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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

ENVIRONMENTAL
HEARINGS OFFICE

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

No. 01-133
No. 01-160

REPLY DECLARATION OF TOM
LUSTER IN SUPPORT OF STAY

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

Tom Luster declares as follows:

1. I am over the age of 18, am competent to testify, and have personal knowledge of the facts stated herein.
2. I am responding to the briefs and declarations provided by Ecology and the Port of Seattle in response to the ACC's request for a stay of certification that the proposed project will meet water quality standards.
3. I have reviewed several recent documents relevant to the 401 review and certification, including the certifications issued by Ecology in August and September, 2001, the July 2001 low flow analysis (Low Flow Plan), the December 2000 Stormwater Plan (including all July 2001 replacement

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1 pages), and the August 2001 Cumulative Impacts Study. I have also reviewed briefs, declarations, and
2 accompanying documents related to the above-referenced appeals.

3 4. My primary concern in this matter is the 401 certification issued for this proposed
4 project is based largely on speculation rather than the required "reasonable assurance" standard. The
5 decision to certify the proposed project is clearly not based on a "preponderance of evidence" showing
6 that water quality standards will be met. The result is a certification that does not meet applicable
7 requirements for water quality protection, and a project approved and conditioned so as to almost
8 certainly lead to unmitigated or inadequately mitigated degradation of the state's waters. Additionally,
9 I believe that if this approach is determined to be acceptable, it would provide precedence to allow
10 similar results on most, if not all, projects undergoing 401 certification review in the state of
11 Washington.
12

13
14 5. I have structured this declaration as follows: I first address several basic elements of the
15 laws and regulations guiding 401 implementation as they apply in general and to this proposed project.
16 These include:

- 17 * the applicability of the goal statements contained in the federal Clean Water Act, the state
18 Water Quality Control law (RCW 90.48), and state water quality standards (WAC 173-201A);
19 * the regulatory requirements regarding the scope of the project being reviewed; and,
20 * the definition and interpretation of "reasonable assurance". For reasonable assurance, I also
21 focus on specific critical elements of the proposed project and identify several that fall far short of the
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1 level of reasonable assurance needed for 401 decisions, including the proposed stormwater plan, low
2 flow mitigation plan, and the 401 certification's dependence on current and future 402 permits.

3 6. I then address several other issues or contentions raised in the various documents
4 submitted by the respondents regarding my earlier declaration. These include questions regarding my
5 capability to evaluate the 401, my level of familiarity with the review process, and other issues.
6

7 7. In the interest of brevity, I have focused my response primarily on those briefs and
8 declarations submitted by Ecology rather than the Port, as I am most concerned about Ecology's
9 assertions of regulatory adequacy.

10 **A) Basic Elements of Laws, Regulations, and Guidelines Applicable to 401 Certification:**

11 8. Goal statements of the primary applicable laws and regulations: As important as the
12 proposed airport expansion may be, it is still required to comply with applicable water quality laws and
13 regulations. These include sections of the federal Clean Water Act, the state Water Quality law (RCW
14 90.48) and state water quality standards (WAC 173-201A), as well as other appropriate requirements of
15 state law including, for example, the water code. Ecology is the state agency designated to implement
16 these laws and regulations.
17

18 9. At the state level, the water quality law and water quality standards not only contain
19 requirements for fairly specific elements of water quality such as establishing beneficial uses,
20 establishing narrative and numeric criteria, determining compliance with the standards, and the like,
21 but also include policy statements meant to guide their implementation:
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1 **RCW 90.48.010** Policy enunciated. It is declared to be the public policy of the state of
2 Washington to maintain the highest possible standards to insure the purity of all waters of the
3 state consistent with public health and public enjoyment thereof, the propagation and
4 protection of wild life, birds, game, fish and other aquatic life, and the industrial development
5 of the state, and to that end require the use of all known available and reasonable methods by
6 industries and others to prevent and control the pollution of the waters of the state of
7 Washington. Consistent with this policy, the state of Washington will exercise its powers, as
8 fully and as effectively as possible, to retain and secure high quality for all waters of the state.
9 The state of Washington in recognition of the federal government's interest in the quality of the
10 navigable waters of the United States, of which certain portions thereof are within the
11 jurisdictional limits of this state, proclaims a public policy of working cooperatively with the
12 federal government in a joint effort to extinguish the sources of water quality degradation,
13 while at the same time preserving and vigorously exercising state powers to ensure that present
14 and future standards of water quality within the state shall be determined by the citizenry,
15 through and by the efforts of state government, of the state of Washington.
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20 **WAC 173-201A-010** Introduction. (1) The purpose of this chapter is to establish water quality
21 standards for surface waters of the state of Washington consistent with public health and public
22 enjoyment thereof, and the propagation and protection of fish, shellfish, and wildlife...
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1 10. At the federal level, the Clean Water Act includes similar guidance:
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4 ***Section 1251. Congressional declaration of goals and policy (a) Restoration and maintenance***
5 ***of chemical, physical, and biological integrity of the Nation's waters. In order to achieve this***
6 ***objective, it is hereby declared that, consistent with the provisions of this chapter -***

7 ***(1) it is the national goal that the discharge of pollutants into the navigable waters be***
8 ***eliminated by 1985;***

9 ***(2) it is the national goal that wherever attainable, an interim goal of water quality which***
10 ***provides for the protection and propagation of fish, shellfish, and wildlife and provides for***
11 ***recreation in and on the water by achieved by July 1, 1983;***

