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

AIRPORT COMMUNITIES
COALITION,

Appellant,

v.

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

Respondents.

PCHB No. 01-133

RESPONDENT DEPARTMENT OF
ECOLOGY'S RESPONSE TO
APPELLANT'S MOTION FOR STAY

I. INTRODUCTION

Appellant, Airport Communities Coalition (ACC), requests a stay of the effectiveness of the Department of Ecology's (Ecology) Order No. 1996-4-023525, issued on August 10, 2001,¹ which constituted a Clean Water Act § 401 Certification, an RCW 90.48 Order and Coastal Zone Consistency (401 Certification) determination for the Port of Seattle's (Port) construction of a runway and other projects at the Seattle-Tacoma International Airport (STIA). As set forth below, the ACC falls far short in carrying its burden to establish that it is

¹ On September 21, 2001, Ecology rescinded Order No. 1996-4-02325 and issued Order No. 1996-4-02325 (Amended-1) in its place. A copy of the amended 401 Certification is attached as Exhibit 1 to the Declaration of Ann Kenny. Pursuant to the Agreement Re Rescission of 401 Certification signed by the Board on September 20, 2001, if the ACC appeals the amended § 401 Certification, all pleadings filed in this appeal (PCHB No. 01-133), including the ACC's request for a stay, will be transferred to the newly filed appeal.

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1 entitled to a stay of the 401 Certification. Ecology requests that the Board deny the ACC's
2 motion for stay.

3 II. STATEMENT OF FACTS

4 The Port submitted its initial application for a Clean Water Act § 404 Permit ("404
5 Permit") and 401 Certification in December, 1997. The required public process, involving a
6 public hearing and acceptance of written comments, followed. Based on the application
7 submitted, Ecology issued a 401 Certification to the Port on July 20, 1998. Declaration of Ann
8 Kenny (Kenny Dec.) at ¶ 8. That 401 Certification was later withdrawn when the Port
9 discovered that it had underestimated the amount of wetlands that would be filled by the
10 project. *Id.*

11 The Port subsequently submitted a second application for a 404 Permit and 401
12 Certification in September 1999. A second public notice and public comment process
13 followed. In September 2000, with the end of the Clean Water Act's one year timeframe for
14 Ecology to respond to the Port's application approaching and key issues regarding the project
15 still unresolved, the Port elected to withdraw its pending application. *Id.* On October 25,
16 2000, the Port filed a new application with the Corps and Ecology. A public hearing on the
17 application was held in January 2001, and a written public comment period provided. *Id.* at
18 ¶ 9.

19 Since the submittal of the Port's initial application, Ecology has received written public
20 comment, during the formal public comment period and on an informal basis. A substantial
21 amount of the written comments have come from the ACC. Ecology's process of reviewing
22 the Port's proposal has been continuous from the Port's completion of its EIS and submittal of
23 its first application for a 401 Certification in 1998. Over that time, Ecology has developed an
24 in-depth understanding of the project and its potential environmental impacts. The terms of the
25 401 Certification were developed through coordination with Ecology's experts on wetlands
26 science, hydrology, stormwater management, water quality, toxics and fish biology. *Id.* at

¶ 10. This process enabled Ecology to craft a 401 Certification that protects the environment and provides reasonable assurance that water quality standards will be met.

III. ARGUMENT

A. Applicable Legal Standards.

A motion for stay before the Board is governed by RCW 43.21B.320(3), which provides that:

The applicant may make a prima facie case for stay if the applicant demonstrates either a likelihood of success on the merits of the appeal or irreparable harm. Upon such a showing, the hearings board shall grant the stay unless the department or authority demonstrates either (a) a substantial probability of success on the merits or (b) likelihood of success on the merits and an overriding public interest which justifies denial of the stay.

See also WAC 317-08-320. Under the stay standard, the ACC has the initial burden of showing that it has a likelihood of success on the merits of its claim that Ecology, when issuing the 401 Certification, did not have reasonable assurance that water quality standards would be met. In the alternative, the ACC must establish that, if the 401 Certification is not stayed, it will suffer irreparable harm.

When attempting to overturn a 401 Certification, the appellant “must establish by a preponderance of the evidence that Ecology did not have ‘reasonable assurance’ that the applicable provisions [of the Clean Water Act and state water quality standards] would be complied with.” *Friends of the Earth v. Ecology*, PCHB No. 87-63, Final Findings of Fact, Conclusions of Law and Order at 25 (1988) (majority opinion). The ACC, although acknowledging that the Board has employed the preponderance of the evidence standard in its review of a 401 Certification, attempts to elevate that standard to one of certainty—suggesting a beyond a reasonable doubt standard—by selectively defining “assurance” and ignoring “reasonable”. *See* ACC Memorandum in Support of Motion for a Stay at 4 (ACC’s Memorandum). Adding the definition of “reasonable”, which is defined as “being within the bounds of reason : not extreme : not excessive” and “moderate” (*Webster’s Third New*

1 | *International Dictionary* (1971) at 1892), to that of “assurance” indicates that “reasonable
2 | assurance” is something more than a probability but less than a certainty.

3 | Even Tom Luster, whom ACC promotes as the expert on 401 certifications, has stated
4 | that the “reasonable assurance” standard is less than certainty. Discussing the meaning of
5 | reasonable assurance, Mr. Luster wrote:

6 | Review under Section 401 requires Ecology to have “reasonable assurance” that
7 | the water quality standards will be met. “Reasonable assurance” is a term of
8 | law meaning we must have a “preponderance of evidence” showing that the
9 | proposed actions will meet the standards. In addition, “reasonable assurance”
10 | recognizes that there is some uncertainty with the decision, given that the
11 | proposed actions will occur sometime in the future and cannot be fully
12 | predicted. Therefore, once we have the necessary “preponderance of evidence”
13 | showing that standards will be met, we can then include conditions that address
14 | the remaining areas of uncertainty—for example, conditions can be added to the
15 | 401 permit that require monitoring, compliance inspections, review and
16 | approval of any design changes, etc.

17 | Attachment to letter from Tom Luster to Senator Julia Patterson at 3, dated January 21, 2001,
18 | attached to the Declaration of Ann Kenny (“Kenny Dec.”) as Exhibit 3.² Moreover, in
19 | addressing a challenge to a 401 certification this Board indicated that certainty is not the
20 | standard. “Fears that we do not know enough are part of the normal condition of mankind. By
21 | themselves, they are not sufficient to overcome Ecology’s decisions in this case.” *Friends of*
22 | *the Earth*, PCHB No. 87-63, Conclusion of Law VIII at 28.

