

Luster, Tom

From: Luster, Tom
Sent: Wednesday, September 27, 2000 1:40 PM
To: 'Stockdale, Erik'
Subject: FW: Dinsmore Draft


DELIBERATIVE DOCUMENT

Hey --

Here's my draft denial letter, and the latest draft of the withdrawal letter below...



SeeTac401denial.doc

Tom L.

-----Original Message-----

From: Fitzpatrick, Kevin
Sent: Wednesday, September 27, 2000 11:35 AM
To: Luster, Tom; Hellwig, Raymond; Marchioro, Joan (ATG); Stockdale, Erik
Subject: FW: Dinsmore Draft

I have made my edits, deletions and additions to the attached document in red.
Kevin

-----Original Message-----

From: Luster, Tom
Sent: Wednesday, September 27, 2000 10:01 AM
To: Hellwig, Raymond; Marchioro, Joan (ATG); Fitzpatrick, Kevin; Stockdale, Erik
Subject: RE: Dinsmore Draft

Hi all --

ATTORNEY CLIENT PRIVILEGED

Thanks for the letter, Ray. I've made my edits in the attachment below.



DinsmoreTL.doc

I have a couple of main concerns:

The draft unnecessarily and inappropriately limits the scope of our review. We've received a number of comments in the past couple of weeks that I have not yet been able to review, and I assume that some of those comments will need to be incorporated into our subsequent 401 review. Additionally, we will be going through another public comment period, and we are likely to have several additional substantive issues raised that must be addressed if we are to

provide a defensible 401 decision.

We cannot promise the Port that this letter contains all the issues that need to be addressed, since we don't know them all yet, and since that would completely ignore the required public process. It's not likely that every issue raised during the public comment period will need to be a part of our 401 review, but there will be some, and we should not mislead the Port on this.

We must be clear on the timing issue. I do not agree with an artificial sixty-day review period -- while I understand the desire to provide the Port some certainty, it does not realistically reflect the complexity and controversy of the project. I think given the pressures associated with this proposal, the history of issues related to timing, etc., we will spend a significant amount of any sixty-day period debating where we are in the sixty-day period.

If we must include a sixty-day review period, here are some keys to making it work:

- 1) we do not present the Port with the full detailed list of issues until after the public comment period;
- 2) the sixty-day period does not start until after the end of the public comment period, after our review of comments and presentation to the Port of issues to be resolved, and after the Port's submittal of complete and approvable documents; and,
- 3) we make it clear as to when the clock starts and stops -- for instance, if the Port submits addenda or supplemental documents after we've accepted what are presented as "final, approvable" documents, the clock starts over (i.e., no more documents dribbling in a page or a chapter at a time).

We should also anticipate public disclosure requests from various groups to allow outside review of some of these documents, and we should anticipate review comments from those groups on those documents. We should decide now how to handle comments received while we are in our sixty-day review mode -- perhaps we could accept review comments for the first thirty days of the sixty-day review period, and then have the last thirty days be a "blackout" period in which we review everything received and make our 401 decision or conditions accordingly.

I hope these comments help us get to a workable and defensible review process. Please let me know if you have questions.

Tom L.

-----Original Message-----

From: Hellwig, Raymond
Sent: Tuesday, September 26, 2000 9:40 PM
To: Marchioro, Joan (ATG); Fitzpatrick, Kevin; Stockdale, Erik; Luster, Tom
Subject: Dinsmore Draft

"ATTORNEY CLIENT PRIVILEGE"

The attached letter attempts to incorporate messages and tone conveyed to me by Tom F. Don't be shy about offering edits etc. Obviously the meat is the portion describing conditions and stormwater submittal requirements.

I'll see Joan down in Olympia tomorrow. Please don't hesitate to leave me messages or try to get a hold of me in Olympia. Please coordinate with Joan as appropriate.

Thanks.

(Tom/Erik, you are off the hook for the Thursday a.m. meeting at the Port Offices (Pier 69) - per my voice mail.....)