12 ***(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;***

13 ***(4) it is the national policy that Federal financial assistance be provided to construct publicly***
14 ***owned waste treatment works;***

15 ***(5) it is the national policy that areawide waste treatment management planning processes be***
16 ***developed and implemented to assure adequate control of sources of pollutants in each State;***

17 ***(6) it is the national policy that a major research and demonstration effort be made to develop***
18 ***technology necessary to eliminate the discharge of pollutants into the navigable waters, waters***
19 ***of the contiguous zone, and the oceans; and***
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1 *(7) it is the national policy that programs for the control of nonpoint sources of pollution be*
2 *developed and implemented in an expeditious manner so as to enable the goals of this chapter*
3 *to be met through the control of both point and nonpoint sources of pollution.*
4

5
6 11. These goal statements may sound lofty or may in some ways seem to be wishful
7 thinking; however, they are still a part of the regulations applicable to 401 review and are meant to
8 serve as guidance to Ecology in carrying out its responsibilities as the state agency designated to
9 implement water quality regulations.

10 12. In reviewing and issuing this 401 certification, Ecology has taken an approach that is
11 certainly significantly less than ensuring “the highest possible standards” or the “restoration and
12 maintenance of chemical, physical, and biological integrity” for the subject waterbodies. The 401
13 certification instead ensures that existing discharges of various contaminants will continue to receive
14 less than adequate treatment, anticipates that future discharges will be subject to weaker standards than
15 are in place now, and provides a mechanism for the continued decline in water quality in several urban
16 watersheds. Even assuming for a moment that Ecology’s position in this appeal is valid, it is
17 unfortunate for the people of the state that the agency is arguing emphatically to weaken the process it
18 uses to assure water quality standards are met.
19

20 13. If this 401 certification is found to be valid and thereby provides precedence for future
21 401 review, I believe it would result in an inadequately protective agency review and decision-making
22 process based on a very high degree of speculation and uncertainty. The 401 review process would
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1 move steadily away from the goals cited in the three laws and regulations above and would establish a
2 standard allowing project elements to be no more than conceptual, monitoring requirements to be no
3 better than inconclusive, and mitigation measures to be more suggestion than certainty.

4
5 14. Regulatory basis for the scope of the project being reviewed: The 401 certification
6 improperly ignores substantial elements of the proposed project that are currently affecting or may soon
7 affect the quality of state waters. Some project elements that have or will result in adverse effects to
8 waters of the state are either not addressed at all or have been put off to be evaluated at some point in
9 the future. Therefore, it is proper and necessary to impose a stay to prevent further adverse impacts to
10 waters of the state. These adverse effects have occurred for some time as a direct result of the
11 proposed project, despite Ecology not issuing the 401 certification until recently and despite the Corps
12 not yet issuing its 404 permit.

14 15. The 401 certification describes the project being reviewed as the construction of a third
15 runway and related project components, including taxiways, runway safety areas, a South Aviation
16 Support Area, and other elements (p. 1 of the WQC). Ecology's brief (p. 24) correctly states that in a
17 401 review, the agency is to evaluate an entire project, and cites the U.S. Supreme Court's decision in
18 P.U.D. No.1 vs. Ecology: "401(d) is most reasonably read as authorizing additional conditions and
19 limitations on the activity as a whole once the threshold condition, the existence of a discharge, is
20 satisfied." Additionally it is Ecology's practice to generally evaluate the direct, indirect, and
21 cumulative water quality-related impacts associated with a proposed project. Section 401(a) states that
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1 the certification covers both the construction and operation of a facility, thus including associated long-
2 term anticipated developments with the review.

3 16. Several years ago, at the beginning of Ecology's 401 review for this proposed project,
4 the agency recognized the project scope described above, and included essentially the entire airport
5 along with several proposed projects associated with the airport expansion or located nearby in the
6 affected watersheds. From a practical standpoint, it would have been difficult to do otherwise and
7 somehow separate the existing airport from the proposed project elements – for instance, both the
8 airport and the proposed elements included existing and proposed discharges to waters of the state; the
9 airport and the proposed elements included existing and proposed discharges to waters of the state; the
10 functions of the proposed project elements were integrally related to the rest of the facility (e.g., the
11 third runway did not exist in isolation -- it was dependent on taxiways, stormwater systems, terminals,
12 etc. either existing or proposed at the airport); and it was believed at the time that many of the
13 discharges from new project elements would be intermingled to some degree with existing discharges.
14 In actuality, however, as time went on, the scope of Ecology's review and eventual issuance of the 401
15 certification was continually reduced, generally after discussions with the Port about their difficulties in
16 complying with various requirements of the project review, and generally despite recognition of the
17 regulations and legal decisions cited above. Most recently, through Condition B of the September
18 2001 401 certification, Ecology further separated elements of the project through timing constraints,
19 and making some elements subject to 401 conditions only until a future NPDES permit was issued,
20 without adequate assurance that such a permit would adequately provide the level of reasonable
21 assurance necessary for project components approved through issuance of a 401 certification.
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1 17. As a result, there are a number of activities directly and indirectly related to, or
2 integrated with, the proposed project that have not been adequately evaluated for their impacts on
3 waters of the state. One of the most significant examples is the extensive fill and grading activities that
4 the Port has already carried out on the west side of the airport. These activities are for the sole purpose
5 of constructing the proposed project. The activities have included removal of vegetation, placement
6 and compaction of fill, and construction of several sizable stormwater control structures that intercept
7 surface runoff generated by these new surfaces. All of these actions have very probably resulted in
8 adverse effects to nearby surface waters, including wetlands. However, these impacts have not been
9 adequately evaluated as part of the 401 review and the degraded conditions likely resulting from these
10 activities now serve as the baseline for stream and wetland functions.
11