23 | In order for the ACC to prevail in its motion for stay and on its underlying appeal, it
24 | must provide more than mere speculation and what ifs that water quality standards will not be
25 | met by the project. As established below, the ACC has not made a *prima facie* showing that it
26 | will either succeed on the merits of its appeal or that it will suffer irreparable harm if the stay is
27 | not granted. An analysis of the ACC’s claims demonstrates that there is a substantial
28 | probability that Ecology will prevail on the merits of the appeal. The Board should therefore
29 | deny the motion for stay.

30 | ² See Declaration of Ann Kenny, paragraphs 8-18, for a complete discussion of Ecology’s 401
31 | certification process and the application of that process to the Port’s request.

1 | **B. The ACC Has Not Demonstrated A Likelihood Of Succeeding On The Merits Of**
2 | **Its Appeal.**

3 | 1. **The 401 Certification requires mitigation for impacts to wetlands.**

4 | The ACC asserts that the 401 Certification does not adequately compensate for impacts
5 | to wetlands created by the Port's construction of its proposed projects. To reach that
6 | conclusion, the ACC must necessarily ignore the extensive nature of the Port's Natural
7 | Resource Mitigation Plan (NRMP), the conditions in the 401 Certification and applicable law.
8 | As demonstrated below, the wetland mitigation required by the 401 Certification compensates
9 | for wetland impacts and will, in fact, result in net benefits to the highly urbanized and degraded
10 | Miller, Walker and Des Moines Creek basins.

11 | In crafting the wetland mitigation plan, Ecology and the Port were guided by the unique
12 | nature of the project and specific regulatory requirements addressing important airport safety
13 | issues. The Federal Aviation Administration (FAA), due to concern for bird-aircraft strike
14 | hazard, strictly limits the wetland mitigation projects and other activities that attract wildlife
15 | near existing airports. Declaration of Erik Stockdale (Stockdale Dec.) at ¶ 14. In addition,
16 | RCW 90.74.005(2) requires state resource agencies, including Ecology, addressing wetland
17 | impacts caused by public infrastructure projects to consider innovative mitigation measures
18 | that "are timed, designed, and located in a manner to provide equal or better biological
19 | functions and values compared to traditional on-site, in-kind mitigation proposals." Under
20 | RCW 90.74.020(1), such mitigation plans may propose wetland mitigation that occurs within
21 | the Watershed Resource Inventory Area (WRIA) as the wetlands being impacted. Taking into
22 | consideration the FAA's limitation, the requirement to provide meaningful mitigation for the
23 | anticipated impacts to wetlands, and the provisions of ch. 90.74 RCW, Ecology developed a set
24 | of minimum "environmental objectives" that the Port was required to follow in developing the
25 | NRMP. Those objectives, described in paragraph 16 of the Declaration of Erik Stockdale,
26 |

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included the requirement that wetlands impacted be replaced on a one-to-one basis³ in-basin and on a two-to-one basis out-of-basin.⁴

Applying Ecology's wetland mitigation guidance, the Port thoroughly evaluated the project's impacts to wetlands and avoided such impacts where possible. Stockdale Dec. at ¶ 17. The Port, to the extent practicable, has minimized the project's impacts to wetlands and streams. *Id.* In constructing the third runway and associated projects the Port will cause direct permanent impacts to 18.37 acres of wetland, and long-term temporary impacts to 2.05 acres of wetlands. Declaration of Katie Walter (Walter Dec.) at ¶¶ 8, 10.

The provisions of the NRMP reduce adverse impacts to wetlands, provide compensation for those impacts, and establish rigorous mitigation protocols. Stockdale Dec. at ¶ 17. The plan provides for 102.27 acres of in-basin mitigation and 65.38 acres of out-of-basin mitigation, for a total of 167.65 acres of mitigation. *Id.* at ¶ 19. Therefore, the Port proposes a total of 167.65 acres of wetland and upland buffer mitigation as mitigation for unavoidable impacts to 18.37 acres—in excess of nine times the acreage of the impact. *Id.* Applying the mitigation ratio acreage discounts (1:2 for wetland enhancement, 1:10 for wetland preservation, 1:5 for upland buffer enhancement) to the Port's mitigation proposal results in 29.82 acre credits for in-basin mitigation and 42.91 acre credits for out-of-basin mitigation, for a total of 72.73 acre credits. *Id.* at ¶ 20. Dividing the 18.37 acres of permanent wetland impact by the acre credits, the NRMP provides 1.62-acre credits in basin for every acre of impact, and 2.34 acre credits out-of-basin for every acre of impact—a net mitigation credit for the mitigation package of 3.96 acre credits for every acre of impact.⁵ *Id.* at ¶ 21. In addition, the

³ "One-to-one" replacement means that for every acre of wetland impacted, one acre of wetland must be created, restored or enhanced.

⁴ "Out-of-basin" means out of the immediate creek basin but within the same WRIA. Mitigation being proposed in Auburn is within the same WRIA as the wetlands at the project site.

⁵ The 167.65 of compensatory mitigation and 72.73 acre credits do not include the Port's realignment and restoration of Miller Creek through the former Vacca Farm, a highly degraded headwater wetland system in the basin, the in-stream habitat restoration elements proposed in Miller and Walker Creeks, nor buffers on Des Moines Creek at the Tyee golf course. Even without providing credit for those mitigation activities, the NRMP

1 Port must mitigate for the long-term temporary impacts to 2.05 acres by providing 11.85 acres
2 of compensatory mitigation in Wetland A17 (2.85 acres of wetland enhancement and 8.6 acres
3 of upland buffer enhancement), resulting in a mitigation credit of 3.15. Stockdale Dec. at ¶18.
4 The Port’s wetland mitigation plan represents the largest and most significant urban watershed
5 mitigation package ever required by Ecology. *Id.* at ¶ 21.

