

Luster
EXHIBIT NO. 209
7-102
M. Green

RECEIVED
SEP 12 2001
MARTEN BROWN INC.

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

AIRPORT COMMUNITIES COALITION,)
Appellant,) No. 01-133
v.) DECLARATION OF THOMAS R.
STATE OF WASHINGTON,) LUSTER
DEPARTMENT OF ECOLOGY; and) (Section 401 Certification No.
THE PORT OF SEATTLE,) 1996-4-02325 and CZMA concurrency
Respondents.) statement, issued August 10, 2001,
Related to Construction of a Third
Runway and related projects at Seattle
Tacoma International Airport)

Thomas R. Luster declares under penalty of perjury as follows:

1. I am over the age of 18, am competent to testify, and have personal knowledge of the facts stated herein. I have been asked to review the water quality certification that is the subject of this appeal and to provide the Board with information useful in determining whether the proposed project and the certification comply with applicable requirements of the federal Clean Water Act (CWA) and state water quality standards, and whether, consequently, the Board should issue a stay of the certification.

2. My professional background includes 12 years at the Department of Ecology (Ecology) working on water quality, wetland, and sediment-related issues. During my first four

DECLARATION OF THOMAS R. LUSTER - 1

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018680

1 years at Ecology from 1989 to 1993, I worked in the Sediment Management Unit. I evaluated
2 proposed freshwater sediment criteria, managed laboratory contracts related to developing these
3 criteria, and conducted public education and outreach. I was part of the team that prepared the
4 state's sediment management rule, which was adopted as part of the state's water quality
5 standards in the early 1990s.

6
7 3. From 1993 until January 2001, I was a member of Ecology's Federal Permits Unit
8 reviewing proposed projects pursuant to CWA Section 401 and the state's Coastal Zone
9 Management Program (CZMP).

10 4. In 1998, based on my experience at the agency, Ecology appointed me senior
11 policy and technical expert for issues related to Section 401 review, CZMP consistency
12 determinations, and coordinated state responses under Executive Order 81-18, which directed
13 Ecology to provide a state response to federal agencies. I remained in that position until January
14 2001. I provided statewide technical and regulatory guidance to Ecology staff and management
15 on proposed projects that required federal and state permits and involved work in state waters,
16 including wetlands. My responsibilities included developing policy, preparing rules and
17 guidelines, responding to legislative initiatives and inquiries, negotiating with public officials,
18 the regulated community, tribes, citizen groups, staff of Ecology and other federal, state, and
19 local agencies to ensure that state aquatic resource protection requirements were met. I was also
20 responsible for updating Ecology's 401 and CZMP practices based on regulatory or legal
21 developments at the federal level or in other states, and for informing Ecology staff and
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 2

HELSELL FEITTMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018681

1 management about these changes. I was lead author of the desk manual used by Federal Permit
2 Unit staff members at Ecology's headquarters and regional offices around the state to ensure
3 consistent technical, procedural, and substantive review of projects requiring 401 and CZM
4 decisions.

5
6 5. As part of my duties at Ecology, I also served as its lead advisor providing
7 statewide oversight and coordination for management and staff on a wide range of projects
8 requiring state CWA section 401 certifications for U.S. Army Corps of Engineers' Clean Water
9 Act Section 404 permits. Beginning in 1995, I was delegated signature authority for such
10 decisions by Ecology's directors. I was also responsible for training Federal Permit Unit staff and
11 ensuring that staff evaluated proposed projects consistently and in compliance with applicable
12 aquatic protection regulations.

13
14 6. During my tenure in the Federal Permits Unit, I reviewed and made certification
15 decisions or recommendations on more than 700 water quality certifications covering several
16 hundred acres of wetlands and mitigation sites throughout Washington State. I negotiated the
17 state's position on two rounds of CWA Nationwide Permits issued by the Corps of Engineers to
18 ensure the state's interests and aquatic protection regulations were addressed in the hundreds of
19 permit actions across the state having to do with wetland fill, streambank protection projects, and
20 other projects affecting aquatic resources. As a representative of Ecology, I also made
21 presentations on various aspects of 401 and CZMA at conferences and workshops.
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 3

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Oshorn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018682

1 7. In my twelve years at Ecology, I received several awards from the agency,
2 including its Environmental Stewardship Award in 1997. This award is given to a staff member
3 each year in recognition of carrying out Ecology's goals. I received it in part due to my work
4 successfully reviewing several complex and contentious projects seeking 401 certification.

5
6 8. Prior to joining Ecology, I worked at the Snohomish County Public Utility District
7 doing environmental assessments for sites suspected of having PCB contamination due to the
8 presence of older model electrical transformers. I was required to assess each site's potential for
9 environmental and human health risk and develop a prioritized list for replacing the transformers
10 based on level of risk.