12 18. These fill and grading activities started several years ago when the Port asked Ecology if
13 its application and review for 401 certification allowed it to stockpile fill dirt on the airfield for
14 eventual use in third runway construction. The 401 review had started but had not yet been completed,
15 and the 401 decision had not been made. Ecology's position, based on the appropriate regulatory scope
16 of 401 described above, was that the Port could proceed as long as the activity of placing fill for the
17 proposed project did not affect water quality and as long as the Port knew it was assuming the risk and
18 costs of the activity if the project was not approved.
19

20 19. The Port's request moved quickly beyond stockpiling fill dirt on the airfield, and turned
21 into the large-scale filling and grading activities that have occurred over the past several years. The
22 Port's contention was that its activities were allowable as long as they did not result in fill being placed
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1 in surface waters, including wetlands. As was my responsibility as senior 401 reviewer, I explained the
2 scope of 401 as outlined above to others at Ecology and to the Port. However, rather than fall back on
3 the basic premise of Section 401 that the agency is to review and decide on the project as a whole, and
4 the ability to impose “limitations on the activity as a whole” as stated by the Supreme Court, Ecology
5 allowed the activity to continue, despite its evident impacts to nearby streams and wetlands. In fact, in
6 its brief (p. 25), Ecology argues that the requested stay is not in the public interest because it needs the
7 401 in place to allow regulation of fill in the upland parts of the proposed project. This is in direct
8 opposition to the law and legal decision it cites on the previous page. Ecology has merely chosen not
9 to regulate these activities that are taking place solely to support a project subject to 401 review and
10 that may result in a discharge to waters of the state. If applied to other projects, Ecology’s argument
11 would result in the agency reviewing projects for 401 certification that are essentially complete except
12 for the portion sited above a wetland or stream. This clearly is not the intent of the regulations and
13 does not reflect past practices and legal decisions regarding 401 authority.
14
15

16 20. A less critical but similar example of inappropriately reduced project scope is Ecology’s
17 justification for not including an area of impervious surface at the airport in the hydrologic model used
18 to develop the low flow plan. Ecology’s brief (p. 12) and Kenny’s declaration (35) state that effects of
19 the new impervious surface at the airport’s Industrial Waste System (IWS) is outside the scope of the
20 401 review. This might be true if the IWS was independent of the project elements being reviewed;
21 however, part of the proposed South Aviation Support Area would drain to the IWS, and in fact, the
22 IWS is being enlarged as part of the Port’s overall upgrade. The IWS is clearly an integral element of
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1 the overall project to be considered as part of the 401 review and decision. By leaving this area of
2 impervious surface out of the models, the resulting stormwater plan very likely underestimates impacts
3 to the nearby receiving waters.

4
5 21. Other similar examples of activities integral to the proposed project that have either not
6 been adequately evaluated or are not planned to be evaluated for purposes of this 401 include the
7 proposed expansion of State Route 509, the Port's South Access Road, and the proposed regional
8 stormwater detention facility to be located in the southern part of the airport. These projects are not
9 evaluated as part of the cumulative impacts analysis necessary for projects undergoing Clean Water Act
10 review. Cumulative impacts, as defined in 40 CFR 1508.7, include "...the impact on the environment
11 which results from incremental impact of the action when added to other past, present, and reasonably
12 foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes
13 such other actions." While at the start of the initial 401 review for this project in 1997, the State Route
14 509 extension was deemed speculative, with each Port resubmittal of an application for 401, the
15 highway became less speculative, and in the past two years has been subject to extensive
16 documentation and review (including NEPA/SEPA) and discussions between the Port, the Washington
17 Department of Transportation, and various regulatory agencies. Part of the highway is proposed to be
18 built on Port property, and will fill wetlands that will be affected by the Port's proposed expansion. It
19 is likely to require wetland mitigation in the same area south of the airport where the Port had great
20 difficulty identifying adequate mitigation opportunities. Similar circumstances exist for the Port's
21 South Access Road and for the regional detention facility – they are being paid for in part by the Port,
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1 being built on Port property, and are planned to be located over, under, or adjacent to streams,
2 wetlands, or other elements that are part of the Port's current project and mitigation plans. All these
3 projects would be hydrologically connected to Port expansion projects, Port mitigation sites, or
4 waterbodies affected by the Port's expansion. However, for each of these proposed projects, when
5 Ecology raised the issue of adequately incorporating them into the 401 review, the Port essentially
6 refused to cooperate.
7

8 22. The Port and Ecology apparently believe these projects don't exist or don't matter to the
9 project review at hand. This is exemplified in the August 2001 Cumulative Impacts Study (Port of
10 Seattle), which was generated in response to questions and comments made during the recent Corps of
11 Engineers and Ecology 404/401 public comment process. The report is meant to answer questions
12 from the agency, including a question regarding future proposed projects in the area. The report's only
13 mention of future projects is to state that any future projects will be subject to regulations in place at
14 the time they are reviewed. There is no specific mention at all of projects noted above, even though
15 they fall well within the category of "reasonably foreseeable", as they are well into their planning and
16 funding stages, and well within the timeframe generally used by the Corps in conjunction with Ecology
17 when evaluating project impacts. The result, again, is a significant understatement of impacts
18 associated with the proposed project.
19