6 The activities detailed in the NRMP will provide meaningful restoration of the Miller,
7 Walker and Des Moines Creek basins. Stockdale Dec. at ¶ 22. Those actions include (1) the
8 restoration of 1.7 mile long, 200-foot wide swath of riparian habitat in Miller and Walker
9 Creeks, restoring a productive multi-layer native forest system along a currently degraded
10 creeks; (2) the removal of over 380 homes and their attendant driveways, rooftops, septic
11 systems and attendant structures; (3) the removal of 4.3 acres of impervious surface currently
12 draining untreated and undetained stormwater into the creeks within the restored buffer; and
13 (4) the removal human habitation in riparian zones reducing the watershed-scale effects of
14 fertilizer and pesticide runoff, clearing and other human intrusions, pet waste and predation,
15 soil compaction, etc. *Id.*; Walter Dec. at ¶ 27. As pointed out by Erik Stockdale, a Senior
16 Wetlands Specialist with Ecology, “[i]f the residents of these basins wanted to conduct a
17 meaningful watershed-scale restoration action, they would do many of the activities the Port is
18 committing to do in the NRMP.” Stockdale Dec. at ¶ 22.

19 In addition to the particular mitigation activities required by NRMP, the plan also
20 requires a 15 year monitoring period, with strict performance standards and contingency
21 measures. Stockdale Dec. at ¶ 25. The monitoring program includes an adaptive management
22 strategy to ensure that aspects of the NRMP can be readily modified if monitoring results
23 dictate such changes. *Id.* Finally, detailed oversight and review of the Port’s implementation
24 of the NRMP and compliance with the 401 Certification is assured through the Port’s funding

25 _____
26 exceeds the minimum environmental objective Ecology set for the Port by a significant margin. Stockdale Dec. at
¶ 21.

1 of three to five positions at Ecology dedicated to this project. Stockdale Dec. at ¶ 25. In sum,
2 the NRMP and conditions in the 401 Certification provide Ecology with reasonable assurance
3 that water quality standards will be met. *Id.* at ¶ 27.

4 The ACC's assertions that the NRMP will result in degradation of water quality is
5 simply wrong.⁶ First, the ACC's assertion that Ecology has not issued 401 certifications
6 requiring the submittal in the future of final plans is incorrect. A sampling of 401 certifications
7 issued in the last several years demonstrates that Ecology does, in fact, routinely issue
8 certifications that require future submittals. Kenny Dec. at ¶ 15. The 401 Certification sets
9 forth in detail the information that must be incorporated into the final NRMP and the
10 mitigation plan for the 2.05 acres of temporary impacts. *Id.* at ¶¶ 16, 17. Consequently, the
11 ACC's claim that Ecology has acted inconsistently with past practice by requiring the
12 submittal of a final NRMP and a mitigation plan for Wetland A17 to compensate for the 2.05
13 acres of temporary impacts, is wholly unsupported.

14 Second, in its critique of the proposed wetland mitigation, the ACC completely ignores
15 several important elements of the NRMP and 401 Certification: (1) the 23.55 acres of wetland
16 and buffer preservation being provided; (2) that the NRMP addresses the temporal loss of
17 wetland functions; (3) that the 401 Certification requires the Port to mitigate for the 2.05 acres
18 of long-term temporary impacts; and (4) that the NRMP demonstrates that there will be a net
19 gain in the wetland functions and values in the watershed. Walter Dec. at ¶¶ 19-21, 26. Third,
20 the ACC, by focusing exclusively on in-basin mitigation, fails to acknowledge the FAA's
21 safety restriction, the provisions of ch. 90.74 RCW, and the merits of the wetland functions
22 being provided at the Auburn mitigation site. Fourth, the ACC's assertion that 21 percent of
23 the wetlands remaining in the watershed will be eliminated is misleading as it does not account
24 for the 6.6 acres of wetland restoration and 21.46 acres of wetland enhancement being
25

26 ⁶ A thorough response to the ACC's wetland comments is contained in the Declaration of Katie Walter at
paragraph 19-30. The most salient points are excerpted in this brief.

1 provided. Walter Dec. at ¶ 2. Finally, the ACC's assertion that wetlands of high quality are
2 being eliminated ignores the degraded conditions of the basins and the benefits that will accrue
3 by the (a) removal of homes, impervious surfaces, septic systems, riprap and concrete
4 bulkheads, (b) elimination of the unregulated use of pesticides, herbicides and fertilizers, and
5 (c) the replacement of noxious weeds with native plants. Walter Dec. at ¶ 27; Stockdale Dec.
6 at ¶ 22.

7 The ACC has not established that it has a likelihood of succeeding on the merits of this
8 issue. In contrast, the evidence submitted by Ecology demonstrates that it has a probability of
9 succeeding on the merits. That evidence establishes that the wetland mitigation required under
10 the 401 Certification is more than sufficient to offset impacts from construction of the project,
11 will result in net benefits to the watershed and comports with applicable legal requirements.
12 The Board should, therefore, deny the ACC's request for a stay.

13 **2. Ecology's 401 Certification includes specific conditions to ensure that low**
14 **flow impacts will be mitigated.**

15 The ACC contends that the 401 Certification is deficient because it does not give
16 reasonable assurance that impacts from low flows will be mitigated. This contention is
17 erroneous. The 401 Certification contains numerous detailed conditions, ignored by the ACC,
18 which ensure that low flow impacts will be offset.

19 In the process of reviewing the Port's proposal, Ecology realized that the STIA
20 expansion could lower flows in Miller, Walker, and Des Moines Creeks because of the large
21 amount of fill and impervious surface to be added in those basins. To address this water
22 quality impact, Ecology required the Port to develop a plan to offset the expected low flows by
23 adding water to the creeks at rates that to mimic, as much as practicable, the pre-project flow
24 rates. Kenny Dec. at ¶ 31. In December 2000 and July 2001, the Port submitted its Low Flow
25 Impact Analysis-Low Flow Impact Offset Facility Proposal (low flow mitigation plan).

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1 The low flow mitigation plan calls for the Port to offset low flow impacts by capturing,
2 treating and storing stormwater during storm events and then releasing the water to the streams
3 during low flow periods. Whiting Dec. at ¶ 5. Ecology referred the plan to Kelly Whiting, a
4 Senior Engineer with King County's Department of Natural Resources, Ecology's contract
5 hydrology expert, for review. Mr. Whiting concluded that the plan constituted "a substantial
6 proposal to provide mitigation for natural resource impacts which goes well beyond the basic
7 requirements of the King County Surface Water Design Manual." Whiting Dec., Ex. 2.

8 Mr. Whiting made several recommendations for improving the low flow mitigation
9 plan. Whiting Dec., Ex. 2, attachment. These recommendations included more detailed design
10 drawings for the storage vaults, analysis of impacts to aquatic resources during potential low
11 flows during June and July, monitoring, and a contingency plan. Mr. Whiting's
12 recommendations, which were incorporated into the 401 Certification, respond directly to the
13 concerns raised by the ACC. In fact, it appears that the ACC simply repeats concerns it raised
14 earlier in the process and ignores the conditions in the 401 Certification that specifically
15 address those concerns.

