Luster
EXHIBIT NO. 224
2-102
M. Green

Luster, Tom

From: Ehlers, Paula
Sent: Sunday, June 13, 1999 1:52 PM
To: Luster, Tom; Hellwig, Raymond
Cc: McDonald, Tom (ATG); Marchioro, Joan (ATG); White, Gordon
Subject: RE: SeaTac – comments on May 17th mtg

Tom, thanks for responding to my and Ray's requests for clarification...It's good, but I still feel the need to have some of your points further explained. So here goes.

Referring to your items 1 through 4:
1) I agree.
2) I believe this should read "The water quality standards require that beneficial uses be supported in the various waterbodies and that existing beneficial uses not be degraded *by the project impacts*"
3) I assume this is true
4) The way I read the antidegradation section of the WQS, I believe this should read, "Until the standards are met and the *existing* beneficial uses are supported no further degradation can be permitted" Critical words here are ***existing*** and ***further***. My interpretation of this would be "the beneficial uses that are present cannot be further degraded" by any project proposal. Let me know (any of the addressees) if this is an incorrect interpretation.

Now, if my interpretation is correct, how can we (your first paragraph, discussing how we use scenario b) say that *"the port's proposal can only be reviewed if it gets the waterbody back into compliance with the standards"*? This, in my view would be saying that they have to fix all the problems in the waterbody (well beyond the full mitigation that would be required for the Third runway), and, I still can't see where the law allows for this to be a defensible requirement. Again, if I'm missing something, please tell me.

Further in your explanation, you say "Since 401 requires that water quality standards be met, any approach that would result in Des Moines Cr. continuing to not meet standards could not be permitted". My understanding of the law says that "additional discharges" must meet water quality standards; not the waterbody itself. I don't understand how we connect the whole stream to one project. Again, tell me what I'm missing in my understanding.

I do agree wholeheartedly with the intent of your next paragraph, *"Additionally, not only do the scenarios provide a means to restore beneficial uses to Des Moines Cr, they also help avoid the opposite result - if we were to approve projects in this basin that did not include measures necessary to restore beneficial uses, the cumulative impacts of those projects and ongoing development in the basin would probably prevent the creek from ever meeting standards."* I just need to know the policy and legal justification to achieve this through...one 401, one applicant, and one project. I think that this is the direction we should be heading, but are we there yet within the existing 401 permit structure?

If we need to talk further, let's do so

—Original Message—
From: Luster, Tom
Sent: Friday, June 04, 1999 1:03 PM
To: Ehlers, Paula; Hellwig, Raymond
Cc: McDonald, Tom (ATG); Marchioro, Joan (ATG)
Subject: RE: SeaTac – comments on May 17th mtg

AR 018860

Hi Paula and Ray --

I'm writing this to better clarify some of the issues related to our position regarding the Port's proposal, meeting water quality standards in Des Moines Creek, and 401 review.

You had each raised questions about what we had required in the past and why, and about the

Port's responsibility in the watershed.

I hope this helps - let me know if you have questions...

Tom L.

Re: required conditions and mitigation in Des Moines Creek - here's the thought process on this, first in brief bullet form, then in longer narrative form:

1) 401 is meant to ensure that projects are constructed and operated in a manner that meets state water quality standards.
2) The water quality standards require that beneficial uses be supported in the various waterbodies and that existing beneficial uses not be degraded.
3) Des Moines Creek does not currently support the necessary beneficial uses, and it exceeds several narrative and numeric criteria for Class AA waterbodies. It is therefore not currently meeting the water quality standards.
4) Until the standards are met and beneficial uses are supported, no further degradation can be permitted (per antidegradation requirements).

Since the proposed activity (filling several acres of wetlands, discharging stormwater and contaminants, etc.) will result in further degradation of some of those beneficial uses, the activity cannot be permitted unless:

a) measures are taken (by Ecology, local jurisdictions, local citizens, etc.) to restore the beneficial uses; or,
b) adequate conditions are included on any permits issued in that watershed that result in those uses being supported.

Because both the facility and the waterbody must meet the standards, our review needs to encompass both.