11
12 9. My educational background includes a Masters of Science degree in resource
13 geography from Oregon State University and a Bachelor of Science degree in geography from
14 Humboldt State University. For both degrees, my work focused on various environmental issues,
15 including watershed analysis, riparian and stream function, visual resource analysis, and others. I
16 have actively continued my education since then by attending courses and workshops on subjects
17 such as wetland delineation and mitigation, stormwater management, salmon ecology, aquatic
18 toxicology, the legal and regulatory basis of water quality standards, and others. I have also
19 taught a number of courses and workshops on topics including Nationwide Permit compliance,
20 regulatory aspects of dam decommissioning, and other issues related to my 401 and CZMP work
21 at Ecology, and am also a member of the Society of Wetland Scientists.
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 4

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018683

1 10. Although I currently live in California, I still own a home and property in
2 Washington State that includes part of a large wetland complex.

3 11. As I gained experience in Ecology's Federal Permits Unit, I was assigned several
4 large, complex, and controversial proposed projects around the state that required 401 review,
5 including the Emerald Downs racetrack, Battle Mountain Gold, U.S. Navy dredging projects, and
6 the proposed SeaTac expansion and third runway. My role as Ecology's lead staff on the
7 proposed SeaTac expansion continued from sometime in 1995 or 1996 until October 2000 until
8 Ecology reassigned me. As part of my work on the proposed project, I wrote a 401 water quality
9 certification that was withdrawn after the discovery of significant additional wetland and aquatic
10 resource-related impacts that had not been disclosed earlier in the review. The Port subsequently
11 applied a second time for a 401 in the fall of 1999, but withdrew its application in September
12 2000, shortly before the one-year decision deadline imposed by the Clean Water Act. The Port
13 withdrew its application when Ecology informed the Port its certification request would be
14 denied because the proposed project had not yet met numerous regulatory requirements. A denial
15 letter to that effect had been prepared.

16 12. I have reviewed the current 401 certification issued by Ecology in August 2001
17 and understand it is based on review of the Port's third application for which notice was first
18 published on December 27, 2000. While I left Ecology in January 2001 to work in a similar
19 regulatory capacity for the state of California, I have continued to maintain familiarity with the
20 proposed project through review of various documents associated with the proposal and
21
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 5

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018684

1 occasional discussions with Ecology staff involved in the 401 review. I am therefore familiar
2 with the proposed project, the water quality-related impacts and issues, and the applicable
3 regulatory requirements.

4
5 13. My role as lead 401 reviewer during the several years I was responsible for
6 developing Ecology's decision on the proposed SeaTac Expansion and Third Runway project
7 included informing both the Port and Ecology of applicable requirements related to 401 and
8 water quality standards, reviewing Port submittals, requesting additional information as
9 necessary, and determining on behalf of the agency whether we had reasonable assurance that
10 water quality standards would be met. I represented Ecology at a number of site visits and
11 numerous meetings with Port officials and staff from other agencies, and convened public
12 hearings pursuant to the public notices. I attempted to obtain necessary information about the
13 proposal, its expected effects on water quality, wetlands, and other aquatic resource-related
14 issues. I also reviewed documents provided by the Port and its consultants, public comments and
15 documents provided by interested parties, and other materials necessary to inform Ecology's
16 decision on whether the proposed project would meet applicable aquatic protection requirements.
17

18
19 14. My role as 401 reviewer did not require an evaluation of whether a third runway
20 was needed. From a regulatory perspective, that question is primarily a part of the Corps'
21 alternatives analysis to determine whether a proposal needs to be built in waters of the U.S. The
22 401 review is based only on whether a project proposed to be built in state waters meets the
23 applicable water quality standards. If it does not, then it cannot be approved.
24

25
DECLARATION OF THOMAS R. LUSTER - 6

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018685

1 15. The proposed project is undeniably complex from both an environmental and
2 regulatory perspective. It is one of the largest proposed projects in the history of the state's 401
3 review process, and involves permanent and temporary impacts to several hundred feet of
4 streams and about 20 acres of wetlands in several different watersheds. It includes both existing
5 and future discharges to several waterbodies that already show evidence of impairment, and it
6 requires compliance with several interacting federal and state regulations. The proposed project
7 is located in an area subject to highly complex interactions between surface water, wetlands, and
8 groundwater, and is in or adjacent to areas of known or suspected soil and groundwater
9 contamination.
10

11 16. This declaration primarily addresses requirements related to Section 401 of the
12 CWA, which also involves compliance with state water quality standards. I first discuss some of
13 the significant regulatory elements of 401 review applicable to this proposed project, including
14 some general provisions of 401, the role of "reasonable assurance" in Ecology's decision making,
15 and the relationship between the different requirements of Section 401 and Section 402 (NPDES)
16 as they relate to this proposed project. I then describe several broad concerns about this proposed
17 project and evaluate several specific conditions of the August 2001 certification regarding their
18 compliance with applicable requirements. My conclusion is that many of the same problems that
19 prompted Ecology to inform the Port it would have to deny the previous 401 application have
20 still not been resolved. As a result, the August, 2001 401 certification is not based on reasonable
21
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 7

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018686

1 assurance that water quality standards will be met, and, in fact, the decision is likely to result in
2 water quality standards being violated.

