 28) cites a 1987 Corps informal Regulatory Guidance Letter (“RGL”)⁶ which
5 states, in part:
6

7 If a state issues a 401 water quality certification, and a state or federal court voids or sets aside
8 that certification before the Corps issues the permit and within the statutory 1 year period from
9 the date of application, then the Corps cannot issue the permit unless and until the 401
10 certification is legally revived.

11 RGL 87-03 (emphasis added). The Port claims (p. 28) that, because the PCHB is not a state court, a
12 PCHB stay would have no effect. This attempt to distort the RGL into making the PCHB irrelevant
13 has no basis in the law. In the usual case, appeals of 401 certifications do go directly to a state superior
14 court. *See, e.g., United States v. Commonwealth of Puerto Rico*, 721 F.2d 832, 834 (1st Cir. 1983)
15 (Ex. F to Eglick Decl.) (explaining that “the EQB is the Puerto Rican agency charged with certification
16 responsibilities, and its decisions are, in the normal course, appealable to the Commonwealth’s
17 superior court”). Here, the Washington Legislature has established the PCHB as a quasi-judicial body
18 with specialized expertise to “provide for a more expeditious and efficient disposition of appeals with
19 respect to the decisions and orders of the department ...” RCW 43.21B.010. The reference to state
20 courts in the Corps’ letter does not indicate that the Corps rejects the authority of a state quasi-judicial
21 body, particularly since a state’s judicial arrangements are singularly within its discretion.⁷

22
23 ⁶ On its face, the RGL lists an expiration date of “December 31, 1989.”

24 ⁷ Even if the Board were not a recognized state judicial body, its role as the final state authority on the 401 suggests that,
under the RGL, the 401 cannot be considered issued if the Board stays it.

1 *Ohio Forestry Association v. Sierra Club*, 523 U. S. 726, 118 S. Ct. 1665 (1998) (Eglick Decl.,
2 Ex. G), cited by the Port to argue that “administrative decisions are not ripe for review when the actual
3 activity that would produce the alleged harm requires a separate permit that could be challenged in a
4 separate judicial proceeding,” is not on point. Port Br. at 29. In *Ohio Forestry Association*, a case
5 under the National Forest Management Act, 16 U.S.C. § 1604(a), the Court held that the Sierra Club’s
6 suit was not ripe for judicial review because the Sierra Club could pursue all its claims when a site-
7 specific proposal was made, at which time the factual components of the dispute would be “fleshed
8 out, by some concrete action.” *Id.* at 733-738.

9
10 This case before the PCHB is obviously ripe for review as it results directly from DOE’s
11 issuance of a site-specific 401 certification, triggering a 30-day appeal period.
12

13 **C. Reasonable Assurance Requires a Water Right**

14 The Port and Ecology label ACC’s argument that a water right is required for the low flow
15 mitigation plan as “creative” (Ecy. Br. at 12) and “radical” (Port Br. at 13). What neither tell the
16 Board is that the Attorney General’s own advice to Ecology in April, 2001, was also that a water right
17 was required, as the notes on the cover page of this Reply demonstrate. Eglick Decl., Ex. A.⁸
18

19 When Ecology’s senior management met in April 2001 to review this issue, it was told “the
20 Port’s project will have only minor impacts to flows in Miller, Walker and Des Moines Creeks.” *Id.*
21 Whether that was ever true, Ecology subsequently acknowledged in August 2001 that:

22 *The need for water for low-flow mitigation is substantial. For example, the project will take*
23 *away nearly one-third of the base flow in Des Moines Creek at the most critical time of the*

24
25 ⁸ The notes were withheld under the PDA as “deliberative” and only released by Ecology after it issued its 401 decision.
ACC’S REPLY MEMORANDUM IN SUPPORT OF HELSELL FETTERMAN LLP Rachael Paschal Osborn
ITS MOTION FOR A STAY - 8 1500 Puget Sound Plaza Attorney at Law
1325 Fourth Avenue 2421 West Mission Ave.
Seattle, WA 98101-2509 Spokane, WA 99201

1 *year. The Port needs to manage stormwater such that it can offset this impact during a 90-day*
2 *period starting in late July each year.*⁹

3 What Ecology is now labeling as “creative” was in fact its own attorney’s advice. What the
4 Board has before it in Ecology’s decision not requiring a water right is a “policy position” rather than
5 an accurate reflection of the law. In fact, none of the Port and Ecology arguments comport with the
6 requirements of state water law and the Board’s own precedent.

7 Ecology and the Port both argue that the agency has never before required a water right for a
8 low flow mitigation plan in which stormwater is the source water. Ecy. Br. at 12-13; Port Br. at 13.
9 What Respondents do not mention is that the agency has never before authorized a low flow mitigation
10 plan that relies upon stormwater as a source of mitigation water. Ecology has, however, authorized a
11 number of low flow mitigation plans that, like the Port’s plan, rely on the use of public water
12 resources. In those instances, a water right was required as a part of the process. Second Declaration
13 of Dr. Peter Willing at ¶ 12 (“Willing 2d Decl.”).

14 Ecology argues that stormwater mitigation is designed to mimic the natural hydrologic cycle.
15 Ecy. Br. at 13. In fact, all low flow mitigation plans are so designed: is Ecology arguing that all such
16 plans are therefore exempt from water rights requirements? Ecology further claims that the low flow
17 plan is virtually “indistinguishable” from “more traditional stormwater management plans,” differing
18 only in scale. Ecy. Br. at 14. This is simply not true. Significant differences include the length of
19 time the stormwater will be detained, the type of treatment the stormwater will receive, and the precise,
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24 ⁹ Ex. F to [First] Declaration of Peter Eglick in Support of Motion for Stay, previously filed with the Board (Memorandum
dated August 13, 2001, from Ray Hellwig to Tom Fitzsimmons, Ecology Director) (italics in original).

1 prolonged and exacting release rates that are being proposed. Moreover, the purpose of low flow
2 stormwater detention differs from that of the Port's other stormwater vaults.

3 Ecology's assertion that "there is no change in hydrology" is nothing short of remarkable. Ecy.
4 Br. at 14. The whole purpose of the 401 Certification is to address the massive alterations in
5 hydrology that will be caused by the Third Runway Project. The low flow mitigation plan is one of
6 several mechanisms designed to offset some of those changes. There is distinct controversy over the
7 extent of those changes and whether they are or can be fully mitigated. See First and Second
8 Declarations of William A. Rozeboom; Declaration of Dr. Patrick Lucia.

10 Contrary to Ecology declarant Edward O'Brien (O'Brien Decl. at ¶ 14), the Port proposal is not
11 for low flow mitigation through use of standard stormwater management techniques such as
12 infiltration, which cannot provide the certainty that low flow mitigation requires.¹⁰ In order to satisfy
13 the 401 Certification requirements, the Port must deliver specific amounts of water to specific streams
14 at specific times. While the Port proposes to use stormwater as the water source to accomplish this
15 complex mitigation task, the process itself has nothing to do with stormwater management.¹¹

17 Ecology is therefore incorrect in characterizing ACC's argument as based solely on the
18 temporary storage of stormwater. Ecology Brief at 14. The Port's low flow mitigation plan meets all
19

20 ¹⁰ The Port attributes to Mr. O'Brien the statement that Ecology "has required permittees to mitigate impacts with on-site
21 BMPs such as collection and infiltration of stormwater." Port Br. at 14. On the contrary, Mr. O'Brien simply recites the
22 content of the stormwater manual, provides no information about Ecology's actual permitting practices, and offers no
23 examples of low flow mitigation plans involving use of detained stormwater.

24 ¹¹ Interestingly, Ann Kenny asserts that if the amount of water contemplated in the current version of the low flow
25 mitigation plan is inadequate, the Port can simply "purchase more water." Kenny Decl. at ¶ 22. The Port has already
attempted to purchase water for low flow mitigation from Seattle Public Utilities. SPU declined to sell, however, upon
learning that Ecology would require it to change its water right claim. Eglick Decl., Ex. H (Port Commissioners Agenda,
October 31, 2000). Not only is purchase an uncertain contingency, but it points up the need for a water right to fully
implement the mitigation plan.

1 classic requirements for a water right: it involves the capture of publicly owned waters with the intent
2 of constructing a complex (unproven) system to use them for a beneficial purpose. Such system and
3 intent for beneficial use converts the Port's stormwater storage from mere capture to appropriation.
4 Ecology offers no response whatever on these key factors.

5
6 The Port's response focuses first (Br. at 14) on the "fundamentals" set forth in the Water
7 Resources Act. However, this attempt to distinguish "use" versus "management" fails, and with good
8 reason. If it succeeded, prospective water users around the state would simply install stormwater
9 basins to obtain an unregulated source of water. Contrary to the Port's assumption, it is possible to
10 manage and use water at the same time; stormwater management and water code requirements are not
11 mutually exclusive.

12
13 The Port continues with an analysis of water right permit criteria that is both inaccurate and
14 incomplete. Port Br. at 15-16. For example, the Port claims that because the amount of stormwater
15 captured will vary annually it would be impossible to quantify the mitigation water right. However,
16 the Port has already quantified the amount of water it claims is required for low flow mitigation. Low
17 Flow Analysis/Flow Impact Offset Facility Proposal (Parametrix, July 2001) (Fendt Decl., Ex. C).

