

Luster, Tom

From: Luster, Tom
Sent: Wednesday, October 18, 2000 9:05 AM
To: Hellwig, Raymond; Ehlers, Paula; Fitzpatrick, Kevin; Marchioro, Joan (ATG)
Subject: SeaTac...

Hi all --

I want to provide you with a copy of the somewhat drafty notes I used for yesterday's discussion of the issues. I realize that mine is apparently the minority opinion on what the Port and Ecology need to do to meet 401 requirements, but I think it would be helpful for you to have these for a couple of reasons:

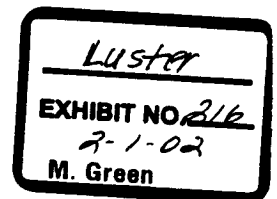
- * perhaps they are clearer in writing than through my verbal explanations; and,
- * while some of them may be "internally resolved through consensus (minus 1)", we are likely to hear these or similar issues raised during public review, and will need to respond to them later in our 401 process.



SeaTacRAIssues.doc

I do hope this helps us towards a defensible decision. Please let me know if you have questions.

Tom L.



DRAFT

October 17, 2000

TO: Joan Marchioro

FROM: Tom Luster

RE: Adequacy of Ecology's 401 review for proposed SeaTac expansion

I have identified several issues that need to be better resolved for Ecology to issue a defensible 401 certification that meets regulatory requirements. These issues involve two main 401-related concerns – ensuring that Ecology complies with state water quality standards and the federal Clean Water Act, and adequately identifying project-related impacts to ensure necessary mitigation is provided. The issues include the following:

401 Regulatory Requirements and Policies –

- **Interaction of 401 and 402:** Ecology's current approach does not mesh with Clean Water Act requirements and does not meet the Water Quality/SEA Program policy on 401/402 review.
- **Water Quality BMPs:** the Port's current proposed BMPs for new discharges are not adequate to meet requirements of the state water quality standards and the Clean Water Act. Per the above-referenced policy and the current draft Ecology Stormwater Manual, the 401 may need to require additional BMPs in order to ensure water quality standards will be met.
- **Timing of 402 major modification:** Ecology's current approach with the Port conflicts with the Water Quality/SEA Program policy on 401/402 review.

Additional Impacts to be evaluated as part of 401 review –

- **Flow Augmentation:** Ecology's current proposed condition does not provide the necessary reasonable assurance that impacts will be mitigated.
- **Additional Impacts to Tyee Pond:** recent information provided by the Port suggests there are potential additional impacts to Tyee Pond that have not been disclosed or evaluated as part of the project's EIS or permit applications.
- **Additional Wetland Impacts due to proposed Lagoon #3 Expansion:** the proposed IWS Lagoon #3 expansion apparently includes some direct and indirect wetland impacts that have not yet been evaluated.
- **Additional Impacts Identified in De-Icing Report:** the Port's report of last year identified impacts that have need to be further evaluated (and perhaps mitigated) as part of Ecology's 401 review.
- **Clean Fill criteria:** to be continued, pending further Ecology discussions...
- **Piecemealing:** several current proposed 401 conditions would piecemeal our project review and may result in inadequate mitigation for project-related impacts.
- **Governor's certification letter:** we still need to ensure the Port is complying with the Agreed Order (cleanup) and the Clean Air requirements.

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We need to resolve these issues in order for Ecology to have reasonable assurance that the Port's proposal will meet water quality standards. [Note: the two step "reasonable assurance" process requires that Ecology first have a "preponderance of evidence" that water quality standards will be met, and then that contingencies are in place (as 401 conditions) for any areas where there is remaining doubt about the ability of the project to meet water quality standards.]

Several of the current proposed conditions are dependent on the possible future availability of evidence showing that standards will be met. This approach would result in a highly provisional 401 certification – essentially, Ecology would be saying "we have certainty that your project will meet the standards and here's the permit to build your project; however you can't build the project until we have certainty about how you're going to mitigate for several impacts that would result in standards not being met."