Under scenario a) above, Ecology would not issue any permits that are detrimental to the waterbody until the problems are solved - this might be the most straightforward way to help restore the creek and could provide additional impetus for the local interests - cities, citizens, potential permit applicants, interest groups, etc. - to work together on a solution. Once the creek was supporting the necessary beneficial uses, we could then start issuing discharge permits again. This approach could also take several years, require lots of interaction and negotiation among many parties in the Des Moines Creek watershed, etc. There has already been a lot of progress on this approach through the work of the basin planning group, but there is still a lot of work to do before Des Moines Creek meets the standards.

However, instead of scenario a), we are using scenario b), which allows Ecology to consider an applicant's proposal as long as it includes the measures needed to restore the affected beneficial uses. Instead of telling the applicants in the basin that we can't even consider their permit application until the basin's problems are solved, we are saying we can review your proposal as long as it will get the waterbody back into compliance with the standards.

Both scenario a) and b) above are appropriate, necessary, and defensible uses of 401. They are essentially the same approaches used in 303(d)-listed waters -- if the uses in a waterbody are impaired, then Ecology must take steps to remove the sources of impairment through TMDLs, through limitations on permits, through working with the local involved parties to resolve pollutant loadings, etc. Both a) and b) are also examples of how our permit review is

consistent with Ecology's new emphasis on the watershed approach -- this provides an excellent example of what it means to use the watershed approach in permit review to ensure that water quality standards are met.

[Also, as a side note, I used the term "irresponsible" in my previous e-mail as a softer way of saying "not permittable". Since 401 requires that water quality standards be met, any approach that would result in Des Moines Creek continuing to not meet standards could not be permitted. Both scenario a) and b) would allow the standards to be met; however, anything short of those approaches would allow the degradation to continue, and could not be certified.]

Additionally, not only do the scenarios provide a means to restore beneficial uses to Des Moines Creek, they also help avoid the opposite result - if we were to approve projects in this basin that did not include measures necessary to restore beneficial uses, the cumulative impacts of those projects and ongoing development in the basin would probably prevent the creek from ever meeting standards. We would essentially be writing off Des Moines Creek, which is not allowed under the water quality standards.

I ran these scenarios by Tom McDonald last year and Joan Marchioro more recently and they both concurred with this approach. In fact, the Port concurred with this approach last year - for example, they understood that even though the diminished summer flows weren't entirely due to the Port's development, Ecology couldn't certify their proposal until those low summer flows were alleviated, which is why they included flow augmentation as part of their mitigation package. The RDF was included in the Port's mitigation package for similar reasons.

So - what needs to be done? According to the information I've seen, the non-supported beneficial uses seem to be degraded primarily because of high stormwater flows, low base flows and high water temperatures, and excessive contaminants. If the Port's mitigation plan includes elements that restore these non-supported uses (such as the RDF or equivalent, flow augmentation, and adequate stormwater BMPs), then we may be able to concur on a 401. If the plan does not include these elements, the waterbody will continue to not meet standards, and we will not be able to certify. Last year's Port proposal included these elements and we were able to certify (albeit provisionally, which I am not comfortable doing again).

Re: "responsibility" - to clarify one other important point - this approach does not mean the Port is responsible for fixing all of the problems in the watershed. What we have said all along is that because Des Moines Creek is not meeting the standards and is not fully supporting all the required beneficial uses, we cannot allow further degradation to that waterbody until the beneficial uses are restored. I would come to the same conclusion on any proposed 401 project that would adversely affect the conditions in the creek - it just so happens that the one proposal we're looking at is the Port's.

—Original Message—
From: Ehlers, Paula
Sent: Wednesday, June 02, 1999 5:02 PM
To: Luster, Tom
Cc: Hellwig, Raymond
Subject: FW SeaTac – comments on May 17th mtg

Tom, I too would like to hear the answer that Ray poses on the second bullet below, because when I think I understand what we all agreed to on this subject, something is stated that makes me think otherwise. It is my understanding that through 401 authority, an applicant needs to reduce or provide mitigation relative to their project impacts. To this end, POS will not be allowed

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to make things worse in the watershed, and some mitigation elements should have the effect of making some parameters improve. But, I need to verify that you are *not* implying that the POS (ala their proposing the 3rd runway) is responsible for restoring all of the "lost" beneficial uses in the watershed. I, too, want to insure that we are on firm legal grounds for our requirements. I certainly don't mind requiring that an applicant do more than minimal mitigation (recognizing that mitigation isn't always 100% effective), but I need to know what it is that you are suggesting we can *legally* require of the POS with regards to restoring Des Moines Cr. Simply, "that it would be irresponsible" is not enough of a justification.

