POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Appellant,

v.

DEPARTMENT OF ECOLOGY and THE PORT OF SEATTLE,

Respondents.

No. ~~01-133~~

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

(Section 401 Permit No. 1996-4-02325, Issued August 10, 2001)

"Many of the same problems that prompted Ecology to inform the Port it would have to deny the previous 401 application have still not been resolved. As a result, the August 2001 401 certification is not based upon reasonable assurance that water quality standards will be met, and, in fact, the decision is likely to result in water quality standards being violated."

Thomas R. Luster Declaration, ¶ 16, September 10, 2001.

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ORIGINAL

I. INTRODUCTION

Appellant Airport Communities Coalition ("ACC"), composed of the Cities of Burien, Des Moines, Federal Way, Normandy Park and Tukwila and the Highline School District, respectfully requests that the Pollution Control Hearings Board (the "Board") enter an order pursuant to RCW 43.21B.320 and WAC 371-08-415 staying the effectiveness of Department of Ecology ("DOE") Order# 1996-4-02325, issued August 10, 2001 (§ 401 Certification and Coastal Zone determination for Sea-Tac Third Runway and related projects). ACC bases its request both on a likelihood of success on the merits of its appeal and on the irreparable harm that will result if the permit is not stayed.

II. STATEMENT OF FACTS

The background of the Port's proposal and Ecology's review of it are described in detail in the attached Declaration of Thomas R. Luster ("Luster Decl."), who, until January 2001, was Ecology's senior policy and technical expert for issues related to Clean Water Act § 401 review. Mr. Luster was DOE's lead staff on the Port's Third Runway application for five years, until he was reassigned in October 2000. Luster Decl. at ¶ 4, p. 12. A copy of DOE's August 10, 2001, § 401 Certification (the "Certification"), additional project background, and important information concerning the project scope and the environment for which it is proposed are included in ACC's Notice of Appeal.[1]

The Port of Seattle's ("Port") Sea-Tac Airport has a smaller land base (2200 acres) than virtually any other major U.S. airport. Its site is characterized by four fishbearing streams (Des

[1] Extra copies of these were submitted last week so that the Board would have them when reviewing of this stay motion. The Board is urgently requested to review these materials since, in the interest of brevity, their content has not been repeated here.

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Moines, Miller, Walker and Gilliam Creeks), three watersheds and numerous wetlands which support diverse aquatic life. Three of the four streams are classified as Class AA waters of the state. The streams and associated environment have long been important to the ACC cities and the School District. *See* ACC's Notice of Appeal at 2-3, 7-8.[2] They are characteristic of the still viable -- but fragile -- aquatic systems which have been much in the news as the Puget Sound region awakes to the consequences of their elimination.

The Port has proposed to shoehorn an 8500 foot third runway into the site by placing 20 million cubic yards of fill -- according to DOE itself, the equivalent of 34 football fields each piled 300 feet deep[3] -- in a canyon on the airport's west side which forms part of the area's vital ecosystem. In doing so, the Port would obliterate 20 acres of high-functioning wetlands, and replumb the watersheds while attempting to handle the massive amounts of polluted stormwater which the project would generate. The project would admittedly starve area streams of flows of clean fresh water necessary for their viability as Class AA waters. Overall, it presents a gross scenario for degradation of water resources by what DOE acknowledges is one of the largest public works projects ever attempted in Washington.[4]

III. APPLICABLE LAW

Pursuant to RCW 43.21B.320(3) and WAC 371-08-415(4), the Board must stay an order if the party requesting the stay makes a *prima facie* case for issuance of a stay by showing **either**: (1) a

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[2] An aerial photo and a map of the site are attached as the last exhibits (Exhibit N and O, respectively) to the Declaration of Peter J. Eglick ("Eglick Decl.").

[3] DOE Press Release, August 10, 2001, attached as Exhibit A to the Declaration of Peter J. Eglick in Support of ACC's Motion for Stay.

[4] *Id.*

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likelihood of success on the merits of the appeal; **or** (2) irreparable harm. Upon such a showing, the Board "shall grant the stay" unless DOE demonstrates either a substantial probability of success on the merits or a likelihood of success coupled with an overriding public interest justifying denial of the stay. WAC 371-08-415 (emphasis added).

A preliminary injunction, akin to a stay, is not a preliminary adjudication on the merits, but a device for preserving the status quo and preventing the irreparable loss of rights before judgment. *Textile Unlimited, Inc. v. ABMH and Co., Inc.*, 240 F.3d 781 (9th Cir. 2001*), citing Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). ACC seeks a stay here to ensure that the watersheds are maintained until the Board has an opportunity to rule on the merits of ACC's appeal.

In determining appellant's likelihood of success on the merits, the Board looks to the standards governing issuance of § 401 certifications. A certification must be based on a valid finding that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 CFR §121.2(a)(3); *PUD No. 1 v. Washington Dept. of Ecology,* 511 U.S. 700, 712 (1994) (Eglick Decl., Ex. B). *See* 33 U.S.C. §1341(a)(1), (d); *Okanogan Highlands Alliance et al. v Department of Ecology and Battle Mountain Gold Company,* PCHB Nos. 97-146, 97-182, 97-183, 97-186, and 99-019, Final Findings of Fact, Conclusions of Law and Order (January 19, 2000), Conclusion Nos. 62-65 ("OHA").

Water quality standards are composed of three elements: numeric criteria for both conventional pollutants and toxic substances, WAC 173-201A-030(1)(c) and -040; narrative criteria protecting

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beneficial uses of state waters, WAC 173-201A-030(1)(a) and (b); and an antidegradation standard. RCW 90.54.020(3); WAC 173-201A-070. *See Dept. of Ecology v. PUD No. 1,* 121 Wn.2d 179, 186-89, 849 P.2d 646 (1993); *OHA*, *supra*, at *Id.* Washington's water quality standards include procedural and substantive requirements for determining compliance. *See, e.g.,* WAC 173-201A-100 (mixing zones), -120 (general classifications) and -160 (implementation).

A § 401 determination will be invalidated when a preponderance of the evidence demonstrates that Ecology did not have reasonable assurance of compliance with applicable water quality standards. *Friends of the Earth v. Ecology*, PCHB No. 87-63, Final Findings of Fact, Conclusions of Law and Order at 25 (1988) (majority opinion) ("FOE");[5] OHA, *supra*, at Conclusion 63.

