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ENVIRONMENTAL
BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)	
)	
Appellant,)	
)	
CITIZENS AGAINST SEA-TAC)	
EXPANSION,)	
)	PCHB No. 01-160
Intervenor/Appellant,)	
)	
vs.)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY, and)	
PORT OF SEATTLE,)	
)	
Respondents.)	

TRANSCRIPT OF PROCEEDINGS

DAY ONE

March 18, 2002
Lacey, Washington

ORIGINAL

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AR 054842

1 BE IT REMEMBERED that the above-entitled matter
2 came on for hearing before the Pollution Control Hearings
3 Board, Day One commencing on the 18th day of March, 2002,
4 and continuing through Day Ten, the 29th day of March,
5 2002. The hearing was conducted at the Environmental
6 Hearings Office, 4224 6th Avenue SE, Rowe Six, Building
7 2, Lacey, Washington.

8 Sitting as the Washington State Pollution
9 Control Hearings Board were KALEEN COTTINGHAM, presiding;
10 ROBERT JENSEN, Board Chair, and BILL LYNCH, Member.

11 A P P E A R A N C E S

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25 **AR 054843**

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<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>IDENTIFIED</u>	<u>ADMITTED</u>
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1 March 18, 2002

2 MS. COTTINGHAM: We'll go on the record then.

3 I am Kaleen Cottingham and I'm the presiding officer
4 in this case, and we have a bunch of preliminary matters
5 that I want to take care of before I get the rest of the
6 board members in here.

7 So first thing I'd like to do is resolve or address
8 the time frame for resolving any of the outstanding
9 procedural motions, and I'll list them and then I'll talk
10 about them.

11 First, we have a motion to publish the depositions
12 of Ecology managers and we have received the motion
13 itself and the response. When can we expect the
14 reply brief?

15 MR. STOCK: We also have a reply, which I
16 believe we faxed to the board yesterday and to the
17 parties. We have copies here available for the board.

18 MS. COTTINGHAM: When will this information be
19 needed in your presentation of your case, so it gives me
20 a time in which we --

21 MR. STOCK: In terms of motion to publish, for
22 purposes of examination of Ann Kenny, to the extent that
23 we will need to look to her deposition, it will have to
24 be published for that purpose. The motion goes beyond
25 that and asks that it be published for all purposes,

1 including submission of the deposition into the record.
2 If the board wants argument, we can certainly have
3 argument at the end of today, or tomorrow morning, to
4 give the board an opportunity to read the reply brief.

5 MS. COTTINGHAM: Do you need argument on the
6 motions or can we render a decision based on the written
7 materials?

8 MR. STOCK: I think that the written material
9 is sufficient for the board to decide the motion.

10 MS. COTTINGHAM: So if we were able to get to
11 it by the end of today, that would be acceptable?

12 MR. STOCK: Yes.

13 MS. COTTINGHAM: Okay. Next we have the
14 motion in limine to exclude late-produced plans and
15 reports. The same question, when can we expect a reply?

16 MR. STOCK: We submitted a reply to that
17 yesterday as well and we have copies here on that brief
18 as well and can hand them out at this time or during the
19 break, whatever the board's preference is.

20 MS. COTTINGHAM: The earlier the better would
21 be great. When do you need to have this motion decided
22 by for purposes of your testimony or the testimony of
23 others?

24 MR. STOCK: Tomorrow is fine. There's nothing
25 today that is going to be submitted that that motion is

1 necessary to be decided today.

2 MS. COTTINGHAM: Okay. The next one is the
3 motion in limine to exclude the testimony of David
4 Garland. We have received all of the documentation.
5 When is Mr. Garland planned to be put on the stand?

6 MR. STOCK: That will presumably be during
7 Ecology's case.

8 MR. YOUNG: That's correct. I think he is in
9 our first group of witnesses.

10 MS. COTTINGHAM: So we don't need a decision
11 today or tomorrow, but the sooner the better.

12 MR. YOUNG: I think that's correct, yes.

13 MS. COTTINGHAM: We had also a motion in
14 limine to quash the subpoena of Linda Logan, but I
15 understand from the parties that that's been withdrawn?

16 MR. STOCK: That's correct.

17 MR. PEARCE: That's correct, Ms. Cottingham.

18 MS. COTTINGHAM: Then we had motion to strike
19 the prehearing brief of the port's. I have reviewed the
20 materials and I'm going to deny the motion. It seems
21 that both parties have liberally used some techniques to
22 squeeze a lot of information into the prehearing briefs,
23 and they have all been read anyway, so I'm going to deny
24 that motion.

25 Are there any other preliminary motions?

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1 MR. STOCK: I think those are all of the
2 preliminary motions, and we have the reply briefs to hand
3 up to the board.

4 MR. PEARCE: One issue. On the motion in
5 limine to exclude plans and reports, that's a very
6 important motion to us. We would like to be able to
7 provide argument on that.

8 MS. COTTINGHAM: Oral argument?

9 MR. PEARCE: (Nods head affirmatively). If
10 the board wants it.

11 MR. EGLICK: I guess if we are going to do
12 oral argument, then we'd like to do it as well on the
13 deposition motion, if oral argument is going to take
14 place anyway on motions.

15 MS. COTTINGHAM: I'm using an administrative
16 appeals judge on these motions, so after we take a look
17 at all the materials submitted, the board will decide
18 tomorrow whether or not to have oral arguments, and if we
19 do, we'll do it first thing in the morning tomorrow.

20 MR. PEARCE: Thank you.

21 MS. COTTINGHAM: So there's no other motions,
22 preliminary matters. Next, I'd like to review the
23 process for the chess clock. Do we have one?

24 MR. POULIN: Yes, we do, Your Honor. It's
25 here.

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1 MS. COTTINGHAM: Do you want to explain to
2 everyone how it works so everyone knows.

3 MR. POULIN: This is the Chronos chess clock,
4 it's digital. It's turned on with a single push of the
5 center button, and it is set in the count-up mode so that
6 when a given side's clock is on, it will count up, so at
7 the end of each day, we will have a total time elapsed
8 for that day. The clock is switched back and forth with
9 a single push of the button.

10 MS. COTTINGHAM: You don't have to push two
11 buttons, just one button?

12 MR. POULIN: Just a single button, so that if
13 the clock is here and we finish our argument, we hit the
14 switch to turn off our clock and turn on the other clock.

15 There is a built-in delay that we can adjust, but
16 it's presently set for one minute to give time for
17 transition so that when we finish, we can stop the clock,
18 or, rather, switch the clock, sit down, get out of the
19 way, give the other side time to get up.

20 MS. COTTINGHAM: Okay. I had wheeled this
21 little box in here that we could set it on, although it's
22 kind of low, or we could set it on the corner of
23 someone's table. What is the preference of the parties?

24 MR. STOCK: I think it will be easiest to
25 reach if we set it on one of the corners of the tables

1 instead of having to reach over the tables.

2 MS. COTTINGHAM: After the oral arguments, the
3 podium is going to be wheeled out of here, so there will
4 be a little bit more room. I would like you to label the
5 buttons "respondents" and "appellants" so everyone knows
6 what button they're hitting.

7 I have, as you will note, put a time-remaining
8 chart, and at the end of every day, we will adjust that
9 based on the readings on this clock, and we will keep a
10 running tally of that every day, just so everyone is
11 aware of that.

12 We also have a list of the order of witnesses for
13 the next day or so, and at the end of every day, we will
14 adjust this as well. So we will try and keep these up to
15 date.

