PCHB NO 01-133
AIRPORT COMMUNITIES COALITION v.
ECOLOGY and THE PORT OF SEATTLE

ORIGINAL

MEMORANDUM OPPOSING ACC'S MOTION
FOR STAY ORIGINAL

AR 008787

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

PORT OF SEATTLE'S MEMORANDUM OPPOSING ACC'S MOTION FOR STAY

ORIGINAL

AR 008788

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In order to construct a new third runway and other improvements at Seattle-Tacoma International Airport ("STIA"), the Port of Seattle is required to obtain a permit to fill wetlands from the U.S. Army Corps of Engineers ("Corps"). As part of the §404 approval process, the Department of Ecology ("Ecology") is required to certify under §401 of the Clean Water Act that work requiring the federal permit will meet the state's water quality standards. Airport Communities Coalition ("ACC") has moved to stay Ecology's §401 Certification. The Board should deny ACC's motion because ACC can show neither a likelihood of success on the merits, nor irreparable harm. Moreover, there is an overriding public interest in proceeding with this important public project.

As discussed in detail below, ACC's claims raise numerous technical issues regarding wetland mitigation and functions, groundwater and surface water modeling, selection of numeric fill criteria that will protect groundwater, and prediction of water quality impacts from an extensive technical record. These issues are particularly within Ecology's technical expertise, and the Board gives substantial deference to Ecology on such technical issues. The expert declarations submitted by the Port conclusively rebut every argument and opinion offered both in ACC's legal memorandum and in the declarations of its experts. Accordingly, ACC has failed to show any chance of prevailing on the merits. The overwhelming weight of the evidence is that Ecology had reasonable assurance that the Port's projects will comply with all applicable water quality regulations. To the extent expert opinions conflict, it is the expert agency's job to resolve those technical differences. *Webb v. Gorsuch*, 699 F.2d 157, 160 (4th Cir. 1983). And with respect to ACC's complaints about the modeling and evaluation methods utilized, it is the expert agency that should determine which testing method is most appropriate. *Seattle Community Council Fed. v. FAA*, 961 F.2d 829, 833-34 (9th Cir. 1992).

ACC also cannot prove irreparable harm because the indisputable fact is that the §401 Certification does not allow any work to commence. Any filling of wetlands requires a §404 permit from the Corps, and it is uncertain when the Corps will issue any permit. Further, under Corps policy, a stay of the §401 Certification would not prohibit the Corps from issuing a §404 permit, and the Board lacks general equitable powers to enjoin action under a federal permit. ACC's remedy for the harm it alleges is more properly sought in federal court at such time the §404 permit is issued by the Corps. Moreover, even if the Port were

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to obtain a §404 permit and fill the small quantity of wetlands (2.8 acres) that it plans to fill prior to March 2002 (when trial is scheduled), there would be no irreparable harm because the wetland mitigation and stream restoration plans are so thorough that each wetland function is fully mitigated.

Finally, the Board should consider the public interest. This public project has been planned for many years and is critical to the region's transportation infrastructure. Any delay in completion would involve significant costs to the region, the state, the taxpayers, and the travelling public.

II. FACTUAL BACKGROUND

This case is the latest in a long series of appeals and lawsuits brought by ACC to try and stop development at STIA. The ACC interlocal agreement states the purpose of the ACC: "To stop the construction of any additional runways at Seattle Tacoma International Airport." Lindsey Dec., Ex. A.

As planned for by the Puget Sound Regional Council and as approved by the Federal Aviation Administration ("FAA"), the Port is proposing to reduce existing and future airport delays and enhance commercial aviation capacity by constructing improvements pursuant to a Master Plan Update ("MPU") adopted by the Port and the FAA in 1997. These improvements include a new 8,500-foot parallel air-carrier runway (approximately one-half mile west of existing runways), a 600-foot extension of Runway 34R, extension of runway safety areas, terminal improvements, and expansion and the South Aviation Support Area to accommodate aircraft maintenance and air cargo facilities. Some of the MPU projects will involve the discharge of fill material into waters of the U.S., which requires a §404 permit and a §401 certification from Ecology.

The proposal to construct the MPU improvements at STIA was arrived at after years of study, debate, and decision-making by governmental bodies and elected officials in the Puget Sound region. That background is set forth in the declaration of STIA director Gina Marie Lindsey ("Lindsey Dec.") and in prior Superior court and appellate court cases. The Lindsey Dec. attaches earlier court decisions for reference by the Board.

With regard to the MPU improvements requiring discharge of fill material into waters of the U.S., the Port has proposed extensive mitigation to restore and improve existing wetlands, fully mitigate for all wetland functions, improve and protect streams, develop new wetlands, and construct stormwater facilities

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that will detain and treat stormwater (both for the new project, and at the existing airport, which will improve existing water quality discharges).

Ecology's §401 certification process has involved the review of numerous technical issues and expert reports, most of which have been submitted and reviewed since December 2000.[1] The background on each of the technical issues is included in the declarations supporting this memorandum:

- Declaration of James C. Kelley, Ph.D. ("Kelley Dec.). Wetlands ecologist Dr. Kelley describes the wetland permitting review process, how all wetland functions are being fully mitigated, and how the riparian and wetland mitigation will improve ecological conditions.
- Declaration of Donald E. Weitkamp, Ph.D. ("Weitkamp Dec."). Fisheries biologist Dr. Weitkamp describes the area streams, the consultation process with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, their findings of no impact to endangered species, and the additional studies that show no impact to aquatic biota and long-term aquatic habitat improvement.
- Declaration of Linda R.J. Logan, Ph.D. ("Logan Dec."). Dr. Logan is an expert in environmental and analytical chemistry and stormwater quality and toxicity. She explains why there is no evidence of existing violations of water quality standards and why Ecology has assurance that the new project will not violate water quality standards.
- Declaration of Paul S. Fendt ("Fendt Dec."). Professional engineer and stormwater expert Paul Fendt describes the permitting process with Ecology, especially the changes since December 2000, the low streamflow analysis and modeling for that analysis, the stormwater management plan for STIA, and numerous details about how the stormwater management system at STIA will provide reasonable assurance that the new project meets all water quality regulations.
- Declaration of Joseph Brascher ("Brascher Dec."). Stormwater modeling expert Joseph Brascher describes the industry-standard model for low streamflow and how that model was accurately calibrated.
- Declaration of C. Linn Gould ("Gould Dec."). Soil scientist Linn Gould discusses the selection of fill acceptance criteria for fill used at STIA and how those criteria are fully protective of water quality.
- Declaration of John J. Strunk ("Strunk Dec."). Environmental geologist and hydrogeologist John Strunk describes the existing contaminated areas at STIA and concludes there is no reasonable threat that those contaminants in contained areas will migrate to the area of the third runway construction.
- Declaration of Elizabeth Clark ("Clark Dec."). Environmental engineer Elizabeth Clark describes the protective criteria used for acceptance of fill prior to the issuance of the §401 Certification.

The Port has also submitted the declarations of Seattle Mayor Paul Schell ("Schell Dec."), Port of Pasco Director James L. Morasch ("Morasch Dec."), Mr. Alan C. Ralston of The Boeing Company ("Ralston Dec.") and STIA Director of Aviation Facilities Michael Feldman ("Feldman Dec."), all of which discuss

[1] Fendt Dec.¶74-75. The Board should note that ACC's main witness, former Ecology employee Tom Luster, by his own admission in a letter to Wash. Sen. Julia Patterson, is "not aware of all the changes that have occurred with the Port's proposal or Ecology's review since I was taken off the project in October [2000]." Ex. C to Jones Dec. (emphasis supplied).

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why it is critical to the public interest that the MPU improvements not be delayed. Moreover, the declaration of project manager Michael Cheyne ("Cheyne Dec.") discusses the enormous financial harm that will occur if construction were halted as a result of any stay, and also discusses the project schedule for work in wetlands – little of which is scheduled to occur near term, and the impacts of which will be fully mitigated.

III. LEGAL ARGUMENT

A. Standard for Granting a Stay

For the Board to stay the § 401 Certification, ACC must demonstrate either a likelihood of success on the merits or irreparable harm. RCW 43.21B.320(b). While the Board's review is *de novo*, *Marine Environmental Consortium v. Ecology*, PCHB Nos. 96-257 et al. (1997), even under that standard the Board has consistently given deference to Ecology's specialized knowledge and expertise on technical issues. *Georgia Manor Water Association v. Ecology*, PCHB 93-68, at 3 (1994); *Department of Ecology v. PUD No. 1*, 121 Wn.2d 179, 849 P.2d 646 (1993), *aff'd*, 114 S. Ct. 1900 (1994). Such deference is particularly appropriate here because the §401 Certification and the conditions it imposes are highly technical. In such instances, the Supreme Court has counseled that substantial deference should be accorded Ecology's determinations. *Hillis v. Dep't. of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997) (deference to Ecology when case is "based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise."). On issues of legal interpretation:

> It is well settled that "great weight is generally accorded to the interpretation of a statute by the administrative agency which is charged with its administration." *Kaiser Aluminum v. Dept. of Ecology*, 32 Wn. App. 399, 404, 647 P.2d 551 (1982). . . . Moreover, the Kaiser Court advised that even greater deference should be given to an agency's construction of its statute or regulation where technical expertise was required in its administration. *Id.*

Foltz v. PSAPCA, PCHB No. 94-28, 1994 WL 905604, *5 (1994); *see also Davis Industries, Inc. v. PSAPCA*, PCHB No. 97-37, 1997 WL 556194, *4 ("The courts gives great deference to the construction of a regulation by an agency charged with its administration.").