18
19 Further, it is common for the amount of water used by an irrigator or municipality to vary
20 according to weather and other factors. Not only is this not "at odds with one of the principal
21 objectives" of the water code (Port Br. at 16), but the code contains express provisions to deal with
22 annual variability, i.e., a five-year relinquishment timeline and exemption for factors (such as drought)
23 that are outside the water user's control. RCW 90.14.140(1)(a), .160

1 Ecology's assertion that private water rights and the public interest are not implicated here is
2 incorrect. Br. at 14. The Port proposes to discharge water into Des Moines, Miller and Walker Creeks
3 where, in the future, it quite reasonably may be sought by other water users. These water users will
4 not, as Ecology and Port assert, attempt to appropriate it from the Port's stormwater vaults. Ecy. Br. at
5 15; Port Br. at 17, n.17. Rather, they will seek it from the streams and aquifers themselves. The
6 purpose of a water right in this instance is to protect the instream flows that the Port is required to
7 create from impairment by others. RCW 90.03.290. The public interest in the protection of these
8 streams is expressed generally in RCW 90.54.010, and .020(3), and more specifically in the Green-
9 Duwamish Instream Resources Protection Program, WAC Ch. 173-509, which is designed to "retain
10 perennial rivers, streams, and lakes in the Green-Duwamish drainage basin with instream flows and
11 levels necessary for preservation and protection of wildlife, fish, scenic, aesthetic and other
12 environmental values . . . and to preserve water quality." WAC 173-509-010. Ecology's amnesia on
13 this point is worse than disappointing.
14
15

16 Ecology cites (Br. at 14) *West Side Irrigation Co. v. Chase*, 115 Wash. 146 (1921), and *Wash.*
17 *v. Lawrence*, 165 Wash. 509 (1931), for the proposition that requiring the Port to obtain a water right
18 for the low flow mitigation plan would serve no purpose. These water code enforcement cases both
19 indicate that the water code is intended to be a comprehensive regulation of state waters and that it is
20 Ecology's duty (as successor to the state hydraulic engineer) to implement the code. *West Side* at 150;
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25 ACC'S REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION FOR A STAY - 12

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 006749

1 *Lawrence* at 510. ACC agrees.¹² Ecology's reluctance to carry out that duty here is inexplicable. The
2 Port proposes to appropriate public waters and put them to beneficial use. A water right is required.
3 RCW 90.03.010 ("all waters within the state belong to the public, and any right thereto, or to the use
4 thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner
5 provided and not otherwise.") Ecology must exercise the authority provided under RCW Ch. 90.03
6 and require the Port to obtain and tender such a right before the 401 Certification may be issued.
7

8 Finally, attempting to distinguish *Okanogan Highlands Alliance*, PCHB Nos. 97-146, et al.,
9 Ecology claims that the Third Runway Project does not involve alterations to hydrologic divides and
10 therefore no water right is required. Ecy. Br. at 15. However, compensation for low flow impacts, and
11 attendant water rights, is not limited to situations where water is moved from one drainage basin to the
12 next. In any event, the Third Runway Project will in fact lead to permanent alterations in the
13 groundwater contribution areas of the streams affected by Third Runway construction. Rozeboom 2d
14 Decl. at ¶ 20.
15

16 The Port also argues that no new water rights were required in *OHA, supra*, because Battle
17 Mountain Gold already had water rights. Port Br. at 16. This misinterprets the Board's holding, which
18 stated that a water right would be required. As it happened, BMG was able to transfer its industrial
19 mining water rights to mitigation purposes at the end of the project. This does not vitiate the central
20 *OHA* holding that some water right was required. *OHA, supra*, Summary Judgment Order on
21 Stipulated Issues Nos. 20, 21 and 22 ((10/23/98)).
22

23 _____
24 ¹² ACC does not agree that the sole purpose of the code is "to create a mechanism for avoiding private disputes over the use
of water" (Ecy. Br. at 14), a proposition refuted by Ecology's own citation to RCW 90.03.290, requiring consideration of
the public interest in water permitting decisions, as well as by the Water Resources Act of 1971, RCW Ch. 90.54.

1 The Port also argues that the source of water is somehow significant in *OHA*. Port Br. at 16.
2 But the pit lake in *OHA*, like the Port's stormwater vaults, was an artificial water body that, during the
3 (perpetual) mitigation phase of the project, would capture water from precipitation falling on Buckhorn
4 Mountain. *OHA* at Finding 9 (1/19/00). Here, as in *OHA*, it is the carefully timed release to streams
5 for the purpose of augmentation that reveals the characteristics requiring a water right: appropriation,
6 intent, beneficial use, and the need for protection from impairment. RCW 90.03.290.
7

8 It makes no difference whether the underlying project for which mitigation is sought involves a
9 water right, or the proposed mitigation itself triggers the requirement. The Board has held that parties
10 may not claim mitigation credit for use of stormwater (or other public waters), for which they did not
11 already own a water right. *L.G. Design, Inc. v. Ecology*, PCHB No. 96-20 (1997); *Auburn School*
12 *District No. 408 v. Ecology*, PCHB No. 96-91 (1996); *Manke Lumber v. Ecology*, PCHB No. 96-102
13 (1996); *Black River Quarry v. Ecology*, PCHB No. 96-56 (1996). See ACC Op. Br. at 16-17. The Port
14 may not use stormwater to augment streamflow unless it has a water right authorizing it do so.
15

16 Respondents also argue that water quality and stormwater management laws -- not the water
17 code -- are the "best" and only mechanisms to analyze the mitigation plan. Ecy. Br. at 15; Port Br. at
18 13-14. This is a false dichotomy. Where the Water Code and the Water Pollution Control Act both
19 apply, both must be used. See, e.g., *OHA*. That flow augmentation is required under the 401
20 Certification does not answer the question of whether a water right is required. Ecology must protect
21 water quality using all appropriate requirements of state law. 33 U.S.C. § 1341(d); *Ecology v. PUD*
22 *No. 1 of Jefferson County*, 121 Wn.2d 179, 192 (1993). The water right permitting provisions, RCW
23 90.03.010 and .290, are such requirements and must be implemented here. "Absent a water right or
24

25 ACC'S REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION FOR A STAY - 14

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 006751

1 similar mechanism for this proposed mitigation element, there is inadequate assurance that this water
2 will be available when it is needed during each low flow period in the coming years and decades.”
3 Luster 2d Decl. at ¶ 51.

4 Finally, as a last-ditch defense, the Port issues a dire warning: if a water right is required here,
5 no stormwater management project is safe. Port Br. at 17. On the contrary, the Port’s proposal to use
6 stormwater as a source for its low flow mitigation plan is unique – Ecology has never authorized such
7 a project before. Public policy objectives are better served by ensuring that water users are not led to
8 believe they may use their stormwater facilities for beneficial uses that would otherwise require a
9 water right.

11 **D. The Low Flow Augmentation Technical Analysis and Plan Are Fraught with Error and**
12 **Uncertainty.**

13 The Port’s model of low flow impacts to Des Moines, Miller and Walker Creeks is inaccurate
14 in several respects. The low flow mitigation plan itself is conceptual and speculative at best, as
15 evidenced by the Certification’s four pages of further work required – and no concomitant requirement
16 for review and approval by Ecology. Luster 2d Decl. at ¶ 28; Rozeboom 2d Decl. at ¶¶ 23-24; Willing
17 2d Decl. at ¶¶ 6-12. It contemplates heretofore untested mechanisms to store and release water.
18 Rozeboom at *id.*; Willing at *id.* “There is currently a high risk that the Port’s low flow plan . . . will
19 fail to achieve its intended mitigation objectives.” Rozeboom 2d Decl. at ¶ 23. Failure of the low flow
20 mitigation plan would result in significant degradation to area streams during critical low flow periods.
21 Luster 2d Decl. at ¶ 29.

1 Ecology claims these problems are cured by its pages of “conditions” requiring further work by
2 the Port after the 401 issues. But these conditions for further analysis do not amount to reasonable
3 assurance that Ecology now knows either (1) the full impact of the Third Runway Project on stream
4 hydrology, or (2) the efficacy of using a system of stormwater detention and release to offset those
5 uncertain impacts. “These . . . are essentially the types of criteria one would use to design an
6 experiment, not to use as the basis for reasonable assurance.” Luster 2d Decl. at ¶ 32. Nor are they
7 comparable to conditions in past Ecology 401s calling for subsequent submission of non-critical
8 information. *Id.* at ¶ 57-59.

10 Ecology quotes selectively and out of context the Declaration of Kelly Whiting to defend the
11 uncertainty of the low flow plan. Ecology contracted with King County for Mr. Whiting’s services as
12 an expert reviewer of both the Stormwater Management Plan and the Low Flow Impact Analysis/Flow
13 Impact Offset Facility Proposal. Whiting Decl. at ¶ 2. Mr. Whiting has now submitted to the Board an
14 eye-opening review of the low flow documents that fully supports ACC’s contentions in this matter.
15 *See* Whiting Decl. at ¶ 2 (pp. 6-8) and Ex. 2; Rozeboom 2d Decl. at ¶¶ 6, 9 ; Luster 2d Decl. at ¶¶ 30-
16 32.

18 For example, while Ecology touts (Br. at 10) Mr. Whiting’s statement that the low flow plan
19 constitutes “a substantial proposal to provide mitigation for natural resources impacts which goes well
20 beyond the basic requirements of the King County Surface Water Design Manual” (Whiting Decl., Ex.
21 2), it does not tell the Board that Mr. Whiting limits his remarks with significant caveats. For example,
22 Mr. Whiting cautions that “[t]here are . . . significant gaps in the documentation of the analyses
23

1 performed and the associated mitigations.” Whiting Decl., Ex. 2 at p. 1. His review continues for 13
2 pages to describe those gaps in detail.