20
21 23. Reasonable Assurance: Despite its statements to the contrary, Ecology cannot currently
22 have reasonable assurance that water quality standards will be met. Ecology's brief (p. 3-4) and
23 Kenny's declaration (5-7) both cite the definition and explanation of "reasonable assurance" contained
24

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1 in the Draft Federal Permits Team Desk Manual, Version 1.01, January 24, 2000 (the 401 Manual).
2 Ms. Kenny states that it provided the basis for her finding of reasonable assurance in Ecology's 401
3 decision (p.8). As noted in Kenny's declaration, I was the primary author of that manual, and I wrote it
4 with the help and guidance of Ecology's 401 staff and under the direction of Ecology management.
5 The purpose was to ensure more conformity among permit reviewers when evaluating requests for 401
6 certification and to provide Ecology staff and management consistent understanding of the 401 process
7 and requirements. It was written to be a "living document" to be updated as necessary when new
8 regulations were promulgated, new court decisions needed to be incorporated, or new permit processes
9 were implemented. The version Ecology cited in its brief and in Kenny's declaration is the version I
10 wrote and used when I was at Ecology.
11
12

13 24. Ecology points out correctly in its brief and in Kenny's declaration that reasonable
14 assurance does not require absolute certainty, and spends considerable effort attempting to show I
15 believe otherwise. Actually, I agree fully with the definition and explanation contained in the 401
16 Manual. I used it as the basis of my review during my tenure as lead 401 reviewer on the proposed
17 project as well as in my training of Ecology staff and management on 401 review. My statements in
18 this response and my previous declaration are based on that definition.
19

20 25. Ecology erroneously interprets a statement in my previous declaration as meaning that
21 reasonable assurance requires absolute certainty or something akin to "beyond a reasonable doubt". In
22 that declaration, I state that Ecology "...must be certain at the time of certification that the proposed
23 project will meet standards..." (emphasis added). The focus and context of my statement is the time at
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1 which reasonable assurance is needed (that is, when the 401 decision is made), not the degree of
2 certainty. The 401 Manual's definition of reasonable assurance also refers to "levels of certainty",
3 which is clearly something short of absolute knowledge, and meshes well with the above statement in
4 my declaration.

5
6 26. The 401 certification is not based on a "preponderance of evidence" showing that water
7 quality standards will be met: In citing the 401 Manual, Ecology correctly presents reasonable
8 assurance as a two-step process. Step 1 is to determine, through a "preponderance of evidence" that
9 water quality standards can and will be met, and identify any areas of uncertainty. Step 2 is meant to
10 address those areas of uncertainty identified in Step 1 and require measures that will remove or reduce
11 the uncertainty. The two steps are not equal and are not interchangeable. Reasonable assurance
12 requires that Step 1 be completed – that is, a finding must be made, based on a preponderance of
13 evidence, that standards will be met – before moving on to Step 2. Doing Step 2 first, or before Step 1
14 is completed, could result in a finding of compliance based on no evidence and entirely dependent on
15 future monitoring or contingency measures. Step 2 is more properly seen as a means to further confirm
16 the findings of Step 1.

17
18 27. In Ecology's 401 certifications of the past two months, some significant project
19 elements are subject to conditions based exclusively or nearly exclusively on the measures described in
20 Step 2 without having an adequate basis in the requirements of Step 1. They would therefore be
21 implemented based not on a preponderance of evidence showing they will meet the standards, but on
22 yet-to-be developed designs and monitoring approaches that Ecology hopes may eventually result in
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1 compliance. The result is an unacceptable level of uncertainty as to whether the project can and will
2 meet water quality standards. For some of the project elements, the level of uncertainty is such that it
3 is more likely the project will exceed standards rather than meet them.
4

5 28. A primary example is the proposed low flow plan. Certification Condition I requires the
6 Port to submit elements of this plan that are currently missing or are believed to be inaccurate. Its
7 eventual design is to be based on future submittals and documentation, future findings that the models
8 used as the basis for this plan may turn out to be accurate, and a not-yet-developed monitoring plan that
9 may well be inadequate or inconclusive. The 401 does not require that any of these future submittals
10 be reviewed and approved by Ecology. Therefore, there is no basis for reasonable assurance.
11

12 29. The low flow plan as presented in the 401 certification and as described in Ecology's
13 brief and declarations is at best conceptual and speculative. The plan, based on an apparently untested
14 proposal, inadequate data, and preliminary designs, is meant to mitigate for a significant project
15 impact. Failure of the necessary mitigation meant to be provided by the plan would result in significant
16 degradation to area streams during critical low flow periods.
17

18 30. Ecology's brief states that low flow impacts will be mitigated by implementing this plan
19 and cites Whiting's description of the plan (p. 10) as a "substantial proposal that goes beyond
20 requirements of the King County Stormwater Design Manual". Compliance with that manual is not at
21 issue, since the regulations that apply to conditions of the 401 certification are the state water quality
22 standards and the federal Clean Water Act. Additionally, neither King County's nor Ecology's
23 stormwater manual are intended to assure compliance with water quality standards. In my numerous
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1 discussions with Ecology's water quality staff and King County's staff, they are generally very careful
2 to distinguish between meeting the requirements of stormwater manuals and those of the water quality
3 standards, and are careful not to state that compliance with a manual means compliance with the
4 standards (see, for example, the O'Brien declaration, which does not claim that the provisions of the
5 stormwater manual adequately address the standards). Ecology's citation above should therefore not be
6 construed as ensuring compliance with water quality standards.
7