Assuming that ACC *were* able to show a likelihood of success and irreparable harm, which it has not, the Board will not grant a stay if Ecology or the Port 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." RCW 43.21B.320(3). In this case, the Port and Ecology have shown both a substantial probability of success on the merits *and* an overriding public interest. The Board has refused to

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grant stays on either or both of those grounds. *See, e.g. McKenna v. Ecology*, PCHB 00-054 at 2 (Order Denying Stay, June 28, 2000) (denying stay based on failure to show likelihood of success on the merits); *Ortman v. Depts. of Agriculture and Ecology,* PCHB 99-115 and 116 (October 7, 1999) (denying stay based on showing of overriding public interest).

The Board only needs to be satisfied that there is *reasonable* assurance that applicable water quality standards will be met. 33 U.S.C. §1341(a)(3); *Friends of the Earth v. Ecology*, PCHB Nos. 87-63 & 87-64 (1988). It is ACC's burden to show that Ecology did not have reasonable assurance.

B. All Impacts to Wetlands Are Fully Mitigated

ACC alleges that the §401 Certification does not protect beneficial uses of state waters and violates antidegradation standards, claiming that the Port's wetland mitigation plan does not compensate for lost wetland functions. Ecology, the Port and their wetlands experts strongly disagree.

1. A Thorough Process Addressed Lost Wetland Functions. Ecology and the Port used comprehensive, industry-accepted methods to identify wetlands, evaluate their functions, assess potential impacts and design a mitigation program to address all impacts. This process is described in detail in the documents attached to the Kelley Declaration: *Wetland Delineation Report; Wetland Functional Assessment and Impact Analysis; and Natural Resource Mitigation Plan* (all December 2000). Ecology and the Port carefully evaluated the biological and physical indicators of wetland function in each wetland. The Port then designed its projects to avoid wetlands and other aquatic resources wherever possible. Where avoidance was not possible, compensatory mitigation addressed *each* of the lost wetland functions. Kelley Dec.¶¶ 13–49.

The mitigation plan is detailed, comprehensive and far exceeds the wetland mitigation requirements on most projects. Kelley Dec.¶103. In response to approximately 20 acres of wetland impact, the plan will enhance and preserve 167 acres of natural habitat in perpetuity, including creation of 20 acres of new wetlands, restoration and enhancement of 48 acres of wetlands, and replacement of wetland functions far in excess of functions impacted. This will result in one of the largest wetland mitigation sites in Puget Sound. It will remove adjacent residential/commercial land uses and restore riparian wetland and buffers along 1.4 miles of stream. *Id.*

2. Creation of New Wetlands Off-Site Is Necessary and Legally Permissible. ACC argues that the Port's wetland mitigation plan is unacceptable because it creates new wetlands only at an off-site location

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in Auburn, which is in a different sub-basin from the impacts. This issue has been thoroughly considered and documented in the public comments and responses relating to Ecology's §401 deliberations and the Corps' §404 permit deliberations.[2]

There are significant and legally supported reasons why new wetlands may be created only at an off-site location. First, the Port cannot create new wetlands at STIA because wetlands provide attractive habitat for waterfowl, flocking birds, and other wildlife posing serious hazards to aircraft. Since 1960, at least 78 civilian aircraft and 201 civilian lives have been lost worldwide to wildlife strikes, and even more military aircraft and lives have been lost. Between 1994 and 2000, reported wildlife/aircraft collisions at STIA averaged 22.5 per year.[3] FAA Advisory Circular 150/5200-33 states that wildlife attractants, such as wetlands, must be sited no closer than 10,000 feet from turbine aircraft movement areas. The FAA imposed this requirement as a condition of federal funding for the MPU improvements in its 1997 Record of Decision at pp. 25-27. In a letter to the Corps dated April 15, 1998, the Animal Damage Control Office of the U.S. Department of Agriculture describes the bird strike safety concerns at STIA and strongly recommends against the creation or enhancement of wetlands within 10,000 feet of the STIA runways.

Second, there is no legal requirement that compensatory wetland mitigation be located only in the sub-basin where the impacts occur. To the contrary, state law specifically authorizes off-site mitigation of wetland impacts. Chapter 90.74 RCW specifically authorizes Ecology to approve mitigation plans in which wetland mitigation occurs off-site, within the same water resource inventory area (WRIA). The Auburn mitigation project is located in the same WRIA as STIA. The statute provides:

> The department ... of ecology ... may not limit the scope of options in a mitigation plan to areas on or near the project site .... The department ... of ecology ... shall fully review and give due consideration to compensatory mitigation proposals that improve the overall biological functions and values of the watershed ... and accommodate the mitigation needs of infrastructure development.

RCW 90.74.020(2). Airport expansion is specifically listed as an example of infrastructure development for which off-site mitigation is permissible. RCW 90.74.010(3).

3. Wetland Functions Will Be Replaced In-basin. The Port's extensive in-basin mitigation projects fully replace lost wetland functions in the Miller, Walker, and Des Moines Creek basins (with the

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[2] *See, e.g.,* General Response to Comments GR-1 and GR-2, dated March 2000. Jones Dec., Ex. A.

[3] *Id*; Kelley Dec.¶44.

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exception of avian habitat that will be replaced in Auburn). In his declaration, Dr. Kelley discusses each recognized wetland function and how those functions are being replaced by in-basin mitigation. Kelley Dec.¶¶50–101. The replacement of these functions is briefly summarized here:

- *Resident/Anadromous Fish.* The new Miller Creek stream channel will provide improved fish habitat, with features beneficial to fish such as large woody debris, woody riparian vegetation, and substrate variability. The Miller Creek wetland and buffer enhancement is over 51 acres in size and protects over 5,000 linear feet of the creek. The mitigation areas adjacent to Des Moines Creek are over six acres in size and protect over 700 linear feet of Des Moines Creek. Kelley Dec.¶¶57–62.

- *Amphibian Habitat.* Amphibian habitat will be created by converting farmland to shrub and riparian wetlands, replacing lawns, driveways and golf course with wetland and buffer enhancements. *Id.* at ¶¶67–70.

- *Small Mammal Habitat.* Small mammal habitat will be replaced by enhancing and protecting over 100 acres of mitigation area in-basin, including planting vegetation in riparian areas and restoring wetlands to create a diversity of forage and cover habitat. The replacement of the S. 154th St. bridge and the connections to Wetlands 1 and 9 will also mitigate for lost habitat. *Id.* at ¶¶71–74.

- *Export of Organic Matter.* Dissolved organic carbon (DOC) concentrations in Miller Creek will not be altered. Relatively high levels of DOC are found upstream of wetlands to be filled and will be unaffected by wetland filling. Grading of the Vacca Farm mitigation area will result in a net loss of about 0.6 acres of peat soil, a small portion of approximately 39 acres of peat soil at Vacca Farm and the wetlands north of the airfield. The new Miller Creek channel is designed to have overbank flow during 1-year and higher storm events. As floodwaters recede, export of dissolved and particulate organic matter to the stream will occur at higher levels than current conditions due to the increase in organic matter on the site. Also, in the Lora Lake, Miller Creek, and Des Moines Creek mitigation areas, replacement of grass-dominated riparian plants with native woody riparian vegetation and the planting of forest and shrub vegetation in enhanced wetlands will increase the export of organic matter. Under current residential use, residents clear riparian buffers of trees or shrubs, reducing delivery of organic matter to the streams. At the golf course, organic matter is cut and removed from the floodplain. In addition, placement of large woody debris in the creeks and the development of a natural riparian zone will help trap organic debris in the stream channels, where decomposition will provide organic matter. *Id.* at ¶¶75–85.

- *Groundwater Exchange.* The project's impacts to this function has been avoided by project design and mitigated through the low stream flow plan. *Id.* at ¶86.

- *Flood Storage.* The Vacca Farm mitigation site is designed to replace floodplain filled by the project (8,500 cu. yds.) and provide a small net increase (9,600 cu. yds.). The flood storage capacity of filled wetlands will be fully replaced. *Id.* at ¶¶87–90.

- *Nutrient/Sediment Trapping.* The wetlands to be filled do not provide optimal water quality treatment, due to the short residence time of stormwater in the wetlands and a lack of dense emergent vegetation. The Stormwater Management Plan includes extensive water quality treatment such as biofiltration swales and filter strips, which are designed to replace the limited water quality functions of the existing wetlands. Equally important, existing uses that contribute pollutants, such as driveways, lawns, farms and the golf course, will be replaced with natural vegetated buffers. *Id.* at ¶¶91–101.

For these and the other reasons discussed at length in his declaration, Dr. Kelley concludes that "the in-basin elements of the mitigation plan, alone ... will replace the wetland functions lost to filling." *Id.* at ¶49.