If the issues identified in this memo are adequately addressed, we would be well on our way to issuing a defensible 401. If they are not adequately addressed through the 401 process, we could end up with a less-than-defensible 401 that falls short of meeting the regulatory requirements and would result in lower water quality in the nearby creeks and wetlands.

Interaction of 401 and 402:

Issue: Ecology's current approach to the Port's 401 request does not reflect the requirements of the Clean Water Act, does not meet the requirements of the recent 401/402 policy between the Water Quality and SEA Programs or Ecology's draft Stormwater Manual, and does not reflect the findings of a recent Ninth Circuit decision.

Reasons:

1) Clean Water Act requirements: the Clean Water Act includes different requirements for permit review under 401 and 402. The essential difference is that 401 must include all necessary effluent limitations to ensure standards are met, and 402 may include either those limitations or other appropriate measures. The most pertinent language from the Act follows (emphasis added):

"Section 401(d): "Limitations and monitoring requirements of certification. Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

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“Section 402(a) Permits for discharge of pollutants. (1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.”

2) Water Quality and SEA Program Policy Agreement: the Water Quality and SEA Programs recently adopted a policy on how to review projects that require both a 401 and 402 permit. One key component is that when a project’s discharges are not covered by a 402 permit, the 401 may include necessary conditions.

Applicable sections of the policy include the following:

“When a project’s discharges are covered by an Individual 402 Permit, and the project is in compliance with that permit as determined by the Water Quality Program, the 401 Certification will require compliance with the Individual 402 Permit as adequate for compliance with the water quality standards, however additional 401 Certification conditions may be necessary to address compliance for stormwater and other water quality impacts or project areas not covered by the 402 Permit.”

...and:

“For projects that have not yet obtained a required 402 Permit, the 401 Certification will be held in abeyance for a maximum period of one year, or denied without prejudice until the 402 Permit is received. A 401 Certification can not be approved if a required 402 Permit has not yet been received because reasonable assurance that the standards will be met can not be determined on a proposed future permit.”

In addition, Section 1.9.8 of Ecology’s draft Stormwater Management Manual includes the following:

“For projects that require a fill or dredge permit under Section 404 of the Clean Water Act, Ecology must certify to the permitting agency, the U.S. Army Corps of Engineers, that the proposed project will not violate water quality standards. In order to make such a determination, Ecology may do a more specific review of the potential impacts of a stormwater discharge from the construction phase of the project and from the completed project. As a result of that review, Ecology may condition its certification to require:

- Application of the minimum requirements and BMPs in this manual; or
- Application of more stringent requirements.”

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Water Quality BMPs:

Issue: The Port's current proposed water quality BMPs for proposed new stormwater discharges do not provide adequate treatment to ensure required water quality standards will be met.

The Port's current proposed Stormwater Plan includes only the minimum BMPs required under the King County stormwater manual at the proposed new stormwater discharge points into Miller Creek. These are largely the same BMPs currently in place at existing discharges at the airport. Based on monitoring data, these BMPs are resulting in discharges of several contaminants at concentrations higher than the water quality criteria. Discharges from the Port's proposed new discharge points are expected to be similar to the existing discharges; therefore, the contaminant concentrations are likely to be similar as well. The proposed new discharges need to include additional water quality BMPs that will avoid criteria exceedances. Evaluation of these BMPs needs to either take place through 401 review, or 401 needs to be held in abeyance until a revised 402 permit is issued. [Note: I believe that early in the County's review process, we informed the Port that Ecology may need to add conditions to whatever plan the County might approve, but I don't think we've reminded the Port lately of that requirement.

Reasons:

Current proposal does not comply with water quality standards requirements for new discharges: WAC 173-201A-160(4)(a) states that Ecology may include a compliance schedule for existing discharges to meet water quality criteria; but does not allow Ecology to issue compliance schedules for new discharges.