8 31. Elsewhere in Whiting's declaration (p. 6), he states that the manual does not address
9 mitigation needed for low flow caused by fill or impervious surfaces, thereby again raising the question
10 of why the stormwater manual was used as part of Ecology's assurance that the low flow plan is
11 adequate. He identifies specific elements of the plan that are incomplete or "design challenges", also
12 states that additional calibration is required to determine the accuracy of the model used, and that there
13 is not sufficient monitoring data to confidently predict water quality resulting from the discharge of
14 stormwater from these vaults to the creeks. This reiterates the concern I raise above regarding the
15 inadequacy of determining reasonable assurance based on the future submittal of significantly
16 important documents.
17

18 32. Ecology's brief (p. 10) attempts to address the shortcomings identified by Whiting by
19 referencing Condition I.1. of the 401 certification, which requires the Port to later show the adequacy
20 of model calibrations, revise the conceptual drawings to show how the proposed vaults will provide a
21 constant rate of mitigation water, provide an operations and maintenance plan showing how
22 accumulated sediments will be dealt with, develop a pilot program to test whether this proposal will
23
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1 work, and identify unspecified contingency measures if water quality resulting from this plan is not
2 adequate to meet standards. Again, this is an example of relying on future design submittals,
3 monitoring results, and other significant plan elements to ensure compliance with water quality
4 standards without first having a preponderance of evidence that standards will be met. These
5 requirements are essentially the types of criteria one would use to design an experiment, not to use as
6 the basis for reasonable assurance. In my opinion, and based on my experience with the 401 review
7 done for the proposed Crown Jewel Gold Mine project, this low flow plan is in many ways more
8 conceptual than the water quality treatment and streamflow mitigation plan developed by Battle
9 Mountain Gold -- a plan that was rejected by the Board as being too speculative.
10

11
12 33. In further support of its approach with this low flow proposal, Ecology states (p. 11) that
13 the areas of “alleged uncertainty” will be resolved through the Port’s submittals due within 45 days of
14 issuance of the 401. If that is the case, it would have been a very simple matter to wait an additional 45
15 days, review the submittals, and then make the 401 decision based on their adequacy.

16
17 34. As additional justification, Ecology cites Friends of the Earth PCHB 87-63 (“The
18 ‘reasonable assurance’ requirement is met if we find by a preponderance of evidence that acute or toxic
19 conditions are not ... likely to occur.”). This is apparently due to Ecology’s belief that there are not
20 likely to be toxic conditions resulting from an untested method of releasing moderately treated
21 stormwater from several months storage in an underground vault with unknown amounts of
22 accumulated contaminated sediments to provide a substantial percentage of flow to a stream at critical
23 low flow periods. I have not found any adequate description of the basis for this belief, and a belief
24

1 with no evidence and no plans or studies to support it does not result in reasonable assurance. This is
2 clearly a long way from reasonable assurance's simple requirement that there be a preponderance of
3 actual evidence showing water quality standards will be met.

4
5 35. As long as these significant elements of the proposed plan are missing, it remains
6 speculative at best and cannot be used as the basis for reasonable assurance that water quality standards
7 will be met. Despite that, Ecology chose to accept the plan as it currently exists and condition the 401
8 to require the Port to eventually figure out if the plan will work. If it doesn't work, the Port is then
9 required to figure out an as-of-yet unspecified contingency plan. This is especially difficult to accept as
10 reasonable assurance, given the trouble the Port has had throughout both the recent and more distant
11 history of this project review with regards to coming up with an acceptable low flow augmentation
12 plan. There is currently no reason to believe that this proposed plan will be any more successful than
13 the ones Ecology rejected in the past as inadequate for purposes of reasonable assurance and for
14 purposes of meeting water quality standards.

15
16 36. Another example of Ecology moving to the second step of reasonable assurance before
17 completing the first is evident in Condition D.4. It identifies a currently unmitigated 2.05 acre wetland
18 impact. Rather than ensure this impact is adequately addressed at the time of certification, Ecology
19 requires the Port to later submit a conceptual mitigation plan that includes, among other things, an
20 evaluation of the feasibility of improving the hydrologic connection between two wetlands, an
21 evaluation that certainly affects wetland functions and eventual mitigation success. Given Ecology's
22 difficulty over the years in obtaining adequate and accurate wetland mitigation from the Port, it is
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25 REPLY DECLARATION OF TOM LUSTER IN
SUPPORT OF STAY - 18

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1 curious as to why resolution of this fairly significant project element (representing about 10% of the
2 project's direct wetland impacts) has been put off until after certification, even with the requirements
3 of the Port's submittal spelled out elsewhere in the condition. Additionally, the condition requires a
4 conceptual plan to be submitted by November 9, 2001 which begs the question as to why Ecology
5 could not wait a few weeks more to receive the information, review it, and then determine whether it
6 met applicable requirements. And finally, while the condition requires that the plan, when approved by
7 Ecology, be incorporated into the overall Natural Resource Mitigation Plan, it requires nothing more
8 than a conceptual plan be submitted for this area of wetland mitigation.
9