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4. Plan For Additional Mitigation at Wetland A-17. In the §401 Certification, Ecology decided that wetland impacts previously labeled "temporary" were sufficiently long to be re-categorized as "permanent." Accordingly, Ecology required the Port to provide additional wetland mitigation at wetland A-17 and revise its mitigation plan accordingly.[4] ACC argues that the §401 Certification could not issue prior to submission of the revised mitigation plan, arguing that Ecology lacked sufficient information.[5]

The Port's Natural Resource Mitigation Plan ("NRMP") includes detailed plans for enhancing and preserving about 70 acres of wetlands, buffers, and riparian areas in the Miller Creek basin. The §401 Certification requires a number of changes to the NRMP and requires the Port to submit a final revised NRMP, including the Ecology-required changes and any Corps-required changes.[6] In the final revised NRMP, the Port will simply increase the mitigation area to include the wetland A-17 area. The Port's plan for enhancing and preserving this additional wetland area will be the same as the rest of the NRMP, with the only significant difference being an increase in the area covered by the NRMP. Ecology officials are familiar with the wetland A-17 complex, having reviewed the delineation of the wetlands in this area and conducted multiple visits to the site. Kelley Dec.¶102. Ecology need not have delayed its §401 Certification until the NRMP was amended; the department retains full authority to review and require changes to the NRMP and no wetland filling may occur until Ecology approves the final NRMP. *Id.*

C. The Port's Low Flow Mitigation Plan Provides Reasonable Assurance that Flows In Area Streams Will Be Protected

1. Low Flow Impacts Have Been Properly Estimated. ACC claims that the Port has underestimated summer low flows and overestimated the amount of water available for mitigation. ACC also claims that increased impervious surface from the expansion/improvement of the Industrial Wastewater

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[4] Condition D(4)(a).

[5] ACC relies on the Corps' proposed Columbia River channel improvements, where Ecology denied certification for lack of an adequate mitigation plan. ACC Memo at 8. The Columbia River channel project is entirely different from the Port's MPU improvements. The lack of a final mitigation plan was only one of a host of reasons Ecology denied certification for the Columbia River project. Other reasons included: a lack of complete wetland delineations for the proposed upland/wetland disposal sites; lack of information on potential impact to the white sturgeon population; needed additional information on impacts to crab habitat; potential impacts on coastal resources from removal and ocean disposal of a large quantity of sand; and adverse impacts on the estuarine bathymetry and substrate characteristics. Eglick Dec., Ex. C. In contrast to the Columbia River project, it was reasonable for Ecology to conclude here that the Port's NRMP revision to add wetland A-17 is entirely different from the Columbia River channel project.

[6] Condition D(3).

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System ("IWS") and construction of the Des Moines Business Park were not properly modeled. None of these contentions survive scrutiny. In fact, the Des Moines Business Park is no longer even a proposed project. Fendt Dec. ¶36.

The construction of new impervious surface will have two consequences: (1) peak flows will increase during storm events; and (2) reduced infiltration rates will cause summer low flows to drop. Fendt Dec.¶6. The Port proposes a two-fold response to mitigate these impacts: (1) peak flows will be mitigated by detaining stormwater in 344.1 acre-feet of new stormwater detention facilities, with the water being released in a manner that mitigates high flow impacts; (2) summer low flows will be mitigated by detaining stormwater and releasing the detained stormwater continuously into the affected streams during low flow periods. *Id.* at ¶7.

Low flows have been accurately estimated and detained stormwater will be treated so as not to degrade water quality. Brascher Dec.¶¶5–19; Fendt Dec.¶¶ 8–27; 41–54. Estimates of both the current stream flow and the summer low flows were derived from review of 47 years of precipitation records.[7] Fendt Dec.¶13. Review of these records[8] indicated that the appropriate low flow mitigation period is approximately August through November, which is when mitigation will be provided. Fendt Dec.¶15.

The hydrology in the three watersheds was modeled using the Hydrologic Simulation Program – Fortran ("HSPF") model.[9] Brascher Dec.¶4. HSPF is the model required for use by EPA, the U.S. Geological Survey, and Ecology. *Id.* at ¶¶6, 8. In the expert opinion of those intimately familiar with the model, [10] "HSPF is the best model currently available for representing the complete hydrologic cycle [and]

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[7] By contrast, the ACC's Dr. Rozeboom based his estimate of low flows on review of a single year of rainfall records.

[8] Donald Weitkamp explains at ¶14 of his declaration that this same 47 years of precipitation records demonstrates that summer low flows in the STIA-area streams have mean annual flow rate of 0.75 cfs, a flow rate that demonstrates that the streams do not provide (either currently or in the past) desirable salmonid habitat. According to Dr. Weitkamp, "[t]he project will not change these limiting flow conditions for any of the four streams." *Id.* Dr. Weitkamp's evidence rebuts the contention of Dr. Strand that flow reductions below 1 cfs will degrade salmonid habitat. In fact, when a complete record is examined (instead of a single year), it becomes apparent that Dr. Strand's contentions are without basis in fact. Weitkamp Dec.¶16.

[9] The HSPF modeling for low stream flows was supplemented by a groundwater study conducted in 2000 by Pacific Groundwater Group ("PGG"), which evaluated the stormwater that infiltrates into the proposed embankment for the new third runway. The hydrogeologic modeling conducted by PGG for this study is the same model and approach used in the Ecology-sponsored Sea-Tac Runway Fill Hydraulic Studies (PGG 2000). The Port's low flow analysis, the SMP, the HSPF modeling and the groundwater modeling conducted by PGG were reviewed and approved by Ecology. Fendt Dec.¶¶18, 19.

[10] Mr. Kelly Whiting, who worked on this project for King County, has reviewed and approved the SMP, which includes the HSPF modeling. *See* Fendt Dec.¶10 and Ex. D (copy of King County's letter approving the SMP).

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when properly calibrated, the HSPF model provides the most accurate results of any model currently available." *Id.* at ¶¶9, 19.

ACC's assertions of calibration errors in the HSPF model do not withstand close examination. The HSPF model was calibrated using a mass balance calibration, with all of precipitation in the watersheds being considered to make sure that the model accurately reflected the hydrologic cycle within each watershed. Brascher Dec.¶14. A mass balance calibration compares model output with actual measured stream flows at gages[11] in Des Moines, Miller and Walker Creeks. If the model output correlates well to measured streamflow, then the model is well calibrated. In this case, there was a very close calibration between model output and measured flows, and in the opinion of the Port's experts, the HSPF model provides a very accurate prediction of how MPU projects will affect streamflow in area streams. Brascher Dec.¶¶ 16, 17; Fendt Dec.¶¶ 22-24.

ACC's contentions with respect to changes to the IWS and impacts of the borrow areas are likewise deficient. Lining of the IWS lagoons was required in the Port's NPDES permit in order to prevent seepage. Fendt Dec.¶32. Lining of the lagoons will create a 3% increase in the impervious area within the IWS drainage system, Fendt Dec.¶34. This will have a negligible impact on infiltration rates within the system. *Id.* Because the IWS area is a water discharge area, rather than a water recharge area, it was appropriate to model the IWS system as "water," i.e., neither contributing nor infiltrating runoff. *Id.* at ¶33, 34. The hydrogeologic conditions in the borrow areas are not at all comparable to the proposed third runway embankment, because the depth of material, location, material composition, position relative to the respective streams, and stream hydrology are different. Furthermore, a report prepared by PGG for Ecology indicated that excavation of the borrow areas will actually *increase* recharge and infiltration rates to the shallow regional acquifer, which forms a substantial source of base flow for Des Moines Creek. Fendt Dec.¶¶ 37, 38. Finally, each of the remaining deficiencies noted by Dr. Willing (¶17) and Mr. Rozeboom (¶20) are

[11] Mr. Rozeboom asserts that calibration was in error based on information from an upper basin gage. In fact, if calibration of the model had been based on the upper gage, the model would have been out of calibration, would have assumed more water in the system than there really is, and would have actually underestimated low flow impacts. At Walker Creek, King County has stated that the upper gage in this watershed is less accurate than the gage downstream within that basin. Brascher Dec.¶¶ 16, 17.

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specifically addressed by conditions in Ecology's §401 Certification. *See* Fendt Dec.¶28 (listing issues identified by Ecology and conditions addressing them).

2. Low Flow Mitigation Is Feasible and Will Prove Effective. ACC argues that the Port's approach to low flow mitigation is a last-minute change and is infeasible because no technical standards exist to evaluate the Port's proposal. Contrary to ACC's assertions, the Port has been analyzing the mitigation of low flow impacts using detained stormwater for some time. Fendt Dec.¶10. Moreover, the mere fact that there is not a technical manual for evaluating the low flow proposal or final drawings does not mean that the proposal is not feasible, or that it is not based on sound engineering. Fendt Dec.¶¶85, 86. It bears emphasis that Mr. Rozeboom concedes that there is sufficient water to meet the low flow needs. *See* Rozeboom, ¶ 4. Mr. Rozeboom's concession is buttressed by the fact that, in addition to the release of detained stormwater, low flows will be mitigated by the retirement of existing water uses, and seepage from the new embankment. Fendt Dec.¶17.