3 Mr. Whiting “found the low flow plan to be incomplete and to have some unresolved design
4 challenges.” Whiting Decl. at 6, lines 13-14. Echoing ACC’s concerns about the quality of
5 stormwater as an augmentation source, Mr. Whiting states, “There is not sufficient monitoring data on
6 existing wetvault facilities to confidently predict the quality of the reserve water in late summer.”
7 Whiting Decl. at 6-7. Ecology again selectively references Mr. Whiting (Br. at 11), failing to
8 acknowledge his conclusion stated above, i.e., that NO ONE has ever attempted this type of low flow
9 augmentation before. While wetvaults may be described in the King County Design Manual, no data
10 exists to show that they actually work for the purposes contemplated here. This concept is unique.
11 Willing 2d Decl. at ¶¶ 10-11. “Conceptual level technical feasibility provides no assurance that
12 unresolved, non-trivial, design challenges can or will be adequately resolved.” Rozeboom 2d Decl. at
13 ¶24.
14

15
16 This lack of information in general about wetvaults (such as the Port has proposed) is
17 compounded by an absence of basic data (e.g., dimensions and design) for the Port’s specific projects.
18 Port declarant Paul Fendt, while offering no page citation, advises that this information is found in the
19 “Low Flow Mitigation Plan” [sic], but it is not. Willing 2d Decl. at ¶ 8; Rozeboom 2d Decl. at ¶ 22.
20 Mr. Fendt also advises (for the first time) that the Port intends to use “floating orifices” to control
21 water quality and flow problems in the stormwater releases. However, design detail, documentation
22 and even basic substantiation for their otherwise ethereal concept is missing. Willing 2d Decl. at ¶ 9.
23
24

1 King County's reviewer, Kelly Whiting, agrees with ACC hydrology experts Bill Rozeboom
2 and Dr. Malcolm Leytham of Northwest Hydraulic Consultants ("NHC") regarding the potential for
3 inaccurate analysis of low flow impacts. He concurs with NHC's concerns about the Port's misplaced
4 focus on downstream data and agrees that, "the final Low Flow Report should document and discuss
5 the accuracy of the calibrations in predicting upper-stream flow flows and include a statement as to the
6 adequacy of the model in predicting low flows." Whiting Decl. at 7, lines 16-20.

8 In this context, NHC's comment that overall calibration of the HSPF model to assess low flow
9 impacts to Walker and Des Moines Creek remains inadequate should not be surprising to Ecology.
10 Rozeboom 2d Decl. at ¶¶ 8-16. Indeed the Port's own HSPF consultant acknowledges that the model
11 from which impacts have been calculated must be revised and peer-reviewed before a final version is
12 provided to Ecology. *Id.* at ¶ 9; Whiting Decl. at 7. NHC also points out that higher confidence in
13 model outputs could -- and should -- be obtained if the Port utilized actual, rather than synthesized,
14 data. *Id.* at ¶¶ 11, 16.

16 Accurate modeling of low flow impacts remains a major stumbling block. The Port has failed
17 to achieve mass balance during low flow periods (when it matters), to utilize appropriate gauging data,
18 or to calibrate properly (Rozeboom 2d Decl. at ¶¶ 11-16), and its statements on these points are in
19 some places misleading. *Id.* at ¶¶ 12, 14. Moreover, the Port's modeling of the low flow impacts
20 attributable to the MSE wall/embankment is overly simplistic¹³, relies on unrepresentative information
21

23 ¹³ For example, Dr. Lucia states that "use of the two-dimensional Hydrus model to evaluate flow through the embankment
24 in a one-dimensional sense is both an underutilization of the capabilities of the program, and more importantly, a
potentially serious misrepresentation of the flow conditions in the field which most likely impacts the timing of flow
reaching the creek below." Lucia Decl. at ¶ 7.

1 about hydraulic properties of the fill soil, and fails to include a sensitivity analysis – a critical fail-safe
2 given that small changes in model input values could have a large influence on predicted stream flows.
3 Lucia Decl. at Comments A-E, ¶¶ 7-26.

4 Such analyses would pinpoint what ACC expert Dr. Pat Lucia describes as a significant lag
5 time -- perhaps several years -- between construction of the embankment and emergence and
6 contribution of groundwater flowing through the embankment to affected streams. Lucia Decl. at
7 Comment B, ¶¶ 10-11.

8 The 401 low flow mitigation conditions (Cert. at 25) are explicitly designed to allow water
9 quality violations to occur before action must be taken to correct the problem:

10
11 Mitigation during the proposed period appears to effect [sic] low flow frequencies during June
12 and July. Monitoring shall specifically address potential adverse impacts to fish or aquatic
13 biota during June and July. If monitoring shows an adverse effect during this time period the
14 Port shall implement contingencies to address the impact (such as providing additional
mitigation water . . .).

15 In other words, the harm, i.e., violation of state water quality standards protecting beneficial uses, will
16 have to occur BEFORE the Port is required to take action. *See* Rozeboom Decl. at ¶11; Whiting Decl.
17 at pp. 7-8.

18 These identifiable time periods of potential non-compliance with water quality standards are
19 reminiscent of the Battle Mountain Gold mitigation plan design, where the Board deemed unacceptable
20 a seven-year lag time in filling the mine pit lake allowing unmitigated interim water quality violations.
21 *OHA* (2000) at Finding Nos. 40, 64.

22
23 The Port's refusal to include the Industrial Wastewater System (IWS) in its low flow modeling
24 also remains problematic. As Mr. Luster explains, the scope of the Port's 401 application has been

1 subject to erosion over the years. Luster 2d Decl. at ¶¶ 14-22.¹⁴ Allowing the Port to omit IWS
2 impervious surface impacts from the low flow model undermines low flow impact assessment as well
3 as the agency's ability to evaluate the cumulative effects of the Third Runway Project, required for a
4 401 decision. *Id.* at ¶ 20. In fact, parts of the IWS upgrade and expansion are directly connected to
5 Third Runway and MPU construction. *Id.* The infiltration capacity of the newly-lined IWS collection
6 lagoons, along with the increase in impervious surfaces associated with IWS expansion, are critical
7 factors in determining low flow impacts. Rozeboom 2d Decl. at ¶¶ 18-20. Nonetheless, analysis of
8 IWS impacts has been omitted from the low flow impact study.
9

10 Kelly Whiting concludes his declaration by recapping additional significant design
11 "challenges" concerning the Port's low flow mitigation plan. These include "the feasibility to provide
12 very low constant gravity discharge with variable water depths, the feasibility to deliver flows to
13 stream from distant vaults, the quality of stormwater from areas not subject to water quality pre-
14 treatment and subject to vehicular use." Whiting Decl. at p. 8, lines 22-26. In light of this, Ecology's
15 assertion that "every single issue pertaining to the adequacy of the stormwater plan had been
16 successfully resolved" (Kenny Decl. at ¶21) appears to be based on its argument to allow the Port to
17 remove the low flow technical analysis and mitigation plan from the SMP discussion. As the 401
18 suggests, respondents will then process the plan as an independent post-401 certification matter, out of
19 the public eye, and beyond the reach of the PCHB. Rozeboom 2d Decl. at ¶17.
20
21
22

23
24 ¹⁴ The Amended 401 compounds this problem by limiting its scope to "Port 404 projects," narrower than the sum total of
25 projects, operations, and activities which should be subject to 401 certification. See ACC's Notice of Appeal of Re-Issued
401, at ¶¶ 3, 4.

1 Ecology's 'solution' to Mr. Whiting's reservations is to include them in 401 requirements for
2 future analysis.¹⁵ However, under the federal Clean Water Act, 33 U.S.C. § 1341, and applicable
3 regulation 40 C.F.R. § 121.2(a)(3), future submittals and monitoring results cannot substitute for the
4 preponderance of evidence required to assure prospectively that water quality standards will be met.
5 Luster 2d Decl. at ¶¶ 32-34. The Port's failure over several years to submit a complete low flow
6 augmentation plan (*id.* at ¶ 35), and its track record of design and analysis errors and oversights, do not
7 provide a basis to throw precaution to the wind and base a 401 on the assumption that when the Port
8 completes its low flow plan and analysis, it will provide the necessary protection to local streams.
9 Rozeboom 2d Decl. at ¶¶ 23-24.

11 Inherent uncertainties require more precautions -- not less -- in making a 401 decision. *PUD*
12 *No 1 of Pend Oreille County v. Ecology*, PCHB No. 97-177, *et seq.*, Amended Final Findings,
13 Conclusions and Order, Finding No. 25 (2000); *appeal pending*, Washington Supreme Court Docket
14 No. 70372-8 (more protective instream flows are warranted given inherent uncertainty in flow model
15 techniques). Where mitigation is speculative and uncertain, it is not legally adequate for providing
16 reasonable assurance for issuance of Section 401 Certification. *OHA, supra*, Conclusion No. 58. *See*
17 *Hayes v. Yount*, 87 Wn.2d 280, 293, 552 P.2d 1038 (1976). The soundness of a proposal should be
18 determined before approval of the permit, not afterwards. *Ecology v. Barden*, SHB No. 83-42 (1985),
19
20
21

22 ¹⁵ Mr. Whiting acknowledges that his review was not intended to determine Port compliance with state and federal water
23 quality law (Whiting Decl. at ¶¶ 3, 6 (Comment 2 at p. 6)), and does not offer an opinion whether a complete plan was
24 required for purposes of issuing a Section 401 Certification. Whiting Decl. at p. 6; *see* Luster 2d Decl. at ¶¶ 30-31. He
25 does, however, understand that the plan he reviewed was not complete. Whiting Decl. at ¶ 6 (comment 2 at p. 6). The draft
nature of the plan is evident on its face: each of its pages 1-37 are stamped "Draft" across each entire page, and they
include such references as "Section xxxx." *See* Low Flow Analysis at pp. 1-37 (Ex. C to Declaration of Paul Fendt).