16 For example, the ACC asserts that the first release of water from the storage vaults will
17 be an "anoxic slug of sediment laden water carrying a six-month accumulation of pollutant
18 load." Dec. of Peter Willing, ¶ 14. This statement ignores Conditions I (1) of the 401
19 Certification that requires the Port to test one stormwater vault for performance before
20 operation, to aerate the water in the vaults, to monitor the water quality in the vaults, and to
21 apply contingency treatment measures if water quality criteria are not met. The ACC further
22 asserts that the Port's plan fails to mitigate for low flows predicted to occur in June and July.
23 However, the 401 Certification includes a condition requiring the Port to assess the impact of
24 low flow during those months and to implement contingency measures if reduced flows are
25 discovered. Condition I (1)(e)(vi).

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1 Particularly striking is the ACC's complaint of inconsistency regarding the Port's
2 proposal to line drainage swales in the Walker Creek basin. Rozenboom Dec. at ¶ 18. The
3 Port's proposal in this regard was rejected by Ecology. Kenny Dec. at ¶ 34. Instead, the 401
4 Certification requires the Port to gain the necessary reserve storage for the Walker Creek basin
5 from the 69 acres of non-contiguous groundwater recharge area. Condition I (1)(c)(i).

6 The ACC generally argues that the Port's low flow mitigation plan is too uncertain to
7 provide reasonable assurance. This contention ignores the requirement in the 401 Certification
8 that detailed plans be submitted within 45 days addressing the alleged areas of uncertainty.
9 Condition I (1). It is not unusual in complex projects for more detailed plans to be submitted
10 after issuance of a permit. Kenny Dec. at ¶ 15. Reasonable assurance does not require
11 absolute certainty, as the ACC implies. *Friends of the Earth*, PCHB No. 87-63, Conclusion of
12 Law VI at 27 ("The 'reasonable assurance' requirement is met if we find by a preponderance
13 of the evidence that acute or toxic conditions are not ... likely to occur."). Here, the Port's
14 plans contain sufficient detail to enable Ecology to have reasonable assurance because the
15 plans appropriately identify an impact and offer a reasonable and technically feasible method
16 of mitigating for that impact. Kenny Dec. at ¶ 33.

17 The low flow mitigation plan is not as experimental as the ACC contends. The King
18 County Surface Water Design Manual (King County Manual) includes design criteria for wet
19 vaults that will be applied to the Port's underground storage facilities. Whiting Dec., p. 6.
20 These design criteria include provisions to improve the quality of the discharge water. The
21 criteria include air contact, depth restrictions, sediment storage, on-line flow through design,
22 and outlet/inlet works to encourage water turnover. *Id.* The 401 Certification requires that
23 these design criteria be met. Condition I (1)(a)(iv). By requiring the Port to follow these
24 established design criteria, which the ACC ignore, Ecology has addressed the uncertainty
25 concerns of the ACC.

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1 Mr. Whiting analyzed the hydrologic models upon which the low flow mitigation plan
2 is based. He found that they were consistent with the models used to develop the SMP flow
3 control measures. Whiting Dec., p. 7. To respond to concerns regarding the accuracy of the
4 models' calibration, Mr. Whiting recommended that they be calibrated to gages in the upper
5 reaches of the streams in addition to gages at the stream mouths. Ecology incorporated this
6 recommendation into the 401 Certification. Condition I (1)(a)(iii). While the ACC contends
7 that the models fail to account for two areas of impervious surface, these areas are not part of
8 the project for which 401 Certification was sought and thus could not properly be included in
9 the mitigation plan. Kenny Dec. at ¶ 35.

10 The ACC's arguments here are based on speculation. The ACC speculates that water
11 quality criteria will be violated when water is discharged from the vaults and that the
12 monitoring required by Ecology will come too late to correct those assumed violations. The
13 difficulty with the ACC's argument is that, as noted above, it ignores the numerous conditions
14 Ecology has imposed to ensure water quality criteria are met. The ACC's assumption that
15 water quality standards will not be met is not based on fact, but is simply an assumption. The
16 ACC's speculations are insufficient to overturn Ecology's 401 Certification decision. *See*
17 *Friends of the Earth v. Department of Ecology*, PCHB No. 87-63, Conclusion of Law VIII at
18 28 ("Fears that we do not know enough are part of the normal condition of mankind. By
19 themselves, they are not sufficient to overcome Ecology's decisions in this case."). The ACC
20 cannot demonstrate a likelihood of success on the merits on this issue.

21 **3. The Port's stormwater management plan and low flow mitigation plan do**
22 **not trigger the need to obtain a water right.**

23 The ACC makes a creative argument that, in order for Ecology to have reasonable
24 assurance that the Port's low flow mitigation plan will be implemented, the Port must obtain a
25 water right. In support of its argument, the ACC relies on prior decisions of the Board that are
26 clearly distinguishable. Regardless, the major flaw in the ACC's argument is that Ecology has

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1 not traditionally required a water right for the management of stormwater and there is no basis
2 for doing so here.

3 As explained by Edward O'Brien of Ecology's Water Quality Program, who has been
4 assigned to stormwater issues for the last ten years, urbanization and its attendant increase in
5 impervious surfaces causes two major impacts to a watershed: (1) an increase in concentration
6 of pollutants in stormwater runoff; and (2) an alteration of the natural hydrologic cycle. See
7 Declaration of Edward O'Brien (O'Brien Dec.) at ¶ 7, 8. While the initial focus of stormwater
8 management was the removal of pollutants from the water column and reducing the
9 detrimental impacts of high flows, the importance of mitigating low flow impacts has been of
10 concern for many years. *Id.* at ¶ 13, 14.

11 Both Ecology's Stormwater Manual for Puget Sound (1992 and 2001 editions) and
12 King County's Surface Water Design Manual recognize the water quality impacts caused by
13 urbanization. O'Brien Dec. at ¶ 10, 11. To address those impacts, the manuals call for the
14 implementation of "best management practices" (BMPs). For example, Ecology's manual
15 identifies the infiltration of collected stormwater as a preferred BMP because of its reduction
16 of pollutant loading and its positive impact on summer low flows. *Id.* at ¶ 14. As explained
17 below, the requirements of the Port's Comprehensive Stormwater Management Plan (CSMP)
18 and low flow mitigation are designed to address these very issues and, as such, do not trigger
19 the need for a water right.