16 I'd like to talk a little bit about the allocation
17 of space. About how many people do we have sitting out
18 in the back or standing?

19 MS. JOHNSON: About ten.

20 MS. COTTINGHAM: In the prehearing order the
21 parties allocated every chair in this room, and we
22 allocated the two tables up here for attorneys, the first
23 two rows are for attorneys, paralegals and designated
24 clients, designated by the attorneys. And then we left
25 the last two rows for the public. And I need to make

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1 sure that there aren't people sitting in the last two
2 rows that are witnesses or clients unless the clients
3 aren't the designated clients or attorneys, because those
4 are for the general public.

5 So the first two rows are for attorneys and
6 paralegals and designated clients.

7 MS. MARCHIORO: Could you explain what
8 designated clients mean, please?

9 MS. COTTINGHAM: We allocated four seats in
10 that second row for the attorneys on each side, four per
11 side, to allocate to their designated clients. We
12 designated these three seats over here for the on-deck
13 witnesses. We have three, plus the fourth one for our
14 AAJ. So I just want to make sure that the last two rows,
15 which there should be 16 seats, are fully available for
16 the public rather than for witnesses, attorneys,
17 paralegals.

18 MR. TUPPER: Ms. Cottingham.

19 MS. COTTINGHAM: Yes.

20 MR. TUPPER: Beth Ginsberg and I are here from
21 Stoel Rives and we are not attorneys for the port on this
22 case, although, we are attorneys, so we are here today
23 just as part of the public, although we would be happy to
24 yield our seats if there are people that are looking for
25 room.

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1 MS. COTTINGHAM: Well, let me explain, I would
2 like for the last two rows of the public seating to have
3 an honor system rotation to allow everyone who would like
4 to see today to rotate through, so with that as kind of a
5 stipulation --

6 MR. TUPPER: That would be fine with us.

7 MS. COTTINGHAM: Is there any room in the last
8 area to squeeze one or two chairs in there?

9 MS. MARCHIORO: Yes.

10 MS. JOHNSON: I believe so.

11 MS. COTTINGHAM: Okay. Why don't we go off
12 the record for a second and see if we can squeeze a few
13 more chairs back there for the public.

14 (Discussion had off the record.)

15 MS. COTTINGHAM: Back on the record.

16 MR. STOCK: ACC would like to raise an
17 objection to Ms. Beth Ginsberg and Mr. James Tupper
18 sitting in the public seat section. They are attorneys
19 that are being paid by the Port of Seattle, the Port of
20 Seattle consults with these attorneys, and while there's
21 no way that ACC can prove it, I suspect that they are
22 also consulting with the attorneys that have entered an
23 appearance on behalf of the Port of Seattle in this case.

24 So we request that Ms. Ginsberg and Mr. Tupper be
25 counted among the attorneys for the Port of Seattle and

1 that the seats be allocated.

2 MR. PEARCE: Ms. Cottingham, Mr. Tupper and
3 Ms. Ginsberg have not appeared in this case for the Port
4 of Seattle; they are consulting with the Port of Seattle
5 on the 404 case. They're here as interested members of
6 the public.

7 MS. COTTINGHAM: So long as we don't have
8 people queued up to come in, I'm going to let them stay
9 in the room, and if we start to get a line-up there,
10 again, we'll go back to the voluntary rotate through, and
11 I'm going to ask, in that case, that all the people that
12 are sitting in the last two rows consider voluntarily
13 rotating to allow everyone the opportunity to hear the
14 case. Right now I think we have seated everyone, so
15 right now it's not really that big of an issue.

16 Next thing I'd like to talk about is the ease in
17 which we get to exhibits, especially as it relates to the
18 witnesses, but also as it relates to the board members.

19 How do the parties intend to use these exhibits? Do
20 you expect us to bounce between notebook and notebook all
21 the time? What is the --

22 MR. STOCK: The way I envision that it will
23 work is as an attorney is questioning a witness, the
24 attorney will ask the witness to refer to an exhibit.

25 For example, Exhibit 1, which is the September 21

1 401 certification, will undoubtedly be referred to quite
2 a bit throughout the proceedings, and so the attorney
3 will ask the witness to look at Exhibit 1 and it will be
4 incumbent upon the witness to go ahead and get the
5 notebook where the exhibit is located and go ahead and
6 refer to the notebook.

7 Each of the attorneys have their own copies of the
8 exhibits and there are exhibit notebooks behind each of
9 the board members. Hopefully, they are in numerical
10 order and it will be fairly easy for the board to find
11 the exhibit that's being referred to during the
12 testimony.

13 MS. COTTINGHAM: And they are all labeled as
14 to Volume X, Exhibit Y?

15 MR. STOCK: Yes.

16 MS. COTTINGHAM: For each of them.

17 MR. STOCK: On the outside of the exhibit
18 notebooks.

19 MS. COTTINGHAM: Can the attorneys use some
20 care in attempting to give both numbers, volume and
21 exhibit, so we can find the right volume and the exhibit.

22 MR. KRAY: Certainly.

23 MS. COTTINGHAM: The next question is that I
24 think that this mass of notebooks over here is going to
25 be kind of problematic, and I'm wondering if we can push

1 the table up against the windows and have the witness
2 stand out a little bit forward, because the other board
3 member sitting here is not going to be able to see the
4 witness, so would that be an acceptable rearranging of
5 that? I think what I will do is go off the record and
6 ask some people to work on moving that so that it can be
7 usable. Right now I am not sure that somebody could find
8 a volume on that.

9 MR. REAVIS: I think it may be helpful to turn
10 those notebooks around so you can read the spine
11 actually.

12 MS. COTTINGHAM: Exactly, but they are still
13 double booked so you are going to have trouble finding
14 the second row.

15 So we are going to go off the record and I am going
16 to ask some folks to move that around.

17 (Off the record.)

18 MS. COTTINGHAM: Back on the record. These
19 are also exhibits up here, I understand, the deposition
20 exhibits?

21 MR. YOUNG: That's the first 500 or so
22 exhibits, so like Exhibit 1 is in those boxes.

23 MS. COTTINGHAM: And we're going to need to
24 access those?

25 MR. KRAY: Correct.

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MR. YOUNG: I would think so.

MS. COTTINGHAM: Do they have to be taken out, 1, 2, 3, 4. The original goes over there, so --

MR. YOUNG: Do you want them back there just the way those are?

MS. COTTINGHAM: They are white, so they will all be different colors. Yes. This is, I assume, one board member's. Where is the dividing line? We are going to go off the record and allow you to organize these in such a way that they can be useful and so that we can see the witness.

MR. REAVIS: Do you know if it's possible to get another table for right here in front?

MS. COTTINGHAM: I'm going to go look.

(Off the record.)

MS. COTTINGHAM: We'll go back on the record. We're here today regarding PCHB No. 01-160 referred to as Airport Communities Coalition versus Ecology and the Port of Seattle. Citizens Against SeaTac Expansion have been granted intervention status.

Throughout this proceeding the appellants will most likely be referred to as ACC and CASE. If the parties choose to use other acronyms throughout the entirety of the hearing, both for the court reporter and for the board, would you please define any acronyms that you

1 might use.

2 My name is Kaleen Cottingham. To my left is Bob
3 Jensen, to my right is Bill Lynch. We are the three
4 members of the Pollution Control Hearings Board appointed
5 by the Governor.

6 The court reporter today is Kim Otis with Gene
7 Barker & Associates. Because of the length of this
8 hearing, we will be most likely rotating through court
9 reporters throughout the entirety of the hearing.