1 at Conclusion of Law X; *Luce v. Snoqualmie*, SHB No. 00-034 (2001), at Conclusion V(2). Such is the
2 case with the Third Runway 401 Certification.

3 **E. There Is No Reasonable Assurance that the Airport's Stormwater Discharges Will Not**
4 **Violate Water Quality Standards**

5 The Port and DOE offer denial and avoidance rather than reasonable assurance that the airport,
6 particularly in the expanded physical and operational form approved by the 401 decision, will not
7 violate water quality standards. The Port's denial of its history of water quality violations contradicts
8 the weight of the evidence, including that of its own experts. The pre-1998 Annual Stormwater
9 Reports, reporting upstream, downstream and discharge sampling, clearly revealed violations of toxic
10 substances criteria, attributable to the Port. Strand 2d Decl. at ¶¶ 5-6, 21. In 1998, the Port ceased
11 collecting upstream samples, however subsequent sampling of effluent "confirmed discharges rich in
12 metals continued to occur at the Port's stormwater outfalls." *Id.* at ¶ 7. By the admission of the Port's
13 own consultant, Linda Logan, zinc remains a problem at least one of the Port's outfalls. *Id.* at ¶ 8.
14 "Multiple lines of evidence do exist . . . that chemicals, particularly the metals copper, lead and zinc
15 exceed the State's Water Quality Criteria." Strand 2d Decl. at ¶ 4; Luster 2d Decl. at ¶ 46.

16
17
18 Sediment in Miller Creek exceed sediment criteria, a point not refuted by the Port. Given the
19 location and nature of Port discharges to Lake Reba, which lies above Miller Creek, and sediment data
20 above Reba Lake, it is reasonable to attribute these exceedances to Port effluent. Strand 2d Decl., ¶ 13.

21 The Port's Whole Effluent Toxicity testing has also revealed water quality violations. Strand
22 2d Decl. at ¶¶ 8-9. Moreover, although the Port claims to have located the source of zinc pollution, by
23 its own admission it has not implemented source controls for this problem. See Logan Decl. at ¶ 16.
24

1 Nor do the Port's statements about minimal glycol usage comport with its own records,
2 collected from tenant airlines, which reveal continuous and frequent use of glycol products throughout
3 the winter season. Strand Decl. at ¶ 19. Glycols are in fact being discharged in toxic amounts to STIA
4 stormwater. *Id.* at ¶¶ 14-19.

5
6 This history is significant because Ecology has adopted the Port's NPDES permit wholesale
7 into the 401 Certification. If this permit is inadequate to protect water quality under current conditions,
8 then there is no reasonable assurance that water quality standards will not be violated by the Port as it
9 expands its facilities and activities. This is particularly so because of the more protective (and
10 prospective) anti-degradation prism mandated for 401 certification, which does not look just to the
11 relatively relaxed standards of the Port's NPDES permit. Given the Port's history of discharge
12 exceedances, there is a very real possibility that the Port will violate water quality standards come the
13 next rainstorm.

14
15 Further, notwithstanding Special Condition S2 of its NPDES permit, the Port has failed to
16 submit construction stormwater monitoring data to Ecology. Declaration of Greg Wingard. This is a
17 violation of the Port's NPDES permit. It also means that Ecology is completely uninformed as to
18 whether construction water quality violations are occurring now or have occurred in the past even
19 while construction activities have been ongoing at the airport (on the Port/Ecology theory that these
20 activities are "at the Port's risk" and/or not subject to the need for 401 certification).

21
22 The failure of the Port to submit and of DOE to obtain such monitoring data as the Port is
23 required to collect is compounded by the fact that the Port's NPDES permit does not require sampling
24 of stormwater outfalls in a manner that would show whether water quality standards are being violated.

1 The Port no longer samples water quality upstream of its discharges. Strand 2d Decl. at ¶ 7. Its sparse
2 effluent sampling protocols makes it impossible to determine whether samples are representative of
3 true pollutant concentrations. Willing 2d Decl. at ¶¶ 25, 27. DOE has not required the Port to collect
4 and report hardness data, even though the equations for certain toxic criteria require this information in
5 order to determine violations. *Id.*

6
7 These shortcomings in Ecology's past application of the Clean Water Act to the Port are now,
8 perversely, relied on as part of Ecology's defense of its new 401 certification. For example, Ecology
9 declarant Kevin Fitzpatrick lectures ACC and the Board on the difference between the Port's water
10 quality exceedances on an instantaneous basis, which he admits, and actual violations, which he
11 declares cannot be proven because Ecology does not require the Port to collect and report time-
12 averaged samples. Ecy. Br. at 21-22; Fitzpatrick Decl. at ¶ 3 ("The Port's stormwater discharges from
13 the STIA have exceeded state water quality criteria for copper, lead, and zinc on an instantaneous basis
14 . . . [but] . . . [a]t present, there are not established state or federal protocols or methodologies for
15 stormwater sampling and monitoring to determine if pollutant concentrations persist beyond the time
16 periods set in Ecology's regulations").

17
18 Ecology's logic here is inconsistent with the Clean Water Act mandate for 401 certification.
19 ACC need not prove violations. To issue the 401, Ecology must have had reasonable assurance that
20 water quality standards would NOT be violated. Luster 2d Decl. at ¶¶ 37-45. Can such reasonable
21 assurance be found in the face of acknowledged "exceedances"? May Ecology (including over the
22 three plus years of pendency of the Port's application) studiously avoid collecting the information
23 necessary to translate "exceedances" into violations and then cite this avoidance as a virtue in support
24

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HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 006761

1 of 401 reasonable assurance? The Board should say no for the sake of the water quality laws in this
2 state. *See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-65 (1999) (industrial stormwater
3 dischargers “must comply strictly with state water quality standards”).

4 Compounding the problem of the “exceedances” acknowledged by DOE is the failure of the
5 401 Certification to ensure future compliance with water quality standards. The Port (Br. at 23) and
6 Ecology (Br. at 20-31) both assert that because the Port’s stormwater management plan meets design
7 requirements contained in the King County Surface Water Design Manual (KCSWDM), it is therefore
8 reasonable to presume that water quality standards will be met. However, it is inappropriate to rely
9 upon KCSWDM compliance as a basis for a finding of reasonable assurance, particularly in view of
10 the Port’s large and complex proposal. Luster 2d Decl. at ¶ 30. King County itself has warned
11 repeatedly that technical compliance with the KCSWDM does not equate to Clean Water Act
12 compliance. The Design Manual does not guarantee compliance with state water quality standards nor
13 does it represent AKART.¹⁶ Whiting Decl. at ¶ 6(1), p.4, Exhibit 1, cover page and page 1; Willing 2d
14 Decl. at ¶ 19.

15
16
17 Ecology’s reliance on King County approval as AKART violates state and federal law relating
18 to appropriate standards and treatment. RCW 90.54.020(3); 33 U.S.C. § 1341(d). Moreover, had the
19

20
21 ¹⁶ Ecology misinterprets ACC’s point about AKART. Ecy. Br. at 23. As noted in Mr. Whiting’s declaration, “the King
22 County Manual is not AKART.” Whiting Decl. at ¶ 6(1), p. 5, citing King County review comments on draft 401
23 Certification. That he recommends future revisions to the Port’s permits if monitoring reveals failure to comply with
24 standards is not material – Mr. Whiting’s task was to assess compliance with KCSWDM, not with state and federal water
25 quality law. Whiting Decl. at ¶ 3 (“My review of the SMP was limited to determining compliance with the performance
standards in the Manual.”) and Ex. 1 (“it is important to keep in mind the limitation of the work we have performed. . .
Compliance with the technical provisions of the Design Manual does not mitigate all potential impacts of development and
may not provide sufficient information to allow for approval under other codes and regulations.”) The unrefuted point
remains, the Port’s King County-vetted stormwater plan does not equate to “all known, available and reasonable treatment.”

1 Third Runway Project actually been reviewed by King County under the Manual, rather on a contract
2 and under limitations from Ecology, it would have undergone “Large Site Drainage Review” and
3 would likely have required additional stormwater conditions, tailored specifically to the proposed
4 development. Rozeboom 2d Decl. at ¶ 6; Willing 2d Decl. at ¶¶ 16-18; *King County Surface Water*
5 *Design Manual* (King Co. DNR, Sept. 1998) at § 1.1.2.4. Ecology did not require that the project
6 undergo such review.
7

8 Even King County’s limited review under the manual did not result in wholehearted
9 endorsement of the Port’s plans. As even Ecology admits (Br. at 22), selectively quoting King
10 County’s Mr. Whiting, the BMPs relied on for 401 certification are only “partially effective” at best in
11 removing metals. Perhaps understandably, Ecology fails to excerpt Mr. Whiting’s full statement:
12 “However, the effectiveness of the proposed BMPs, primarily biofiltration, at removing non-particulate
13 (soluble) metals is expected to be minimal. Enhanced water quality treatment, beyond the Manual’s
14 basic menu may be warranted based on the monitoring data presented in the SMP.” Whiting Decl. at ¶
15 6(1), p. 5. Elsewhere, Mr. Whiting has indicated that the Port’s BMPs will not remove copper
16 concentrations from its stormwater. Willing 2d Decl. at ¶ 18. Fundamentally, the Port’s approach to
17 stormwater management will not remove metals from the stormwater waste stream. *Id.* at ¶¶ 13-15.
18 The Port’s plan is not AKART. *Id.* at ¶ 19.
19