3 17. Purpose of Section 401 certification: Section 401 of the CWA provides states an
4 opportunity to review projects requiring federal permits to place fill waters of the United States.
5 The state's review is to determine whether the construction and operation of a proposed project
6 meets all applicable federal and state water quality requirements, including portions of the CWA
7 as well as state water quality standards. The state may certify the proposed project as being in
8 compliance, may certify the proposal subject to various conditions, or may deny the certification.
9 The state's decision is binding on the federal agency. The state has up to one year to make its
10 decision, or the federal agency may consider the state to have waived.

11 18. A 401 certification is required only when an applicant proposes to place fill in a
12 waterbody, an activity that most of the time results in a permanent loss of waters of the state.
13 Unlike other permits, such as the 402 NPDES permit, which generally include a regular schedule
14 allowing initial permit requirements to be updated as necessary, a 401 decision is a one-time
15 opportunity to ensure compliance with state water quality standards and to inform the federal
16 permitting agency whether the proposed activities will meet the applicable requirements.
17 Therefore, the 401 review and decision is critical because it is the state's sole opportunity to
18 determine whether the proposed permanent loss of all or part of a waterbody is adequately
19 avoided, minimized, and mitigated, and whether the activities associated with construction and
20 operation of the facility requiring the certification meet water quality standards.
21
22
23
24

25 DECLARATION OF THOMAS R. LUSTER - 8

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018687

1 19. "Reasonable Assurance": For a certification to be issued, the agency must have
2 "reasonable assurance" that the proposed project will meet applicable water quality standards.
3 Requiring "reasonable assurance" as the standard for a 401 decision is in part a recognition of the
4 "one-time" nature of the permit – the state must be certain at the time of certification that the
5 proposed project will meet standards, because it will generally not have another opportunity to
6 weigh in. Section 401 does include provisions allowing certifications to be suspended or
7 revoked under certain circumstances, but there is no guarantee such suspensions or revocations
8 could occur before all or part of the permanent loss to a waterbody occurs.

10 20. During my several years of 401-related experience, Ecology's practice for meeting
11 the "reasonable assurance" standard generally meant that certifications could not be issued until
12 the agency had reviewed and approved complete and final documents submitted by the applicant
13 for critical project elements such as wetland delineations, wetland mitigation and monitoring
14 plans, a description of BMPs that would be employed at the project, and the like. In limited
15 instances when future approvals were anticipated, the "reasonable assurance" standard required
16 that the documents approved at the time of certification provide sufficient information to allow a
17 high degree of certainty that the water quality standards would be met.

19 21. Interaction of Sections 401 and 402 of the CWA: As mentioned before, the
20 proposed SeaTac expansion project requires both certification under Section 401 of the CWA
21 and NPDES permit coverage under Section 402 of the Act. Approvals issued under either
22 section 401 or 402 require compliance with similar aquatic protection requirements (e.g., Section
23
24

25
DECLARATION OF THOMAS R. LUSTER - 9

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018688

1 401 requires compliance with CWA sections 301, 302, 303, 306, and 307 for 401 permits, and
2 Section 402 requires compliance with CWA sections 301, 302, 306, 307, 308, and 403).

3 22. However, to address the immediate and permanent losses of waterbodies that
4 occur under 401 certifications, Ecology's practice has been to recognize that the CWA imposes a
5 stricter standard of review in 401 than it does in 402. Section 401(d) of the Act states that a 401
6 certification must include all necessary effluent limitations to ensure standards are met, while
7 Section 402(a) states that a 402 permit may include either those limitations or other measures
8 that would eventually lead to standards being met. In practice, this often results in an iterative
9 process occurring over one or more five-year section 402 permit cycles in which a permit will
10 require certain BMPs to be implemented, the resulting discharges to be monitored, the
11 monitoring data assessed to determine if additional BMPs need to be implemented, discharges
12 resulting from those new BMPs being monitored, and so on, until the applicable criteria are
13 eventually met. Also, 402 permits generally regulate the concentration or volume of effluent
14 being discharged from a point source (although they often include source control BMPs meant to
15 reduce contaminant loads at a facility before they enter the point source discharge).

16 23. In contrast, and as stated earlier, 401 certifications are only required when an
17 applicant proposes to place fill in a waterbody, thereby resulting for the most part in a permanent
18 loss of all or part of a waterbody. A 401 decision is the one-time opportunity for the state to
19 determine whether the proposed activity meets the applicable aquatic resource regulations and to
20 inform the federal permitting agency of its decision. Unlike the 402 process, it is not meant to
21
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 10

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018689

1 initiate an iterative multi-year process for bringing a noncompliant activity and project into
2 compliance, and its interaction with the federal permitting process generally does not allow the
3 initial decision to be revisited. For projects such as the proposed SeaTac expansion, it is not
4 sufficient to base a 401 decision on the adequacy of a 402 permit. For instance, if the 402 permit
5 does not include specific effluent limitations or does not require BMPs that are known to
6 adequately treat discharges to meet the applicable water quality criteria, then the 401 must serve
7 to "fill the gaps" and include conditions that address those shortcomings. It is in this context that
8 the third runway's project's 401 certification must be reviewed.
9