Annual stormwater monitoring reports and recent Discharge Monitoring Reports (DMRs) for existing BMPs at the Port (which are what are being included in the current proposed Stormwater Plan) show concentrations for several contaminants above water quality criteria (including copper, lead, zinc, and TSS). In addition, the analysis done by the WQ Program two years ago (by Lisa Austin) showed that the Port's proposed BMPs were not adequate to meet several water quality criteria. Clearly, this does not result in Ecology having a preponderance of evidence that standards would be met; in fact, the data show the opposite – the preponderance of evidence is that these BMPs, whether monitored at Port discharges or as described in much of the literature on urban stormwater runoff, result in regular exceedances of the water quality criteria

Using these same BMPs at the Port's new discharges would likely result in similar levels of contaminants, resulting in unallowable discharges from new discharge points.

Stormwater discharges associated with an industrial NPDES permit are subject to water quality based standards: a recent Ninth Circuit Court decision (*Defenders of Wildlife v. Browner*, December 7, 1999) states that the Clean Water Act requires stormwater associated with an industrial NPDES permit to meet water quality based standards. While not conclusive (since the case was primarily about municipal stormwater permits), the Court's decision provides strong support for requiring BMPs above and beyond the minimum requirements of the County's stormwater manual. Since the decision was issued after Ecology issued the current NPDES

permit to the Port, the 401 review provides the opportunity and obligation to upgrade the Port's BMPs.

The Court's decision includes the following passages:

"When a permit is required for the discharge of storm water, the Water Quality Act sets two different standards:

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers --

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.

33 U.S.C. S 1342(p)(3) (emphasis added)."

...and:

"As is apparent, Congress expressly required industrial storm-water discharges to comply with the requirements of 33 U.S.C. S 1311. See 33 U.S.C. S 1342(p)(3)(A) ("Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.") (emphasis added). By incorporation, then, industrial storm-water discharges "shall . . . achiev[e] . . . any more stringent limitation, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 1370 of this title)." 33 U.S.C. S 1311(b)(1)(C) (emphasis added); see also Sally A. Longroy, *The Regulation of Storm Water Runoff and its Impact on Aviation*, 58 J. Air. L. & Com. 555, 565-66 (1993) ("Congress further singled out industrial storm water dischargers, all of which are on the high-priority schedule, and requires them to satisfy all provisions of section 301 of the CWA [33 U.S.C. S 1311]. . . . Section 301 further mandates that NPDES permits include requirements that receiving waters meet water quality based standards.") (emphasis added). In other words, industrial discharges must comply strictly with state water-quality standards."

Previous 401 certification included additional BMPs to serve as Ecology's baseline: Ecology's previous 401 included a condition requiring more stringent water quality BMPs than are currently being proposed by the Port. Part of our message to the Port and to the public has been that the previous 401 established Ecology's environmental baseline. If we do not require at least the same level of water quality BMPs in any future 401, we would be stepping back from that commitment.

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AR 018794

Timing of 402 Major Modification:

Issue: We erred in telling the Port that the timing for the 402 major modification had no connection with our 401 review.

Reason:

Compliance with Water Quality/SEA Program Policy: Per the policy cited in the above section, the major modification must either be completed before Ecology issues a 401, or the discharges proposed for coverage under the major modification need to be conditioned under a 401.

Flow Augmentation:

Issue: Ecology's latest proposed flow augmentation agreement with the Port does not provide reasonable assurance. This latest proposal states that the Port must provide certainty about the source of augmentation water before it can build impervious surfaces in the Des Moines Creek watershed (e.g., SASA). This does not adequately address the project's impact to stream baseflows, and represents a significant change from Ecology's previously considered 401 condition, which would have required the Port to provide certainty about the source of water before 401 certification could be issued.

Reason:

Baseflows reduced by placing fill, redirecting construction-related stormwater, as well as new impervious surfaces: Lower baseflows in the Des Moines Creek basin are predicted not only due to new impervious surface associated with the proposed project, but would also result from placing fill and detaining/rerouting stormwater from the construction area. The latest proposed condition addresses only the impact associated with new impervious surface, and if included as a 401 condition, could result from several years of lower streamflow (because of fill being placed) without mitigation.