20 The Port (Br. at 24) and Ecology (Br. at 22) also rely on development of a future “site specific”
21 study that could lead to alteration of water quality criteria for metals in the Port’s outfalls as support
22 for the 401. See 401 Condition J(2)(a). This process, involving a Water Effects Ratio Study
23 (“WERS”), by its nature implies a relaxing of water quality criteria, an intent confirmed by the Port’s
24

1 own declarant. Logan Decl. at ¶ 27; Willing 2d Decl. at ¶¶ 20-24. Ecology's reliance on the WERS is
2 telling, as Tom Luster points out: it represents acknowledgment that Ecology has no assurance that
3 water quality standards which currently apply will not be violated. Luster 2d Decl. at ¶¶ 47-48.
4 However, WAC 173-201A-040(3) requires public review and comment before site specific changes in
5 such standards may be adopted.¹⁷ There is no guarantee that the changes will occur --unless Ecology
6 has made inappropriate, undisclosed promises outside of the process and in the absence of the data
7 mandated in the WAC.
8

9 The inclusion of the WERS condition poses the question: if the BMPs are effective and the Port
10 is not discharging contaminants such as metals, why are site specific relaxation of standards needed ?
11 Ecology does not answer, yet its 401 Certification relies on a process of future alteration of water
12 quality standards. That process is itself subject to uncertainty yet the 401 offers no alternate basis for
13 reasonable assurance. Such double contingencies are not the stuff of which reasonable assurance is
14 made.
15

16 Respondents object to ACC's citation of another loophole as unwarranted, however, the
17 reference in the 401 to "mixing zones" is confusing, especially given the Port (Br. at 26) and Ecology's
18 (Br. at 23) response. See WAC 173-201A-100. If in fact the referenced mixing zones are to be created
19 as part of short-term water quality modifications, WAC 173-201A-110, a set of procedures apply,
20 including SEPA and APA compliance. *Id.* If the referenced mixing zones are governed by 173-201A-
21

22 ¹⁷ Interestingly, after almost three years, the Port has finally published its February 1999 in-house Water Effects Ration
23 Screening Study. Logan Decl., Attachment C. The reason for the delay becomes apparent upon inspection. Critical
24 information is missing. What is known indicates that the sampling was highly dilute and likely did not accurately represent
25 the metals concentrations in the streams or stormwater discharges. Willing 2d Decl. at ¶¶ 22-24. Nor was the preliminary
evidence presented in this study peer reviewed or generally reviewed by the interested scientific community. Strand 2d
Decl. at ¶ 12.

1 100 (as implied by the 401 Cert. reference to 173-201A-100(6)) they are subject to compliance with
2 procedures relating to AKART and the APA as set forth in WAC 173-201A-100. Condition A(2)(e) of
3 the 401 Certification explicitly contemplates a 100-foot mixing zone downstream of applicable
4 discharges. However respondents may spin the 401's explicit – and unlimited – reference to mixing
5 zones, the condition is not in compliance with water quality standards. Luster 2d Decl. at ¶ 56.
6

7 The retrofit of stormwater facilities, which respondents also cite as evidence that the 401 will
8 not allow “exceedances” to continue as business as usual at the airport, is illusory. The Port (Br. at
9 27) and Ecology (Br. at 23) deny it, but the plain language of the 401 Condition offers the Port an exit
10 ramp. 401 Cert., Cond. J(1)(c) (“For every ten (10) percent of new impervious surface added at the
11 project site, the Port must demonstrate that twenty (20) percent of retrofitting has occurred unless
12 demonstrated that a twenty (20) percent rate isn't feasible”) (emphasis added). The Port has already
13 indicated that retrofit is not feasible. Strand 2d Decl. at ¶ 20; ACC Memorandum in Support of Motion
14 for Stay at 27-28.
15

16 Finally, Ecology (Br. at 22) appears to misunderstand ACC's argument regarding effluent
17 limitations. While NPDES terms may be incorporated into a Section 401 Certification, such
18 incorporation is not dispositive of the reasonable assurance question, particularly in light of the
19 differing roles and perspectives of NPDES permits and 401 certifications. Luster 2d Decl. at ¶ 41-49.
20 Effluent limits necessary for reasonable assurance must be included as per federal statute, even if not
21 found in the NPDES permit. 33 U.S.C. § 1341(d) (“Any certification under this section shall set forth
22
23
24

1 any effluent limitations . . . necessary to assure” compliance with water quality standards).¹⁸ Section
2 401 addresses itself to anti-degradation as well as compliance with water quality criteria. Ecology
3 must ensure that the Third Runway Project will not worsen water quality.

4 Once again, where there is uncertainty about impacts, Ecology must act conservatively in
5 crafting conditions and mitigation for 401 Certification.¹⁹ These precautionary principles are the
6 essence of the 401 process, yet Ecology has turned them on their heads assuming that certification
7 must issue absent proof that a violation will occur, accepting blank pages now with promises to
8 complete them later.

10 **F. The Amended Certification Provides No Reasonable Assurance that Third Runway**
11 **Embankment Fill Will Not Result in Water Quality Violations.**

12 On June 27, 2001, a little more than a month before Ecology issued the 401 Certification,
13 Ecology’s own Toxic Cleanup Program in Lacey was telling Ecology’s Water Quality Program in the
14 Northwest Regional Office that, if Ecology was not going to “restrict fill material to naturally
15 occurring uncontaminated soils,” then Ecology should use the most stringent standards in WAC 173-
16 340-900, Table 749-3 (Ecological Indicator Soil Concentrations (mg/kg) for Protection of Terrestrial
17 Plants and Animals), accept only clean natural soil for the uppermost six feet of soil, and require the
18 statistical testing methods for soils specified in WAC 173-340-740 because of the “considerable
19

21 ¹⁸Ecology cites (Br. at 22) *Protect the Peninsula's Future* (“PPF”) to argue that a 401 cert. may be conditioned upon
22 issuance of an NPDES permit. In OHA, the board discussed and distinguished PPF on grounds that “it is not possible to
23 apply that ruling to this case without additional evidence that the anticipated discharges from the waste rock piles may be
24 feasibly controlled under a NPDES permit” See *OHA, supra*, at 2. Ecology may not rely on the prospect of better, as yet
unwritten conditions in future versions of the Port’s NPDES permit as reasonable assurance in the here and now.
¹⁹ *PUD No. 1 of Jefferson County* at 202-203; *PUD No. 1 of Pend Oreille County, supra*. Studies to determine the
effectiveness of an uncertain impact or condition must be conducted before the permit is issued. *Ecology v. Barden*, SHB
No. 83-42, et seq., Conclusion No. X (1985).

1 variability in soil concentrations.”²⁰ Rather than adopt these more stringent standards and require an
2 embankment of “naturally occurring uncontaminated soils,” the amended 401 Certification gives the
3 Port permission to build a contaminant-laden mountain dotted with “hotspots” of toxic substances
4 through which water can infiltrate and de-grade nearby streams.

5
6 The revised Certification gives the Port wide latitude and multiple options to accept and use fill
7 that contains contaminants in amounts greater than natural background levels. Pursuant to
8 Certification Condition E(1)(b), the Port may import fill contaminated up to the levels specified in the
9 Certification with somewhat more restrictive levels for four contaminants within the first six feet of the
10 embankment. Cert. at 17-18. Alternatively, the Port may adopt, in part, but not in total, the
11 recommendations of the U. S. Fish and Wildlife Service and construct a “drainage layer cover” above
12 the massive rock drainfield underlying the fill with material that would be allowed for the upper six
13 feet of the embankment. Cert. at 18. Finally, if the contaminated fill fails to meet the fill criteria in the
14 Certification, Ecology will allow the Port to employ a Synthetic Precipitate Leaching Procedure
15 (“SPLP”). Cert. at 18. Because the Certification allows the SPLP to be “amended in the future”
16 (Condition E(1)(b) at 18), the Port may choose any of the above options, or none of them at all.

17
18 Rather than acknowledge that the Certification’s fill acceptance criteria do not comport with
19 the recommendations of Ecology’s Toxic Cleanup Program, both Ecology and the Port try to mislead
20 this Board into believing that the Certification prohibits the Port from importing any contaminated fill.
21 *See*, Ecology Brief at 19 (“The Port is prohibited from using non-naturally occurring uncontaminated
22

23
24 ²⁰ Email thread dated 6/27/01 4:01 PM from Peter Kmet to Kevin Fitzpatrick (cc to Chung K Yee) regarding his
recommendations for language for 401 certification, First Eglick Decl. Ex. H.

1 materials”); and Port Brief at 18 (“[T]he Port is prohibited from using fill from known contaminated
2 sources” and “extensive investigation of each fill source is required to ensure that no fill is accepted
3 from a contaminated site.”).

4 While the revised 401 Certification prohibits the use of fill sources “that are determined to be
5 contaminated following a Phase I and Phase II site assessment” (Condition E(1)(d)), the only purpose
6 of these site assessments is to “verify that excavated soil from the proposed fill source complies with
7 the fill criteria” (Condition E(1)(a)) contained in the 401 Certification. Strand 2nd Decl., ¶ 22.
8 Samples obtained from the fill source as part of the site assessments are to be “compared to the fill
9 criteria [set forth in the Certification] to determine the suitability of the fill source for Port 404
10 projects.” Cert. § E.1.(b); Strand 2nd Decl., ¶ 22. As a result, Condition E(1)(d) does not restrict the
11 Port “to using only naturally occurring uncontaminated soils,” unless one accepts the legitimacy of the
12 401’s forgiving definition of “naturally occurring uncontaminated soils” in the first place. Yet, this is
13 precisely one of the grounds for ACC’s appeal. As in other aspects of the 401, the Ecology/Port
14 defense relies on circular reasoning (‘we are right because the 401 says we are’) rather than reasonable
15 assurance.
16
17

18 As proof that Ecology’s fill acceptance criteria allow the Port to import more than “only
19 naturally occurring uncontaminated soils,” the Board need only look as far as the Second Declaration
20 of Dr. John Strand which describes in detail, with citation to internal Port memoranda, how the Port
21 has imported and stockpiled at the Airport over 165,000 cubic yards of contaminated fill from the
22 Hamm Creek Restoration site, the First Avenue Bridge project and the Black River Quarry. Strand
23 2nd Decl. at ¶¶ 23-25. Sediments from the Hamm Creek site contain DDTs and PCBs. *Id.* at ¶ 23.