The term "reasonable assurance" is not explicitly defined. In such instances, the Washington Supreme Court has looked to Webster's Third New International Dictionary. *See, e.g., Development Services of America v. Seattle,* 138 Wn.2d 107, 118, 979 P.2d 387 (1999). It defines assurance as "something that inspires or tends to inspire confidence," and as "the quality or state of being sure or certain: freedom from doubt: certainty." As discussed below, the Certification falls far short of such a standard.

IV. ARGUMENT

A. The Board Should Stay the Certification Because ACC is Likely to Succeed on the Merits.

[5] A more detailed explanation of this standard is found in the *Friends of the Earth* dissent at p. 17 (certification invalid if the preponderance of evidence shows one of the following: (1) All known available and reasonable methods to control pollution have not been employed (RCW 90.48.010); (2) That contamination, or other alteration of the waters' properties will or is likely to render the waters harmful, detrimental, or injurious to public welfare, commercial, recreational, or other legitimate beneficial uses, or to fish or other aquatic life (RCW 90.48.020); (3) Acute or chronic toxic conditions for aquatic biota are likely to result (WAC 173-201-045(2)(c)(vii); or (4) Degradation of existing water quality will occur which will interfere with existing water uses and cause long-term irreparable harm to the environment (WAC 173-201-035(8)).

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1. The Certification permits filling of ecologically significant wetlands without compensating for loss of wetland functions.

The Port proposes to fill 18.37 acres of wetlands in the Miller, Walker and Des Moines Creek watersheds, permanently impact an additional 2.05 acres of wetlands along Miller Creek, and alter the location of a portion of Miller Creek to accommodate the Third Runway. The Port's plans for mitigating these losses have been analyzed for ACC by wetlands scientist Amanda Azous. Ms. Azous is co-editor and co-author of *Wetlands and Urbanization* (CRC/Lewis Press 2000), a 300-page text and reference book on how best to protect and manage wetlands in an urbanizing environment. Per Ms. Azous, the Port's proposal, accepted by DOE, for in-basin wetland mitigation is dominated by "enhancement" rather than replacement. Declaration of Amanda Azous ("Azous Decl.") at ¶ 2. Sixty-seven acres (62% of the in-basin mitigation) will be enhanced upland buffer area. Just under nineteen acres (28%) of the Port's proposed in-basin mitigation acres will be enhancement of existing wetlands. An incomplete restoration is proposed for 6.6 acres of prior converted cropland (comprising 10% of the in-basin mitigation acres). Azous Decl. at ¶ 6. As a result, the 401 certification does not require mitigation of wetland functions within-basin. Further, wetland creation, the only mitigation activity that could directly "replace" lost wetland functions, is proposed only for an area near Auburn, adjacent to the Green River, well outside the watersheds sustaining the loss. *Id.* at ¶ 7.

The majority of wetland acres being eliminated for the Third Runway project in the Miller Creek watershed are more highly rated Class II wetlands, rather than lower quality Class III and IV wetlands. *Id.* at ¶ 24. 37.42 acres of wetlands hydrologically connected to Miller Creek remain in its

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watershed. Of that set, 26.02 acres of wetlands are located in the upper Miller Creek watershed. Of those remaining, hydrologically connected wetlands, 7.05 acres will be eliminated by the Port's proposal, which is 21 percent of the wetlands remaining in the entire watershed and 27 percent remaining in the upper watershed. Eliminating such a high percentage of remaining wetlands within a fragile but viable watershed will impair, not protect, water quality. Azous Decl. at ¶ 25. Removal of wetlands within the Miller, Walker, and Des Moines Creek watersheds will alter stream hydrology, diminish habitat, and harm fish communities. *Id.*

The Port's mitigation package is far removed from DOE's longstanding guidelines for appropriate mitigation activities and ratios. It is unrelated to the functions eliminated or the needs of the watersheds affected. For example, over-all, although *92 percent* of the wetlands proposed for elimination are of low-to-moderate importance for waterfowl habitat, and *80 percent* are of low-to-moderate importance for flood storage (proportionally the *lowest*-ranking functions among all the wetlands being eliminated), waterfowl habitat and flood storage are the primary wetland functions targeted for replacement in the Port's Natural Resource Management Plan ("NRMP"). *Id.* at ¶ 23.

The failure of enhancement activities such as those proposed here by the Port to compensate for loss of actual wetlands is well documented in the scientific literature, yet DOE has accepted enhancement of an upland buffer and remaining wetlands as an equivalent functional exchange for permanently eliminating the functions provided by 20.42 acres of existing wetlands.[6] The riparian and

[6] An analogous plan for "modest improvement and protections to existing resources" with "much of the acreage credited for mitigation...located on uplands" was rejected as insufficient in the Battle Mountain Gold case. OHA, *supra*, Findings 53-54 and Conclusion 67 at p. 29.

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slope wetlands targeted for elimination by the Port have far superior water quality functions in comparison to the upland buffer the Port would restore as compensation. *Id.* at ¶ 19.

Fundamentally, the certification accepts a Port proposal to replace apples with lemons. It creates the impression of mitigation where no effective mitigation in fact exists. It appears to be tailored to the needs of the project rather than the requirements of the law. *Id.* at ¶ 26. There is no reasonable assurance that water quality standards would not be violated with the elimination of 20 acres of high functioning wetlands within the affected watersheds. *Id.* at ¶ 26, 27.

The inadequacy of the mitigation accepted by the Certification is aggravated by its acknowledged failure to require submission of any plan at all for loss of two of the twenty acres of targeted wetlands. This "represents 10% of the proposed project's total direct wetland impacts – a significant amount." Luster Decl., ¶35 at p. 25. Over the past two years, the Port's Natural Resource Mitigation Plan ("NRMP") consistently underreported the amount of wetlands lost by characterizing construction-related access roads, sediment and erosion control ponds, staging areas and stockpiling areas as "temporary impacts" even though these uses would continue for years as, for example, the Port runs trucks by the minute and hour to import 20 million cubic yards of fill. Azous Decl. at ¶ 16. Over one year ago -- and several times since -- the ACC's experts drew DOE's attention to this undercounting of lost wetlands. However, it was not until the August 2001 401 Certification that DOE belatedly acknowledged that the "temporary impacts" proposed for at least 2.05 acres of Miller Creek basin wetlands were in fact permanent impacts requiring mitigation. Certification ("Cert.") at § D.4. p. 9. Even then, however, it did not require a mitigation plan prior to issuance of the Certification.