10 I'd like to discuss some process things. First of
11 all, the board expects, as all of the attorneys in the
12 room know, we expect civility from all the parties and we
13 expect no participation from the audience. This is a
14 formal hearing on the matter.

15 I'm going to ask very nicely first, will everyone
16 please turn off your cellular phones and pagers. I don't
17 think anyone in the room wants to be interrupted by cell
18 phones or pagers.

19 I expect the efficient use of our time. We have set
20 up a very elaborate time-keeping process to keep us on
21 the straight and narrow, including the use of a chess
22 clock and an allocation of time as well as an accounting
23 of time at the end of every day to make sure that we can
24 finish this hearing within the allotted time.

25 I also expect adherence to the matters set forth in

1 the various prehearing orders. We already dealt with
2 some of the seating arrangements this morning. I don't
3 need to talk about that anymore, but I expect that people
4 will be respectful of others if we do have more people
5 than chairs in this room.

6 I need everyone to recognize that we will be in this
7 room for a full two weeks and that there will be other
8 cases on going at the same time that will take other
9 conference rooms and other areas, so when we break or
10 when we have lunchtime or at the end of the day, I need
11 everyone to be respectful of the noise level in this
12 office and try and keep it to a minimum.

13 There is coffee in the lobby and anyone choosing to
14 have coffee, just recognize it's 25 cents a cup, a dollar
15 a day or ten dollars for the entire hearing.

16 And with that, we'll start with appearances from the
17 parties.

18 MR. EGLICK: Peter Eglick from Helsell
19 Fetterman for Airport Communities Coalition.

20 MR. POULIN: Rick Poulin for Citizens Against
21 SeaTac Expansion, or CASE.

22 MS. OSBORN: Rachael Paschal Osborn for
23 Airport Communities Coalition.

24 MR. STOCK: Kevin Stock with Helsell Fetterman
25 for the Airport Communities Coalition.

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1 MR. WITEK: Michael Witek with Helsell
2 Fetterman for the Airport Communities Coalition.

3 MR. KRAY: Jeff Kray, Assistant Attorney
4 General, for Ecology.

5 MR. REAVIS: Gil Reavis with Brown, Reavis &
6 Manning for the Port of Seattle.

7 MR. PEARCE: Roger Pearce with Foster, Pepper
8 & Shefelman for the Port of Seattle.

9 MR. YOUNG: Tom Young for Department of
10 Ecology.

11 MS. MARCHIORO: Joan Marchioro for Department
12 of Ecology.

13 MS. COTTINGHAM: Is that all of the attorneys?

14 Prior to opening statements, I would like to, for
15 the record, identify some of the decisions that have been
16 made by the board and will be considered part of the
17 record.

18 First of all, this case was originally filed as PCHB
19 01-133. As a result of a stipulation entered by the
20 board, the Department of Ecology rescinded the 401
21 certificate and reissued an amended certificate. An
22 appeal was subsequently filed and has been given the
23 number 01-160.

24 All of the matters in both the original file and in
25 the later file are considered part of the record in this

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1 matter.

2 The board has considered, but reached a split
3 decision, on summary judgment on issue 9(a), and so that
4 matter is still before us.

5 The board has granted summary judgment on issue
6 number 14, and that decision will be incorporated by a
7 reference in the decision on this matter.

8 The board has denied a motion in limine on the
9 written direct testimony of Tom Luster.

10 The board orally this morning denied the motion to
11 strike the prehearing order of the Port of Seattle.

12 The parties withdrew the motion to quash the
13 subpoena of Linda Logan.

14 And the board has reserved decision on three motions
15 filed late last week, and those are the motion to publish
16 depositions of Ecology managers, the motion in limine to
17 exclude late-produced plans and reports, and the motion
18 in limine to exclude the testimony of David Garland. The
19 board will take those under advisement and later this
20 afternoon, if we determine it necessary, we will let you
21 know that we will have oral argument on at least two of
22 those motions first thing in the morning, or we will
23 render a decision.

24 The board has entered an evidentiary order
25 identifying the admissibility of the exhibits in this

1 case. I understand all parties have a copy of the matrix
2 that we will use to govern admissibility. That order and
3 the associated matrix will govern the exhibits unless, on
4 allowable motion, the board further rules on a specific
5 exhibit.

6 Are there any other preliminary matters that the
7 board needs to address?

8 If not, I would like to then explain how the hearing
9 will be conducted. First we'll have opening arguments.
10 We have allocated one half hour each side for opening
11 arguments. The appellant carries the burden in this case
12 and they will go first, followed by the intervenors,
13 followed by the respondents.

14 Then the appellants will put on their case by
15 calling their witnesses. As indicated earlier, each
16 party may only have one lead examiner per witness to
17 avoid confusion. And we will then do cross examination,
18 redirect and there will be no further examinations of
19 witnesses. The board will ask questions and then if
20 there are follow-up questions by either side, they shall
21 be limited to the questions asked by the board.

22 After the appellant's case, the intervenors will
23 call their witnesses, and after that, the respondents
24 will begin their case.

25 Now, I earlier said that there was half an hour for

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1 each side for opening, unless the respondents wish to
2 reserve their right to have their opening when they begin
3 their case. You can let me know later.

4 At the end of all of this, we will have closing
5 arguments. We have allocated one hour to each side for
6 closing arguments. And, again, at the end of every day,
7 we will account for the time that we've used to keep us
8 on the straight and narrow.

9 And with that, we will begin this case.

10 Mr. Eglick.

11 MR. EGLICK: Good morning to the board and
12 thank you to the presiding officer. For the record,
13 again, my name is Peter Eglick and I'm one of the
14 attorneys from Helsell Fetterman for the Airport
15 Communities Coalition.

16 We want to start by thanking the board for inviting
17 us into your home. I'm not sure when you invited us, you
18 knew quite how we would move in, but we will try to make
19 it as comfortable as we can for everyone, given the
20 number of notebooks that surround us all.

21 As I was thinking about this case this morning,
22 looking at the snow, what came to mind for me was
23 actually, first, not anyone else but Samuel Taylor
24 Coleridge, who once said, "Advice is like snow, the
25 softer it falls, the longer it dwells upon and the deeper

1 it sinks into the mind." We're going to try in this
2 case to give you our advice, our evidence, on what's
3 wrong with the 401, why there is no reasonable assurance.
4 Please forgive us in advance if we're not as gentle as
5 snow, but in two weeks, we may have trouble meeting that
6 goal. We will try, and by "we," I mean my colleagues
7 from Helsell Fetterman and from CASE, Mr. Poulin,
8 representing the Airport Communities Coalition. That's
9 the five cities affected by the proposal as well as the
10 Highline School District and CASE, that's the Citizens
11 Against SeaTac Expansion. And later we will be
12 describing for you the relative position of those cities
13 geographically and physically with relation to the
14 airport and the proposal.

15 Samuel Taylor Coleridge also comes to mind for
16 another reason. He was the first English critic to
17 articulate a theory of poetry and of literature which
18 attempted to explain how we can sit and watch, for the
19 sake of reaching a goal, some unproven, maybe even
20 fantastic presentation, play, poetry, and accept it. And
21 what he coined was a term I'm sure you've heard at one
22 time or another, since he coined it about 300 years ago,
23 250 years ago, it's a term called the suspension of
24 disbelief.

25 What that means is that you accept non-reality as

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1 reality for the duration of the performance, the art
2 experience. The production and all of its elements
3 attempt to create an illusion of reality, a
4 verisimilitude, and the audience completes the illusion
5 by accepting it as real for the sake of the performance.