The previous proposed condition provided the necessary level of certainty missing from the current proposed condition – the Port was to provide certainty about the source augmentation water and the ability of its proposed treatment system before the 401 could be issued. This was a negotiated position based on Ecology's recognition that the water rights decision on the Port's preferred source of water could take some time.

Clean Fill: pending further Ecology discussion...

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Additional Impacts to Tyee Pond:

Issue: The Port recently informed Ecology that the Tyee Pond was to be used as a spill containment site. This impact had not been included on previous documentation related to the Port's proposal (EIS, application to Corps, Wetland Functional Analysis, etc.), has not yet been evaluated as part of our 401 review, and mitigation has not yet been provided. This is a potentially significant impact to almost 5 acres of Category II forested/scrub-shrub/emergent wetland.

Response: The Port needs to provide further evaluation of this impact and propose any necessary mitigation. Also, at the very least, Ecology needs to coordinate with the Corps to determine how this impact fits into the 404/401 Public Notice and permit evaluations.

Additional Wetland Impacts due to proposed Lagoon #3 Expansion:

Issue: The proposed expansion of IWS Lagoon #3 will result in about 10 acres of additional impervious surface being added just north of Wetland 28. This indirect hydrologic impact has not yet been evaluated. In addition, Appendix D of the 1998 Lagoon #3 Expansion Hydrologic Report (which I received yesterday, October 16, 2000) identifies several deficiencies in the current lagoon that must be corrected as part of the expansion, including reconstructing the eastern containment dike and relocating stormwater piping in the ravine to the east of the lagoon. The area immediately east of the lagoon consists largely of wetlands that have so far been described elsewhere in Port documents as not being impacted by the Port expansion project.

Response: The Port needs to provide additional documentation showing the possible direct wetland impacts associated with the stormwater piping relocation and the indirect impacts associated with the loss of pervious surface in the area. If there is an impact, it needs to be identified in the upcoming 404/401 Public Notice, and both impacts need to be evaluated as part of our 401 review.

Additional Impacts Identified in De-Icing Report:

Issue: the previous Port report on de-icing identified several impacts to waters of the state that have not yet been addressed through either the 401 review or the 402 permitting process. Pending receipt and review of the Port's next report, these impacts may need to be evaluated and mitigated through the 401 review process.

Reason:

- the previous Port report showed levels of dissolved oxygen and metals in some parts of Des Moines and Miller Creeks that result in water quality criteria being exceeded. These impacts have not yet been evaluated.

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Response:

- the Port needs to provide an updated report for Ecology's 401 review that addresses the issues raised in Ecology's October '99 letter. Based on Ecology's review of that report, we may have to come up with 401 conditions that will result in those impacts being avoided or mitigated (e.g., additional water quality BMPs, additional mitigation to make up for the loss of wetland functions in NW Ponds, etc.).

Avoid Piecemealing: Several of Ecology's current potential conditions would result in approval of the project provisional upon future actions which should be identified now in order to avoid piecemealing of impacts and mitigation.

Examples include:

- Borrow Site #3: the current proposed condition states that Borrow Site #3 could not be used until Ecology approved a mitigation plan.
- Flow Augmentation: the current proposed condition would allow impacts to streamflow without any mitigation in place that addresses the impact.

In the example above, the resulting 401 would be issued acknowledging known impacts but not including mitigation necessary to address those impacts.

Compliance with Governor's certification letter:

Issue: the Governor's certification letter requires the Port to meet the requirements of the Clean Air Act and an Agreed Order regarding groundwater cleanup at SeaTac. Ecology needs to determine compliance with the Clean Air Act as part of its CZM review, and needs to determine the status of the Agreed Order and any interrelationship with 401 requirements. For example, if there are cleanup sites or potential cleanup sites within the footprint of various SeaTac Master Plan Expansion Project elements being reviewed for 401, we would need to ensure the 401 adequately evaluates potential impacts to aquatic resources.

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AR 018797