So, help me in my confusion and let's talk about this some more. I think it's important that we are all in synq with our understanding of our legal authority and requirements.

—Original Message—
From: Hellwig, Raymond
Sent: Tuesday, June 01, 1999 1:44 PM
To: Luster, Tom; Stockdale, Erik; Fitzpatrick, Kevin; Stone, Bob; Nye, Roger; Langley, Ron; Ehlers, Paula
Cc: Marchioro, Joan (ATG); McDonald, Tom (ATG); Aboe, Sharon
Subject: RE: SeaTac – comments on May 17th mtg.

Thanks Tom. I'll give you some quick feedback to this now, and more thoughtful feedback at our meeting with Kevin on the 11th (assuming we have a little time to meet before Elizabeth shows up – we are scheduled at 1:00 with her, perhaps the three of us could meet during lunch). Anyway:

- I think we should avoid the (Elizabeth's) terminology re "de-coupling" 402 from 401. Rather we should work to describe their interrelationships, how to x-reference etc. For example, we have already agreed that the 401 would reference the 402 with regard to compliance with WQ standards.

- Once again, I hear your point regarding the status of the DM sub-basin "It would be irresponsible..." to approve a project that allowed those conditions (the broken hydrologic functions) to **continue** or to make them worse. I'll ask my question again. The sub-basin is not closed, the POS proposes to mitigate for impacts from its proposed project i.e., understands it cannot let the conditions get worse (in fact the POS thinks its proposal will result in net benefits – we are undecided on this of course). BUT, it does not necessarily want to mitigate for impacts resulting from development it has not been responsible for – that is not attributable to its operations – or it might be a stretch to prove so. Therefore, if the basin isn't closed, and the POS will more than mitigate for impacts associated with the master plan improvement projects, what would be the basis for a denial (remember the agreement re 401/402)?

See you on the 11th

—Original Message—
From: Luster, Tom
Sent: Tuesday, June 01, 1999 12:16 PM
To: Hellwig, Raymond; Stockdale, Erik; Fitzpatrick, Kevin; Stone, Bob; Nye, Roger; Langley, Ron; Ehlers, Paula
Cc: Marchioro, Joan (ATG); McDonald, Tom (ATG)
Subject: SeaTac – comments on May 17th mtg.

—Original Message—
From: Bolender, Wendy
Sent: Wednesday, May 26, 1999 11:44 AM
To: Bob Stone; Erik Stockdale; Gordon White; Joan Marchioro; John Glynn; Kevin Fitzpatrick; Mike Rundlett; Paula Ehlers; Raymond Hellwig; Roger Nye; Ron Langley; Tom Luster; Tom McDonald
Subject: Summary from May 17 meeting

Here is the summary from our meeting with the Port on May 17.

<< File: Port of Seattle May 17.doc >>

--Wendy

Hi all --

Thanks to Wendy for putting together the draft summary from the 5/17 meeting. I, of course, have some comments...

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And, as usual, I am doing this to help get us to a defensible decision. It seems that the proposed project and the associated issues are continuing to shift quite a bit from decisions we made over the last couple of years. Some of my comments below may seem familiar because we seem to be re-visiting a lot of elements that were discussed and resolved previously.

Please let me know if you have questions...

Tom L.

Re: Clean Fill Criteria -- based on Roger's summary of the criteria (provided separately), I have a couple of concerns and questions:
* the Method A cutoff appears adequate for now; however, I have two concerns about the statement that it only applies to material placed in 1999, and that other criteria may be used for beyond 2000.
1) material above Method A may be considered solid waste or problem waste and could invoke the requirement for a landfill permit, along with all the associated issues -- siting requirements, design requirements, etc. (and could be at odds with the FAA's Advisory Circular that says landfills should not be sited within 10,000' of active runways). We need to check with King County to find out their threshold for landfill requirements.
2) since the 401 is a one-time evaluation of the proposal, we need more assurance of what the fill criteria will be for the life of the project. We need to determine what additional materials the Port is proposing to include during future haul years and ensure that those materials will meet the 401 requirements. This "future fill" issue is especially important because the materials placed after the 1999 season will be the ones placed in wetlands and may have the stronger connection to groundwater paths -- we need to know what contaminant thresholds will be in place to prevent leaching into surface waters or groundwaters.
Additionally, the two points above tie together in that we do not want to be permitting a future landfill or cleanup site, and that we need to include necessary conditions in the 401 to ensure that doesn't happen.