6 Suspension of disbelief has been also called the
7 willful act of deferral of one's critical faculties for
8 joining in believing the unbelievable to further the aims
9 of the performance.

10 Well, how is this manifested? You go to a play, you
11 see a stage performance. There will be a facade, it
12 shows a house or a building that looks very substantial.
13 There may be a door that works, there may be a window
14 that works. And it's accepted as real for the sake of
15 the performance. But, in fact, it doesn't exist as a
16 structure, as a working functioning structure, there is
17 none. It's an elaborate, artful facade which works for
18 purposes of the performance if one suspends disbelief.

19 Fortunately, Samuel Taylor Coleridge did not write
20 the Clean Water Act. The Clean Water Act asked for
21 something more than suspension of disbelief. It requires
22 reasonable assurance that water quality standards and
23 water quality laws, the linchpins of Clean Water Act
24 protections, will not be violated.

25 What ACC and CASE will be presenting in the course

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1 of this appeal in testimony from our witnesses and in
2 words and exhibits attributable to the respondents
3 themselves, their own words, their own documents, is
4 evidence that the 401 issued by Ecology is a facade,
5 which still depends on a suspension of disbelief rather
6 than a reasonable assurance of what lies behind.

7 We are going to show that while in some cases life
8 can imitate art, the Clean Water Act requirement for
9 reasonable assurance does not allow for this approach and
10 it's not met here. What we ask the board to do as the
11 evidence and testimony comes in over the next two weeks
12 is to ponder the meaning of reasonable assurance in the
13 context of what Ecology itself has characterized.

14 And I'm sure we have told this to the board before,
15 but this is one of the largest public works projects ever
16 undertaken in this state, and one, which Ecology itself
17 has acknowledged, has enormous potential consequences -
18 that's Ecology's word, enormous - for water quality and
19 the natural environment.

20 As the board knows from its own stay decision, the
21 proposal is essentially to fill a canyon to create a
22 platform for the third runway, and we will be describing
23 that and you will learn about it in testimony, and to
24 replumb really the watersheds for Miller, Des Moines,
25 Walker Creeks, class double A waters of the state. So

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1 that's what's at stake.

2 The board set a standard for reviewing evidence in a
3 case such as this in the Battle Mountain Gold case,
4 what's also known as OHA, Okanogan Highlands Alliance.
5 What the board does here will determine whether that
6 standard is upheld and continued or whether it is, in
7 essence, abandoned, watered down. And what the board
8 does here will, therefore, set a precedent for every
9 other 401 certification in terms of what is required.

10 Now, I was looking for a good explanation of what
11 the scope of a 401 certification is supposed to be so I
12 could then give you a little bit of preview of coming
13 attractions in the context of that scope. And, you know,
14 there is that one case reported that went to the United
15 States Supreme Court, litigated by the Department of
16 Ecology, and the Department of Ecology won the case, and
17 it's PUD Number 1 versus Washington Department of
18 Ecology. It's a case that was decided about eight or
19 nine years ago in the U.S. Supreme Court. Ecology won.
20 And the brief that Ecology submitted in that case is
21 published, and what the brief says, in terms of what the
22 scope -- it quotes the Environmental Protection Agency as
23 to what is the scope of a 401 certification, what is an
24 agency supposed to look at. So this will be the
25 framework in which we'd ask you to look at the evidence

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1 I'm going to preview.

2 And what the brief submitted by Ecology to the U.S.
3 Supreme Court says is that the scope is all of the
4 potential effects of a proposed activity on water
5 quality, direct and indirect, short and long-term,
6 upstream and downstream, construction and operation,
7 should be part of a state's certification review.
8 That's Ecology to the U.S. Supreme Court.

9 What the evidence is going to show here is, first of
10 all, that Ecology has not followed its own advice. The
11 exhibits, the 401 on its face, the testimony that will be
12 presented, is going to show that, in fact, between the
13 first 401 certification on August 10 and the second 401
14 certification on September 21, 2001, Ecology scaled back,
15 it changed the wording of what was covered to retreat
16 from this scope I just read you, to retreat from what the
17 statute requires, and in a way that it cannot itself
18 explain, so the testimony, the evidence will show that
19 Ecology has substituted in the September 401 language
20 that says it covers 404 projects. But Ecology cannot
21 tell you what is a 404 project and what is not. So that
22 if you want to know what the protections of the 401
23 certification apply to, if you want to know what there is
24 reasonable assurance for and what there is not reasonable
25 assurance for, the testimony will be Ecology cannot say,

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1 Ann Kenny cannot tell you. The testimony will be it's in
2 process, we're thinking about it. And that, we would
3 suggest, is the first detour from reasonable assurance
4 and a fundamental one.

5 The testimony will also show with regard to
6 wetlands, and on that you will be hearing from our
7 experts, Amanda Azous and Dyanne Sheldon, but you'll also
8 be hearing from four folks testifying on behalf of the
9 port and Ecology, Cassin, Stockdale, Kelley, and Walter,
10 and what you'll find is from that testimony, that there
11 still is not a clear statement on what the mitigation
12 package is. In fact, you can go look in the record,
13 through all those exhibits, and find that the mitigation
14 package described in the materials that you reviewed for
15 the stay motion, after the 401s were issued, is different
16 than the mitigation package described and that we're
17 going to hear testimony about from the respondent's
18 witnesses. And, in fact, no two of the respondents agree
19 on what the mitigation package is.

20 You'll also find that with regard to wetlands, and
21 this is a problem that was highlighted in the OHA case,
22 what is being preserved are not wetlands or not wetlands
23 that aren't already protected, what is being preserved
24 are uplands, buffers, anything but wetlands. That's the
25 package. The package is inadequate, the package does not

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1 meet the OHA standard, the package does not meet the
2 water quality standard, the package does not meet the
3 antidegradation standard.

4 You'll also be hearing testimony regarding the
5 port's low-flow plan. This is a critical part of the
6 package here of supposed mitigation that provides
7 reasonable assurance, and, once again, the theme will be
8 suspension of disbelief.

9 Neither the port nor Ecology have a final low-flow
10 plan. Ecology hasn't accepted that which the port has
11 offered and the port is still working on it, trying to
12 make it acceptable. That's been the case not just before
13 the 401 but, the testimony will show, in the six months
14 since even up to within the last few weeks.

15 So you have a key issue, the testimony will show -
16 by the way, an issue that was also key in Battle Mountain
17 Gold - on which there is no agreement by Ecology, by the
18 experts, certainly not by our experts, but even by the
19 respondents, that it has been addressed in an accurate,
20 non-speculative manner and that solutions have been found
21 that provide reasonable assurance.

22 And I dare say that there be some testimony that
23 suggests that given what is proposed here, there is no
24 such solution on the horizon, certainly none that would
25 provide reasonable assurance.

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1 You will have testimony, and this will come, once
2 again, from respondent's witnesses as much as from our
3 own, that although an agreed order under MTCA was signed
4 by the state several years ago with the port, although
5 the governor's certification to the federal government of
6 the third runway project depended on that agreed order
7 and what it required for its certification to federal
8 government that the project could go forward consistent
9 with environmental laws, the agreed order has not been
10 complied with in one significant respect. What's that?
11 There is substantial existing contamination of the
12 airport. There was a concern years ago that was supposed
13 to be raised and addressed by the agreed order that that
14 contamination would migrate and that the migration would
15 be facilitated to the streams, to aquatic resources as a
16 result of third runway construction. There was supposed
17 to be an extensive modelling program performed under that
18 agreed order as part of the third runway review and 401
19 certification. It's never occurred.