20 The Port's low flow mitigation plan involves capturing, storing, treating and releasing
21 stormwater to Walker, Miller and Des Moines Creeks to offset low flows predicted to occur as
22 a result of increases in impervious surface area in those watersheds. The intent of the low flow
23 mitigation plan is to mimic, as much as practicable, the pre-project hydrologic curve. Kenny
24 Dec. at ¶ 31. That is, the system is designed so that flows in Walker, Miller and Des Moines
25 Creeks will be the same after completion of the project as they are now.

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1 The Port's proposal requires the temporary storage of stormwater in underground vaults
2 so that sufficient amounts are available for release to the streams during the predicted low flow
3 periods. Whiting Dec at ¶ 5. This temporary storage is the sole basis for the ACC's argument
4 that a water right is necessary. Absent such temporary storage, the Port's CSMP would be
5 indistinguishable from more traditional stormwater management plans for which no water right
6 has been required. In fact, the Port's CSMP and low flow mitigation plans differ only in scale
7 from traditional stormwater management plans. All such plans detain stormwater for short
8 periods of time in drainage ditches, catch basins, bioswales or the like in order to prevent
9 degradation of nearby waterbodies. The Port simply proposes to detain the water for longer
10 and release it in a more controlled manner than is usual.

11 The Port's proposal to temporarily store stormwater does not trigger the need for a
12 water right for two principal reasons. First, the Port's proposal is designed to protect water
13 quality by mimicking pre-project conditions. Second, requiring a water right in these
14 circumstances serves no purpose and would, in fact, be detrimental to the public interest by
15 discouraging valuable stormwater management efforts.

16 The purpose of the 1917 water code was to create a mechanism for avoiding private
17 disputes over the use of water. *West Side Irrigation Co. v. Chase*, 115 Wash. 146, 149-50,
18 196 P. 666 (1921). The permit process established in the code is intended to protect senior
19 users from subsequent appropriations, to ensure the beneficial use of water, and to protect the
20 public interest. RCW 90.03.290. The code is a "complete system of regulation for the
21 distribution of the waters of the state" designed to "provide 'an inexpensive and ready manner
22 of settling all disputes concerning such matters.'" *Washington v. Lawrence*, 165 Wash. 508,
23 510, 6 P. 2d 363 (1931).

24 Here, the purposes of the water code are not implicated because there is no change in
25 hydrology and thus there will not be an impact to either senior users or the public interest. The
26 Port is not capturing water that would otherwise be available for senior users. Instead, the Port

1 is temporarily detaining stormwater and releasing it to the area streams in such a manner as to
2 mimic, as much as possible, the pre-existing hydrologic conditions. The ACC's argument that
3 someone might seek to appropriate the water in the storage vaults and thus prevent the Port
4 from carrying out the low flow mitigation plan is entirely theoretical and not based on any
5 actual possibility of impairment or detriment to the public interest.

6 Moreover, Ecology has already analyzed the proposal for compliance with water
7 quality criteria in the context of its 401 review. Analysis of the Port's proposal is best carried
8 out under water quality laws rather than water resources laws because it is the water quality
9 criteria that are implicated by the proposal and which it is designed to satisfy. *See generally*
10 *PUD No. 1 of Jefferson Co. v. Dept. of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed. 2d
11 716 (1994) (Ecology may require augmentation of streamflows in the context of 401
12 certification).

13 The ACC relies on *Okanagan Highlands Alliance (OHA) v. Dept. of Ecology*, PCHB
14 No. 97-146, 97-182, 97-183, 97-186, 99-019 (2000), in support of its arguments. *OHA*,
15 however, clearly is distinguishable. The project proposal in *OHA* involved a permanent shift in
16 the hydraulic divide between two creeks. The proposal required permanently rerouting water
17 from one drainage to another in order to offset the impacts of the proposal. Here, there is no
18 such change in hydrology; no rerouting of water from one drainage to another. Instead of a
19 transfer from one drainage to another, the Port proposes simply to delay the release of water to
20 the same basin in a manner that mimics pre-existing hydrology.

21 The ACC also relies on cases this Board addressed in the statewide water rights appeals
22 litigation. See ACC's Memorandum at 16-17, to support its water rights argument. Again, this
23 reliance is misplaced. Those cases involved applicants seeking new water rights where the
24 granting of a water right would impair senior rights. To offset that impairment, the applicants
25 proposed a variety of mitigation measures, including the capture of stormwater runoff from
26 impervious surfaces. The Board disallowed such mitigation generally on the grounds that it

1 was not shown that the proposed mitigation plans would prevent the proposed withdrawal from
2 impairing existing rights. *See e.g., Black River Quarry v. Dept. of Ecology*, PCHB No. 96-56,
3 Findings of Fact, Conclusions of Law and Order (1996). These cases are inapposite. The
4 question in this instance is not whether stormwater infiltration may be claimed as mitigation
5 for a new withdrawal, but rather is whether the Port's proposal requires a water right in the first
6 place.

7 In essence, the ACC seeks to stretch the water code to a situation—the management of
8 stormwater—to which it was never designed to apply. The Board should reject the ACC's
9 argument.

10 **4. The fill acceptance criteria in the § 401 Certification protects water quality.**

11 Consistent with its arguments regarding other conditions in the 401 Certification, the
12 ACC puts forth nothing more than pure speculation in support of its assertion that the fill
13 acceptance criteria for the third runway embankment is not protective of water quality. Having
14 realized the inadequacy of its presentation, the ACC resorts to misconstruing an e-mail
15 communication between Ecology employees to bolster its assertions. Again, the ACC must
16 present much more to carry its burden that it is likely to succeed on the merits of that issue. As
17 detailed below, the fill criteria condition in the 401 Certification comports with applicable law
18 and provides reasonable assurance that water quality standards will be met.

19 The proposed third runway will be constructed west of the existing runways. Site
20 preparation for the proposed runway requires the importation of an estimated 17 to 22 million
21 cubic yards of fill to raise the ground level of the adjacent parcels to that of the other runways.
22 Fitzpatrick Dec. at ¶ 7. When regulating the quality of fill used to fill wetlands, Ecology
23 employs the Army Corps of Engineers 404 Permit standard of “free from toxic pollutants in
24 toxic amounts” and Ecology regulations requiring that fill materials not constitute sources of
25 contaminants exceeding state surface water standards (WAC 173-201A) or state groundwater
26 standards (WAC 173-200) at any time over the life of the project. *Id.* at ¶ 9. Because of the

1 large quantity of fill to be used in creating the embankment and the fact that there are currently
2 no national or state guidelines on acceptable fill standards, Ecology elected to craft fill
3 screening protocols for inclusion in the 401 Certification. Fitzpatrick Dec. at ¶ 8.