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This dispensation is flatly inconsistent with the law and DOE's previous practice. For example, in September, 2000, DOE denied a request for 401 certification from the Army Corps of Engineers, for its proposed Columbia River channel improvements. DOE determined that it was "unable to certify that this proposed project will meet antidegradation requirements and protect and maintain beneficial and characteristic uses (such as fish, shellfish, wildlife habitat, recreation), as required by state water quality standards (Ch. 173-201A WAC)."[7] One distinct basis cited by DOE for the denial concerned shortcomings in the Corps' wetlands plans:

> **Impacts on Wetlands**. Ecology has not received from the Corps complete wetland determinations and delineations for all proposed upland/wetland disposal sites. In addition, Ecology has not received final, approvable mitigation plans for wetland/habitat losses.

Id. (Bold in original, emphasis added in last sentence). Tom Luster has confirmed the disparity between Ecology's treatment of the Corps and the Port:

> In my experience as Ecology's senior 401 expert, Ecology would regularly either deny certifications or have the applicant withdraw its request for certification if mitigation plans or other documents were not adequate. One significant recent example of this is Ecology's denial in September 2000 of a request for certification from the Corps of Engineers for the proposed channel deepening in the lower Columbia River. Ecology denied certification of this proposed project in part due to the Corps' failure to submit complete and final wetland mitigation plans.

Luster Decl. at ¶ 35, p. 24.

Wetlands have long been recognized for their importance in, among other things, controlling erosion and protecting down-stream water quality. *United States v. Akers,* 1985 U.S. Dist. Lexis 23436

[7] Letter to Army Corps of Engineers from Gordon White, Program Manager, Shorelines and Environmental Assistance Program, Department of Ecology dated September 29, 2000, attached as Exhibit C to Eglick Decl.

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(E.D. CA 1985 at 27). (Eglick Decl., Ex. D). Wetlands "have a profound influence on the food web, water flow conditions, and habitat available in a watershed." Azous Decl. at ¶ 5. The purpose of the water quality standards is to prevent water quality from falling below acceptable levels. *PUD No. 1, et al. v. Department of Ecology, et al.,* 511 U.S. 700, 704 (1994) (citations omitted) (Eglick Decl., Ex. B). Wetlands are "waters of the State" protected by the state's water quality standards.[8] Ecology's guidelines under those standards for wetlands provide that:

> The primary means for protecting water quality in wetlands is through implementing the antidegradation section of the water quality standards. The antidegradation policy in the water quality standards establishes the bottom line for water quality protection in Washington's waters: 'existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to beneficial uses shall be allowed.'

Id., p. 3 (citing WAC 173-201A-070).

In applying the antidegradation policy to wetlands this Board has explained that "[T]he antidegradation policy is expressed in terms of a goal that there be no net-loss of wetlands. In regulating activities impacting wetlands the department requires a staged analysis and mitigation ratio." OHA, *supra*, at Conclusion 66 (citing *O'Hagen v. DOE,* PCHB No. 95-25 (1995)). It has rejected "off-site and out-of-kind mitigation" as insufficient because it did not focus on "actual compensation for or replacement of lost resources." *Id.,* at Findings 53-54. The Port proposal here, suffers from the same fatal flaw.

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[8] Water Quality Guidelines for Wetlands, Department of Ecology Publication No. 96-06 (April 1996), p. 50 (Eglick Decl., Ex. E), published on Ecology's website (also citing 40 C.F.R. §122.2, defining waters of the United States to include wetlands).

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In summary, the Certification authorizes significant uncompensated loss of twenty acres of high functioning wetland beneficial uses and will result in water quality degradation. Accordingly, ACC is likely to succeed in its appeal on this point, requiring issuance of a stay.

2. The Port's low flow analysis and augmentation plan fail to provide reasonable assurance of protection for Des Moines, Miller and Walker Creeks.

Water quality standards encompass not only numeric criteria to control conventional and toxic pollutants, but also broader protection for "designated uses" such as fish migration, spawning and rearing, recreational uses, and aesthetics. WAC 173-201A-030(1)(a) and (b). Protection of stream flow is a critical component of the Certification process. Projects that impact streamflow and designated instream uses are subject to special scrutiny in the permitting process. *Ecology v. PUD No. 1, supra* at 187.

DOE has in fact determined that absent mitigation the Third Runway Project will degrade streamflow in Des Moines, Miller, and Walker Creeks, which the Certification acknowledges are classified as Class AA waters.[9] Cert. at § A.1., p. 2. According to Dr. John Strand, an expert fisheries biologist who has studied the three streams:

> Both coho and chum salmon are known to spawn and rear in Miller Creek, Walker Creek, and Des Moines Creek. (Hillman et al. 1999). Chinook salmon frequent the outfalls of Miller and Des Moines Creeks in Puget Sound during their outmigration (Parametrix 2000a). Both the Miller Creek and Des Moines Creek Watersheds are also exploited by resident cutthroat trout (Parametrix (2000a); Miller Creek may include an anadromous race of cutthroat trout. Warm water fish species including yellow perch, black crappie,

[9] A memorandum to DOE Director Fitzsimmons, briefing him on the § 401 certification, states that "The need for low-flow mitigation is substantial. For example, the project will take away nearly one-third of the base flow in Des Moines Creek at the most critical time of the year." (This memorandum is labeled draft, but is in fact dated August 13, 2001 – three days after issuance of the 401 certification). Memorandum from Ray Hellwig to Tom Fitzsimmons, Eglick Decl., Ex. F.

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> largemouth bass, and pumpkinseed sunfish have been found in the upper reaches of both watersheds (Parametrix 2000b). Prickly sculpin, three-spined stickleback, and crayfish also occur throughout each watershed (Parametrix 2000b).[10]

Declaration of Dr. John Strand ("Strand Decl.") at ¶ 7.