1 Material from the First Avenue Bridge project and the Black River Quarry contain TPHs in excess of
2 the then existing MTCA cleanup levels for TPHs. *Id.* at ¶¶ 24, 25.

3 By allowing contaminated fill to be imported and used in the embankment, the revised
4 Certification also allows the Port to violate embankment recommendations of the U.S. Fish and
5 Wildlife Service (“FWS”) as contained in FWS’ Biological Opinion.²¹ Strand 2nd Decl., ¶ 27. The
6 Port states that “ both the amended §401 Certification and the BO adopt fill criteria for two distinct
7 zones of the embankment, the first (called the ‘drainage layer cover’) being an ‘ultra-clean’ 40-foot
8 wedge of fill along the western edge of the embankment, and the second being the remainder of the
9 embankment.” Port Brief at 19. According to the Port, prior inconsistencies between the certification
10 and the BO have been corrected by the amended Certification requiring the Port to comply with the
11 more stringent criteria between them. *Id.* What the Port fails to tell this Board is that the BO calls for
12 three embankment zones: the first is the drainage layer cover, just above the drainfield; the second is
13 the main embankment layer; and the third is the surficial three feet, subject to more stringent criteria
14 than the main embankment layer. BO at 42 (Exhibit B to Gould Decl. in support of Port’s Response).
15 In contrast, the Amended 401 , while purporting to be based on the BO, omits any discussion of the
16 third protective zone (the “surficial three feet”) for which the FWS BO requires more restrictive
17 criteria. Declaration of Dr. Pat Lucia (“Lucia Decl.”) at ¶¶33, 34. This omission is significant. For
18
19
20

21
22 ²¹ The Port (at 20-21) makes much of the fact that ACC dismissed its Endangered Species Act (“ESA”) lawsuit and
23 suggests that in doing so, ACC tacitly approved the recommendations in the U.S. Fish and Wildlife Service Biological
24 Opinion (“BO”) regarding embankment construction. Again the Port’s arguments are misleading. The purpose of ACC’s
25 ESA lawsuit was to require consultation consistent with § 7 of the ESA. The suit did not address substantive issues
including, for example, whether the fill criteria in the BO were appropriate. Moreover, ACC’s lawsuit was voluntarily
dismissed without prejudice. Eglick Decl., Exhibit I (Order of Dismissal by Stipulation dated August 6, 2001, U.S. District
Court, W.D. Washington, Case No. 00-915).

1 example, under the Amended 401's drainage layer option, the Port could use fill containing 2000
2 milligrams per kilogram ("mg/kg") of chromium on the surficial three feet compared to the limit of 42
3 mg/kg established in the BO. Under the revised Certification, the Port could also use fill for the
4 surficial three feet contaminated with up to 250 mg/kg of Lead and 5 mg/kg of Selenium whereas the
5 BO limits those pollutants to 220 mg/kg and .8 mg/kg respectively.
6

7 Moreover, the Port's defense of the numeric criteria in the amended 401 is plagued with errors.
8 The Port erroneously states (Br. at 19) that only 4 contaminant criteria are based on MTCA Method A
9 cleanup levels. In fact, seven contaminant levels established in the Certification are identical to
10 MTCA method A clean-up levels: Arsenic (20 mg/kg)²²; Chromium (2000 mg/kg); Lead (250 mg/kg);
11 Mercury (2 mg/kg); Gasoline (30 mg/kg); Diesel (2000 mg/kg); and Heavy Oils (2000 mg/kg).
12

13 The Port also incorrectly claims that most of the contaminants in the amended Certification are
14 set to Puget Sound Natural Background levels or at the Practical Quantitation Limits. Port Brief at 19-
15 20. In fact, while DOE has not established natural background levels for all contaminants listed in the
16 Certification (*See*, Ex. C to Gould Decl.), of the nine listed contaminants for which natural background
17 levels have been established, six of the levels set in the Amended 401 exceed natural background, in
18 some cases significantly, and none of the contaminants are set at the Practical Quantitation Limits
19 ("PQL") identified in DOE Technical Memorandum #3 PQLS as Cleanup Standards (November 23,
20 1993) ("Memorandum 3"). Lucia Decl., ¶ 36, Ex. B. The table below makes the comparisons:
21
22
23

24 ²² DOE's own toxics expert expressed concern that 20mg/kg of Arsenic was too high and should have been set at natural
background. Eglick Decl., Ex. J (Chung Yee email 9/11/2000).

Contaminant²³	401 Cert.²⁴	Puget Sound Background²⁵	PQLS²⁶
Arsenic	20	7	1.5
Beryllium	0.6	.6	.5
Cadmium	2	1	.1
Chromium	42/2000	48	.05
Copper	36	36	.5
Lead	220/250	24	.5
Mercury	2	.07	.002
Nickel	100/110	48	7.5
Selenium	5		.75
Silver	5		.1
Zinc	85	85	.03

Lucia Decl. ¶ 36.

The Port's Risk Assessor, C. Linn Gould, also misstates the Practical Quantification Limits. Ms. Gould asserts that the PQL for Selenium and Silver are both 5mg/kg. Gould Decl., Exhibit E. However, Ecology's Technical Memorandum 3 states that "in some instances (indicated by a 'thumbs-up' icon in the tables), the laboratories were able to attain a PQL lower than the federal PQL." Tech. Memo. 3 at p.3. Thus, as early as 1993, DOE identified Method 6010, establishing a PQL for

²³ All values listed in milligrams per kilogram ("mg/kg").

²⁴ Cert. at § E.1.(b).

²⁵ As established by DOE publication 94-115 (October 1994).

²⁶ These values represent the minimum PQLS in mg/kg as stated in Table II of DOE Memorandum #3 (November 23, 1993).

1 Selenium at .75 mg/kg, and Method 7741 establishing a PQL for Silver at .1 mg/kg. Memorandum 3,
2 Table II, at p.7; Ex. B. to Lucia Decl.

3 The Port generally alleges that “scientific calculations” utilizing a back-calculating approach
4 derive safe soil contaminant levels for the protection of water quality. Port Brief at 20. However, the
5 analysis, calculations and tables of DOE’s own expert, Chung Yee, show that for some contaminants
6 the 3-phase “back-calculating” model for deriving soil contamination levels for the protection of
7 surface and ground water would require contaminant levels much lower than those allowed by the
8 Amended Certification. Eglick Decl., Ex. J (Email from Ecology’s Chung Yee). For example, Mr.
9 Yee calculated that in order to protect groundwater only 5.79 mg/kg of Antimony should be allowed,
10 yet the Certification allows approximately 3 times that much Antimony (16 mg/kg). *Id.* Similarly, Mr.
11 Yee calculated that only 2.92 mg/kg of Arsenic should be allowed in order to protect groundwater and
12 that, at maximum, Ecology should have set the Arsenic level at natural background (7mg/kg) rather
13 then the 20 mg/kg allowed in the Certification. *Id.*

14 That the revised Certification sets the level of acceptable contamination too high for purposes
15 of ensuring water quality and protecting plants and animals is clear from Ecology’s own Toxics
16 Cleanup Program senior environmental engineer, Peter Kmet, quoted by ACC in our opening brief.
17 *See Memo in Support of Motion for Stay at 19 and Exs. G and H of First Eglick Decl.* In response,
18 Ecology was only able to obtain from Mr. Kmet a two-page declaration, which we urge the Board to
19 scrutinize carefully for what it does -- and does not -- say. Mr. Kmet’s declaration only cautions that
20 his emails “should not be construed to conclude that the acceptable fill criteria . . . are or are not
21 protective of water quality.” Kmet Decl. at ¶ 3 (emphasis added).

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24
25 ACC’S REPLY MEMORANDUM IN SUPPORT OF
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HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 006772

1 Criteria to ensure that contamination will not be placed on site are only as good as the testing
2 program to apply them, particularly where over 20 million cubic yards of fill is concerned. Here, the
3 Amended 401 criteria are not only themselves flawed, but fatally undercut by a sampling protocol
4 virtually designed to ensure that contaminants can be introduced above the levels set in the
5 Certification, resulting in toxic “hotspots” throughout the embankment. Lucia Decl. ¶39, 40; Strand
6 2nd Decl. ¶ 26. For example, the Certification only requires six (6) samples for fill sources greater
7 than 100,000 cubic yards. Certification at 16. As early as September 2000, Ecology’s expert, Mr.
8 Kmet, recommended 10 samples from every 2000 cubic yards, or, for “native borrow pits” a minimum
9 of 10 samples. Lucia Decl., ¶ 40, Ex. C (Kmet email dated 9/11/2000). Ecology’s own Toxics
10 Cleanup Program Publication 91-30 also recommends a much higher sampling program than proposed
11 in the Certification. Strand 2nd Decl. at ¶ 26. For example, for a 200,000-cubic yard candidate fill
12 stockpile, the Toxics Cleanup Program publication recommends a minimum number of 226 samples as
13 compared to the six samples required in the Amended Certification. *Id.*

14
15
16 WAC 173-201A-040(1) mandates that “[t]oxic substances *shall not be introduced above*
17 *natural background levels* in waters of the state which have the potential either singularly or
18 cumulatively to adversely affect characteristic water uses, cause acute or chronic toxicity to the most
19 sensitive biota dependant upon those waters, or adversely affect public health, as determined by the
20 department” (emphasis added); *see also* WAC 173-201A-030(1)(c)(vii). By allowing the embankment
21 to be built with fill containing toxic substances “above natural background levels,” the potential, if not
22 the probability, exist for contaminants to percolate through the fill pile into the groundwater, ultimately
23 contaminating wetlands and surface waters that may be connected to the groundwater stream. Strand

1 2nd Decl. ¶28; Lucia Decl., ¶ 28. The 401 fill acceptance criteria do not provide reasonable assurance
2 that toxic substances will *not be introduced above natural background levels* which have the potential
3 either singularly or cumulatively to adversely affect characteristic water uses, or cause acute or chronic
4 toxicity to the most sensitive biota. *Id.* The Certification should be stayed for this reason alone.