4 The fill screening protocols, contained in Condition E of the 401 Certification, are
5 designed to meet Ecology's and the Corps' above stated regulatory requirements, to satisfy the
6 requirements of WAC 173-201A-040(1) ("[t]oxic substances shall not be introduced above
7 natural background levels in waters of the state which have the potential either singularly or
8 cumulatively to adversely affect characteristic water uses"), the antidegradation standard in
9 WAC 173-201A-070(4)(a) ("[e]xisting instream uses and the level of water quality necessary
10 to provide full support to those uses must be maintained and protected"), and to provide the
11 necessary reasonable assurance that water quality standards would be met with respect to the
12 Port's use of fill materials. Fitzpatrick Dec. at ¶¶ 9, 15.

13 Condition E establishes a tiered approach that the Port must follow when selecting
14 sources of fill material. The threshold requirement is that the Port can only use naturally
15 occurring uncontaminated soil as fill material. This requirement is embodied in Condition E
16 (1)(d), which categorically prohibits the use of contaminated fill on the site. Fitzpatrick Dec. at
17 ¶ 10. The Port's compliance with this prohibition is reinforced by the specific protocols the
18 Port must follow when selecting a fill source. First, under Condition E (1)(a) Documentation,
19 the Port is required to investigate all potential fill sources to ascertain whether the proposed
20 site has a history of contamination. Condition E (1)(a) defines in detail the site investigation
21 that the Port must perform and the information that must be submitted to Ecology documenting
22 that investigation. *Id.* at ¶ 11.

23 The next protocol ensuring the use of naturally occurring uncontaminated soil is found
24 in the verification provision of Condition E. The verification provisions, contained in
25 Conditions E (1)(a)(iv) Fill Source Sampling and E (1)(b) Criteria, mandate that the Port
26 sample fill materials for the potential contaminants listed, establishes a minimum sampling

1 schedule, and sets forth criteria for concentrations of naturally occurring contaminants in soil.
2 Fitzpatrick Dec. at ¶ 12. As explained by Kevin Fitzpatrick, Section Manager of Ecology's
3 Water Quality Program at its Northwest Regional Office, "the purpose of the verification is
4 two-fold: (1) to establish that the source of fill is indeed uncontaminated; and (2) to ensure
5 that any naturally occurring contaminants in soil do not exceed the specified concentrations."
6 *Id.* The criteria are necessary because of the potential for naturally occurring contaminants
7 present at levels in excess of the stated concentrations to violate state groundwater and surface
8 water standards if mobilized. *Id.* The criteria in Condition E (1)(b) were developed to address
9 the possibility that those contaminants could be mobilized in the soil and reach surface water
10 or groundwater. An additional measure in Condition E (1)(b) designed to further reduce the
11 risk of mobilization of naturally occurring contaminants from soils is the establishment of
12 lower concentration requirements for certain naturally occurring contaminants (chromium, lead
13 and nickel) depending on their final placement in the fill profile. As prescribed in that
14 provision, the Port is required to use stricter criteria when screening fill for placement in the
15 fill profile in those locations where there is an increased risk of mobilizing the contaminants
16 into surface water or groundwater. Fitzpatrick Dec. at ¶ 13.

17 Finally, Conditions E (2) As-Built Documentation and E (3) Post Construction
18 Monitoring, provide additional assurance that the fill materials used by the Port meet
19 Ecology's objective that the placement of fill not jeopardize either state surface or groundwater
20 standards. Fitzpatrick Dec. at ¶ 14. Under Condition E (2), the Port must track all fill
21 materials imported onto the construction site. The purpose of that provision is to permit
22 Ecology and the Port to know with some certainty the exact location and elevation of the
23 various fill materials used. *Id.* Additional assurance is provided by Condition E (3), which
24 requires the Port to monitor both surface water and groundwater conditions throughout project
25 development. The monitoring requirement is designed to serve as an "early-warning" system
26

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1 concerning surface water and groundwater conditions in the unlikely event that unsuitable fill
2 material was deposited onto the site. *Id.*

3 In sum, the fill screening protocols established in Condition E ensure that fill materials
4 used for the embankment will meet water quality standards. The Port is prohibited from using
5 non-naturally occurring uncontaminated materials. The specific criteria developed by Ecology
6 for concentrations of naturally occurring contaminants in soil are appropriately conservative.
7 Fitzpatrick Dec. at ¶ 15. Consequently, it is exceedingly unlikely that the naturally occurring
8 contaminants listed in the criteria will mobilize and move into groundwater and surface waters
9 at concentrations exceeding acute or chronic criteria set forth in the state's surface and
10 groundwater standards. The conditions in the 401 Certification governing the Port's selection
11 and use of fill material provide Ecology with reasonable assurance that water quality standards
12 will be met throughout the life of this project.

13 The ACC presents no evidence that the fill screening protocols of Condition E are not
14 protective of water quality. Rather, the ACC resorts to misconstruing an e-mail from an
15 Ecology employee, Pete Kmet, and mischaracterizing how clean-up levels are developed under
16 the Model Toxics Control Act ("MTCA"). Neither point assists the ACC in carrying its burden
17 of establishing a *prima facie* case that it has a likelihood of the success on the merits of this
18 issue.

19 Because the ACC has no evidence that the stringent fill screening protocols in the 401
20 Certification will result in violations of state water quality standards, it resorts to a strained
21 reading of Mr. Kmet's e-mail as support for its assertion that the fill criteria in Condition E
22 (1)(b) do not provide reasonable assurance. As is clear from the opening sentence of Mr.
23 Kmet's e-mail, the comments he provided were only applicable if Ecology was "not going to
24 restrict fill material to naturally occurring uncontaminated soils[.]" Declaration of Pete Kmet
25 ("Kmet Dec."), Exhibit 1. In fact, as demonstrated above, the baseline requirement Ecology
26 imposed on fill used by the Port is that it be naturally occurring uncontaminated soils. In

1 addition, Mr. Kmet was asked to respond to a narrow request—suggest proposed language
2 addressing terrestrial ecology risk. Kmet Dec. at ¶ 2, Exhibit 1. Mr. Kmet’s response
3 answered only that request. It did not address all issues regarding the establishment of fill
4 criteria for the Third Runway project, nor did it constitute his opinion regarding the
5 protectiveness of the fill criteria included in the 401 Certification. Kmet Dec. at ¶¶ 3, 4.