The Port's low flow mitigation plan has been fully described and the analysis supporting the mitigation has been fully explained. The vaults and other systems used to mitigate for low flow impacts utilize standard engineering principles commonly applied in stormwater management. While the scale of the MPU projects is larger than most projects, the constructibility and engineering issues are far from unique and do not raise feasibility concerns. Fendt Dec.¶¶85, 86. Reasonable assurance does not require that the project produce final construction drawings in order to determine if the proposed mitigation and other plans will work. As Mr. Luster notes (Luster, ¶35), the §401 Certification before the Board was the last in a long series of submittals by the Port. Ecology's review of the current plans did not begin anew with the submittal of the Port's application in December 2000. The Ecology team had been reviewing the project for years (including the critical past year when Mr. Luster was not involved in the review). *Id.*

ACC's attack on the feasibility of the Port's proposed mitigation plan fails, since each of the issues raised is easily addressed (in fact, as noted above, Ecology addressed these issues as conditions of its §401 Certification). The use of a floating orifice for extracting detained stormwater will prevent the introduction of particulates, as well as maintain constant head pressure. Fendt Dec.¶46. BMPs are available to address other concerns: increased baffling to enhance sediment trapping capabilities, inspection/maintenance to ensure proper function, placement of inlets and outlets to minimize resuspension of sediments, ventilation

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features, provision for reserved storage above dead storage areas, and contingencies if pilot program/monitoring show that they are needed (filtration/mechanical aeration). *Id.* Finally, water transit losses can be addressed simply by extending piping, if necessary. Fendt Dec.¶50.

3. The Low Flow Mitigation Plan Will Not Degrade Water Quality. ACC's claim that the low flow mitigation plan will degrade water quality is without foundation. As noted above, BMPs will be employed to remove particulates. Fendt Dec.¶46. Contrary to Dr. Strand's contention, weekly monitoring for dissolved oxygen is sufficient. Although DO can increase rapidly from new stormwater input, a decrease in DO occurs only gradually and, if necessary, reaeration can be easily accomplished using passive aeration systems such as drip towers or cascades over roughened surfaces. Fendt Dec.¶47.

Dr. Willing's claims regarding the viability of filter strips and bioswales as pretreatment options are perhaps the weakest of ACC's arguments. Beginning with the claim that STIA lies in a "semi-arid" climate (Willing, ¶ 34), Dr. Willing then misrepresents a 1992 Metro study in order to argue that bioswales actually produce fecal coliform bacteria. *Compare* Willing ¶35 with Fendt Dec.¶49. Scientific studies have shown biofiltration swales and filter strips to be effective BMPs for removal of other pollutants. They are included in BMP menus in both the King County Surface Water Design Manual (1998) and the Revised Stormwater Management Ecology Manual (Ecology 2001) as treatment for stormwater. This is because they take advantage of the binding capacity of soil particles and the organic and inorganic ligands in soils to either render chemicals inert, or prevent them from entering the stormwater system altogether. Fendt Dec.¶42. Use of these pretreatment devices constitutes the state of the art in the design of stormwater management systems.

D. A Water Right Permit Is Not Required to Manage Stormwater

Under the SMP, the Port will mitigate the project's high and low flow impacts by capturing, detaining, treating, and then carefully releasing detained stormwater to area streams. For high flow mitigation, stormwater will be detained and then slowly released to avoid the adverse water quality and habitat impacts of extreme high flows. Similarly, for low flow mitigation, stormwater will be detained and then released to area streams during low flow periods in order to avoid adverse water quality and habitat impacts.[12] For both high and low flow mitigation, pollutants in the stormwater will be reduced to acceptable

[12] The SMP describes the Port's objective to mimic pre- project conditions by establishing a target flow regime. This regime is based on flows experienced when 75% of the land was covered with pervious forest, 15% with pervious grass, and 10% with

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levels by appropriate treatment methods, avoiding harm to fish and other aquatic organisms.[13] Weitkamp Dec.¶¶8–11, 16–17.

ACC argues that this streamflow mitigation plan is flawed because the Port has not obtained a water right authorizing it to manage its stormwater in this manner. This argument fails for several reasons. First, there is no legal basis, and certainly no precedent, for requiring a water right to manage stormwater. Second, both the Washington Legislature and Ecology have recognized the distinction between water use or "utilization," which requires a water right, and the management of stormwater, which does not. Third, applying the water code to legally required stormwater management would lead to absurd results (because water is always "available" and the amount of the "use" would vary annually, making application of the water code nonsensical). Fourth, adopting ACC's radical position would require a water right for every stormwater management project in the state.

1. Water Quality Law Requires the Collection, Detention, Treatment and Delayed Release of Stormwater, and a Water Right is Not Required. Discharges of stormwater have been regulated by state and federal law since at least 1987, when the Clean Water Act was amended to add a requirement to obtain an NPDES permit for discharges of certain classes of industrial and municipal stormwater. 33 U.S.C. 1342(p). Since then, Ecology has promulgated numerous regulations and two comprehensive stormwater manuals and has issued numerous permits addressing stormwater.[14] From their inception, stormwater management programs have identified low flow impacts as a concern, and required best management practices to mitigate low flow impacts. *See* Declaration of Edward O'Brien ¶¶9-14 (filed by Ecology).

To the Port's knowledge, Ecology has never required any person to obtain a water right to collect, detain, treat and discharge stormwater. Ecology's approach is based on a sound reading of water resource laws, as well as the knowledge that stormwater management is comprehensively regulated by the Clean Water Act, the Water Pollution Control Act, and that nothing would be gained by imposing water right permit requirements.

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impervious surface. The Port intends to manage its stormwater so that flows neither exceed predevelopment flows nor fall below the minimum flows needed in the dry months. Fendt Dec.¶¶8–29, 39–47.

[13] This system will be closely monitored, and if Ecology determines that designated uses are not being adequately protected, additional mitigation requirements may be imposed. Fendt Dec.¶¶28, 39–40.

[14] See Ch. 173-221 and 223 WAC; Puget Sound Stormwater Manuals.

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ACC attempts to make much of the fact that the Port is being required to mitigate not only for high flow impacts, but also for low flow impacts, arguing that this is the key element of the Port's plan that distinguishes it from typical stormwater management and triggers the need for a water right. ACC is incorrect in its assumption that stormwater management does not typically require mitigation for low flow impacts. As early as the 1992 Puget Sound Stormwater Manual, Ecology recognized low flow impacts from development, and has required permittees to mitigate impacts with on-site BMPs such as collecting and infiltrating stormwater. O'Brien Dec. ¶¶14. This typical on-site stormwater collection and infiltration requirements are no different than what is being required of the Port here. The new version of the Western Washington stormwater manual is even more explicit in recognizing and imposing mitigation requirements for low flow impacts. O'Brien Dec..

There is no basis for arguing that "typical" stormwater detention/release for high flow management does not require a water right, but stormwater detention/release for low flow management does. In both cases stormwater is being collected, detained, treated, and released in a manner that mitigates the impacts of the development. Neither triggers the need to obtain a water right.

2. Management of Stormwater Is Not a Beneficial Use of Water. Throughout the water code, the Legislature links the requirement to obtain a water right to the "use," "utilization," or "appropriation" of water. *See, e.g.*, RCW 90.03.010 ("all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise"); RCW 90.03.250 ("[a]ny person ... hereafter desiring to appropriate water for a beneficial use shall make an application to the department for a permit to make such appropriation, and shall not use or divert such waters until he has received a permit from the department." (Emphasis added).

While the definition of "use" is broad, it is not unlimited. In RCW 90.54.020(2) the Legislature expressly distinguished between the "use" or "utilization" of water, which requires a water right, and the "management" of stormwater, which does not require a water right:

> Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:
> ...
> 2. *Uses* of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic

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values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

...

11. Water *management* programs, including but not limited to, water quality, flood control, drainage, erosion control and storm runoff are deemed to be in the public interest.

RCW 90.54.020 (emphasis added). These sections of the Water Resources Act highlight the Legislature's differentiation between beneficial uses and water management programs. The water management programs the Legislature describes are exactly the ones the Port and other stormwater permittees undertake when they collect, detain, treat, and release stormwater. By referring to these activities as "management" rather than as "use" of water, the Legislature demonstrated that it recognizes the difference between these and traditional beneficial uses. Furthermore, because the Legislature avoided the terms of art it used elsewhere in the water code to discuss the prerequisites for obtaining a water right permit, it is reasonable to conclude that the Legislature did not intend to require a water right permit for stormwater management.[15]

3. Applying the Water Code to Stormwater Would Lead to Absurd Results. The legislative intent not to require a water right for stormwater management is reinforced by examining the criteria for a water right, which make no sense when applied to stormwater management. First, Ecology can issue a water right permit only if it determines that water is "available." Ordinarily, this requires an assessment of the quantity of unappropriated water in a surface water body or aquifer. When the water subject to the permit is all the rainfall that falls on a facility, however, it is meaningless to ask whether water is physically available – the answer in every case will be yes. Second, an applicant for a water right must set forth the "nature and amount of the proposed use" of water. RCW 90.03.260 (emphasis added). Ecology then determines whether water is available in the amount requested, and if so, to issue a permit "stating the amount of water to which the applicant shall be entitled." *See* RCW 90.03.290 (emphasis added). When stormwater is managed, however, it is impossible to predict the precise amount of precipitation that will fall and consequently impossible to quantify the total amount of water that will be "used." Therefore, the Port or any other

[15] When the Legislature uses different terms in the same statutory scheme, it is presumed to do so intentionally. Furthermore, the different terms reflect a difference in legislative intent. *E.g., Simpson Investment Co. v. Department of Revenue,* 141 Wn.2d 139, __ P.2d __ (2000) (Legislature intended different meanings for "financial business" and "financial institution"); *Cazzanigi v. General Electric Credit Corp.,* 132 Wn.2d 433, 446, 938 P.2d 819 (1997); and *Wells v. Western Washington Growth Management Hearings Bd.*, 100 Wn. App. 657, 671, __ P.2d __ (2000) (Legislature intended different meanings for "matter" and "issue"). The Legislature deliberately chose a different word – "management" – to refer to the handling of stormwater. It did not use the traditional water right triggering terms such as "appropriation," "use," or "utilization." Based on this choice of terminology, the Legislature viewed management of stormwater differently from traditional uses of water that require a water right permit.