5
6 **G. There Is No Reasonable Assurance for Wetlands, Which Will Be Irreparably Harmed**

7 At the outset, the Port argues it only intends to fill 2.8 acres of wetlands initially, suggesting
8 that this activity will not cause irreparable injury, and is therefore not eligible for a stay. Both Ms.
9 Azous and Ms. Sheldon categorically disagree. Sheldon Decl., ¶ 22. Ms. Azous identifies those
10 wetlands as particularly important to the Miller Creek watershed:

11 The wetlands the Port plans to fill in the initial phase are the most significant surface water
12 sources to the remaining wetlands adjacent to Miller Creek. The majority of the 2.8 wetland
13 acres to be filled in the short term are hydrologically connected to the creek. The loss of these
14 wetlands would result in the permanent loss of nutrients and water to the Miller Creek wetland
system

15 Azous Decl., ¶ 6. Further, Ms. Azous notes that, once these wetlands are eliminated, “there will be
16 little information available to fully restore them because no monitoring of their hydrologic contribution
17 to the system has occurred.” *Id.* at ¶ 8. She concludes, therefore, agreeing with Ms. Sheldon, that,
18 “The critical role these wetlands play in maintaining the functions of the Miller Creek wetlands
19 combined with the difficulty of restoring their functions in the ecosystem once they are eliminated
20 make their loss irreparable. *Id.* at ¶ 9.

21
22 Thus, even assuming that the Port would adhere to its non-binding suggestion to this Board that
23 it would only initially fill 2.8 acres of wetlands in the absence of a stay, the loss would be irreparable.
24

1 The Port and Ecology argue that the provisions of RCW Chapter 90.74 governing
2 compensatory mitigation for wetlands support the 401 decision, despite its failure, as described by
3 ACC's wetland experts, to protect and preserve important wetland functions on the site.

4 Respondents also refer to RCW 90.48.261, which suggests that the provisions of RCW 90.74
5 should guide agency actions under Chapter 90.48. In doing so, respondents confuse two different
6 functions. One function, the primary one in this instance, is a certification by Ecology, required
7 pursuant to the federal Clean Water Act, that state water quality standards and criteria will not be
8 violated by the construction and operation of the overall project. This Certification requires taking into
9 account not only the anti-degradation standards adopted by Washington under the federal Clean Water
10 Act and Chapter 90-48, but all other state laws respecting preservation of waters (including wetlands)
11 of the state, such as the water code and Washington's Water Resources Act of 1971.²⁷ Therefore,
12 while RCW Chapter 90.74 may guide Ecology on mechanistic issues of mitigation, it cannot trump the
13 overarching requirement under the federal Clean Water Act that the agency grant certification only if it
14 has reasonable assurance that state water quality standards are met. If off-site mitigation will serve in
15 the sense that anti-degradation requirements are not transgressed, then RCW 90.74 authorizes such a
16 mechanism. It cannot, however, force a certification under the Clean Water Act which does not meet
17 the Act's requirements.
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23 ²⁷ See, e.g., RCW 90.54.020(3)(a) (requiring maintenance of flows "necessary to provide for preservation of wildlife, fish,
24 scenic, aesthetic and other environmental values, and navigational values," as cited in *Washington Dept. of Ecology v. PUD*
No. 1, supra. See Ransel, A Sleeping Giant Awakens: PUD No 1 of Jefferson County v. Washington Dept. of Ecology, 25
25 *Env. Law* 255 (1995), at p. 4 and n. 59, 60. (copy attached as Exhibit K to Eglick Decl.).

1 Once scrutiny moves past the respondents' citation of RCW Chapter 90.74 to excuse the
2 paucity of actual wetlands mitigation, respondents resort to a numbers game. For example, Ecology
3 claims (at 6) that "the plan provides for 102.27 acres of in-basin mitigation and 65.38 acres of out-of-
4 basin mitigation, for a total of 167.65 acres of mitigation ... Therefore, the Port proposes a total of
5 167.65 acres of wetland and upland buffer mitigation as mitigation for unavoidable impacts to 18.37
6 acres -- in excess of nine times the acreage of the impact." Ecy. Br. at 6. This sounds good, until one
7 looks behind the numbers and discovers that, to make such claims, Ecology has had to ignore its own
8 published guidance as to what counts as mitigation and what does not, and as to how various forms of
9 mitigation may be recognized. Both Amanda Azous and Dyanne Sheldon,²⁸ experienced wetland
10 scientists, have submitted declarations in support of this Reply which debunk the respondents' claims.

11 Per Ms. Azous and Ms. Sheldon, respondents' analyses are flawed in the following respects:

- 12 • It assumes that wetland "creation," "restoration," and "enhancement" are equivalent --
13 directly contrary to Ecology's own published guidance.²⁹ Sheldon Decl. ¶¶ 10, 11; Azous Decl. at ¶
14 22.

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19 ²⁸ In 1981, Ms. Sheldon was hired by King County and became its first wetland planner, creating the County's precedent-
20 setting wetland management program, establishing the first wetland rating system, the first requirements for buffers and
21 setbacks on wetlands, and the first requirements for compensatory mitigation ever set by a local or state government in the
22 Northwest. Sheldon Decl. at ¶ 2. She has been frequently consulted by King County and the Department of Ecology on
23 matters relating to wetlands management, ratings, and mitigation and, for example, was hired by Ecology in 1992 "to
24 conduct the field assessment element, to provide technical review and oversight, and to write key portions of Ecology's
25 precedent-setting study, "Wetland Replacement Ratios: Defining Equivalency." Sheldon Decl. at ¶ 3.

²⁹ Ms. Sheldon's bottom line is that, if Ecology's own published guidelines for analysis were followed, the Port's "total
compensation credit" would be roughly 23 acres, not 167 acres as stated in the 401 Certification, to compensate for the
identified impacts of over 20 acres. Thus the 401 Certification would allow the Port to just meet the acreage standards for
compensatory mitigation for the known impacts by using in-basin and out-of-basin compensation with no compensation
provided for the anticipated secondary impacts to wetlands." Sheldon Decl., ¶ 12 (emphasis added).

1 • Contrary to Ecology’s claim that the Port’s wetland mitigation program is
2 “unprecedented,” what is actually “unprecedented is Ecology granting mitigation ‘credits’ for simply
3 *preserving* existing wetlands in the project area, and for enhancing *upland* buffer habitats.” Sheldon
4 Decl. ¶ 13 (italics in original); Azous Decl. at ¶ 15.

5
6 • “Providing compensation credit for wetland losses through improvements to *upland*
7 forest habitats on a calculated acreage basis is not justified ecologically nor in Ecology’s own guidance
8 documents.” Sheldon Decl. at ¶ 15; Azous Decl. at ¶ 14.

9 • In Ms. Sheldon’s experience, an application cannot be considered complete when it
10 “contains five **pages** of corrections, additional data needs, clarifications of Port submitted plans, and
11 revisions still required by Ecology of the applicant to the *approved* plans. ... The Port has failed to
12 adequately address wetland issues, and Ecology acknowledges that in a *de facto* manner by requesting
13 clarification and additional analysis specifically related to long-term wetland sustainability which
14 influences water quality.” Sheldon Decl. ¶ 16.

15
16 • The 401 conditions raise “gravest concerns” about “the ability of the Department of
17 Ecology to implement and enforce them.” They are “ambiguous and unclear” and, with regard to 2.05
18 acres of wetland impacts, ten percent of the total wetlands lost, no compensation plan is provided for
19 review and approval. Sheldon Decl. at ¶ 17, 18, 21; *see* First Luster Decl.

20
21 • The much-touted restoration/relocation of Miller Creek involves running it “through Vacca
22 Farm’s peat bog by placing it on an impervious fabric ‘substrate’, thus hydrologically isolating the
23 stream from the groundwater and the wetlands (a source of late-season streamflow). However, such a
24

1 plan has never been attempted according to the manufacturer of the fabric substrate, who had no data
2 on whether or not the plan would work.” Sheldon Decl. at ¶ 19.³⁰

3 Finally, as Ms. Azous points out, the Amended 401 subtly eliminates a prior condition
4 (D(1)(g)) requiring pre-construction hydrologic monitoring. Azous Decl. ¶ 32. The condition now
5 requires immediate commencement of wetland hydrologic monitoring, but no longer requires such
6 monitoring to have occurred or occur prior to construction activities. Neither the Port nor Ecology
7 have offered a convincing explanation for this wording change, but Ms. Azous has identified its effect:
8

9 This change in 401 conditions eliminated the opportunity for Ecology to develop hydrologic
10 performance standards that more reasonably reflected the normal conditions of the wetlands
11 before further alteration by the Port’s construction activities. Under the current 401, the Port
12 will be able to continue to alter the drainage basin, affecting hydrologic patterns and tributary
13 area to wetlands while collecting monitoring data that predictably indicates the wetlands are
14 increasingly dry.