<< File: Dinsmore.doc >>

AR 018456

DRAFT – ATTORNEY-CLIENT PRIVELEGED

CERTIFIED MAIL

date

TO: Port of Seattle
17900 International Blvd., Suite 402
Seattle, WA 98188-4236
ATTN: Mr. Michael Cheyne

TO: District Engineer
Department of the Army
Seattle District, Corps of Engineers
P.O. Box 3755
Seattle, WA 98124
ATTN: Tom Mueller, Chief
Regulatory Branch

RE: Denial of request for Water Quality Certification #1996-2-02325R – Port of Seattle. Place fill and excavate material from approximately 18.33 acres of streams and wetlands in and adjacent to Des Moines, Miller, and Walker Creeks, in King County, Washington, with additional direct and indirect impacts to waters of the state for construction and operation of a proposed Master Plan expansion of Seattle-Tacoma International Airport.

Dear Mr. Cheyne and Mr. Mueller:

The Department of Ecology (Ecology), on behalf of the state of Washington, has reviewed the above-referenced proposed project pursuant to the applicant's request for water quality certification under Section 401 of the federal Clean Water Act. This review for water quality certification is required as part of the Section 404 review being done by the Seattle District U.S. Army Corps of Engineers for the proposed discharge of dredged or fill material into navigable waters. Section 401 review is meant to ensure compliance with Sections 301, 302, 303, 306, and 307 of the Clean Water Act and other appropriate requirements of state law, which include RCW 90.48 and 173-201A WAC.

At this time, Ecology does not have reasonable assurance that the proposed project will comply with the applicable federal and state water quality requirements and is unable to certify that this proposed project meets the necessary requirements. Therefore, per Section 401 of the federal Clean Water Act, the applicant's request for water quality certification is denied.

The reasons for denial include, but are not limited to, the following:

- Inadequate Stormwater Management Plan: the current proposed Stormwater Management Plan includes serious deficiencies that must be corrected before Ecology has reasonable assurance that the Stormwater Plan will allow water quality standards to be met. These deficiencies include errors in model calculations, inconsistencies between various parts of the Plan, and proposed stormwater treatment and detention measures that fall short of the Best Management Practices described in the Puget Sound Stormwater Manual and the King County Surface Water Runoff Manual.

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DOE 11/28/00 319

- **Inadequate Natural Resource Mitigation Plan:** the project, as currently proposed, does not yet include adequate mitigation for impacts to waters of the state. The applicant's current Natural Resource Mitigation Plan must be revised to include additional detailed analysis of the cumulative impacts of the proposed project, must include additional detailed mitigation elements that fully address these impacts, and must include improved performance standards in some areas. It must also be fully coordinated with other required project elements such as the Stormwater Management Plan.
- **Inadequate streamflow augmentation plan:** analyses of project impacts show that the proposed project would result in diminished streamflows in some areas. Ecology has informed the applicant that project mitigation must therefore include streamflow augmentation. While the applicant has proposed a flow augmentation plan, it does not yet include a confirmed source of augmentation water and does not yet include the level of detail necessary to provide reasonable assurance.

Consequently, we are unable to certify that the construction and operation of this proposed project will meet antidegradation requirements, will ensure beneficial and characteristic uses are maintained, and will sufficiently protect water quality and fish, shellfish, wildlife, and public use, as required by state water quality standards (173-201A WAC).

Ecology understands that the applicant plans to re-apply for water quality certification sometime in the near future. We will work with the applicant and the Corps to fully identify specific issues that must be addressed to meet the applicable requirements and will provide guidance to the applicant to help develop documents with the necessary level of detail and information for our 401 review.

Appeal Process: Any person aggrieved by this decision may obtain review thereof by appeal. The applicant can appeal up to 30 days after receipt of this decision, and all others can appeal up to 30 days from the postmarked date of the permit. The appeal must be sent to the Washington Pollution Control Hearings Board, PO Box 40903, Olympia WA 98504-0903. Concurrently, a copy of the appeal must be sent to the Department of Ecology, Enforcement Section, PO Box 47600, Olympia WA 98504-7600. These procedures are consistent with the provisions of Chapter 43.21B RCW and the rules and regulations adopted thereunder.

Please contact Tom Luster of my staff at (360) 407-6918 if you have any questions or would like more information.

Sincerely,

AR 018458

Gordon White, Program Manager
Shorelands and Environmental Assistance Program

GW:tl

cc: EPA – Joan Cabreza
USFWS – Nancy Brennan-Dubbs
WDFW – Phil Schneider
Ecology – Ray Hellwig, Paula Ehlers, Kevin Fitzpatrick, Erik Stockdale, Tom Luster
Ecology A.G.'s Office – Joan Marchioro
[others?]

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