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stormwater manager required to apply for a water right permit would have no basis for quantifying the amount of water sought, since the amount of stormwater to be managed will vary from year to year. Requiring a water right permit when the amount to be "used" will vary annually, and be totally outside the permit holder's control, is at odds with one of the principal objectives of the water rights permitting system, which is to quantify water rights so that the total amount of water subject to valid rights is known.

4. Prior PCHB Decisions Do Not Require a Water Right for Stormwater Mitigation. ACC argues that the Board has previously required a water right before stormwater can be detained and used to mitigate stream flow. The Board has never so held, and ACC misconstrues those cases, including the Board's decision in the Battle Mountain Gold ("BMG") water right appeal.[16]

BMG was required to obtain a new water right to construct a mine pit for two reasons. First, the BMG mine pit would shift the hydrologic divide at its mountaintop location, and move water that would have otherwise flowed west (into the Myers Creek drainage) to the east (into the Toroda Creek drainage). Second, during the life of the mine, water (from groundwater and surface water) that would collect in the mine pit would be diverted from the Pit Lake for ore processing. The requisite water right was granted to BMG. In response to an argument that a new water right was necessary to allow BMG to use Pit Lake water to mitigate for reductions in stream flows, the Board concluded that a new right was not necessary, holding that the water right previously issued for the hydrologic shift/ore processing should be amended to allow use of Pit Lake water for mitigating stream flow impacts. *See* Summary Judgment on Stipulated Issues Nos. 20, 21 and 22 (Oct. 23, 1998).

ACC argues that this decision stands for the proposition 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." ACC Memo at 15. ACC's interpretation of the Board's ruling fails to recognize the important differences between BMG's mitigation plan and the Port's stormwater management plan. BMG's proposal involved a classic diversion of surface water. If the Port was proposing to divert water from a lake to mitigate for low flow impacts in area streams, it would also have to obtain a water right to do so. The Port, however, is not proposing to divert surface water or pump groundwater to mitigate for low flow impacts. Instead, the Port is proposing to use detained stormwater to mitigate for these impacts. This is stormwater that the Port will be

[16] *Okanogan Highlands Alliance, et al v Battle Mountain Gold and Department of Ecology*, PCHB NO. 97-146 (1998).

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capturing, detaining, treating and eventually releasing *regardless* of whether the stormwater also serves as mitigation for the project's streamflow impacts, as it is legally required to do under state and federal water quality laws.[17]

ACC also cites several earlier Board decisions concerning creative mitigation schemes proposed by water right applicants. Each of these applicants was seeking authority to withdraw groundwater for various consumptive uses.[18] Those cases have no applicability here, where the Port is managing stormwater and not proposing to withdraw groundwater or divert surface water for a consumptive use.

As explained above, there is no legal distinction between the Port's proposed stormwater management plan and the stormwater management plans of thousands of other projects in Washington. Although the MPU projects are larger in scale than most projects, the essence is the same – to collect, detain, treat, and release stormwater in order to mitigate for stream flow impacts, including bank erosion, water quality, and habitat protection. Mitigation for low flow impacts is clearly contemplated by both the prior and current versions of Ecology's Stormwater Management Manual and is no different from mitigation for high flow impacts. If a water right permit is required for implementation of the SMP, then Ecology must require a water right for all other projects that manage stormwater. This is an absurd result, which would have severe consequences for the environment and the state's water rights permitting regime, and should be rejected by the Board.

E. The Strict Fill Acceptance Criteria Fully Protect Groundwater and Surface Water Resources

ACC challenges the §401 Certification for "adopting contamination limits" for third runway fill based on criteria from the Model Toxics Control Act, RCW 70.105D ("MTCA"). ACC's arguments fail for a

[17] The Board's written decision in the BMG case reflected a concern that, unless BMG obtained a water right allowing it to divert water from the Pit Lake, another person might establish a senior claim to the same water. BMG would then have been unable to meet its mitigation obligation under the §401 certification. This case does not present that risk. As noted above, the Port must collect, detain, treat, and release the stormwater that falls on its property. No one else will be able to intercept this stormwater, thereby preventing the Port from mitigating law flow impacts. One of the primary reasons for obtaining a water right – establishing a right to water to the exclusion of others – simply does not exist in this situation.

[18] In each of these cases, the applicants sought to avoid a finding that their proposed water use would impair existing rights by receiving mitigation credit for water "saved" through vegetation removal, septic recharge, or capture of stormwater runoff from impervious surfaces. The Board ruled that the proposed mitigation would not avoid impairment of existing rights, because the applicant was not offering any new water to mitigate for the amount he or she planned to divert. With regard to stormwater runoff, for example, but for the creation of impervious surfaces the water would "naturally recharge the system and benefit the base flows of streams. No credit is merited nor authorized under the Water Code for returning to nature what originally belonged to it." *E.g., Black River Quarry, Inc. v. Ecology*, PCHB No. 96-56 (Final Findings of Fact, Conclusions of Law and Order (November 15, 1996)).

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number of reasons. First, ACC focuses exclusively on the numeric criteria, ignoring other provisions that are designed to ensure that no material from a contaminated site is used in the embankment. Second, ACC's arguments have little application to the amended §401 Certification. Most of the numbers in the amended §401 Certification are not MTCA standards at all, but instead either represent natural background conditions (unaffected soil) or were set at the lowest level at which current testing methodology can quantify the constituents. Third, and perhaps most importantly, ACC has offered no basis, scientific or otherwise, showing that fill meeting the criteria in the §401 Certification will contain hazardous substances that will be transported in quantities that could adversely affect water quality. To the contrary, the Port's evidence shows that the constituent levels in the §401 Certification will cause no violation of water quality standards. Fourth, ACC's discussion of MTCA requirements contains numerous substantive errors and misrepresentations of Ecology policies and communications.

Absent any evidence that fill meeting the amended §401 Certification's criteria could adversely affect water quality, ACC has failed to demonstrate a likelihood of success on the merits, that Ecology lacked reasonable assurance in setting the fill criteria, or that the fill criteria will lead to any harm, much less irreparable harm.

1. The §401 Certification Adopts Procedures to Ensure that Soil From Contaminated Sources Will Not be Used in the Embankment. By focusing exclusively on the numeric criteria, ACC overlooks a critical fact regarding the fill criteria – namely that the Port is prohibited from using fill from known contaminated sources. Condition E(1)(d). Extensive investigation of each fill source is required to ensure that no fill is accepted from a contaminated site. Condition E(1)(a). Before accepting any fill from a site, the Port and its contractors must conduct a Phase I environmental site assessment, including review of available information on uses of the proposed source and an inspection of each site to confirm such information. *Id.* In addition, the Port and its contractors must sample soil from each source for a specified list of contaminants. *Id.*

The Port is also required to submit documentation certifying compliance with these requirements at least five days before accepting any fill from a particular source. *Id.* Ecology may review the documentation, and may reject fill from a source that fails to meet the criteria. *Id.* Moreover, the Port must keep records indicating where fill from different sources is placed in the embankment so that Ecology can

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require "additional compliance conditions and/or corrective action" if necessary. Condition E(2). To ensure that the system is working, the Port must develop a monitoring plan, Condition E(3), and Ecology can require corrective action, if monitoring demonstrates a need. *Id.* Ecology's requirement of extensive investigation and sampling, and Ecology's maintenance of control over the selection of fill sources, provides reasonable assurance that contaminated fill will not be used in the embankment.

2. The Numeric Criteria Fully Protect Waters of the State. ACC contends that Ecology erroneously used MTCA standards for fill criteria, implying that fill meeting MTCA Method A criteria will degrade water quality in Miller and Des Moines Creeks. Yet ACC's argument has little, if any, relevance to the fill criteria in the amended §401 Certification, which reconciles the fill criteria contained in the original §401 Certification with those contained in a Biological Opinion issued by the U.S. Fish and Wildlife Service ("FWS") on May 22, 2001 ("BO"), after a lengthy consultation process between the FAA and FWS under the federal Endangered Species Act. *See* Gould Dec., Ex. B. The BO specifically considered whether fill used in the third runway embankment would affect water quality in Miller and Des Moines Creeks and adversely affect aquatic species listed under the Endangered Species Act. The BO concluded that the fill criteria were protective of water quality.[19] Both the amended §401 Certification and the BO adopt fill criteria for two distinct zones of the embankment, the first (called the "drainage layer cover") being an "ultra-clean" 40-foot wedge of fill along the western edge of the embankment, and the second being the remainder of the embankment. Gould Dec.¶6. Different numeric criteria are applied to these two zones, with more stringent criteria applied to the drainage layer cover. *See* Gould Dec., Ex. E.