10 37. Ecology attempts to address the shortcomings described above in its brief and in
11 Kenny's declaration (29) by citing Condition A.1 of the certification as its fallback assurance that the
12 proposed project will meet standards. Condition A1 is a standard condition included on all or most
13 401 certifications that, when based properly on other information and conditions that provide
14 reasonable assurance, is useful to declare Ecology's expectation to the permittee. However, as applied
15 to this proposed project with its currently inadequate level of information, this condition has very little
16 meaning – it essentially does little more than inform the Port, the Corps, and the public that the project
17 will meet standards because Ecology says it has to. If reasonable assurance could be based on a
18 simple declaratory condition such as A.1, then a 401 certification would need no other conditions at all
19 to ensure water quality standards would be met.
20
21

22 38. Reasonable assurance is a positive assertion based on known information, not a negative
23 assertion based on the lack of information: The 401 and Ecology's brief and declarations include a
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1 number of instances where the lack of information is inappropriately interpreted to ensure compliance
2 with water quality standards. Similarly, there are several instances where the agency ignores or
3 discounts information that suggests standards are likely not being met.
4

5 39. As I stated in my previous declaration, and as presented in the 401 Manual cited above,
6 reasonable assurance requires a positive finding based on information showing that standards will be
7 met. It does not mean that because there is insufficient evidence to show standards are being violated,
8 that standards are likely being met. This is an important distinction, as not only does it require that
9 compliance with standards be affirmed, it also avoids putting the agency in the position of trying to
10 "prove a negative", which is logically impossible.
11

12 40. Despite this necessary element of reasonable assurance, Ecology in several places
13 describes its 401 decision as being based on the lack of information, or puts the burden on the appellant
14 to prove standards will be violated. For example, in its brief at p. 19, Ecology charges that the ACC
15 has no evidence that water quality standards will be violated. That is entirely misleading -- it is
16 Ecology's obligation when issuing a 401 to base its certification on evidence that standards are being
17 met. This point is further illustrated in the discussion below.
18

19 41. The 401 certification inappropriately defers significant elements of reasonable assurance
20 to current and future 402 permits: Another significant issue related to reasonable assurance for this
21 proposed project is the relationship between the 401 certification and 402 permit. Several 401
22 conditions largely or entirely defer to the 402 (e.g., Conditions B.1.f, H., J.2.c., and K.1), and a number
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1 of statements in its brief and declarations explain that reasonable assurance for the 401 relies to a great
2 extent on the adequacy of the 402.

3 42. This reliance on the 402 permit is misplaced. For example, Ecology's brief (p. 21)
4 states that while the Port's stormwater discharges have exceeded water criteria on an instantaneous
5 basis, there is no evidence that they have violated water quality standards. This is apparently due to the
6 NPDES permit not requiring monitoring adequate to determine whether the discharges comply with
7 water quality standards (Fitzpatrick declaration at 3). Fitzpatrick goes on to state that Ecology cannot
8 determine if the discharges are meeting standards. At the very least, this should mean Ecology does
9 not have reasonable assurance to affirm that standards will be met, and therefore should not issue the
10 certification without resolving this issue. What Ecology does have, however, are data that show
11 regular criteria exceedences in the discharges, so if the data suggest anything, they should suggest the
12 likelihood of violation rather than compliance.

15 43. Using this justification as the basis for reasonable assurance in the 401 certification is
16 unacceptable. While imposition of a future NPDES permit with monitoring requirements adequate to
17 determine compliance may someday alleviate this concern, such a permit is not now in force, and the
18 current permit should not be found to be adequate for purposes of 401. Additionally, this situation
19 makes Condition J.2.b an essentially meaningless or unenforceable permit condition -- it sounds like a
20 good idea, but there are no measures in place to implement it.

22 44. The 401 contains no requirements to correct this deficiency in monitoring other than the
23 possibility of addressing it in future NPDES permits. The reason given (Fitzpatrick 3) is that there are
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1 no established federal or state protocols for stormwater monitoring. Absent these established protocols
2 and absent the ability to determine whether these discharges are meeting water quality standards,
3 Ecology cannot have reasonable assurance.

4
5 45. Because of this shortcoming in monitoring techniques, I suggested several times during
6 my tenure as Ecology's 401 reviewer that interim monitoring methods be developed that would at least
7 give a better indication of whether standards were being met and would provide a stronger basis for
8 reasonable assurance for purposes of 401 review (e.g., 20 grab samples taken five minutes apart during
9 certain storm events could provide sufficient data to interpolate the one-hour average concentration
10 needed for some acute criteria). While they may or may not have been useful for NPDES purposes, I
11 believed they would have helped with the level of assurance needed in 401 – however, they were not
12 acted on and others were not developed, and Ecology therefore still does not have any evidence other
13 than the knowledge that water quality criteria are regularly exceeded. This does not equate to
14 reasonable assurance that standards are being met.

15
16 46. In a related example of Ecology's reliance on a 402 inadequate for purposes of 401's
17 reasonable assurance standard, Ecology's brief (p. 22) states that the BMPs required in the 401 and 402
18 "may be partially effective" in treating metals. This again is an inadequate basis for reasonable
19 assurance, especially given such things as the known criteria exceedences in the Port's discharges, the
20 high metals concentrations in the Northwest Ponds identified in the Port's de-icing study, and the
21 ambient concentrations of various metals in the receiving waters already subject to extensive
22 discharges of inadequately treated stormwater.