10 24. The issues raised by this review fall into several categories. First, in some
11 instances, the necessary information does not exist for Ecology to have reasonable assurance that
12 the applicable water quality standards will be met. In other instances, based on the information
13 that has been provided, it is apparent that there is no assurance that standards will be met. In
14 some of those instances, there is actually reasonable assurance that standards will not be met. In
15 addition, several specific conditions of the certification are flawed in that they are likely to lead
16 to noncompliance with the water quality standards.
17

18 25. In summary, and as explained below, based on my knowledge of the
19 environmental circumstances at and near the site, the certification overall is based on speculation
20 rather than reasonable assurance, and therefore the project as proposed and certified does not
21 conform to regulatory requirements. The conditions of the certification will not result in water
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 11

HELSELI FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018690

1 quality being adequately protected from project impacts associated with stream and wetland fill,
2 stormwater discharges, decreased streamflow, and other effects on the aquatic environment.

3 26. The environmental conditions at and near the proposed project site and the
4 approach chosen to design, review, and certify the proposal make it difficult, if not impossible,
5 for the proposed project to comply with Section 401 requirements: During Ecology's review of
6 the Port's second 401 application, it became apparent that, due to the scope of the Port's
7 proposal, the applicable regulations would require Ecology's review to be based on a
8 comprehensive, watershed-focused approach to determine whether the many interacting project
9 elements and associated impacts could meet 401 requirements. This would require both the Port
10 and Ecology to comprehensively re-assess the design, impacts, and mitigation elements of the
11 proposed project if Ecology was to eventually approve a valid and defensible 401 certification.

12 27. This conclusion was based largely on information available about the
13 environmental setting showing that several waterbodies were not fully supporting beneficial uses,
14 and that the existing levels of impairment in those waterbodies were being caused in part by
15 activities of the Port and facilities associated with the Port, as well as by non-Port-related
16 activities in the watersheds. The Port's third runway proposal did not adequately address these
17 activities, even though they were resulting in the effected waterbodies not meeting water quality
18 standards. It was apparent that the Port's proposal would likely continue and increase the
19 existing impairment. Because 401 review was required to address compliance of the waterbodies
20 with water quality standards, this issue could not be avoided. Examples of information leading
21
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 12

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018691

1 to this conclusion included data in the Des Moines Creek Basin Plan, prepared by a consortium
2 of local communities and the Port, which established that a number of beneficial uses in the
3 stream had already been impaired, including fish habitat and fish passage, and that the stream
4 was subject to regular exceedances of water quality criteria. The Port's discharge monitoring
5 reports required as part of its NPDES permit also showed ongoing exceedances of water quality
6 criteria. Monitoring also showed in many cases that criteria were being exceeded in the receiving
7 waters upstream and downstream of the various discharges. In addition, Des Moines Creek was
8 on Ecology's list of impaired waterbodies (pursuant to CWA Section 303(d)) due to high levels
9 of fecal coliform.
10

11 28. The different kinds of existing impairment in the waterbodies along with the
12 connections among them and the various elements and impacts of the proposed airport project
13 made it problematic whether an adequate mitigation plan could be implemented that would avoid
14 violations of water quality standards. Many of the solutions and mitigation measures the Port
15 was proposing for its new activities and project would have aggravated existing harm to aquatic
16 resources, thereby requiring additional evaluation and new mitigation measures. For instance,
17 some of the Port's proposed stormwater mitigation measures led directly to problems with low
18 streamflow or decreased the possibilities of success at wetland mitigation sites. The Port's
19 proposed resolution of low streamflow issues then resulted in significant questions about water
20 rights, groundwater contaminant levels, and other issues that needed to be resolved before
21 Ecology could reach the required level of reasonable assurance for this certification request.
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 13

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018692

1 29. As the review progressed, I became aware of other sources of information that
2 confirmed or expanded upon those identified above showing watershed-wide problems in the
3 area of the proposed project. I explained to the Port several times during the review that impacts
4 identified due to this information needed to be addressed as part of the 401 review because they
5 provided further documentation that the waterbodies affected by the existing and proposed
6 facilities were not meeting water quality standards. This additional information included:
7

- 8 • De-icing study: The Port provided a study of the effects of de-icing fluids in the Des
9 Moines Creek watershed. The study showed that several metals exceeded water quality
10 criteria in the Northwest Ponds. These ponds represent the single largest remaining
11 wetland complex in the watershed, are subject to discharges from the Port and other
12 facilities, and are a part of or adjacent to several mitigation elements of the Port's
13 proposal and other related proposed projects that would result in additional cumulative
14 impacts to the ponds. From my review, it appears that the 401 certification issued in
15 August 2001 does not address these metals concentrations and their deleterious effects on
16 water quality and beneficial uses in the wetlands and downstream waterbodies. It appears
17 instead to include tacit approval of a de facto mixing zone in the Northwest Ponds that
18 does not comply with requirements of the state water quality standards in WAC 173-
19 201A-100. Applicable requirements for mixing zones are discussed in more detail below.
20
21 • Studies of urban stream impacts and functions: Studies by Dr. Richard Horner and Dr.
22 Derek Booth of the University of Washington and others about the relationship between
23
24