The streamflow impacts of the Third Runway project represent a significant portion of the summertime low flow in the affected streams, e.g., up to one-third of Des Moines Creek late summer flow. *See*, Luster Decl., ¶35, p. 28. The predicted changes to streamflow will result from the large increase in impervious surfaces at the airport, expansion of the industrial wastewater system (IWS), and associated long-term land use changes in the basin. Declaration of William A. Rozeboom ("Rozeboom Decl.") at ¶ 5. Due to the streams' importance to the community, ACC asked several independent scientists to monitor and review proposals for addressing the airport project's acknowledged threat to their flows. They included Dr. John Strand, Dr. Peter Willing, and Northwest Hydraulic Consultants (Dr. Malcolm Leytham and William A. Rozeboom, P.E.). Their perspectives on the low flow issue are presented in their attached declarations.

If flows in the affected streams fall below target levels, impacts to anadromous as well as resident fish species will likely occur over the entire length of the streams. Strand Decl. at ¶ 33. Relatively small errors could have large consequences. Luster Decl. at ¶ 35, p. 28; Declaration of Dr. Peter Willing ("Willing Decl.") at ¶ 19.

The Port has long known that streamflow mitigation would be required as a condition of the certification. The Port has proposed and then discarded several mitigation proposals over the past two

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[10] According to Dr. Strand, a fourth stream, Gilliam Creek, "supports many of the same species of fish as found in Miller

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years. Willing Decl. at ¶ 8. The current low flow mitigation plan was submitted by the Port to DOE just days before issuance of the Certification. Willing Decl. at 8; Rozeboom Decl. at ¶ 6. It proposes a plan for use of impounded stormwater which, per Mr. Rozeboom and Dr. Leytham, is "unprecedented." Rozeboom Decl. at ¶ 7; *See*, Luster Decl. at ¶ 35, p. 28. To make matters worse, the proposal documentation "is so poor as to make an informal review virtually impossible." Rozeboom Decl. at ¶ 7; Strand Decl. at 34. "There is an absence of initial design and project information necessary to demonstrate how the system will function in practice." Rozeboom Decl. at ¶ 7. "Several of the sections identified in the report table of contents, and which are vital to understanding the analysis and flow offset proposal, are not provided" including "the major section discussing Determination of Impacts to Streamflow." *Id.* at ¶ 16. The mitigation plan is also inconsistent with other project documents, most notably the Stormwater Management Plan. Rozeboom Decl. at ¶¶ 7, 16, 17.

The low flow technical analysis fails to incorporate and anayze current and proposed activities that will affect stream hydrology. Rozeboom Decl. at ¶ 7. *See,* Luster Decl., ¶ 29. It relies on a predictive model which is not accurately calibrated, a flaw that seriously undermines its prediction of the magnitude and timing of streamflow impacts. Rozeboom Decl. at ¶¶ 9-12; Willing Decl. at ¶ 19. Finally, the technical analysis contains inconsistencies that are generally resolved in favor of the Port. Rozeboom Decl. at ¶¶ 13-16.[11]

Creek, Walker Creek and Des Moines Creek." Strand Decl., ¶7.

[11] Significantly, King County cautioned in an August 3, 2001 letter that its detailed review of stormwater plans did not extend to the low flow mitigation plan. Eglick Decl. Ex. F.

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"If built as shown, the first discharge to the receiving Class AA streams, which would already be under stressed low flow conditions, would be an anoxic slug of sediment laden water carrying a six-month accumulation of pollutant load." Willing Decl. ¶ 14. The mitigation plan's water quality protection methods are inadequate and rely on elaborate requests for future plans. Strand Decl. at ¶¶ 34-35; Willing Decl. at ¶¶ 13-15. The low flow plan should have incorporated modeling and bench-scale testing to determine the impacts of long-term detention on stormwater quality. Strand Decl. at ¶ 35. Rather than determine feasibility in advance, the Certification authorizes a pilot program to determine whether stormwater vault releases will make it to the streams (Cert. at § I.1.(a)(ix), p. 22), a highly speculative approach for a critical condition of the project. Luster Decl. at ¶ 35; Rozeboom Decl. at ¶ 17.

The Certification authorizes a monitoring plan that is inadequate to timely identify problems and correct them. Strand Decl. at ¶¶ 35-36. Its use of the Benthic Index of Biotic Integrity (BIBI) will not detect potential early impacts associated with the discharge of detained stormwater to the project streams, and harm to the resource could occur before it is detected. Strand Decl. at ¶¶ 36-37.

The sparsity, inconsistency, and inherent contradictions of the Port's documentation for its "unprecedented" low flow mitigation proposal speaks volumes. Its acceptance by DOE as a basis for § 401 certification is inconsistent with the law and the agency's past practice. Luster Decl. at ¶ 35, p. 24-25. A stay is appropriate because ACC is likely to prevail on this issue.

3. The absence of a water right for the Port's proposal for perpetual use of impounded stormwater precludes a finding of compliance with state water quality standards.

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Construction associated with the Third Runway project will radically alter the hydrology of the watersheds and stream systems encompassing Sea-Tac Airport. Among other impacts, the Third Runway will deplete stream flow in Des Moines, Miller and Walker Creeks during the low flow season, June through October. Rozeboom Decl. at ¶ 6. Such flow depletion will impair characteristic uses of these streams, including their ability to support life stages of salmonids and resident fish populations. Strand Decl. at ¶ 33. Such uses in the affected Class AA streams are protected under Washington state water quality standards. WAC 173-201A-120(6) and -140(21). Thus, without permanent and effective mitigation, hydrologic changes directly attributable to Third Runway project construction will degrade water quality, in violation of federal and state law. RCW 90.48.080; 33 U.S.C. § 1341.

To obtain § 401 certification, the Port is therefore required to demonstrate that legal and practical means were in place to permanently mitigate low flow impacts. *Department of Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 185-192 (1993), *aff'd*, 511 U.S. 700 (1994). *Okanogan Highlands Alliance, et al. v. Department of Ecology, et al.*, PCHB No. 97-146, Summary Judgment on Stipulated Issues Nos. 20, 21 and 22 at p. 2 (10/23/98) ("*OHA*"); *PUD No. 1 of Pend Oreille County v. Department of Ecology*; PCHB No. 97-177, Amended Summary Judgment (10/15/98), *appeal pending*, Washington Supreme Court Docket No. 70372-8.

The Port's low flow mitigation proposal calls for impoundment of approximately 46 acre feet of water in several stormwater vaults during the period December through early summer each year. The stormwater would be detained until stream flows in Des Moines, Miller and Walker Creeks

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dropped below prescribed levels (predicted to occur between June and August) and then released from the vaults to compensate for the diminution in flow attributable to Third Runway construction and operations. Cert. at §I.1.(e), p. 24; Eglick Decl. Ex. F, pp. 3-4.