20 We have a preferred pathway analysis, which is some
21 musings on a piece of paper by an expert from the port.
22 We do not have the modelling that was promised under the
23 agreed order, simply violated.

24 Finally, and I'm going to ask Mr. Poulin from CASE
25 to address issues of water quality, but I did want to

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1 talk for a moment about fill and the fill criteria. The
2 proposal is to import 20 million cubic yards of fill to
3 this site. The suggestion is that the site will be
4 protected because there will be purportedly stringent
5 criteria for contaminants in the fill and, in addition,
6 for testing, sampling of the fill, to make sure that
7 those contaminants can be identified.

8 What the testimony will show, and, once again, this
9 is not just testimony from ACC and CASE witnesses, but
10 the testimony will show from the exhibits, from the words
11 of the respondent's own consultants and experts, that the
12 criteria both with regard to the substantive criteria for
13 fill, with regard to the sampling requirements, are
14 woefully inadequate. We know, for example, the testimony
15 will show that Peter Kmet acknowledged - he is senior
16 toxic engineer for the Department of Ecology - there were
17 serious problems ignored. We know that using these
18 supposedly stringent criteria, contaminated material have
19 already been brought to the site. We know, in fact, that
20 the criteria are set up and the testing, this SPLP back-
21 up testing that we'll be talking about under the 401
22 that's supposed to back up the original criteria, is set
23 up in such a way the testing cannot detect the levels of
24 contamination that are forbidden at the site. It's too
25 unrefined to detect that which is prohibited. That's

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1 what the testimony will show.

2 There's no reasonable assurance. This can only be
3 accepted if you suspend disbelief, you accept the facade,
4 you say the door works and, therefore, the structure
5 exists and is functional. That's the problem.

6 We're also going to present testimony on the water
7 rights issue. You had briefing on that, but we will once
8 again be presenting the evidence that there is a proposed
9 capture and beneficial use which triggers the requirement
10 for a water right.

11 And, finally, we think that the testimony will show,
12 including, once again, those of Ecology witnesses, that
13 it's not totally an accident that disbelief was
14 suspended. This 401, the testimony will show, was rushed
15 out under pressure with interference from the highest
16 levels of government in the state, the Governor's Office,
17 repeatedly.

18 One of the considerations that was key on rushing
19 out and getting out this 401, the testimony will show,
20 was cost. No requirement, for example, for fill sampling
21 was accepted that would be too stringent to the port and,
22 therefore, increase its cost. Cost was a factor in the
23 401, it's not a factor under the Clean Water Act, and
24 certainly not to the extent that it was made an issue
25 here.

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1 I'll ask Mr. Poulin to address water quality, but I
2 would also ask the board, as you go through, as you
3 listen to the testimony, as you hear the deferrals that
4 were granted - we'll approve now, but you'll get us
5 something later - as you learn of the shifts in what is
6 proposed and what is claimed to be proven and what the
7 mitigation will be, ask yourselves, is this the standard
8 you want to set for reasonable assurance not just for
9 this case but for future major proposals? Do you want an
10 agency to be told that it is okay to suspend disbelief
11 for the purpose of issuing a 401 that is supposed to give
12 reasonable assurance that water quality standards of the
13 aquatic resources of this state will not be degraded,
14 will be protected?

15 And Mr. Poulin will speak in the few moments I have
16 left. Thank you.

17 MR. POULIN: Good morning. Once again, I am
18 Rick Poulin on behalf of the Citizens Against SeaTac
19 Expansion, an organization which intervened in this
20 action because of the enduring care and concern of CASE's
21 members for the quality of live they enjoy and the
22 quality of the environment that still remains in the
23 vicinity of SeaTac International Airport.

24 The port has suggested in its brief that ACC and, by
25 reflection, CASE's mission is to stop the project and

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1 that, therefore, they suggest that our witnesses'
2 testimony should be taken with a grain of salt. Well,
3 I'm not surprised that the port would impugn the motives
4 of some of the few people it has not been able to dupe
5 into passivity or bully into submission. But the board
6 should understand that the port has demonstrated itself
7 to be an organization that will stop at nothing to build
8 the coveted third runway regardless of the cost and
9 regardless of the environmental impacts. It will fudge
10 any numbers, it will manipulate any study result, and it
11 will misrepresent any legal authority. I'll talk about
12 some of those misrepresentations in detail in a moment.

13 But before I continue, I'd like to talk briefly
14 about the key legal authority governing water quality at
15 issue here, and that is the Washington State water
16 quality standards. They are found in the Washington
17 Administrative Code 173-201A. The water quality
18 standards include narrative standards, they include
19 numeric criteria and they include an important, but often
20 overlooked, antidegradation standard. The
21 antidegradation standard requires that, "Existing
22 beneficial uses shall be maintained and protected and no
23 further degradation which would interfere with or become
24 injurious to existing beneficial uses shall be allowed."

25 It's clear under Washington law that the water

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1 quality standards fully apply to storm water. In WAC
2 173- 201A-160, the law states that, "Activities which
3 cause pollution of storm water shall be conducted so as
4 to comply with the water quality standards. The primary
5 means to be used for requiring compliance with the
6 standards shall be through best management practices..."
7 And through a citation to the subpart above, the WACs
8 made clear that best management practices shall be
9 applied so that violation of water quality criteria shall
10 be prevented.

11 Now, on page 17 of its prehearing brief, the port
12 misrepresents the holdings of three cases to manufacture
13 the appearance of support for its argument that one
14 element of the water quality standards' numeric criteria
15 do not apply to discharges of storm water. This brings
16 us back to the appearance of disbelief. The argument
17 sounds good, it looks good on paper, it looks well
18 supported, but when you examine the details, it's simply
19 not true.

20 And on behalf of CASE, I'm asking you to please
21 examine the details that you're going to hear. I know
22 this is a challenging case and you're going to be working
23 very hard over the next two weeks and far beyond that,
24 but please look at the details.

25 On page 17 of its brief, the port cites three cases,

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1 Oregon Natural Resources Council versus National Forest
2 Service, Puget Soundkeeper Alliance and Waste Action
3 Project, all to support its assertion that stormwater
4 discharges are somehow excused or exempt from complying
5 with the narrative criteria in the water quality
6 standards.

7 Oregon Natural Resources Council doesn't say that.
8 It involved only discharges of nonpoint sources of
9 pollution in a national forest. That's not what we have
10 here. And the main bulk of the case addressed the
11 existence of a cause of action in a citizen suit. This
12 isn't a citizen suit and there is no dispute as to
13 whether there's a cause of action. We're not trying to
14 enforce the Clean Water Act; we're trying to assure that
15 the proposed project complies with the water quality
16 standards that storm water is subject to.

17 Puget Soundkeeper Alliance is a case from this
18 board. This board did not hold that compliance with
19 numeric effluent limits is not required for storm water.
20 The misrepresentation is particularly egregious because
21 the case didn't even involve storm water.

22 And in Waste Action Project the board did not hold
23 that the use of BMPs for storm water constitutes AKART,
24 which is an acronym for All Known Available and
25 Reasonable Technologies.

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1 The port also argues that there is no evidence of
2 any violations of water quality standards resulting from
3 its discharges. This is manifestly untrue. Both Ecology
4 and the port are on record as admitting that there are
5 violations and exceedances of water quality criteria in
6 the receiving waters. Ecology's admission is found in
7 the permit fact sheet, plain black and white language,
8 and the port's admission is found in the 1997 Storm Water
9 Receiving Environment Monitoring Report, which is Exhibit
10 426. That exhibit states, maximum concentrations of
11 dissolved metals measured in Miller Creek only exceeded
12 EPA's and the state's acute criteria for aquatic life for
13 copper and zinc. Copper and zinc criteria were exceeded
14 in samples from both upstream of the stormwater
15 discharges and in the stormwater discharge itself, but
16 only copper was exceeded downstream of the outfall.