13 Azous Decl. ¶ 32.

14 The Board need not resolve the overall issue of the merits of the Port’s proposal with regard to
15 wetlands to find a stay appropriate here. It need only determine that there will be irreparable injury
16 from the 2.8 acres of wetland fill which the Port itself has said it would do at the outset. In the
17 alternative, the Board can speak to the merits of the Port’s wetland plan. In doing so, ACC urges the
18 Board to review the declarations of all of the experts (Ecology, the Port, and ACC), testing their
19

20
21 ³⁰ Ms. Sheldon observed with regard to the untested relocation of Miller Creek:

22 The point is this: what will be Ecology staff’s response if the stream channel/wetland interflow function fails?
23 One of the functional gains the NRMP identifies is relocation and restoration of Miller Creek into a floodplain
24 setting: yet key elements of that future condition are pure speculation (the fabric remaining permeable). Although
a monitoring plan and contingency actions have been identified, how exactly will Ecology implement them? The
Port will have its permits, the runway will be built and operational, and there will be no ‘hammer’ to encourage the
Port to design and implement a ‘fix’ (that begs the question of how one would propose to ‘fix’ a broken stream
channel bottom...). ...

25 Sheldon Decl. ¶ 19.

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HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 006778

1 assertions against one another. While, in some cases, disagreements among experts can be dismissed
2 as insoluble differences of opinion, that is not the case here. Ecology itself in the past has done much
3 to set the parameters of appropriate wetlands evaluation. Its assertions -- and those of the Port's
4 experts -- as well as those of ACC's experts, can be tested against the very standards which Ecology
5 itself has previously set concerning appropriate classification, mitigation and replacement of functions,
6 in the context of the state's anti-degradation standard. If the Board does so, it will find that there is a
7 likelihood of success on the merits of ACC's claim that the 401 decision with respect to wetlands does
8 not provide reasonable assurance that water quality standards will not be violated.

10 **H. The Overriding Public Interests Justify Issuance of a Stay.**

11 Neither the Port nor Ecology has established a likelihood of success, much less a substantial
12 probability of success on the merits. However, because ACC has established a likelihood of success
13 on the merits and irreparable harm, even assuming the respondents have demonstrated a likelihood of
14 success, the stay should still issue because there is no "overriding public interest which justifies denial
15 of the stay." WAC 371-08-415 (emphasis added). The term "overriding" is not explicitly defined. In
16 such instances, the Washington Supreme Court has looked to Webster's Third New International
17 Dictionary. See, e.g., *Development Services of America v. Seattle*, 138 Wn.2d 107, 118, 979 P.2d 387
18 (1999). It defines overriding as "1: Domineering, Arrogant . . . 2: subordinating all others to itself:
19 dominant, principal, primary."
20

21
22 The declarations submitted to the Board mostly by the Port staff all offer variations on the
23 theme that improvements at the Airport are "crucial to the region's infrastructure" (Port Br. at 29) that
24

25 ACC'S REPLY MEMORANDUM IN SUPPORT OF
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HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 006779

1 delays at the airport are “a serious problem for The Boeing Company and its Customers” (*Id.*) and that
2 delays in proceeding with the project will cost the Port \$49,000.00 per day.³¹ *Id.* at 29-30.

3 These statements reflect striking tunnel vision with regard to the public interest, particularly in
4 light of recent events. Neither the Port, nor DOE even acknowledge the other public interests which
5 must be considered and overcome to justify denial of the stay. These public interests include those in
6 clean water,³² in public confidence in the integrity of the 401 process, and in avoiding a precipitous
7 plunge into a billion-dollar capital project when recent events have sent all cautionary flags up the
8 mast.

9
10 The overriding concern in the law for assurance of clean water must transcend the Port’s
11 concerns. Here, the communities near the airport use and enjoy area streams and wetlands and devote
12 considerable resources to their protection and enhancement. Declaration of Sally Nelson, Mayor, City
13

14
15 _____
16 ³¹ The Port also admits, at pages 27-28 of its Brief, that it is uncertain when or if the Corps will issue the § 404 Permit.
17 Thus, if the Port is to be believed, a stay in and of itself would not be the sole cause of costs associated with purported
18 project delays. The Port’s statement further suggests that it is willing to risk \$49,000.00 per day of public monies in the
19 face of the uncertainty of § 404 approval.

20 ³² In adopting the Clean Water Act congress declared that “The objective of this chapter is to restore and maintain the
21 chemical, physical, and biological integrity of the Nation’s Waters.” 33 U.S.C. § 1251(a). In implementing the Clean
22 Water Act, our own legislature declared that it is the Policy of Washington to:

23 [M]aintain the highest possible standards to insure the purity of all waters of the state consistent with public health
24 and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life,
and the industrial development of the state, and to that end require the use of all known available and reasonable
methods by industries and others to prevent and control the pollution of the waters of the state of Washington.
Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible,
to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal
government’s interest in the quality of the navigable waters of the United States, of which certain portions thereof
are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal
government in a joint effort to extinguish the sources of water quality degradation, while at the same time
preserving and vigorously exercising state powers to ensure that present and future standards of water quality
within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of
Washington.

25 RCW 90.48.010.

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HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

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1 of Burien ("Nelson Decl.") at ¶2; Declaration of Robert Sheckler, Mayor, City of Des Moines
2 ("Sheckler Decl.") at ¶¶ 3-7. This public interest cannot be lightly overridden.

3 Further, as reflected in the joint declaration of Declaration of Senator Julia Patterson, Senator
4 Dow Constantine, Senator Tracey Eide, Representative Karen Keiser, Representative Shay Schual-
5 Berke, Representative Joe McDermott, Representative Erik Poulsen, Representative Mark Miloscia,
6 and Representative Maryann Mitchell, elected officials with broad responsibilities and more expertise
7 in the public interest than Port employees possess, the need for meaningful, effective review of the 401
8 (requiring a stay) is especially important here. That is because the integrity and appearance of fairness
9 in the 401 certification process became suspect after Ecology abruptly removed its senior Clean Water
10 Act expert, Tom Luster, from the matter in October, 2000. Such concerns were enhanced after
11 Ecology issued a Certification to the Port on August 10, 2001, and then, after the Port complained
12 about it, agreed to amend it to the Port's satisfaction. This occurred out of the public eye and without
13 notice to or involvement of the scientists commissioned by the local cities to comment to Ecology on
14 Port proposals. Legislators' Decl. at ¶ 5.

17 Thus, there are overriding public interests here -- strongly in favor of granting a stay so that the
18 public as a whole can have confidence that the right environmental decision has been made, for the
19 right reasons, in the appropriate manner. Legislators' Decl. at ¶6.

20 If the Port's claimed overriding public interest in quick commencement of third runway
21 construction did not withstand scrutiny before the events of September 11, 2001, it is even weaker
22 now. Declaration of Dr. Stephen Hockaday ("Hockaday Decl.") at ¶¶8, 10-20, 29-39. Prior to
23 September 11, 2001 air traffic at Sea-Tac was already dropping; with approximately 5% less aircraft
24

25 ACC'S REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION FOR A STAY - 44

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 006781

1 operations in summer 2001 than in summer 2000. Hockaday Decl. at 15. Since the September 11
2 tragedy, Sea-Tac operations are now down 25%, with no clear prospect for improvement. Hockaday
3 Decl. at ¶ 14. There are also now serious questions regarding the ability of the Port to finance third
4 runway construction. Hockaday Decl. at ¶¶ 20-27.

5
6 The Boeing Company's support for the Port's claim that it must move forward now and not in
7 six months is incongruous given that Boeing itself is in the midst of layoffs which far exceed any seen
8 in this region in a generation. In light of this, and the concomitant drastic reductions in employment by
9 the local airline industry, it borders on ludicrous for Boeing (while rethinking its own business plans)
10 to claim an overriding public interest in proceeding with haste on a \$1 billion project. Legislator's
11 Decl. at ¶ 9.

12 While, in the end, the Port may decide to proceed with its plans (if the 401 Certification passes
13 legal muster and any Corps 404 permit does likewise), there is -- and should be -- no rush in doing so.
14 This is a time for reexamination of how the air transportation industry does business. The Port is not
15 exempt from this obvious public need for reexamination, nor should it be. There is no overriding
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1 public interest which would contradict the need for a stay to preserve the Board's ability to review and
2 act effectively on the Ecology certification.³³

3 DATED this _____ day of October, 2001.

4 HELSELL FETTERMAN LLP

5
6
7 By:

8 Peter J. Egnick, WSBA #8809
9 Kevin L. Stock, WSBA #14541
10 Michael P. Witek, WSBA #26598
11 Attorneys for Appellant

12 
13 Rachael Paschal Osborn
14 WSBA # 21618
15 Attorneys for Appellant

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23 ³³ Little weight should be accorded to the Puget Sound Regional Council's ("PSRC") endorsement of the Third Runway.
24 The PRSC process to search for third runway alternatives was fundamentally flawed. Declaration of Robert Olander
25 ("Olander Decl.") at ¶5. For political reasons, the PRSC disregarded its own advisory committee's recommendation for
further study of three alternatives to the third runway in Pierce, Snohomish and East King Counties. Olander Decl. at 6.
ACC'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR A STAY - 46

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201