All waters of the state are owned by the public and their use for beneficial purposes requires a water right. RCW 90.03.010. When the Port collects water from its runways and other impervious surfaces it is collecting water that is publicly owned. When it detains this water for the purpose of augmenting streamflow, it becomes a functional appropriation, for a beneficial purpose, that triggers water code requirements. RCW 90.54.020(1).

This Board itself has already ruled that the capture, storage and release of water as mitigation for impacts to stream flow in the context of a § 401 certification requires a water right. *OHA, supra,* at 2 ("The Board concludes that documented water right changes should be approved and issued for implementing the post-reclamation portion of the streamflow mitigation plan. Water right changes should be issued to clearly record the right and priority of water necessary to implement the plan."). Similarities between the gold mine proposal in *OHA* and the Third Runway project are striking. Like the Crown Jewel mine in *OHA*, the Third Runway would permanently alter the hydrology of streams draining the area. These changes would deplete flow in streams that are closed to new water rights. See WAC 173-509-040(1). The flow quantities are small but nonetheless significant to the affected streams. Strand Decl. at ¶ 33.

In *OHA*, the applicant held water rights that were deemed acceptable for both existing mitigation and future conversion to instream uses (although the summary judgment ruling did not

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insulate the applicant from an ultimately adverse decision invalidating those water rights). In contrast, the Port does not possess water rights that can be converted to streamflow augmentation, now or in the future. Indeed the Port has previously offered, but then discarded at least two schemes to transfer water rights to serve its mitigation plan. Willing Decl. at ¶ 8-11.

The *OHA* summary judgment decision was consistent with earlier Board decisions addressing mitigation for water rights usage. As a part of the "statewide" water right appeals in the mid-90's, several appellants proposed various mitigation activities to offset the impacts that would occur if they were granted new groundwater rights. Activities such as septic recharge, vegetation loss, and capture and release of stormwater (the same mitigation proposed by the Port here) were rejected by the Board because the applicants, like the Port, proposed to use water that did not belong to them. *Black River Quarry v. Department of Ecology*, PCHB No. 96-56, Final Findings of Fact, Conclusions of Law and Order (11/15/96), *aff'd on other grounds sub nom Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68 (2000); *L.G. Design, Inc. v. Department of Ecology*, PCHB Nos. 96-20 and 96-25, Order on Motion for Summary Judgment (2/5/97); *Auburn School District No. 408 v. Department of Ecology*, PCHB No. 96-91, Final Findings of Fact, Conclusions of Law and Order (12/20/96); *Manke Lumber Co. v. Department of Ecology*, PCHB No. 96-102, *et seq.*, Final Findings of Fact, Conclusions of Law and Order (11/1/96).

In *L.G. Design*, the Board explicitly held that "a water right applicant is not entitled to mitigation credit for proposals involving the capture and diversion of stormwater runoff from impervious surfaces." *L.G. Design, supra.* Similarly, in *Auburn School District*, the Board confirmed

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that a project proponent may not use stormwater for stream flow enhancement absent a water right. The Board stated "[t]hat water . . . belongs to the public and is subject to the right of prior appropriators." *Auburn School District, supra*, at Conclusion XII.

The Port's plan here is not for a typical stormwater detention project. The Certification purports to authorize a low flow mitigation plan in which the Port would, every year, impound significant quantities of stormwater in special "reserve" vaults, for months at a time, in order to release it during late summer. The purpose is not to ameliorate peak flows, the usual goal of stormwater detention, but to provide perpetual mitigation for permanent water quality degradation. These factors distinguish the Port's proposal from routine stormwater facilities, including other stormwater facilities at Sea-Tac Airport.

Despite the availability of clear precedent and repeated admonitions from within and outside the Department (including in comment letters from ACC), DOE decided not to require the Port to obtain a water right for the mitigation scheme. Instead, DOE issued a § 401 certification that authorizes and requires the Port to use stormwater for mitigation of water quality degradation. This is not a legally acceptable answer to the requirement for assurance that water quality standards will not be violated.

The problem presented here – permanent impacts versus transient solutions – goes to the heart of the reasonable assurance standard required for § 401 certification. DOE cannot certify compliance with water quality standards if the Port has not demonstrated a permanent and legal source of augmentation water to offset low flow impacts. *OHA, supra.* Absent the legally required water right,

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there can be no assurance that stream flows in Des Moines, Miller and Walker Creeks will be protected for the life of the Third Runway. The applicable precedents and code leave no doubt that ACC will succeed on the merits. The statute therefore requires issuance of a stay.

4. The Certification allows the deposit of millions of cubic yards of potentially contaminated fill with no assurance that the contaminants will not result in a violation of water quality standards.

To provide a site for the Third Runway, the Port proposes to fill a canyon on the airport's west side with twenty (20) million cubic yards of fill. Underneath the fill, the Port proposes to construct an enormous rock drainfield to "capture" groundwater and transport it downslope in the hope of supporting the streams and wetlands below. Strand Decl. at ¶ 28. As early as DOE's review of the Port's 1998 original application, and continuing to the present certification, DOE has acknowledged that environmental standards for imported fill criteria were necessary to avoid violation of water quality standards. The Certification itself acknowledges the need to "ensure that the fill . . . does not contain toxic materials in toxic amounts, thereby preventing the introduction of toxic materials in toxic amounts into waters of the state which include wetlands." Cert. at § E.1., p. 14. It then purports to address this problem by adopting contamination limits for the fill based on the Model Toxics Control Act, Ch. 70.105D RCW ("MTCA"), cleanup levels.

The use of such fill for construction of the third runway does not provide reasonable assurance of compliance with water quality standards. The purpose of MTCA is to control hazardous wastes on contaminated sites taking into account the "costs and benefits of alternatives and selecting the

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alternative whose incremental costs are not disproportionate to the incremental benefits."[12] Thus, under MTCA, a cost benefit analysis is used to determine the level of contamination which may remain on a site. MTCA does not purport to clean-up to natural or background conditions. It is therefore inappropriate for determining the quality of fill material to be placed in the area of wetlands and streams which support significant aquatic life. Strand Decl. at ¶ 29.