The original §401 Certification contained numeric fill criteria that, in some instances, differed from those adopted in the BO. The amended §401 Certification reconciled those two sets of numbers by requiring that, in the event of any discrepancy, the Port was to comply with the more stringent criteria. Based on the merger of the two sets of criteria, only four constituent criteria in the amended §401 Certification are based on MTCA, and all four have been proven to protect water quality. Gould Dec.¶15. Most of the remaining criteria reflect (1) naturally-occurring "background" levels; (2) the lower limit of current methodologies'

[19] Similarly, the National Marine Fisheries Service ("NMFS"), in two consultation opinions, concluded that the MPU improvements "may affect but are not likely to adversely affect" chinook salmon and that "[T]he effects of the proposed [Third Runway] actions are transient, local, and of low intensity and are not likely to adversely affect Essential Fish Habit in the long-term." *See* Weitkamp Dec., Ex. C at 15-16 (May 31, 2000 Consultation Letter); Jones Dec., Ex. F (August 9, 2001 Consultation Letter) at 1.

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ability to quantify the constituents, referred to as the "practical quantification limit" or "PQL"; or (3) numbers derived from conservative "back-calculations" used to determine the amount of a particular contaminant that could be present in soil without causing an exceedance of ambient water quality criteria. Gould Dec., Ex. E.

The amended §401 Certification's criteria for the following constituents represent background conditions in the Puget Sound region: antimony, arsenic, beryllium, cadmium, copper, lead, mercury, nickel and zinc.[20] Gould Dec.¶11. Because these compounds occur naturally in Puget Sound soils, it is neither necessary nor feasible to require fill that is lower than background. Gould Dec.¶11 & Ex. C. Moreover, there is no evidence that use of soil containing natural background levels of these compounds would have any impact to water quality. Gould Dec.¶11. Similarly, the use of PQLs recognizes the fact that more stringent criteria would be meaningless, since current analytical methodologies are incapable of measuring constituents beyond these levels, making use of criteria below PQLs an exercise in futility. *Id.* at ¶12.

After extensive analysis of impacts of contaminated fill on endangered species in Miller and Des Moines creeks, the BO adopted fill criteria for the drainage layer cover that were either set at background levels, or that were derived by "back-calculating" soil contamination levels from the water quality criteria in WAC 173-201A. *See* BO at 41 and Table 9; Gould Dec.¶6. Back-calculation is a very direct approach to determining the amount of a particular contaminant that can exist in soil without affecting water quality. This procedure starts with the numeric water quality criteria for the receiving water and works backward to derive soil concentrations that will be protective of designated water quality effects. Gould Dec.¶9. Use of the back-calculation approach (adjusted for background and PQL) provides reasonable assurance that all constituents in third runway fill are protective of water quality. *Id.* at ¶¶13-15.

ACC can hardly disagree with the back-calculation approach because, when the BO was issued adopting that approach, ACC dismissed its lawsuit brought against the Port and FAA under the Endangered Species Act. As ACC stated in its motion for dismissal, ACC had "achieved substantially all the relief [it] sought in this case through issuance of a biological opinion by the U.S. Fish and Wildlife Service (FWS) in May 2001 addressing the effects of the ongoing implementation of the Master Plan Update Development

[20] In the remainder of the embankment, the following criteria were based on background levels: antimony, arsenic, beryllium, copper and zinc. Gould Dec., Ex. E.

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Actions (MPU) for Seattle-Tacoma International Airport on threatened Coastal/Puget Sound bull trout and endangered marbled murrelets . . . ." Jones Dec., Ex. E. At that time, ACC proclaimed that "[t]he effect of the biological opinion and concurrence letter is exactly what ACC had sought to achieve in this case and the related district court case – to provide substantial additional protections for bull trout, chinook salmon and marbled murrelets. These administrative actions have rendered this case largely moot." *Id.*

ACC's argument on fill criteria hinges completely on its objection to the use of MTCA Method A standards. As discussed above, however, only four of the criteria in the amended §401 Certification are derived from MTCA Method A. Even with regard to those four criteria, ACC's MTCA analysis is flawed. First, ACC is simply wrong in claiming that a cost-benefit analysis had anything to do with the establishment of MTCA soil standards. Cost was not a factor in selection of the numbers. *See* Declaration of Peter Kmet (Ecology). Second, ACC has offered no evidence whatsoever showing any adverse effect on water quality arising from the §401 Certification's fill criteria, whereas the Port's evidence discussed above proves the opposite. ACC's attempt to create evidence out of two Ecology e-mails fails on its face,[21] and its entire fill criteria argument amounts to nothing more than speculation and should be rejected.

The numeric criteria for the entire third runway embankment are protective of water quality, as shown by scientific calculations previously adopted by FWS and accepted by ACC. The §401 Certification's fill criteria are either equal to or more stringent than those contained in the BO. Since ACC has yet to offer any evidence that the fill criteria will cause *any* adverse effects on water quality, ACC's challenge to the §401 Certification will certainly fail. Accordingly, ACC's motion for stay should be denied.

3. ACC's Other Fill-Related Objections Lack Merit. Although ACC's motion for stay does not deal directly with two of its prior objections to third runway fill, those arguments also lack any merit. The first relates to fill brought in prior to the issuance of the §401 Certification. Comments previously made by ACC on this issue during public comment periods contained no analysis or evidence but were instead based

[21] Lacking any evidence, ACC makes much of its mistaken belief that Ecology "rejected" recommendations made by Mr. Peter Kmet, a senior environmental engineer with Ecology's Cleanup Program. ACC relies on two e-mails in a strained attempt to make it appear that Ecology disregarded advice from Mr. Kmet about protection of water quality. *See* Exhibits G and H to the Declaration of Peter Eglick. In fact, Mr. Kmet's e-mail contradicts the statements now being made by ACC. It is apparent from the e-mail that Mr. Kmet's recommendation only addressed "potential impacts on plants and animals." It was not intended to address "human health exposure pathways or protection of aquatic organisms." In short, Mr. Kmet was answering a question that is different from the question posed by a §401 Certification. *See* Declaration of Peter Kmet.

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purely on conjecture. The evidence shows that there is no reasonable chance that any adverse effects to water quality will result from the Port's prior filling activities. *See* Clark Dec.¶¶3-15. The second issue, again raised largely without any foundation, concerns known contamination located near the airport terminal facilities and the fear that such contamination would migrate to the third runway embankment, where it might affect water quality in Miller Creek. Again, ACC's objections have no support and are contrary to fact. Struck Dec., ¶¶3-9.

F. There Is No "Per Se" Violation of Water Quality Standards From Project Stormwater

The Board has recognized that stormwater at STIA is already subject to comprehensive regulation pursuant to an NPDES permit.[22] The NPDES permit governs discharge of all stormwater at STIA, including the industrial wastewater system, and holds that:

> Compliance with this permit is deemed compliance with the Federal Water Pollution Control Act (33 U.S.C. §1251 et seq.) and the Water Pollution Control Act (RCW 90.48).[23]

Despite this existing regulatory oversight and the lack of any existing violations, and in spite of never appealing the NPDES permit, ACC makes broad and unsupported claims that existing stormwater discharges at STIA persistently violate state water quality standards.[24] ACC then jumps to the conclusion that Ecology is not permitted to issue a §401 certification for the new project at STIA. This unwarranted position ignores the evidence showing (1) that all applicable regulations are currently being met at STIA, (2) that the new project will be required to use all known, available reasonable methods of treatment ("AKART"), (3) that retrofitting and riparian enhancements will improve the existing conditions, (4) that whole effluent toxicity and recent in-stream testing show that water quality standards are currently being met, and (5) that the new project will be required to comply with site-specific water quality standards. A detailed discussion of those water quality issues is found in the Logan Dec. *See also* Fendt Dec.¶¶21,42–83, 88–90; Weitkamp Dec.¶¶2–17; Kelley Dec.¶¶56–61, 66–60, 80–89, 103.

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[22] *CASE v. Ecology*, PCHB 01-090 (Order Denying Motion to Stay, Aug. 29, 2001).

[23] Fendt Dec., Ex. G at 8.

[24] In sharp distinction to the unsupported legal position taken by ACC, the Board has frequently held that a §401 certification may be accomplished by conditioning the certification on the issuance of a NPDES permit – so long as the anticipated discharges may be feasibly controlled under an NPDES permit. *Protect the Peninsula's Future v. Ecology*, PCHB 96-178 (1996); *Okanagon Highlands v. Ecology*, PCHB No. 97-146 (1999) (Order Denying Summary Judgment).

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In many prior decisions, this Board has held that the use of best management practices (BMPs) for stormwater management constitutes all known, available and reasonable methods of treatment (AKART), and is the appropriate method for controlling stormwater. *Puget Soundkeeper Alliance v. Ecology*, PCHB No. 98-50 (April 15, 1999); *Waste Action Project v. Ecology*, PCHB No. 97-69 (Oct. 13, 1997); *Save Lake Sammamish v. Ecology*, PCHB No. 95-141 (June 27, 1996); *see also* WAC 173-201A-160(3). Here, Ecology has intensively reviewed and approved the proposed stormwater management plan as AKART. Fendt Dec.¶21.