17 Switching over to Des Moines Creek, only copper and
18 zinc concentrations exceeded criteria. Listen to this:
19 Copper and zinc were exceeded in samples from both
20 upstream and downstream of the discharge as well as in
21 the stormwater discharge itself.

22 If you look at the numbers, Miller Creek and Des
23 Moines Creek exceed state water quality standards, the
24 port's discharges had considerable amounts of copper and
25 zinc, and the result is receiving waters that are worse

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1 off downstream of the port's discharges than they were.
2 That's uncontroverted.

3 Now, the essential problem with the proposal that
4 the port has offered to fix the problem is that it
5 involves more of the same, but the problem is and the
6 common sense reality is that if you keep doing what
7 you're doing, you're going to keep getting what you're
8 getting.

9 The port's proposal for more of the same is to
10 continue using ineffective best management practices that
11 are good for some things, but they're not good for
12 controlling the discharges of dissolved metals that
13 result from the port's industrial stormwater discharges.

14 There's lots of great flow control, we have problems
15 with it, but you should understand that flow control does
16 not constitute treatment for industrial pollutants. The
17 filter strips and bioswales that are proposed to treat
18 the runoff from the huge area off the runway airfields
19 and the third runway are not effective for removing
20 dissolved metals.

21 Privately Ecology and the port have conceded that
22 the only way they can beat the water quality standards is
23 to change the water quality standards. The evidence
24 shows there's a three-part strategy that includes calling
25 the best management practices currently in use AKART,

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1 then increasing the numeric criteria through the use of a
2 site-specific study. The port understands that it's
3 presently incapable of meeting the numeric criteria for
4 storm water, but if it can raise the criteria, then maybe
5 in the future, it will be able to meet those criteria.
6 And that's what we see, we're in an iterative process,
7 give us some adaptive management in 15 or 20 years, no
8 problem, we can meet the new standards that we are going
9 to create through the site-specific study.

10 But that's not acceptable under the Clean Water Act.
11 In order to have reasonable assurance and obtain a 401
12 certification, the port has to meet water quality
13 standards at the outset, not sometime in the remote and
14 distant future.

15 The port would also like to get mixing zones at its
16 outfalls. In one sense, that's an issue for the future,
17 but in another sense, the 401 certification does
18 authorize mixing zones right now. Section 82(d) and (g)
19 of the 401 certification authorize a mixing zone for
20 turbidity for the instream work and the shoreline work,
21 stream-side work, that the port must do to implement the
22 proposed project.

23 The advance authorization for the mixing zone for
24 turbidity violates both WAC 173-201A-110 and 173-201A-
25 100. Section 110 states that "A temporary turbidity

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1 mixing zone is...authorized only after the activity has
2 received all other necessary local and state permits and
3 approvals" - which this project has not yet, they don't
4 have the HPAs for the instream work - "and after the
5 implementation of appropriate best management practices
6 to avoid or minimize disturbance of in-place sediments
7 and exceedances of the turbidity criteria." The BMPs
8 haven't even been proposed yet, much less implemented.
9 But the law further requires that no mixing zone shall be
10 granted unless the supporting information clearly
11 indicates the mixing zone would not have a reasonable
12 potential to cause a loss of sensitive or important
13 habitat, substantially interfere with the existing or
14 characteristic uses of the water body, or result in
15 damage to the ecosystem, or adversely affect public
16 health.

17 The problem is Ecology has authorized the mixing
18 zone without taking those protective steps required by
19 the regulation, but Ecology cannot have reasonable
20 assurance that the instream bank work will not result in
21 violations of the water quality criteria for turbidity
22 until it complies with these protective measures.

23 Indeed, the water quality criteria places a strict
24 100-foot limit on the extent of any mixing zone for
25 turbidity in small streams with flows only up to 10 cfs.

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1 And you'll see in the evidence that's presented that the
2 flows in these streams in the summer is often less than 1
3 cfs, so how they are going to get that turbidity to
4 settle out in less than 100 feet. I think it's going to
5 take quite a bit more than the suspension of disbelief to
6 pull that off. And Ecology has not required the port to
7 demonstrate how they're going to do it and how they're
8 going to avoid the violation of water quality standards.

9 So I applaud you for your attention and I look
10 forward to presenting our case over the next week. Thank
11 you very much.

12 MR. KRAY: Good morning members of the board.
13 I am Jeff Kray, Assistant Attorney General, on behalf of
14 Ecology.

15 This case is about reasonable assurance that the
16 Port of Seattle's master plan update projects will meet
17 applicable water quality standards.

18 The board reviews this issue de novo. In other
19 words, the board decides at the conclusion of this
20 hearing whether there is reasonable assurance. ACC has
21 the burden to prove by a preponderance of the evidence
22 that Ecology and this board do not have reasonable
23 assurance.

24 In this hearing, Ecology will prove that Ecology had
25 reasonable assurance when it issued its order granting a

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1 401 certification to the port; prove that ACC cannot
2 carry its burden; and prove that the board has reasonable
3 assurance to affirm Ecology's order granting the port 401
4 certification.

5 A 401 certification is a water quality
6 certification. The certification is based on the
7 proposed project. Ecology assigns a 401 certification
8 reviewer to each 401 application and did so in this case.
9 In this case, Ann Kenny will testify that she drafted the
10 401 certifications issued to the port on August 10th,
11 2001 and September 21, 2001. Miss Kenny has reviewed
12 over 50 401 certifications for Ecology. She has managed
13 the port's 401 certification application since October of
14 2000. She will testify that Ecology has been reviewing
15 the port's plans with regard to these projects for many,
16 many years.

17 The certification process is dynamic. For each 401
18 certification, Ecology assembles a team of experts to
19 review the application. Over time those experts gather
20 information, set conditions, and put mechanisms in place
21 to insure that the applicant meets water quality
22 standards.

23 For the port's application, as with other 401
24 certification applications, Miss Kenny relied on
25 Ecology's experts to assemble the technical pieces of

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1 Ecology's responses to the port's application and to
2 define the conditions in Ecology's 401 certifications to
3 the port.

4 During the hearing, the board will hear from some of
5 Ecology's scientific experts and the consultants who
6 participated in the 401 certification. Allow me to
7 briefly introduce those individuals.

8 Kevin Fitzpatrick is a water quality specialist. He
9 will discuss general water quality issues, stormwater
10 management, the port's compliance with its NPDES permit,
11 and acceptable fill criteria.

12 Ed O'Brien is an environmental engineer. He will
13 address stormwater management.

14 Ching-Pi Wang is a hydrologist. He will address his
15 preferential pathways analysis, the embankment fill
16 seepage monitoring plan and the MTCA agreed order.

17 Chung Yee is a professional engineer. He will
18 address fill criteria.

19 Dave Garland is a hydrogeologist. We anticipate he
20 will address embankment modelling and groundwater
21 science.

22 Eric Stockdale is a wetland scientist. He will
23 address wetlands and the impacts to aquatic resources.

24 Katie Walter is also a wetland scientist. She will
25 address wetlands and impacts to aquatic resources.

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1 And Kelley Whiting is a civil engineer in King
2 County's Department of Natural Resources. He will
3 address the comprehensive stormwater management plan and
4 low-flow issues.