In its Certification adopting MTCA-based contamination standards as criteria for Third Runway fill, DOE disregarded the recommendations of Peter Kmet, its own Toxics Cleanup Program senior environmental engineer. Mr. Kmet had advised his colleagues within DOE two months before release of the Certification that "MTCA should **not** be used for the establishment of clean-fill criteria" for the airport project.[13] He further advised, as a fall back, that "if MTCA is to be used for this purpose, all other requirements of the MTCA should be applied for the establishment of the clean fill criteria." *Id.* In his email transmitting Mr. Kmet's recommendation within DOE, Mr. Yee expressed his own opinion that deference was due to Mr. Kmet's opinions because "his recommendations are considered as the department policy with respect to this [the Third Runway] project . . ." *Id.*

Mr. Kmet expanded on his fall back point in an email dated June 27, 2001, which started, "If we are not going to restrict fill material to naturally occurring uncontaminated soils, I recommend you

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[12] MTCA Regulation: Establishing Cleanup Standards and Selecting Cleanup Actions, Department of Ecology, Publication No. 94-130 (May 2001 ed.), p. 5.

[13] Email from Chung K. Yee to Kevin Fitzpatrick regarding acceptable fill criteria language for Draft 401 Certification, June 13, 2001 (Eglick Decl., Ex. G, p. 2, emphasis added).

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use the following language to address potential impacts on plants and animals."[14] Mr. Kmet went on to recommend DOE use the most stringent standards in WAC 173-340-900, Table 749-3 (Ecological Indicator Soil Concentrations (mg/kg) for Protection of Terrestrial Plants and Animals); the use of only clean natural soil for the uppermost six feet of soil; and the use of the statistical testing methods for soils specified in WAC 173-340-740 because of the "considerable variability in soil concentrations."

The Certification effectively rejects Mr. Kmet's recommendations and allows fill contaminated at levels significantly greater than he recommended. *See* Cert. at § E.1.(b) (hazardous substance table), pp. 16-17. For example, it allows fill contaminated at 2000 milligrams per kilogram (mg/kg) for chromium compared to 42 mg/kg in table 749-3, the standard recommended by Mr. Kmet; 2 mg/kg for mercury compared to .1 mg/kg in table 749-3; and 2000 mg/kg for diesel compared to 200 mg/kg allowed under Table 749-3. Even for the upper six feet of fill, where the Certification adopts a standard more protective than MTCA Method A for four select contaminants, it is much less protective than Mr. Kmet's recommendation that only "clean natural soil" be used. P. Kmet, June 27 email (Eglick Decl., Ex. H). Significantly, Mr. Kmet cautioned explicitly that even his fall back recommendations to address "potential impacts on plants and animals" did "**not address potential human health exposure pathways or protection of aquatic organisms.**" *Id.* (emphasis added).

As noted above, groundwater will flow through the fill and discharge to Miller Creek and other wetlands and streams below the embankment wall. The embankment will be constructed upon a rock sub-drain creating a pathway for leachate. The Port's consultants themselves acknowledged as much in

[14] Email thread dated 6/27/01 4:01 PM from Peter Kmet to Kevin Fitzpatrick (cc to Chung K Yee) regarding his

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modeling the flow of groundwater through the embankment to downstream wetlands and receiving waters using a Hydrologic Evaluation of Landfill Performance ("HELP") model.[15] In relying on MTCA-based contamination standards for fill importation, the Certification ignores Mr. Kmet's admonition that "protection of aquatic organisms...will need to be addressed." P. Kmet June 27, 2001 email (Eglick Decl., Ex. H).

Even assuming that the Certification fill contamination standards would achieve their stated purpose -- avoidance of introducing toxic materials in toxic amounts into waters of the state[16] -- this sets the bar far lower than allowed by the State's Water Pollution Control Act. RCW 90.48, *et seq.*. For example, in Class AA waters, such as Des Moines, Miller and Walker Creeks, state water quality standards require that "[w]ater quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses." WAC 173-201A-030(1)(a). The standards provide that "[t]oxic substances *shall not be introduced above natural background levels* in waters of the state which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependant upon those waters, or adversely affect public health, as determined by the department." WAC 173-201A-040(1) (emphasis added); *see also* WAC 173-201A-030(1)(c)(vii).

Moreover, Washington's antidegradation policy, WAC 173-201A-070, mandates that "[e]xisting beneficial uses shall be maintained and protected and no further degradation which would

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recommendations for language for 401 certification, Eglick Decl. Ex. H.

[15] *See* Hart Crowser presentation to Port's Technical Review Board, November 16-17, 2000, pages 90-91 (Eglick Decl., Ex. I).

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interfere with or become injurious to existing beneficial uses shall be allowed." WAC 173-201A-070(1). Des Moines, Miller, and Walker Creeks are all class AA streams. WAC 173-201A-030(1). *See, PUD No.1 et al. v. Washington Department of Ecology, et al.*, 511 U.S. 700, 719 (1994). Yet, the Certification jeopardizes wetlands and streams by permitting placement of contaminated soil without regard to Mr. Kmet's admonition concerning protection of aquatic biota and human health.

Dr. John Strand, a fisheries biologist with over twenty-five years of experience in assessing the ecological risks to aquatic species and habitats for contaminants, repeatedly advised Ecology in his comment letters that MTCA "should not be used for the purpose of screening soils or sediments for use on the STIA Third Runway Fill Project. It is an inappropriate standard for determining the quality of fill material to be placed in the area of wetlands and streams that are now in relatively pristine condition and which contain significant aquatic life." Strand Decl. at ¶¶ 29-30. Similarly, according to Tom Luster, the fill acceptance criteria in the Certification "are untested and there is no evidence of how contaminants in the accepted fill material will interact with storm and groundwater as it passes through the embankment to the surface waters, wetlands, and mitigation sites immediately downslope." Luster Decl. at ¶ 35, p. 26.

This is not an academic issue. The streams targeted by the project support a diverse and abundant fish fauna and are enjoyed by humans as well. As DOE's Kmet recognized, chemicals associated with contaminated fill materials at the third runway site have the potential to percolate

[16] Cert. at §E.1, p. 14.

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through the fill pile to groundwater as well as to run off following seasonal runs, contaminating the nearby wetlands and surface waters. *See also,* Strand Decl. at ¶ 28.