1. ACC Has Failed To Show Any Persistent Violations of Water Quality Standards at STIA. ACC argues that, under current conditions, there are persistent, ongoing violations of water quality standards. ACC's allegations are factually incorrect for a number of reasons.

First, STIA is in compliance with a stringent NPDES permit, which constitutes per se compliance with the Clean Water Act and RCW 90.48. Logan Dec.¶6; Fendt Dec.¶¶51–54, Ex. G. Second, the evidence relied on by ACC compares apples to oranges. ACC relies on end-of-pipe (or in-pipe) "grab" samples to leap to the erroneous conclusion that over-time, numeric standards in streams are violated. There is absolutely no scientific basis for that conclusion. The end-of-pipe samples are *not* taken from waters of the state and there is *no* showing that the generic numeric standards (which require testing in appropriate sites, based on specific hardness criteria of the stream, and over specific time periods) have been violated – much less persistently violated. Logan Dec.¶¶ 5–8; *see* WAC 173-201A.040. Third, the only in-stream data cited by ACC's experts (old data from 1997) contains widely varied results and is impossible to attribute to any discharges at STIA. *Id.* Because STIA comprises such a small percentage of the relevant watersheds, and because the same types of stormwater constituents (copper, zinc and lead) are common from roadways, ACC has no valid, scientific proof of any existing violations. Logan Dec.¶¶ 5–9; Weitkamp Dec.¶¶6, 13. Fourth, the sediment samples relied on by ACC are irrelevant because there are no state standards for freshwater sediments and the pollutants in the sediments are, again, impossible to attribute to STIA (rather than to the roadways and parking lots in the majority of the watershed). More importantly, the highest sediment sample concentrations cited are substantially *lower* than Ecology's proposed standards and lowest apparent effect thresholds, and would not produce any adverse aquatic effects. Weitkamp Dec.¶13. Fifth, the most recent (1999) in-stream monitoring data shows that in-stream metals concentrations were well below even the

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generic, hardness-corrected numeric water quality standards for the metals about which ACC has expressed concern. Logan Dec.¶9. Sixth, the project is removing many sources of fecal coliform (homes on septic systems, pet populations, farms and farm animals), is enhancing the environment in a way the helps deal with such concerns (restored wetland and buffer functions as opposed to existing lawn and golf course), and adding uses that are not significant contributors of fecal coliform to the stormwater system (fenced runway/taxiway areas and rooftops for maintenance areas).

Moreover, the Port's toxicity testing program has provided reasonable assurance that the new project will meet water quality regulations. The recent in-stream toxicity testing program (1999) showed absolutely no toxicity problems in area streams. Logan Dec.¶9. These tests focused in particular on runoff from outfall SDS3, because SDS3 drains the majority of the existing STIA airfield (runways, taxiways and infields) and is most representative of future conditions from the new third runway project (runways, taxiways, infields). *Id.* In addition, the industry-standard, whole effluent toxicity (WET) testing program at STIA gives reasonable assurance that the new project will not harm water quality. Logan Dec.¶¶11–18. Testing was done on 100% stormwater, and all outfalls tested except one met the performance criteria in the NPDES permit. In particular, there were no problems at SDS3, which is most representative of the project for which the §401 Certification was issued. The only outfall to exhibit toxicity issues was outfall SDN1, and the Port back-traced the toxicity to zinc from uncoated galvanized rooftops. That problem can be readily addressed (either by treating runoff or treating the rooftop). This WET testing provides Ecology with reasonable assurance because all new rooftop areas for the new project will utilize non-leaching materials. *Id.*

Finally, Ecology has reasonable assurance that water quality standards will be met because the new project at STIA must comply with site-specific standards to be developed through a Water Effects Ratio (WER) or other site-specific study. *See* §401 Certification (Cond.J2a). This process is expressly approved by Ecology regulations. Logan Dec.¶¶19–20; WAC 173-201A-040(3). A WER allows the development of site-specific standards because generic, numeric water quality standards are based on tests with pure, laboratory water, and the bioavailability (and hence, toxicity) of chemicals is frequently significantly reduced by natural constituents in water bodies. Logan Dec.¶¶19–22. Two preliminary WER studies have already been conducted to determine the range within which a WER standard would fall at STIA, and the expert evidence shows that development of a site-specific standard is feasible. Logan Dec.¶¶23–28. The WER for

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copper, for example, would be from 7 to 16 times higher than the generic numeric standards. This does *not* mean that waters of the state would be less protected, but rather shows that copper is between 7 and 16 times less toxic in stream water near STIA than in laboratory water. *Id.*

In sum, ACC has failed to show any persistent water quality violations at STIA. Even if there were existing violations, which there are not, ACC cites no authority that the new project could not be certified pursuant to §401. Section 401 only requires that discharges from the facilities needing the federal license or permit will comply with state water quality regulations. 33 U.S.C. § 1341. The recent in-stream and toxicity testing at STIA, the monitoring and toxicity testing at outfall SDS3 (which is most representative of stormwater off runways, taxiways and infields), and the requirement for the WER or other site-specific study in the §401 Certification provide Ecology with reasonable assurance that the new project will comply with state water quality regulations.

2. ACC's Allegations Regarding Glycols Are Entirely Without Merit. Glycols are anti-icing agents that are utilized for safety purposes during limited times of the year at STIA. They are used relatively infrequently because of the mild Seattle-Tacoma climate, and heavy usage is limited to brief mid-winter episodes. All glycol application takes place in areas draining to the Industrial Wastwater System, and appropriate BMPs are in place, so any glycol in stormwater is the result of drip and shear off planes as they taxi to runways and take off. Logan Dec.¶34; Fendt Dec.¶¶55-58.

ACC first claims that glycol discharges to stormwater are not permitted. However, the STIA NPDES permit recognizes that de-icing agents that shear and drip from aircraft are allowed in stormwater. Fendt Dec., Ex. G, Cond.S1(A). ACC also alleges that toxic amounts of glycol are discharged to stormwater and that amounts as low as 1.8 mg/L are toxic. ACC relies on a single report (Hartwell) that is not only contradicted by the great weight of scientific evidence, but is also demonstrably incorrect. Logan Dec.¶¶35–58. First, it is the additives in glycols that are toxic, and glycols have been reformulated in recent years to be far less toxic. (Over 95% of glycols at STIA are the less toxic Type I.) More important, the Hartwell study mis-translated data and is off by a factor of 1,000. The scientist that provided the original reports on which Hartwell was based has confirmed that the Hartwell study is incorrect. *Id.* at ¶¶46, 61. When corrected, the Hartwell study conforms to the great weight of contemporary studies – Type I glycols are a concern at levels of approximately 1800 mg/L and over. *Id.* at ¶¶35–58. All of the concentrations reported by ACC are well

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under that threshold and the presence of even those levels in stormwater are very infrequent. Moreover, there have been two separate studies at STIA disproving any connection between de-icer use and impacts on the ponds at STIA. Fendt Dec.¶¶76–78.

3. Specific Effluent Limits Are Not Required in a §401 Certification. As shown above, because there are no violations of water quality standards at STIA, there is no need for specific effluent limits on stormwater, and ACC's claim that effluent limits were required is without merit. Moreover, the Board has frequently held that numerical effluent limits are not required for stormwater. *E.g., Puget Soundkeeper Alliance v. Ecology*, PCHB No. 98-50 (April 15, 1999). Further, the Port's NPDES permit contains effluent limits where necessary, for sanitary sewer and industrial stormwater discharges.

4. BMPs Are Effective. With no proof, ACC alleges that the BMPs at STIA cannot remove pollutants. Stormwater expert Paul Fendt explains that biofiltration is effective at removing many organic and inorganic particles and rendering them inert. Based on the preliminary WER analysis taken by the Port, the BMPs in the SMP are appropriate. Fendt Dec.¶¶41–43; Logan Dec., Ex.C.

5. Mixing Zones Are Not "Pre-Allowed" by the §401 Certification. The §401 Certification mentions mixing zones in the context of monitoring – "any" mixing zones must be shown to be minimized. §401 Certification, Cond.A2. This is certainly not an "allowance" for a mixing zone – but if there were one in the future, it would have to be minimized. Moreover, contrary to Mr. Luster claims, the mere mention of a mixing zone (or even application of a mixing zone) is not an admission that water quality standards will be violated. Mixing zones are specifically allowed by Ecology regulation. WAC 173-201A-100(10) (allowing mixing zone for stormwater); *Waste Action Project v. Ecology*, PCHB No. 97-69 (Oct. 13, 1997) (allowing mixing zone to demonstrate compliance on pollutant-by-pollutant basis). As discussed above, Ecology has ample evidence that water quality standards will be complied with. No mixing zones are currently required at STIA. *See* NPDES permit (Fendt Dec., Ex G).

6. Groundwater From MTCA Sites at STIA Will Not Migrate to Creeks. ACC asserts the broad claim that pollutants from isolated MTCA cleanup sites at STIA may migrate and release to streams because of the third runway construction – over one half mile away from those sites. As demonstrated by expert geologist John Strunk, the contamination is near the terminal area, is contained laterally, and based on

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extensive analysis, there is no reasonable threat that contaminated groundwater will migrate to the third runway area. Strunk Dec.¶¶3–9.