1 the increase in percentage of impervious surface in a watershed and the resulting decline
2 in stream functions showed that once the percentage of impervious surface in several
3 urban watersheds in the Puget Sound area reached between 10 and 20 percent, stream
4 functions would begin to decline, due to factors such as increased water velocities and
5 scouring, greater differences between storm flows and low flows, increased contaminant
6 loads, and other factors. Both the Des Moines and Miller Creek watersheds include over
7 30% impervious surface, which is a level likely to not allow beneficial uses to be
8 adequately supported in the waterbody unless a number of significant measures are
9 implemented throughout the watershed to address these impacts. While the stormwater
10 plan being developed by the Port addressed reduction of streamflow velocity from Port
11 facilities during storm events, it did not necessarily reduce high contaminant loads
12 resulting from increased stormwater runoff, and not in a manner that would allow the
13 waterbody to meet standards.

- 16 • Reasonable potential analysis: Sometime in the spring of 1999, due to concerns about the
17 Port's early proposed stormwater plans and due to monitoring data from the Port showing
18 that existing BMPs did not adequately treat discharges to meet water quality criteria, staff
19 in Ecology's Water Quality Program were asked to assess the effectiveness of the BMPs
20 the Port was required to implement as a condition of its NPDES permit. That assessment,
21 known as a reasonable potential analysis, compared the characteristics of the Port's
22 runoff, the types of BMPs used to detain and treat the runoff, and the resulting
23
24

1 contaminant concentrations in the discharges. The analysis found that the BMPs were not
2 adequate to reduce contaminant concentrations in typical Port runoff to levels that met
3 water quality criteria. Of particular concern were results showing that copper and other
4 metals were not adequately treated, since very low levels of copper are known to
5 adversely affect fish. It appears that Ecology's analysis was not used to establish the new
6 BMP requirements in either the Port's current NPDES permits or in the recently issued
7 401 certification, despite it showing that water quality criteria would likely continue to be
8 exceeded.
9

- 10 • Reports on failure of mitigation sites: Reports published while the Port's 401 application
11 was pending showed that wetland mitigation projects in King County and throughout the
12 state of Washington had very low levels of success and often did not meet permit
13 requirements. These reports reaffirmed the need for better understanding up front during
14 the various review processes as to the likelihood of mitigation success and the specific
15 steps needed to ensure that success. These do not appear to have been incorporated into
16 the current 401 certification, which leaves key elements of the Port's wetlands mitigation
17 plan unresolved and allows the Port to submit significant elements affecting the success
18 of the various mitigation plans at some point in the future.
19
- 20 • Additional cumulative impacts: Both the CWA and state water quality regulations require
21 that the cumulative effects of a proposed project be included in the state's review for
22 compliance with water quality standards. Along with the proposed SeaTac expansion's
23
24
25

1 direct and indirect effects on about 20 acres of wetlands and several streams, it is also
2 associated with several other interrelated, known, or likely proposed projects that would
3 result in additional impacts to waters of the state. Several of these proposed projects
4 needed to be included as part of the 401 certification's cumulative impact analysis. These
5 include the proposed extension of State Route 509 and the airport's South Access Road,
6 which is planned to be built with Port funding and on Port property on the southern end
7 of the airport immediately adjacent to mitigation sites proposed as part of the current
8 project. It also includes the Des Moines Creek Regional Detention Facility, also
9 proposed to be built on Port property, between the SR-509 extension and the airport.
10 These proposed projects would require significant wetland, streamflow, and stormwater
11 mitigation measures in the same areas where mitigation is necessary for the Port's current
12 project, and where the Port and Ecology have experienced significant difficulty in
13 assuring adequate mitigation can be provided for just the current proposal. The current
14 401 certification does not appear to address this fundamental gap in analysis.

- 15 • Soil and groundwater contamination: The existing airport includes several areas of known
16 or suspected soil and groundwater contamination that have not yet been adequately
17 characterized to determine that they are not affecting surface waters. The Port and
18 Ecology recognized this years ago and developed an Agreed Cleanup Order under the
19 state's Model Toxics Control Act (MTCA) for part of the airport. To ensure that
20 contamination that may affect surface water quality was identified during the 401 review
21
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 17

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018696

1 and that necessary mitigation measures were included as 401 conditions, Ecology also
2 included compliance with the agreed order as a requirement of the Governor's
3 certification letter to the Federal Aviation Administration regarding the proposed SeaTac
4 expansion. This was done in recognition that the 401 was the key regulatory tool
5 available to the state to comprehensively address water quality impacts of the proposed
6 project.
7

8 30. All of the sources of information described above increased my concern about
9 whether the proposed project could meet water quality standards and whether Ecology could
10 issue a valid and defensible certification. Shortly before Ecology reassigned me in October 2000,
11 I realized that the proposed project had reached a point where it would be nearly impossible, if
12 not entirely impossible, to attain the level of reasonable assurance needed to approve a
13 certification due largely to the proposal's interconnected impacts, the difficulty the Port was
14 having with providing the necessary information, the limitations on mitigation opportunities at
15 the various sites, and other issues.
16

17 31. Despite issuance by Ecology of the August 2001 certification, it is evident that the
18 fundamental problems, which we had previously identified, still exist. The August 401 decision
19 does not adequately address the regulatory requirements needed to ensure compliance with water
20 quality criteria, support beneficial uses in the receiving waters, and ensure cumulative impact
21 requirements are met, and does not provide certainty that the proposed project would be
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 18

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA, 99201

AR 018697

1 constructed and operated in a manner that ensures consistency with water quality standards.