5 In addition to these experts, Miss Kenny also
6 consulted with staff from other agencies, including the
7 Army Corps of Engineers, the U.S. Fish & Wildlife
8 Service, the Washington Department of Fish & Wildlife and
9 the National Marine Fisheries Service.

10 Based on her consultations with other agencies and
11 relying on the advice of Ecology's technical experts,
12 Miss Kenny recommended to Gordon White, the program
13 manager of the shorelands and environmental assistance
14 program, that Ecology had reasonable assurance necessary
15 to issue the port a 401 certification.

16 I have only two points I would like to make about
17 the nature of this particular project. One, Ecology's
18 job regarding a 401 certification is the same regardless
19 of the scale of the project. The port's master plan
20 update projects are essentially a large construction
21 project to create a third runway and related facilities.
22 This is the type of project Ecology is very familiar
23 with.

24 Second, what is unprecedented about this project are
25 the mitigation measures Ecology has required the port to

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1 take regarding water quality. Those mitigation measures
2 account for the scale of the project by requiring the
3 port to take additional steps to protect water quality
4 using established, scientifically-sound methods.

5 Because it is the port's project, I will leave
6 further description of the project to Mr. Reavis and the
7 port's opening statement.

8 The board will hear testimony on four main topics:
9 Storm water, acceptable fill criteria, low-flow and
10 wetlands mitigation.

11 With regard to storm water, Kelley Whiting will
12 testify that Ecology referred the port's stormwater plan
13 to King County for review and that he certified that it
14 met the technical requirements of the King County
15 stormwater manual.

16 Mr. Whiting will also testify that the port's plan
17 goes beyond the requirements of the King County manual by
18 requiring the port to retrofit existing facilities and by
19 requiring the plan to meet a more stringent flow-control
20 requirement.

21 Finally, Kevin Fitzpatrick will testify that Ecology
22 also required a site-specific study to identify effluent
23 limits for metals and that discharges are prohibited from
24 new source surfaces until the port completes that study.

25 With regard to acceptable fill criteria, Ann Kenny

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1 and Kevin Fitzpatrick will testify that although Ecology
2 has never previously placed condition in a 401
3 certification on acceptable fill, and although there are
4 no national or state guidelines on acceptable fill
5 standards or criteria, Ecology elected to craft and
6 include conditions in the port's 401 certification that
7 require the port to investigate and insure that fill
8 material comes from uncontaminated sources.

9 As a result of these criteria, the board will hear
10 testimony that it is highly unlikely contaminants will
11 mobilize and move into groundwater and surface water at
12 concentrations exceeding either acute or chronic criteria
13 established in the state's surface water and groundwater
14 standards.

15 The board will also hear testimony that the
16 unprecedented requirements placed on the port in its
17 selection and use of fill materials provide Ecology with
18 reasonable assurance that Washington State's surface
19 water and groundwater quality standards will be met
20 throughout the life of this project.

21 With regard to low flow, Kelley Whiting will testify
22 that Ecology is requiring mitigation for low flow.
23 Mr. Whiting will testify he reviewed the port's low-flow
24 plan and he was satisfied that the calibration is
25 accurate and that the concept is feasible. The board

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1 will hear that Mr. Whiting made some recommendations to
2 further refine the plan and that these were incorporated
3 in the 401 as conditions.

4 These conditions protect water quality by requiring
5 monitoring, testing, final design drawings and other
6 safeguards.

7 With regard to wetland mitigation, the port's
8 project will impact approximately 19 acres of wetlands.
9 However, Eric Stockdale and Katie Walter will testify
10 that the port's compensatory wetland mitigation plan will
11 restore and enhance ecological and hydrologic functions
12 to 176 acres of land. Of that 176 acres, approximately
13 111 acres, or over half of the mitigation, occurs within
14 the affected basin, excuse me, the two affected basins.

15 The in-basin mitigation includes restoring a 1.7-
16 mile reach, or 32 percent of the length of Miller Creek,
17 beyond the creek's conditions prior to the port's
18 project. The plan's monitoring and performance standards
19 insure the success and long-term viability of the
20 mitigation.

21 Ecology's testimony in each of these areas will
22 demonstrate reasonable assurance. Reasonable assurance
23 is the touchstone in this matter. However, reasonable
24 assurance is not static, it is dynamic. Contrary to
25 ACC's position, reasonable assurance is not measured as

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1 of a particular date, it is a condition placed on the
2 project for its duration.

3 Ann Kenny will testify that reasonable assurance is
4 a two-step process. Step one, determine through a
5 preponderance of evidence that water quality standards
6 can and will be met and identify any areas of
7 uncertainty.

8 Step 2, address those areas of uncertainty by
9 including measures that will remove or reduce the
10 uncertainty.

11 Miss Kenny will further testify that for all the
12 technical issues involved with this project, Ecology had
13 substantial information before it to determine through a
14 preponderance of evidence that water quality standards
15 could and would be met. Where there were areas of
16 uncertainty, Ecology developed conditions to remove or
17 reduce that uncertainty.

18 Where a 401 certification includes conditions, part
19 of Ecology's reasonable assurance is that the recipient
20 of the certification will comply with those conditions.
21 Ecology addresses failure to comply with a condition of
22 the certification on a case-by-case basis. The board
23 will hear from Miss Kenny that if a 401 applicant is out
24 of compliance with a particular condition of Ecology's
25 certification, Ecology has several options for insuring

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1 an applicant's on-going compliance with the certification
2 conditions.

3 First, Ecology encourages the applicant to
4 voluntarily comply with the certification condition.

5 Second, if this approach does not produce
6 satisfactory results, Ecology uses its enforcement
7 authority to compel compliance.

8 Third, the 401 certification is adopted in whole by
9 the Army Corps of Engineers into its 404 permit and if an
10 applicant fails to comply with the 401 certification
11 conditions, Ecology will refer the matter to the Corps
12 for enforcement.

13 Ecology will insure the port's on-going compliance
14 with Ecology's certification conditions. Ecology has
15 reasonable assurance that the port's master plan update
16 projects will comply with water quality.

17 To conclude Ecology's opening statement, during this
18 hearing, Ecology will present the board with evidence
19 that ACC cannot carry its burden of demonstrating by a
20 preponderance of evidence that the board does not have
21 reasonable assurance the port's master plan updates will
22 meet water quality standards.

23 Based on the evidence and the controlling law,
24 Ecology will ask the board to affirm Ecology's 401
25 certification for the port's projects.

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1 Thank you and I look forward to spending the next
2 couple of weeks addressing these issues with you.

3 MR. REAVIS: May it please the board, again,
4 for the record, my name is Gil Reavis. My co-counsel,
5 Roger Pearce, and I represent the Port of Seattle in this
6 case.

7 I also want to introduce Michael Feldman from the
8 Port of Seattle, who is sitting over here to my left, who
9 is the director of aviation facilities.

10 I want to join the other parties in thanking you for
11 your attention to this matter.

12 This case is about a large project and an
13 unparalleled mitigation. What I hope to do in this
14 opening statement is to discuss what we believe the
15 evidence will show and, in doing so, discuss what we
16 believe the evidence will not show.

17 I won't be able to address all of the points that
18 Mr. Eglick made, I will leave that to the evidence, but
19 one thing I do want to say is we're not asking anyone to
20 suspend disbelief. What we are asking you to do, which I
21 know you will do, is evaluate the evidence that comes in
22 through the documents and the witnesses and evaluate that
23 evidence fairly, which I know you'll do.