7. Retrofitting of Existing Stormwater System and Riparian Mitigation Will Improve Existing Conditions. ACC claims that retrofitting at STIA will not occur because the Port has discretion on whether to retrofit. Again, ACC is incorrect. The SWP sets forth the schedule for retrofitting the existing airport. The entire STIA facility will be retrofitted for peak flow control. All but a small portion (80 acres) of STIA will be retrofitted for stormwater quality. This decision is final and required in the §401 Certification. Fendt Dec.¶¶59–64; *see* §401 Certification, Cond.J1. The combination of this retrofitting and the removal of polluting uses in the new construction areas (over 400 houses and businesses, septic systems, golf course, and farms) will contribute to improved water quality in the Des Moines and Miller Creek basins. Fendt Dec.¶¶59–64. As described by wetland ecologist Dr. James Kelley, significant improvements to the riparian habitat will be constructed. Kelly Dec.¶¶ 56–61, 66–60, 80–89, 103. Fisheries biologist Don Weitkamp describes in detail the conclusions in the Biological Assessment (no adverse impact on listed species) and the Essential Fish Study (no long-term adverse impacts and restoration projects will provide a long-term benefit). Weitkamp Dec.¶¶8–11, 17. For all the reasons above, Ecology had reasonable assurance that the NPU improvements will comply with water quality regulations.

G. ACC Has Failed To Show Any Likelihood of Irreparable Harm.

ACC's only alleged harm is that wetland filling (and other work authorized by the Corps' §404 permit) will take place. ACC has failed to prove that any harm will actually occur, however, because the §401 Certification itself does not authorize any work.[25] Moreover, as shown in the declarations of Dr. Kelley and Ecology's Eric Stockdale, all wetland functions will be fully mitigated. The §401 Certification merely notifies the Corps that activity which might be permitted under a future federal permit will meet state water quality standards. 33 U.S.C. § 1341; *PUD No. 1 of Pend Oreille County v. Ecology*, PCHB No. 97-177 (October 15, 1998).

The proposed work at STIA that requires a §404 permit (the same work certified in the §401 Certification) will not occur unless and until the Corps issues a permit for that work. ACC claims that the

[25] The Port is currently performing work in the uplands portion of STIA, pursuant to a valid NPDES Permit and other valid agency approvals. No Corps permit is required for that ongoing wetland work.

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§404 permit will issue, but even the hearsay evidence cited by ACC only states that the Corps "hopes" to make a permit decision within two months – not that any form of permit will issue or the date of issuance.[26] In fact, the Corp has not stated when a 404 permit will issue, only that it will eventually make a decision to grant or deny the Port's permit application.

The ACC assumes, without any analysis or citation to authority, that the Corps would be required to hold off on its §404 permit decision should a stay of the §401 Certification be issued. That is not, in fact, the case. The Corps' regulations and regulatory guidance do not require the Corps to deny or withhold permit issuance based on issuance of a stay by the Board. *See* Regulatory Guidance Letter 87-03 ("RGL").[27] The RGL explicitly states that

> Once a Section 401 water quality certification has been issued or a waiver has occurred, the district engineer is not required to deny or condition the Corps permit should a state subsequently deny or add written conditions to the Section 401 ... certification.

RGL 87-03. The only instance in which the Corps is prohibited from issuing a §404 permit is where a state or federal court voids or sets aside the §401 Certification before the Corps issues the permit and within the statutory one-year date from the date of application. While the Board clearly has jurisdiction to hear appeals of Ecology orders, the Board is not a state or federal court and a stay would not amount to voiding or setting aside the Certification. Under the RGL, a stay would not prevent the Corps from taking the action ACC seeks to prevent. ACC's assertion of irreparable harm fails because the harm ACC asserts is not caused by the §401 Certification itself, rather the harm alleged by ACC is contingent upon future permitting action by the Corps.

Because the Board cannot redress the harm ACC asserts in its motion for stay, the Board should also find that ACC has no standing to bring this motion.[28] *CELP v. Ecology*, PCHB 96-165 (1997) (Board must have legal authority to impose a remedy that will redress the injury). Here the Board cannot grant ACC the

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[26] Stock Dec., Ex. A.

[27] Jones Dec., Ex. G. Although the RGL is dated April 14, 1987, and includes an expiration date of December 31, 1989, the RGL has not been superceded and continues to be followed by the Corps. *See* 64 Fed. Reg. 13, 783 (March 22, 1999) (unless superceded by subsequent regulations or RGLs, the guidance provided in RGLs remains valid after expiration date).

[28] Ch. 43.12B RCW does not grant the Board general equitable power, which would be required to prohibit fill under a federal permit. The Board has authority to issue stays. RCW 43.21B.320(3). In this instance, however, a stay will not provide the relief the ACC seeks.

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remedy it seeks. This does not mean, however, that ACC is without a remedy. If the Corps issues a §404 permit, ACC has an immediate and complete remedy available to it in federal district court. *Citizens Alliance to Protect Our Wetlands v. Wynn*, 908 F. Supp. 825 (W.D. Wash. 1995).

Moreover, the U.S. Supreme Court has held that administrative decisions are not ripe for review when the actual activity that would produce the alleged harm requires a separate permit decision that could be challenged in a separate judicial proceeding. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 118 S.Ct. 1665 (1998). The Board should reach the same result in this case, finding that ACC's motion is not ripe because ACC's alleged irreparable harm will not occur until the Corps issues a permit.

Finally, as discussed above and in the Kelley Dec., the Port is providing extensive and wide-ranging mitigation for all wetland impacts. As explained by Dr. Kelley, all wetland functions are being mitigated, so there will be no irreparable harm even if fill occurred. *Kelley Dec.*¶¶49-103; *see Wynn*, 908 F. Supp at 833-34 (no irreparable harm where 17.4 acres of wetland fill in Auburn area was being mitigated by 56.5 acres of wetland creation and enhancement in Mill Creek area). ACC has not met its burden of proving irreparable harm and, therefore, its motion for stay on that ground must be denied.

H. The Public Interest Weighs Heavily In Favor of Denying the Motion For Stay.

The Board will also not grant a stay if there is an overriding public interest. *Ortman v. Depts. of Agriculture and Ecology,* PCHB 99-115 and 116 (October 7, 1999) (denying stay, in part, based on showing of overriding public interest). In this case, the improvements at STIA are crucial to the region's transportation infrastructure. Lindsey Dec.; Feldman Dec. With respect to citizens in Eastern Washington, who are the first to be delayed or cancelled when there are delays at STIA, Port of Pasco Airport Director James Morasch declares that any delay in construction of the third runway at STIA will cause "substantial injury to the citizens and businesses of the Tri-Cities and the operations of the Tri-Cities Airport." Morasch Dec.¶ 6. Mr. Alan Ralston of The Boeing Company declares that delays at STIA are a serious problem for The Boeing Company and its customers. Ralston Dec.¶¶3-6. Seattle Mayor Paul Schell declares that it is of "vital importance to the citizens and businesses of Seattle" to get the third runway at STIA operational at the earliest possible date. Schell Dec.¶¶5-6.

With respect to the Port, if a stay were entered and the Port was unable to continue with its construction schedule during the pendency of this appeal, the costs would be on the order of $17 million per

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year ($49,000 per day). Construction and operation of the new third runway would be delayed for a year. Cheyne Dec.¶¶5–10. Moreover, in sharp contrast to ACC's speculation about immediate wetland filling, the construction schedule for the MPU improvements is a careful progression. Only approximately 2.8 acres of wetlands would be filled near term (if a §404 permit is issued) in order to complete access roads and continue work on the embankment. For the remaining 15.4 acres of wetlands scheduled for fill, the only planned work in those wetlands prior to March 2002 is temporary erosion and sediment control. The actual fill of those wetlands would not take place until months (and in some instances years) after the issuance of a §404 permit by the Corps of Engineers. Cheyne Dec.¶¶9, 11–12.

The Board should consider the impacts to the public interest, especially in light of the full mitigation of all wetland impacts provided by the MPU projects, and deny ACC's motion for stay.

Respectfully submitted this 1ST day of October 2001.

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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

Airport Communities Coalition, Appellant, v. Department of Ecology and The Port of Seattle, Respondents.	No. PCHB 01-133 CERTIFICATE OF SERVICE

Autumn C. Webb certifies that, on October 1, 2001, I filed/served the following documents on the following persons by the means specified below:

1. Port of Seattle's Memorandum Opposing ACC's Motion for Stay;
2. Declaration of Paul Schell;
3. Declaration of James L. Morasch;
4. Declaration of Alan C. Ralston;
5. Declaration of Michael Feldman;
6. Declaration of Michael Cheyne;
7. Declaration of Gina Marie Lindsey;
8. Declaration of Elizabeth Clark;
9. Declaration of John J. Strunk;

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ORIGINAL

10. Declaration of C. Linn Gould;

11. Declaration of Joseph Brascher;

12. Declaration of Linda R.J. Logan, Ph.D;

13. Declaration of James C. Kelley, Ph.D;

14. Declaration of Paul S. Fendt;

15. Declaration of Donald E. Weitkamp, Ph.D;

16. Declaration of Steven G. Jones; and

17. This Certificate of Service.

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