2 Some examples which illustrate these shortcomings follow.

3 32. Information needed to issue a certification based on "reasonable assurance" and
4 compliance with water quality regulations is either lacking or is insufficient: As noted above,
5 there was already during my review of the Port's application a preponderance of evidence that
6 water quality standards were being violated and that existing and proposed activities by the Port
7 would continue and aggravate this non-compliance. The majority of conditions in the August
8 2001 401 certification essentially concede that information provided since I left Ecology is also
9 significantly incomplete and speculative at best, and consequently falls short of the scope and
10 detail needed to provide reasonable assurance. In fact, several conditions essentially state that
11 Ecology expects water quality standards to be violated unless and until the Port submits
12 additional information necessary to determine otherwise. These include the following:
13

- 14 • Certification Condition A.2.d. & g. (page 3) – these conditions show that Ecology has
15 either implicitly approved mixing zones, assumed mixing zones will be necessary, or
16 determined that the proposed project will not comply with the water quality standards
17 unless mixing zones are approved. However, Ecology has not met the requirements of
18 WAC 173-201A-100(1) through (16) that requires specific review and approval of
19 proposed mixing zones. These certification conditions therefore do not comply with the
20 water quality standards and are likely to result in violations of water quality in the streams
21 subject to these mixing zones. For example, subsection (1) of the mixing zone
22
23
24

1 regulations requires that the allowable size of mixing zones be established in discharge
2 permits or orders. Subsection (4) allows mixing zones to be authorized only when
3 supporting information clearly indicates they would not result in the loss of sensitive
4 habitat, interfere with existing or characteristic uses of the waterbody, and other
5 requirements. Subsection (7) establishes maximum allowable sizes for mixing zones
6 (e.g., no more than 25% of the width of a waterbody, no more than 300' downstream from
7 a discharge, etc.) that can be exceeded only after further specific review and findings by
8 Ecology under other subsections. The 401 decision does not reflect that Ecology has
9 completed any of this required analysis, and the certification does not address,
10 incorporate, or refer to any such analysis. These omissions are significant in part because
11 the receiving waters – Des Moines, Miller, and Walker Creeks – that would be subject to
12 these mixing zones are so narrow as to make it impossible to meet the applicable width
13 requirement and the existing levels of impairment make it unlikely that mixing zones
14 would support beneficial uses of the waterbodies. Therefore, the certification does not
15 provide a basis for ensuring compliance with water quality standards and, in fact, does
16 not conform to those standards.

- 17 • Certification Condition F.1 (page 18) requires the Port to submit by September 30, 2001
18 proposed Best Management Practices showing it can prevent the transport of
19 contaminated groundwater that may be intercepted by utility corridors. The condition is
20 meant to address significant but inadequately addressed impacts associated with both
21
22
23
24

25
DECLARATION OF THOMAS R. LUSTER - 20

HEISELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018699

1 known and suspected soil and groundwater contamination in many areas at and near the
2 airport that may migrate to nearby surface waters. Again, this condition relates to a
3 significant issue that was not resolved during my 401 review, despite numerous
4 discussions with the Port in an attempt to develop an effective solution. It does not
5 comply with WAC 173-201A-160(3)(b), which requires BMPs for non-point sources to
6 be applied so that violations of water quality criteria are prevented. Because the
7 condition does not describe the contaminants of concern, their concentrations, or what
8 specific BMPs will be used to meet this requirement, it cannot be a basis for reasonable
9 assurance for purposes of the current certification. Additionally, no explanation is
10 provided as to why the condition allows the Port to defer its submittal and Ecology to
11 defer its review until sixty days after issuance of the 401 certification itself. This issue is
12 of special significance, given the existing inadequacies in the characterization of areas of
13 known and unknown contaminated areas on and adjacent to SeaTac, and the likelihood
14 that some of these areas may discharge to surface waters. As shown during the several
15 years of negotiations attempting to resolve the terms, meaning, scope, and analysis of the
16 Agreed Order, this matter is not likely to be adequately addressed in the next sixty days.
17 It is likely to take substantial and lengthy effort by the Port and Ecology to further assess
18 the types and locations of contaminants, their fate and transport during construction and
19 operation, and their interaction with groundwater at the airport. Until those issues are
20
21
22
23
24
25

DECLARATION OF THOMAS R. LUSTER - 21

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018700

1 addressed, it is not possible to have reasonable assurance that aquatic resource-related
2 impacts that may be associated with these contaminated areas will be resolved.