In summary, the Certification decision regarding fill rejects the advice of DOE's own Toxic Cleanup Program Senior Environmental Engineer. It permits dumping of contaminated fill rather than requiring use of "naturally occurring uncontaminated soils." It facilitates rather than prevents violation of water quality standards and the state's antidegradation policy, offering no reasonable assurance of compliance with water quality standards. A stay should be granted based on this issue alone.

5. The Certification with respect to stormwater per se violates water quality standards.

The Port's Discharge Monitoring Reports and Annual Stormwater Reports document regular violations of water quality criteria for both conventional pollutants (e.g., fecal coliforms, turbidity) and for toxic substances including zinc, copper and lead. Strand Decl. at ¶¶ 9-13; Luster Decl. at ¶ 27; Willing Decl. ¶¶ 21-23. Exceedances of water quality criteria for the metals copper, lead, and zinc are particular concerns given their designation as Toxic Substances. Strand Decl. at ¶ 9; Willing Decl. at ¶ 22. DOE has acknowledged that both Miller Creek and Des Moines Creek, although designated Class AA waters, are failing the applicable water quality criteria for copper, while Des Moines Creek is failing the criteria for both temperature and fecal coliform. Willing Decl. at ¶ 23. Des Moines Creek is on DOE's CWA §303(d) list for fecal coliform. *Id.* Luster Decl. ¶ 27 at p. 13. Copper and lead also appear in sediment samples from Lake Reba, headwater to Miller Creek, in concentrations that are toxic to aquatic biota. Strand Decl. at ¶¶ 14-16.

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There have been ongoing Port discharges of contaminants including glycols (used in de-icing aircraft) to the Northwest Ponds, "the single largest remaining wetland complex in the [Des Moines Creek] watershed." Luster Decl. at ¶ 29, p. 14. These discharges are not authorized in the Port's NPDES permit and violate RCW 90.48.080. Glycols have also been found in the waters of Des Moines Creek downstream of the Airport and derive, in part, from de-icing and anti-icing compounds utilized at the Airport. Strand Decl. at ¶¶ 17-21. Such compounds and their additives can be toxic to aquatic life at relatively low concentrations. *Id.* The continuing discharge of glycols, including as part of activities associated with the Port's Third Runway, violates state water quality antidegradation requirements. RCW 90.54.020(d); WAC 173-201A-070. Ecology has been aware for some time that the Port's stormwater discharges violate water quality criteria, that these discharges are harming beneficial uses in the streams surrounding the airport, and that the BMP strategy contained in the Port's NPDES permit is inadequate to control these discharges. Willing Decl. at ¶¶ 24-26; Luster Decl. at ¶ 29, pp. 15-16 (In 1999 Ecology performed an analysis of Port's run-off and BMPs which demonstrated that the BMPs "were not adequate to reduce contaminate concentration in typical Port run-off to levels that met water quality criteria.")

Federal regulations require states to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." *PUD No. 1 v. Dept. of Ecology,* 511 U.S. 700, 718 (1994) (citing 40 CFR §131.12). These "implementation methods shall, at a minimum, be consistent with the . . . existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Ibid.* Washington implements its antidegradation

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policy through the use of AKART and BMPs. WAC 173-201A-070(4)(b). It may not issue a § 401 certification that, on its face, violates provisions of Ch. 173-201A WAC or federal requirements for § 401 certifications, including AKART. *See,* fn 5, *supra.*

When issuing § 401 certification, DOE must certify compliance not only with water quality criteria, and "any other appropriate requirement of state law." 33 U.S.C. § 1341(d). DOE must consider all state laws relating to water quality. *Ecology v. PUD No. 1, supra,* 121 Wn.2d at 192. Under Washington's antidegradation laws, DOE may not issue a § 401 certification when streams exceed water quality criteria and pollutant loading from the new project and activities will contribute to future exceedances.

As Tom Luster explains, the different kinds of existing impairment in the water bodies already affected by the airport along with the connections among them and the various elements and impacts of the third runway project

> made it problematic whether an adequate mitigation plan could be implemented that would avoid violations of water quality standards. Many of the solutions and mitigation measures the Port was proposing for its new activities and projects would have aggravated existing harm to aquatic resources, thereby requiring additional evaluation and new mitigation measures.

Luster Decl. at ¶28. Rather than affirmatively establishing limitations needed to protect water quality, the Certification authorizes business as usual, incorporating the Port's NPDES permit and BMPs which have been ineffective to date. In doing so, it violates Clean Water Act Section 1341(d) which requires that it "set forth any effluent limitations and other limitations" necessary to assure compliance with the Act and state requirements." 33 U.S.C. §1341(d). The problem in simply adopting NPDES permit

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requirements into a 401 certification, as Tom Luster explains, is that a 401 certification is a one-time opportunity to evaluate a proposal and to protect water quality in affected streams and wetlands before fills and other irretrievable acts occur:

> Unlike the 402 [NPDES] process, it is not meant to initiate an iterative multi-year process for bringing a non-compliant activity and project into compliance, and its interaction with the federal permitting process generally does not allow the initial decision to be revisited.

Luster Decl. at ¶ 23, pp. 10-11. In light of these principles, the stormwater aspects of the Certification here represent per se violations of water quality standards.

One such violation is apparent in the tacit approval of use of mixing zones. *See,* e.g., Cert. at § A.2.(d), p. 3. Mixing zones may not be established except through the specific procedures and criteria set forth in WAC 173-201A-100. *See* Luster Decl. at ¶ 32, pp. 19-20. Reliance on mixing zones is de facto recognition that Ecology expects the project to result in violations of water quality standards, since the very purpose of mixing zones is to establish a zone where water quality criteria do not apply. WAC 173-201A-100(5). *See*, Luster Decl. at *id.*

The Certification also permits the Port to defer submission of BMPs to control migration and discharge of known and suspected contaminants now lying beneath the airport that are subject to MTCA clean-up orders. Cert. at § ¶ F.1, pp 18-19. "There is significant uncertainty about the characteristics of the pollution, its flow paths, rate of discharge ..." *OHA, supra,* at Conclusion 64. Third Runway construction will affect their migration and release. Yet the Certification effectively postpones to a later date determination of the fate of those contaminants and what measures, if any,

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will prevent their pollution of waters of the state. *See* Luster Decl. at ¶¶ 29, 32. Such deferral is the antithesis of the reasonable assurance necessary for a § 401 certification.