6 In attempting to cast doubt on the fill criteria, the ACC confuses the requirements of
7 establishing cleanup levels with those governing remedy selection. Contrary to the ACC’s
8 assertion, the cost-benefit analysis in MTCA does not apply to the establishment of cleanup
9 levels. See ACC’s Memorandum at 18 and 19, n. 12. The text the ACC refers to in Ecology’s
10 Publication No. 94-130 “pertains to the process for selecting a remedy that is permanent to the
11 maximum extent practicable, not the process for developing cleanup levels.” Kmet Dec. at ¶ 3.
12 WAC 173-340-200 defines a cleanup level as “...the concentration of a hazardous substance in
13 soil, water, air or sediment that is determined to be protective of human health and the
14 environment under specified exposure conditions.” Cost is not a consideration in the
15 development of cleanup levels and has no bearing on the fill screening criteria developed for
16 the 401 Certification. *Id.*

17 In light of the ACC’s failure to present evidence of any deficiencies in the fill screening
18 protocols in the 401 Certification, the Board should deny the request for a stay.

19 **5. Ecology’s 401 Certification includes conditions to ensure that water quality**
20 **standards will be met with regard to the Port’s stormwater discharges.**

21 The ACC next contends that the 401 Certification is deficient in regard to stormwater
22 because the Port’s Comprehensive Stormwater Management Plan (CSMP) does not ensure that
23 water quality standards will be met. This contention fails because the CSMP meets, and goes
24 beyond, the technical requirements of the King County Surface Water Design Manual (King
25 County Manual). Also, the 401 Certification contains specific conditions in addition to the
26 requirements of the CSMP to protect water quality.

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1 In designing its CSMP, the Port agreed to follow the requirements of the King County
2 Manual, which in general sets a higher standard for compliance than Ecology's then existing
3 stormwater manual. Because the King County Manual utilizes hydrologic models not
4 addressed in Ecology's manual, Ecology referred the CSMP to Mr. Whiting, an expert in
5 surface water hydrology with substantial experience reviewing stormwater management plans
6 for compliance with the King County Manual, for review and comment. Whiting Dec. at ¶ 1.
7 Through a series of meetings between Ecology and the Port, deficiencies in the Port's proposed
8 CSMP were identified and plans developed to address them. Kenny Dec. at ¶ 21. The Port's
9 revised plan fully addressed all the deficiencies previously identified. *Id.*

10 Reviewing the elements of the Port's CSMP, Mr. Whiting concluded that the plan met
11 the design requirements of the King County manual. In the memorandum summarizing his
12 review, Mr. Whiting stated that "[t]he SMP demonstrates a feasible conceptual strategy for
13 complying with technical provisions of the King County Surface Water Design Manual and
14 effectively demonstrates that the proposed improvements could fully comply with design
15 manual requirements." Whiting Dec., Ex. 1. In fact, Mr. Whiting found that the SMP went
16 beyond the technical requirements of the manual, stating that "the SMP proposes significant
17 flow control and water quality retrofits beyond minimum compliance with the manual."
18 Whiting Dec. at ¶6, p. 4. The retrofits go beyond even the requirements of Ecology's new
19 2001 stormwater manual and updates to the King County manual. *Id.*

20 The ACC criticizes the SMP for relying too heavily on best management practices
21 (BMPs) that it alleges do not treat metals such as copper, lead, and zinc. The ACC asserts that
22 the Port's stormwater discharges in the past have had concentrations of these metals that
23 "violate" state water quality standards so reliance on BMPs is inappropriate. There are several
24 difficulties with the ACC's contentions. First, the Port's past stormwater discharges have not
25 violated state water quality standards. Fitzpatrick Dec. at ¶ 3. The Port's discharges have
26 exceeded water quality criteria on an instantaneous basis but there is no evidence that those

1 | exceedences have been sustained for a sufficient period of time to constitute violations of water
2 | quality standards. *Id.*

3 | Second, although the Port's proposed BMPs are not designed to treat metals, they may
4 | be partially effective in doing so. Whiting Dec., p. 5. The goal of the BMPs is to remove 80
5 | percent of total suspended solids from stormwater with typical inflow concentrations. To the
6 | extent metal particulates comprise a portion of total suspended solids in the Port's stormwater
7 | discharges, the BMPs may be partially effective in removing them. Whiting Dec., p. 5.

8 | Third, the 401 Certification requires the Port to conduct a site specific study pursuant to
9 | WAC 173-201A-040(3) to determine effluent limitations for metals that will be imposed in the
10 | Port's NPDES permit. Condition J (2). The 401 Certification prohibits the discharge of
11 | stormwater from new pollution generating impervious surfaces at STIA until the study has
12 | been completed and appropriate effluent limitations and monitoring requirements have been
13 | established in the NPDES permit. The purpose of this study is to identify specific effluent
14 | limitations for copper and other metals that will be protective of beneficial uses in the
15 | receiving waters. Fitzpatrick Dec. at ¶ 5. Ecology included this condition specifically to
16 | address the public's concerns regarding metals. Kenny Dec. at ¶ 23.

17 | The ACC, relying on Mr. Luster, asserts that it is inappropriate to incorporate effluent
18 | limitations from an NPDES permit in a 401 certification. This assertion is not defensible.
19 | *Protect the Peninsula's Future v. Ecology*, PCHB No. 96-178 (1996) (§ 401 certification may
20 | be conditioned on the issuance of an NPDES permit). The Port's construction and operation of
21 | STIA facilities associated with the 401 Certification are covered both by the certification and
22 | by the Port's existing NPDES permit. Since both permits address water quality, it is logical
23 | that they should be coordinated. Reasonable assurance that water quality standards will be met
24 | for purposes of the 401 Certification is provided in part by the effluent limitations in the
25 | NPDES permit, which will be specifically designed to protect beneficial uses in the receiving
26 | streams. Kenny Dec. at ¶ 25, 26.

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1 Fourth, the 401 Certification requires that the Port retrofit its existing facilities at a rate
2 of 20 percent retrofit for every 10 percent of new impervious surface added. Condition J
3 (1)(c). These retrofits are expected to improve water quality in the Port's existing stormwater
4 discharges. Fitzpatrick Dec. at ¶ 4. The Port already has had success in implementing source
5 control measures to remove zinc and glycols from its discharges. *Id.* The ACC argues that the
6 retrofit requirement is illusory because the Port is not required to retrofit areas that are too
7 expensive. However, the ACC's argument ignores the fact that only a fraction of pollution
8 generating impervious surface identified in the SMP will not be retrofit due to expense.
9 Whiting Dec. at ¶ 6, p. 3.