- 3 • Certification Condition C.4. (page 5) allows the Port to request extensions of the various
4 post-certification deadlines, which would allow further deferral of the information needed
5 to determine whether there is a basis for reasonable assurance. Given the long history of
6 difficulty we at Ecology had in convincing the Port to submit necessary and adequate
7 information, required mitigation measures, and the like, it is highly unlikely that various
8 submittals required of the Port due to certification conditions will be timely and complete,
9 and will be submitted and approved before various impacts to waterbodies occur. This
10 condition could easily result in discharges and their associated impacts occurring without
11 adequate mitigation and without complying with Section 160(4)(a) of the water quality
12 standards, which prohibits compliance schedules for new discharges. This section of the
13 water quality standards essentially recognizes that new discharges designed and operated
14 with the benefit of current knowledge about available and effective BMPs do not need a
15 compliance schedule, because recently-developed BMPs, including improved source
16 control measures, improvements in treatment technology, and the like, are available that
17 allow discharges to fully comply with water quality criteria.

18
19
20
21 33. Again, the difficulty we at Ecology had in obtaining necessary information from
22 the Port is exemplified by the history of Port's stormwater plan. When Ecology hired experts
23 from King County to review the Port's proposed stormwater plan, they estimated it would take
24

25
DECLARATION OF THOMAS R. LUSTER - 22

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018701

1 about 6 – 8 weeks to review it for consistency with measures contained in the King County
2 stormwater manual. Because the Port's various submittals associated with this plan were
3 incomplete, used internally inconsistent data, incorrect assumptions, and other flaws, the review
4 took over a year and a half, and as is evident from the certification, is still not complete.
5

6 34. Certification Condition A.2.a. (Page 2) requires the Port to submit a monitoring
7 plan for each in-water or shoreline construction project. For purposes of reasonable assurance,
8 approved plans should have been submitted as part of the certification review and incorporated
9 into the final decision if they are part of the basis for determining the proposed project will not
10 violate water quality standards.
11

12 35. I have an additional concern related to these delayed submittals. The certification
13 requires many of them to be submitted for Ecology review and approval during the next several
14 weeks or months, and well within the maximum allowable time period for certification review of
15 one year. If, as the certification indicates, these submittals are needed for Ecology to have
16 reasonable assurance, then the certification should not and need not have been issued without
17 them since there was time for the Port to complete them before the one-year 401 decision
18 deadline for its application. My experience at Ecology was that while we did not unnecessarily
19 attempt to use the full year of review time, we did use as much of it as was necessary to ensure
20 all the relevant issues of a proposed project were addressed and we had final approved plans that
21 resulted in reasonable assurance of compliance with water quality standards. Examples in the
22
23
24
25

DECLARATION OF THOMAS R. LUSTER - 23

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA.99201

AR 018702

1 August 2001 certification of these unnecessary delays and significant gaps resulting from them
2 include:

- 3 • Certification Conditions D.F-3 (pages 5-9) require the Port to submit a revised Natural
4 Resource Mitigation Plan (NRMP) by November 30, 2001. Most of the required
5 revisions are specified in the conditions; therefore, it should have been relatively simple
6 for Ecology to have waited until the Port agreed to and submitted the changes for Ecology
7 approval. This would have resulted in reasonable assurance at the time of certification,
8 rather than speculation that it will come at a point several months in the future. This
9 delayed assurance is of particular concern given the numerous inadequate or incomplete
10 revisions the Port has made to its NRMP, miscommunications between Ecology and the
11 Port regarding mitigation requirements, and past delays in Port submittals of parts of the
12 NRMP.
13

14
15 Also, this approach of allowing future submittal of a final mitigation plan needing
16 further Ecology approval conflicts with other recent agency "reasonable assurance"
17 determinations on 401 certification requests. In my experience as Ecology's senior 401
18 expert, Ecology would regularly either deny certifications or have the applicant withdraw
19 its request for certification if mitigation plans or other documents were not adequate.

20
21 One significant recent example of this is Ecology's denial in September 2000 of a request
22 for certification from the Corps of Engineers for the proposed channel deepening in the
23
24

25
DECLARATION OF THOMAS R. LUSTER - 24

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018703

1 lower Columbia River. Ecology denied certification of this proposed project in part due
2 to the Corps' failure to submit complete and final wetland mitigation plans.

- 3 • Certification Condition D.4 (page 9) requires the Port to submit an additional mitigation
4 proposal for further Ecology approval by September 30, 2001. This mitigation plan is to
5 address 2.05 acres of additional wetland impacts Ecology identified in December 2000 as
6 part of the Port's stormwater management plan. The wetlands impacted represent about
7 10% of the proposed project's total direct wetland impacts – a significant amount, given
8 the identified historic loss of wetlands in the area and the approval in this certification of
9 a mitigation plan allowing wetland mitigation to take place outside the affected
10 watersheds. Despite this significance, the condition requires only that a conceptual
11 mitigation plan be submitted. There is no requirement or timeline for submittal of a final,
12 approvable plan. The condition also requires such measures as establishing a hydrologic
13 connection between wetlands "if feasible", and evaluating the potential for wetland
14 success within an area set aside for mitigation. These requirements again point to a lack
15 of certainty both about whether and how mitigation will occur, and whether it can be
16 completed successfully to ensure compliance with water quality standards. As noted
17 above, Ecology has in the recent past refused to allow such leeway in a 401 certification,
18 and in the example above, to a fellow regulatory agency, the Corps of Engineers, which is
19 responsible at the federal level for regulating wetlands fills.
20
21
22
23
24
25