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1 47. One final problem with the 401 certification's reliance on the 402 permit is illustrated
2 by Condition J.2 and described in Kenny (26). The assurance provided in the 401 is that the Port will
3 not be allowed to discharge stormwater from various surfaces until a site specific study is completed
4 that would allow Ecology to change the water quality standards on a site-specific basis (though not
5 stated in the certification, I assume this refers to the provisions of WAC 173-201A-040(3)). The new
6 limitations and monitoring requirements would then be established in a future 402 permit. This
7 approach ignores the fact that reasonable assurance is based on the standards as they exist at the time of
8 certification. It also ignores the very practical consideration of what to do with the water if the study
9 takes longer than anticipated, or if the required public process and rule revision identifies problems not
10 yet anticipated that would delay or prevent adoption of different criteria. It also improperly assumes
11 that the decision to change the standards will be made, despite whatever findings are made or public
12 comments are received.
13

14
15 48. The above activities subject to the 401 certification are therefore dependent on some
16 future changes in the water quality standards. The certification does not include sufficient measures to
17 address what happens if the anticipated changes are not made. If, for instance, construction is
18 completed before the necessary study is done or different standards are adopted, the Port would have to
19 either stop rain from falling on the airport, route water away from the waterbodies to some other as-of-
20 yet unknown location, or institute other unspecified BMPs adequate to control and store stormwater so
21 as to prevent it from being discharged.
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SUPPORT OF STAY - 23

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1 49. It may be appropriate in some proposed projects for Ecology to rely on a 402 permit for
2 purposes of compliance with 401 requirements, but in this case it is not. For this project in its current
3 state, it would lead to continued uncertainty, likely ongoing degradation of the nearby waterbodies, and
4 non-compliance with regulatory requirements.
5

6 **B) Other Issues:**

7 50. There is insufficient assurance that the Port will have adequate water to carry out
8 required mitigation plans: The 401 inappropriately does not require a water right or other regulatory
9 mechanism to ensure low flow stream mitigation will be provided in perpetuity.
10

11 51. For purposes of mitigation required for 401 and 404 permits, an applicant is generally
12 required to provide mitigation “in perpetuity”. Ecology’s position is that a water right is not needed for
13 the proposed low flow plan. The 401 does not prescribe a water right or any other regulatory
14 mechanism to ensure the necessary water will be provided. It instead includes a condition (#B.1.e) that
15 states the low flow facilities and plan are to remain in effect in perpetuity. This is similar to the
16 situation described above where Condition A.1 is essentially a declaratory statement without adequate
17 information or studies behind it. Despite the assurance from the Port that it plans to be around for a
18 long time, absent a water right or similar mechanism for this proposed mitigation element, there is
19 inadequate assurance that this water will be available when it is needed during each low flow period in
20 the coming years and decades. This is especially important given the difficulty the Port has had over
21 the years in identifying a source of water to draw upon, purchase, or otherwise obtain for its needed
22 streamflow mitigation.
23
24

1 52. Effect of my removal from the project and absence from Ecology on my ability to
2 review the 401 certification: Several statements in Ecology’s brief, and in Kenny’s and Fendt’s
3 declarations challenge my ability to weigh in on this appeal because I am not familiar with documents
4 issued since I left Ecology in January 2001. As I stated above, it is evident that the 401, on its face, is
5 inadequate, and various statements in Ecology’s brief and declarations further emphasize that fact. The
6 examples cited in support of that statement make it clear that familiarity with the underlying documents
7 is less important than familiarity with the 401 process and requirements, and I am still familiar with the
8 401 regulation and its implementation. Additionally, I am very familiar with the site and impacts of
9 the proposed project, which remain the same or very similar to when I was the 401 reviewer.
10

11 53. However, as I stated near the beginning of this declaration, I have also had an
12 opportunity to review several of the most recently issued documents on which the 401 was apparently
13 based. For the most part, they raise many of the same concerns about adequacy, completeness, and
14 accuracy as the previous versions.
15

16 54. Ecology also asserts in its brief and in Kenny’s declaration that I should be unable to
17 comment credibly on the 401 certification because I have not been officially involved in the project
18 over the past several months. This contradicts Ecology’s stated position when I left the agency in
19 January, when I was asked to be available to provide any guidance or project history that might be
20 needed in the course of the ongoing review. In Ms. Kenny’s declaration (12), she states our
21 discussions since I left Ecology have been limited to “the status of the project in very general terms.”
22 However, I recall at least three instances where we discussed her 401 review in more detail:
23
24

- 1 • On May 31, 2001, I provided at her request a brief explanation of the Water Effects Ratio study
2 the Port had discussed much earlier in the 401 review.
- 3 • On June 5, 2001, she called me to ask about the relationship between the 401 certification and
4 the Agreed Order mentioned in the Governor's certification letter to the FAA – in that
5 conversation, I informed her that I had written the letter, that it was written in part to tie the
6 Agreed Order to the 401, and the work done under the Agreed Order was seen as necessary in
7 part to provide reasonable assurance under the 401 to determine whether contaminants at the
8 airport were affecting nearby surface waters. I explained that Ecology had determined at the
9 time that the 401 was the only regulatory handle available to ensure the Agreed Order would be
10 implemented as planned and scheduled. She stated that Ecology was now interested in
11 separating the Agreed Order from the 401 review and was looking for another means to
12 establish the necessary reasonable assurance.
- 13 • On June 7, 2001, we spoke about the relationship between the Port's NPDES permit and the
14 401 review, and whether the NPDES permit was adequate for purposes of 401. I explained that
15 for purposes of 401, the required Best Management Practices (BMPs) should be those shown to
16 result in compliance with water quality standards. She said that this NPDES modification
17 would be limited to something less than that, but that Ecology had informed the Port that the
18 next permit would be more stringent.