10 Contrary to the contentions of the ACC, the 401 Certification does not authorize a
11 "mixing zone" in violation of water quality regulations. No mixing zone is authorized for
12 stormwater discharges. Fitzpatrick Dec. at ¶ 6. The 401 Certification authorized a mixing
13 zone only for in-water and shoreline work and only if the area of the zone is minimized
14 pursuant to WAC 173-201A-110. Mr. Luster's contention that the 401 Certification authorizes
15 mixing zones in violation of state regulations is a misinterpretation of the certification's
16 conditions. Kenny Dec. at ¶ 29.

17 The ACC also misinterprets comments by Mr. Whiting on a draft of the 401
18 Certification. According to the ACC, Mr. Whiting recommended that the 401 Certification
19 include a requirement that runoff from impervious surfaces be treated using "All Known
20 Available and Reasonable Treatment (AKART)." In fact, Mr. Whiting made no such
21 recommendation. Whiting Dec. at ¶ 6, p. 5. His comment was that the AKART requirement
22 should be *removed* from the final 401 Certification because the King County Manual is not
23 AKART. Rather, his recommendation was that the 401 Certification should require AKART
24 only if monitoring showed a need for enhanced water quality treatment. *Id.*

25 Once again, the ACC's arguments regarding stormwater are based more on speculation
26 than hard facts. The ACC essentially speculates that, because of past exceedences in the Port's

1 stormwater discharges, there will also be future exceedences from the newly constructed areas.
2 Not only is this argument logically and factually flawed, it ignores the numerous conditions
3 that Ecology has included in the 401 Certification to address both current and future
4 stormwater discharges. The ACC is unlikely to prevail on this issue.

5 **C. The ACC Has Not Demonstrated That It Will Suffer Irreparable Harm If A Stay
6 Is Not Granted.**

7 In asserting that it will suffer irreparable harm if the 401 Certification, the ACC focuses
8 solely on the filling of wetlands that will occur if the project receives a 404 permit from the
9 Corps. Again, the ACC falls far short in meeting its burden of establishing that it is entitled to
10 a stay.

11 Under Section 401 of the Clean Water Act (CWA), an applicant for a federal license or
12 permit that will result in a discharge to navigable waters shall obtain from the state where the
13 discharge originates a certification that the proposed project will comply with applicable
14 sections of the Act. 33 U.S.C. § 1341(a)(1). If a certification is issued, the terms and
15 conditions of that certification shall become a condition of the federal license or permit. 33
16 U.S.C. § 1341(d). In reviewing a request for 401 certification, Ecology looks at the entire
17 project, not just the impacts to wetlands, to make certain that the project meets the
18 requirements of water quality and other appropriate state laws. *See PUD No. 1 of Jefferson*
19 *Co. v. Department of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed. 2d 716, 727-28 (1994)
20 (“Section 401(d) thus allows the State to impose ‘other limitations’ on the project in general to
21 assure compliance with various provisions of the Clean Water Act and with ‘any other
22 appropriate requirement of State law’ . . . § 401(d) is most reasonably read as authorizing
23 additional conditions and limitations on the activity as a whole once the threshold condition,
24 the existence of a discharge, is satisfied.”) In this instance, if the Corps elects to issue the Port
25 a 404 permit the terms and conditions in the 401 Certification, in their entirety, become a
26 condition of that permit. The Corps cannot place conditions in the 404 permit that are less
restrictive than those contained in the 401 Certification.

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1 While the 401 Certification contains conditions requiring the Port to mitigate for the
2 filling of wetlands, wetland filling is not authorized by the 401 Certification. That activity can
3 only occur if the Corps issues a 404 permit. As the ACC's claim of irreparable harm is
4 directed only at the filling of wetlands, the appropriate forum for a stay of that activity is the
5 federal district court if and when the Corps issues a 404 permit.

6 Moreover, as described in Section III. A. 1. above, the Port's NRMP and the conditions
7 of the 401 Certification address the project's wetland impacts. The wetland mitigation
8 requirements of the 401 Certification compensate for the anticipated loss of wetland functions
9 and, if fact, result in a net benefit to the affected basins. As the declarations of Mr. Stockdale
10 and Ms. Walter indicate, the mitigation activities currently being undertaken by the Port, are
11 improving, not irreparably harming, those basins. See Stockdale Dec. at ¶ 22; Walter Dec. at
12 ¶ 27.

13 The proposed stay is not in the public interest. The ACC's stay request seeks a stay of
14 the entire 401 Certification. If the Board grants that request, an unintended consequence would
15 be the staying of the portions of the certification authorized by Section 401(d) of the CWA,
16 which utilize the authority of ch. 90.48 RCW and other appropriate state law, to address the
17 project's water quality impacts. For instance, Condition E which sets forth the fill screening
18 protocols is directed at all fill material being imported onto the project site, not just the
19 material used to fill wetlands. If the 401 Certification is stayed, the Port would not be required
20 to follow those protocols when using fill material for other purposes. Given the numerous
21 conditions in the 401 Certification that protect the water quality of the affected basins and
22 reach beyond those water quality issues presented by the filling of wetlands, there is an
23 overriding public interest in maintaining the effectiveness of the 401 Certification.

24 The ACC has not demonstrated that it will suffer irreparable harm if the 401
25 Certification is not stayed. In contrast, Ecology has established that it has a substantial
26 probability that it will succeed on the merits of this case and that there is an overriding public

1 interest in continuing the effectiveness of the terms of the 401 Certification. Therefore,
2 Ecology requests that the Board deny the ACC's motion for a stay.

3 **IV. CONCLUSION**

4 In support of its request for a stay, the ACC relies on speculation, incorrect assertions
5 about Ecology's 401 certification process, and misstatements of the record. The evidence put
6 forward by the ACC does not demonstrate that it has a likelihood of succeeding on the merits
7 of any of the issues it raises in its appeal, nor that it will suffer irreparable harm. As this Board
8 has stated previously, fears about the future are part of the human condition and the presence
9 of such fears, without more, is not sufficient to overturn the 401 Certification Ecology issued
10 the Port. The Board should deny the ACC's request for a stay.

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