DECLARATION OF THOMAS R. LUSTER - 25

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018704

1 • Certification Condition E.3 (page 18) requires the Port to submit a Surface and
2 Groundwater Monitoring Plan within 60 days of issuance of the certification. This plan is
3 to ensure that impacts to receiving waters and groundwater caused by placing fill in the
4 embankment area can be detected. Given the many significant and valid concerns
5 identified during the public review process regarding the issue of the embankment, its
6 stability, and its effects on water quality, and the still conceptual design of many aspects
7 of its design, it is clear that this aspect of the proposed project does not meet the standard
8 for reasonable assurance. At various times during Ecology's review of the embankment
9 design, the Port claimed that it was variously meant to hold back stormwater to some
10 degree, store it internally for some length of time, or let stormwater and groundwater pass
11 through it. This issue is also significant because the success of many elements of the
12 Miller and Walker Creek mitigation sites, stormwater facilities in those areas, and other
13 parts of the Port's proposal will be affected by how water either passes through or is
14 retained within the embankment.
15

16
17 The certification also includes criteria developed to determine acceptable
18 contaminant levels in fill materials used in the embankment; however, these criteria are
19 untested and there is no evidence of how contaminants in the accepted fill material will
20 interact with storm and groundwater as it passes through the embankment to the surface
21 waters, wetlands, and mitigation sites immediately downslope.
22
23
24
25

DECLARATION OF THOMAS R. LUSTER - 26

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018705

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- Certification Condition G (page 19) requires that stormwater facilities requiring dam safety permits obtain those permits before construction begins. These facilities should be a part of a stormwater plan approved at the time of certification, and Ecology should know their final design and know whether they will require a dam safety permit. This condition appears to be necessary because it is anticipated that the design of some of these facilities may change. This is important because many of these facilities are in or adjacent to wetlands, streams, and mitigation areas. If it is determined later that dam safety permits are needed, the requirements of those permits may result in an increase in the footprint of those facilities, resulting in significantly greater impacts to wetlands, surface waters or associated groundwaters. However, mitigation needed for these probable impacts has not yet been identified, thereby increasing the level of uncertainty that water quality standards will be met.
- Certification Conditions I.1-a-e (pages 21 – 24) require that a revised Low Flow Impact Offset Facility Proposal be submitted within 45 days of the certification being issued. These conditions list about four pages of information and analysis needed to determine whether this proposed streamflow augmentation method will work. The conditions establish that numerous design aspects, maintenance and operations practices, monitoring requirements, and other elements, have yet to be developed, evaluated or approved. Additionally, one of the conditions requires that a pilot project be developed within three years to determine if the Port’s approach to streamflow augmentation will work. This is a

1 highly speculative approach for a critical mitigation component needed to address low
2 flows already experienced by the nearby streams and expected to increase further as this
3 proposed project is built. These low flows have, and will lead to higher stream
4 temperatures, degradation of fish habitat, and other forms of impairment and water
5 quality criteria exceedances. Approving the certification based on the information
6 provided to date is premature. To my knowledge, this approach of storing stormwater in
7 very large vaults and releasing it at a measured rate several months later to implement
8 low streamflows has never been tried before. It is being proposed for first time where it
9 will affect streams in which water provided from such a system would represent a high
10 proportion of the water available in the stream during critical summer low flow periods.
11 Relatively small design errors, pollutant inflows, temperature variations, maintenance
12 shortcomings or other similar problems could harm the biota dependent on these streams
13 and/or result in these streams drying up completely.

14
15
16 36. In closing, neither the proposed project nor the 401 certification meet the
17 applicable water quality standards. Based on my experience in reviewing this proposal over the
18 past several years, and my review of the 401 issued in August 2001, there is a strong likelihood,
19 and even certainty, that water quality standards will be violated if the proposed project is
20 constructed and operated in a manner consistent with the certification requirements.

21
22 Additionally, contrary to the August 2001 certification, and particularly in light of the proposed
23 project's history of untimely and inadequate submittals by the Port on every significant element
24

25
DECLARATION OF THOMAS R. LUSTER - 28

HEISELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

AR 018707

1 of its proposal, the continuing lack of information regarding the project's final design, impacts,
2 mitigation needs, and final conformity to standards cannot be the basis for reasonable assurance
3 and cannot ensure that beneficial uses will be protected and maintained.

4
5 37. In addition to this declaration and in the interest of full disclosure, fairness, and
6 any legal requirements, I will try to make myself available for any depositions or hearings that
7 may be necessary for this appeal.

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

10 DATED this 10th day of September, 2001, at SAN FRANCISCO, California.
11 Thomas R. Luster
12 Thomas R. Luster

13 g:\u\acc\pchluster-decl-stay.doc

14
15
16
17
18
19
20
21
22
23
24
25

DECLARATION OF THOMAS R. LUSTER - 29

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201