19 55. The Section 401 Certification is the only state permit addressing permanent loss of
20 waterbodies and determining whether the activities associated with construction and operation of the
21 waterbodies and determining whether the activities associated with construction and operation of the
22 waterbodies and determining whether the activities associated with construction and operation of the
23 waterbodies and determining whether the activities associated with construction and operation of the
24 waterbodies and determining whether the activities associated with construction and operation of the

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SUPPORT OF STAY - 26

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1 facility requiring the certification meet water quality standards. In Ms. Kenny’s declaration, she
2 apparently misunderstands this statement in my original declaration (at ¶ 18) as somehow meaning that
3 there are no other state permits addressing water quality. Of course there are, but they are narrower,
4 have a more limited perspective and do not address all that is encompassed in 401 review, especially
5 permanent loss of waterbodies.
6

7 56. It is also suggested by Ecology and the Port that the Certification condition allowing for
8 “mixing zones” has been misconstrued. However, if the intent was to limit a possible mixing zone to
9 turbidity from construction, the Certification should have said so and cited a different section of the
10 WACs. The WAC provision actually cited is not limited in that way.
11

12 57. Issuance of incomplete 401 certifications: As partial justification for its current 401
13 decision, Ecology presents five 401 certifications from 1995 through 2000 that were issued based on
14 less than final project designs or mitigation plans, including two I wrote – Auburn Racing and
15 O’Hagan – in 1995. Both of those certifications were issued before Ecology had a 401 Manual and
16 before the Board had made its decision in Battle Mountain Gold regarding the adequacy of information
17 needed for 401 review. Additionally, it is difficult to compare the issues in the proposed SeaTac
18 expansion with those in these two certifications. In the case of O’Hagan, the impacts – conversion of
19 one type of wetland to another (cranberry bog) – and the required mitigation – preservation of two
20 other acres of forested wetland – are substantially less than the extent and types of impacts and
21 mitigation involved in the proposed airport expansion. In the case of Auburn Racing, there is no
22 comparison between the relatively minor remaining clarifications there (e.g., minor changes to planting
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1 plan) and the fundamental gaps in knowledge necessary for a 401 decision which typify the airport
2 certification.

3 58. Ecology's current 401 Manual provides guidance that 401s should be issued based on
4 adequate information and a finding of reasonable assurance, and should be denied if the agency does
5 not have adequate information. Two recent examples of 401 decisions involving certification denial
6 based on inadequate information are the proposed Columbia River channel deepening in September
7 2000, and the previous application of the Port of Seattle for the airport expansion (withdrawn under
8 threat of denial), again in September 2000.

9
10 59. By presenting these five selected 401s, Ecology seems to be arguing that because the
11 agency issued 401s in the past based on less than the current standard for reasonable assurance, it
12 should be justified in continuing to do so. This approach, however, is not supported by its current
13 guidance manual and other recent examples of Ecology decision-making. It would also disregard the
14 increased understanding of the regulatory and legal requirements for 401 decisions, and discounts the
15 findings of recent studies by King County and Ecology showing a very low success rate for wetland
16 mitigation projects, due in part to the lack of adequate information at the time permits were issued as to
17 whether the proposed mitigation would work.

18
19 60. The Northwest Ponds are "waters of the state": I raise this issue only to address a
20 statement by the Port describing the Northwest Ponds as man-made peat bogs. Ecology's position has
21 been that these are waters of the state, in part due to their pre-existing natural presence in the
22 landscape, in part to the cessation of peat mining activity in the wetlands, and in part due to their
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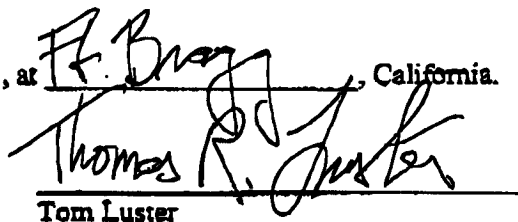
1 functioning as natural wetlands. During my tenure at Ecology, the Corps considered the Ponds to be
2 waters of the U.S., and any placement of dredge or fill material in those wetlands would have required
3 404 and 401 review.

4
5 61. Closing: In closing, I believe the 401 certification, on its face, exhibits significant areas
6 of uncertainty and speculation. The decision to issue the 401 was based largely on incomplete and
7 inaccurate documents. The 401 requires future submittals of documents that Ecology expects will
8 provide justification for its decision, but in many instances, as described in this declaration, that
9 expectation is not supported by evidence or adequate information. These future submittals, in many
10 cases, are meant to address significant impacts and provide substantial mitigation, so if inadequate,
11 they could result in significant degradation to waters of the state. While the detailed requests contained
12 in the numerous certification conditions show that Ecology has done considerable work to identify the
13 current shortcomings of the proposed project, the high level of uncertainty remaining after the 401 is a
14 fatal flaw of its validity.

15
16 62. Unless reversed, this 401 would provide a harmful precedence in the role of 401
17 certification review in protecting and maintaining water quality in the state.

18
19 I declare under penalty of perjury under the laws of the State of Washington that the foregoing
20 is true and correct.

21 DATED this 7th day of October, 2001, at Fr. Broy, California.

22
23 
24 Tom Luster

25 REPLY DECLARATION OF TOM LUSTER IN
SUPPORT OF STAY - 29

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