The new Stormwater Management Plan approved by Ecology in its certification is based on BMPs that do not adequately treat stormwater before discharging it to local streams. Willing Decl. ¶¶ 24-26. Luster Decl., ¶ 29 at pp. 15-16. For example, it relies on filtration BMPs which may be effective for sediment control, but are not effective in removing metals from the stormwater waste stream, and are not intended to do so. *Id.* at ¶ 33. DOE was advised of this by Kelly Whiting, the King County Department of Natural Resources stormwater expert whom Ecology retained to review the Port's successive stormwater plan iterations. Having spent months reviewing the plans, Whiting drafted condition language for Ecology to include in the Certification, which ACC obtained recently through public disclosure. One such condition would have required that:

> All runoff from impervious surfaces (except from the existing bridge)shall be treated using all known available and reasonable treatment (AKART), at the time of initial final design.

Eglick Decl., Ex. J. Whiting cautioned of the need for such a condition by pointing out that the King County Surface Water Design Manual ("SWDM") BMPs on which the Port's stormwater plan relied "is not AKART [all known and available reasonable treatment]." *Id,* emphasis added. Yet, although AKART is required here, per RCW 90.54.020(3) and 33 U.S.C. § 1341(d), the conditions are substantially less stringent. *See,* Cert. at § ¶ J.2(c), p. 26. Once again, DOE's failure to incorporate a condition proposed by its own expert (and King County's) speaks volumes.

Finally, while the Certification pretends to include retrofitting of existing stormwater facilities (Cert. at § J.1.(c), p. 25), apparently as a means of addressing ongoing and future violations of water

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quality standards, this condition is illusory. Close examination of the Port's SMP reveals that the Port does not intend to retrofit. Strand Decl. at ¶¶ 23-27; Willing Decl. at ¶ 27. Further, the certification conditions leave the Port an "out," only requiring 20% retrofitting to follow each 10% of new impervious surface "unless demonstrated that a twenty percent (20%) rate is not feasible." Cert. at §J.1(c), p. 25.

It is little wonder, then, that ACC experts and Ecology's own former senior § 401 official have concluded that the stormwater aspects of the Certification will result in violations of water quality standards. Strand Decl. at ¶ 6, 27; Willing Decl. at ¶ 39; Luster Decl. ¶¶ 25, 30-31, 36.

B. <u>Absent a Stay, the Certification Will Cause Irreparable Harm</u>.

Even if likelihood of success on the merits is not shown, a stay is required where "irreparable harm" will occur in its absence. RCW 43.21B.320(3); WAC 371-08-415(4).

The meaning of "irreparable harm" is often considered in environmental rulings on preliminary injunction motions. *Amoco Production Co., et al. v. Village of Gambrell, et al.*, 480 U.S. 531,545 (1987) ("Environmental injury, by its nature . . . is often permanent or at least of long duration, i. e., irreparable.") (Eglick Decl., Ex. K); *accord, Kucera v. Department of Transportation,* 140 Wn.2d 200, 211 (2000); *United States v. Akers,* 1985 U.S. Dist. Lexis 23436 (E.D. CA 1985 at *27-28) (disrupting wetlands' ecological functions constitutes an irreparable injury to valuable public resource) (Eglick Decl., Ex. D); *California, et al. v. Marsh, et al.,* 687 F. Supp. 495, 501 (N.D. CA 1988) (finding that there would be "substantial harm to the environment if the wetlands are filled before the Corps is able to fully assess [Oakland Airport expansion's] impacts.") (Eglick Decl., Ex. L).

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In this case, the specific purpose of the § 401 Certification requirement is to provide assurance *inter alia* to the Army Corps that its issuance of a CWA §404 permit to the Port for fill of wetlands will not result in violation of state water quality standards. *PUD No. 1, supra,* 511 U.S. at 707-708 (citing 33 U.S.C. § 1341 (CWA §401). The Army Corps of Engineers will therefore shortly issue a Clean Water Act Section 404 permit decision in reliance on the Certification. Declaration of Kevin L. Stock in Support of Motion for Stay. Assuming that decision is affirmative, once issued, the Port will begin in earnest construction of the Third Runway including filling and embankment construction.

Such activities and the attendant destruction of wetlands would be well underway before the Board could issue a decision on the merits of the 401 appeal. It is telling in this regard that, on its website, the Port already describes the Third Runway as a "Work in Progress." *See* excerpt from Port website, September 8, 2001 (Eglick Decl., Ex. M). The Port states that it has already awarded at least one contract for importation of 1.9 million cubic yards of fill this year for the Third Runway, delivery of which is **not** dependant upon issuance of environmental permits. *Id.* This is in addition to the millions of cubic yards of fill which the Port has already stockpiled on site, poised for deposit in short order.

Alteration of streams and site hydrology and placement of fill into the wetlands and headwaters surrounding the airport will significantly degrade the watersheds: an irrevocable step one that cannot be undone and which will cause irreparable harm to the watersheds. Azous Decl. at ¶¶ 4, 34. Once filled, wetland functions will be lost. *Id.* at ¶ 9, p. 7, and ¶10. Even if removal of the fill was ordered, wetland functions would not return to pre-filling conditions for decades, if at all. The long-term loss of

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ecological function that would result from the filling of wetlands for the third runway is an irreparable harm. *Amoco, supra,* 480 U.S. at 545 (1987); *United States v. Akers*, 1985 U.S. Dist. Lexis 23436 (E.D. CA 1985 at *27-28).

The Board should therefore grant a stay to prevent irreparable harm to aquatic resources which would preempt the effect of any subsequent ruling on the merits by the Board.

DATED this 12 day of September, 2001.

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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and THE PORT OF SEATTLE, Respondents.	No. ~~01-133~~ CERTIFICATE OF SERVICE

I, Rachel Parks, an employee of Helsell Fetterman LLP, attorneys for the Airport Communities Coalition, certify that:

I am now, and at all times herein mentioned was, a resident of the State of Washington, and over the age of eighteen years.

On September 13, 2001, I caused to be hand-delivered a duplicate original and three (3) copies of ACC's Memorandum in Support of Its Motion for Stay in the above-captioned case to:

Pollution Control Hearings Board
4224 – 6th Avenue S.E., Bldg. 2, Rowe 6
Lacey, WA 98504

and on the same day caused to be delivered a true and correct copy of same to:

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ORIGINAL

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of September, 2001, at Seattle, Washington.

Rachel Parks

Rachel Parks

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