Re: Wall Design and Construction -- impacts to forested wetlands should not be considered temporary, as those impacts will not be mitigated in the immediate future. The Port should identify how much of those impacts are in forested wetlands and include those as part of their mitigation for permanent impacts.

Re: Mitigation Plan -- usually, Ecology and the Corps work together to come up with a single mitigation plan that meets both Ecology's and the Corps' requirements. Hopefully, we'll be able to do the same with this project; even though the Corps raised the functions and values issue in a different way than we had previously. If we don't come to agreement on the same mitigation plan, we need to coordinate with the Corps and the Port to ensure that the two mitigation plans do not conflict.

Re: Runway Anti-Icing -- we resolved the issue of the NW Ponds quite a while ago -- they are waters of the state. The question is what kinds of impacts will there be, and what kind of mitigation is necessary and appropriate?

Re: Stormwater Water Quality/Water Quantity -- we'll be divvying up the 401/402 elements separately, so I'll provide comments separately on that (and will probably include a short description of the regulatory difficulty in de-coupling 402 from 401). But here's one initial thought -- 401 needs to address impacts to waters of the state due to the proposed project. If the Port wants to use the WER process as the basis for the project requirements, facility designs, etc, and wants a mixing zone that would allow additional downstream impacts, then the 401 decision must wait until that process is completed and those additional downstream impacts need to be incorporated into the 401 decision. The 401 decision will be based on the standards as they exist at the time of the decision, not on future potential changes to the applicability of the standards.

Re: Wall Design Update -- same comment as Wall Design and Construction above.

Re: Regional Detention Facility -- we need more certainty on this issue. I have heard both that the RDF is part of the Port's proposal and is not part of the proposal. If the Port is going to meet Level 2 by using the RDF, then it needs to be part of the Port's project: if they are going to use wet vaults, we need to see where and how they are designed and what additional BMPs would be needed to get them to AKART (for both detention and treatment). In both cases, we also need to determine what impacts would result and what mitigation would be necessary.

Also, the recommendation in the Basin Plan includes a high-flow bypass pipeline as part of the RDF -- that should be part of the review of the RDF design/impacts/mitigation/etc.

Again (ad nauseum... sorry to keep harping on this, but this is what it will take to get to a defensible approval), the Des Moines Creek watershed is already experiencing such a high number of detrimental cumulative impacts that we should not even consider approving a project of this magnitude until there are measures in place that restore the lost beneficial uses -- this is particularly applicable to the RDF issue, since the lost beneficial uses are primarily tied to the amount of impervious surface in the basin and the lack of adequate stormwater controls. However, since we have decided to consider the Port's proposal, we need it (or any other 401 project in the basin) to provide a way for beneficial uses to be supported -- otherwise, we will be writing off Des Moines Creek and will not be allowing it to meet the standards. The Basin Plan (which I am using because it, along with various EIS and Port-related documents, provides the best available information on the Des Moines Creek area) describes a watershed in which the hydrologic functions are "broken" -- 100-year storm flows every two years, stream erositivity rates at ten times the natural rate, low summer flows dropping to almost half the natural flows, etc. It would be irresponsible of me to approve a project that allowed those conditions to continue or to make them worse.

We may be able to handle this like we did on the previous certification -- require the RDF or other facilities -- but I want to know before we make a 401 decision what the impacts of each approach will be, and what mitigation might be needed.

Re: Flow Augmentation -- we cannot issue a 401 without some means of flow augmentation. This is an issue similar to the one above -- Des Moines Creek is currently not supporting beneficial uses, in part due to diminished summer flows and associated higher water temperatures, and any additional impacts in the basin must

result in those uses being supported. The Basin Plan states that summer stream flow has already been reduced 21%, and that expected future buildout will further reduce it 41%.

The Port solved this problem for the last 401 by providing the groundwater well. While the Port will likely need to come up with another solution this time, we should expect at least the same level of mitigation.

Re: Schedule --
* the public hearing should be listed as a joint Corps/Ecology hearing.
* Ecology's decision on the CZM process should be described as concur, object, or waived.

That's it for now -- let me know if you have questions...