24 I'm sure that you have read enough about the project
25 to understand the general project layout, so I don't want

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1 to spend a lot of time on that. We have all been to the
2 site and have seen where the third runway is going to be
3 built.

4 The third runway and associated projects are being
5 built largely to reduce delays occurring during bad
6 weather. Having a functioning airport that allows for
7 future growth is obviously important to the region.

8 The third runway is currently the state's most
9 important public transportation project. No one here can
10 deny that transportation is a critical issue in the
11 state, particularly given what's happening in the
12 Legislature these days.

13 But you will no doubt hear argument from ACC, as
14 Mr. Eglick alluded to, about what they claim is
15 interference by the Governor's Office in the 401 process.
16 While you will hear that argument, I don't suspect that
17 you will actually hear any evidence that amounts to
18 interference. What you will hear is that the Governor's
19 Office was interested in the progress of this
20 certification. And I think given the importance of this
21 public transportation project to the state, it's no
22 wonder that the governor is interested in how it's
23 progressing along.

24 But this case really is not about whether the third
25 runway should go at SeaTac or whether another airport

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1 should be built somewhere else; that case has already
2 been decided. The Puget Sound Regional Council several
3 years ago made the decision. Puget Sound Regional
4 Council is a group of elected officials from the Puget
5 Sound region. That decision was appealed by ACC and the
6 appeal was terminated in favor of the project.

7 This case instead is about water quality, whether
8 construction of a third runway and the master plan update
9 projects will adversely affect water quality.

10 No one denies that the project is very large. You
11 were able to see that on the site visit. But the
12 mitigation measures that are being applied to this
13 project are the most extensive ever applied to a project
14 of this type. Many of those mitigation measures are, in
15 fact, unprecedented, and you'll hear testimony about
16 that.

17 Ann Kenny, who wrote the 401, said in her direct
18 testimony she is not aware of any other project requiring
19 a 401 certification that has ever been subjected to this
20 level of scrutiny. Let me give you two examples of that.

21 First, Miss Kenny said that using numeric criteria
22 for fill on a construction project is unprecedented in
23 the history of the department. It may be unprecedented
24 anywhere.

25 Secondly, the 401 requires the port to go beyond

AR 054894

1 mitigating for the impacts of this project. It requires
2 the port to retrofit existing stormwater management
3 facilities that aren't being built for this project.
4 This type of mitigation, going beyond the impacts of the
5 project, is highly unusual and, in fact, is quite
6 significant.

7 You will hear evidence of many other ways in which
8 the mitigation measures for this project go beyond what
9 has been done in the past.

10 We will present testimony from a number of qualified
11 experts in various fields. While I don't want to go into
12 a description of the testimony, I do want to list the
13 witnesses for you. This is summarized in our trial brief
14 so I just want to mention names.

15 Wetlands, Mr. Eglick referred to Jim Kelley and Jan
16 Cassin.

17 Low-flow impacts, you will hear from Paul Fendt, Joe
18 Brascher, and Charles, or Pony, Ellingson.

19 Storm water and water quality, you will hear from
20 Keith Smith, Charlie Wisdom, Paul Fendt, Don Weitkamp and
21 Bill Stubblefield.

22 On fill criteria, you will hear from Elizabeth
23 Leavitt, Linn Gould, Beth Clark, and Mike Riley.

24 On embankment issues, you will hear from Mike
25 Bailey, an engineer with Hart Crowser.

AR 054895

1 I want to discuss a little bit of the history of
2 this project because I think it's important to understand
3 how we got here. The port's witnesses have provided this
4 history primarily in the testimony of Michael Cheyne, who
5 is the director of planning for the airport, and
6 Elizabeth Leavitt, who is the manager of environmental
7 aviation programs for the port.

8 There are several important points to note for this
9 history. First, Ecology's work on this 401 certification
10 is not the first environmental review of this project.
11 There have been two environmental impact studies done in
12 the past, one done by the Puget Sound Regional Council
13 and a second one done jointly by the port and the FAA.
14 And those reviews required mitigation measures that's
15 described in those decisions and those decisions are
16 attached to Mr. Cheyne's testimony. So I would urge you
17 to review those and note that this project has in fact
18 been through several environmental reviews.

19 Two federal agencies, in fact, the Fish & Wildlife
20 Service and the National Marine Fisheries Service,
21 reviewed the third runway project specifically for its
22 effect on aquatic organisms. Those two agencies focused
23 on water quality to determine whether or not there would
24 be any adverse impacts to species covered by the
25 Endangered Species Act. Those reports will be in the

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1 record. Those two agencies concluded that any impacts
2 were unlikely.

3 Second, at every step of the way, there's been
4 public notice and comment for this project. ACC has
5 participated in review of the project for many years.
6 After many of the earlier proceedings were completed,
7 litigation was brought and the decisions of those
8 agencies were tested in court.

9 As you can see from Mr. Cheyne's testimony, all the
10 challenges to the project have been resolved in favor of
11 the project.

12 Third point on the history is that Ecology has had
13 third-runway proposals before it for over five years.
14 The first application for this project was filed in
15 December of 1996. Mr. Kray described the testimony of
16 several Ecology witnesses, many of whom have lived with
17 this project for years and they've had an ample
18 opportunity to look at the project and to ask all the
19 hard questions.

20 Given this history, it's not accurate to assert that
21 this 401 was somehow hurried through the approval
22 process. It's taken a long time and many, many years and
23 hours of work.

24 So what I would like to do now is address some of
25 the 22 issues before the board. Obviously, I can't

AR 054897

1 address them all; I am going to address a few that have
2 general application to a number of other issues.

3 The over arching question here is obviously number
4 4, is there reasonable assurance that water quality
5 standards will be met. There isn't a lot of dispute
6 about the standard. Mr. Kray discussed that. It's in
7 Ecology's desk manual, it's stated in prior decisions of
8 the board. There must be a preponderance of the evidence
9 that water quality standards will be met. Now, Ecology
10 has determined that those standards will be met.

11 Overcoming that decision requires proof by a
12 preponderance of the evidence that there was not
13 reasonable assurance, and appellants have the burden to
14 prove that to you.

15 Now, in that connection, you will hear a lot of
16 testimony from ACC's witnesses, raising many, many
17 questions about various issues. As you listen to this
18 testimony, I would urge you to think about whether ACC
19 has met its burden to prove that Ecology lacked
20 reasonable assurance.

21 For example, ACC alleges, as Mr. Poulin described,
22 that there have been long and repeated violations of the
23 NPDES permit. I would urge you to look at that evidence
24 carefully. I think what you're going to find is that
25 most of that evidence is about exceedances of numeric

AR 054898

1 criteria and most of those exceedances are based on
2 instantaneous grab samples; whereas, the water quality
3 standards often require averages over time. So the data
4 is not there in many, if not all, of those instances.

5 Secondly, look carefully at where the samples are
6 taken, because many of those samples are not taken in the
7 receiving waters. Even those that are taken in the
8 receiving waters don't necessarily indicate what the
9 cause of that contamination is because some of these
10 streams, particularly Des Moines Creek, drain a very
11 large urban area including a highway, the Pacific Highway
12 South.

13 So I suspect that you will hear a lot of testimony
14 that a certain activity might have a particular effect
15 but not a lot of testimony that it will have that effect
16 or even that it probably will have that effect.

17 ACC's witnesses are often unable to quantify the
18 effects that they have identified, and our position is
19 that the burden of proof requires more than that.

20 On the other side of the coin, we believe the port's
21 witnesses have in fact studied those impacts, quantified
22 them, resolved them; that has been reviewed by Ecology in
23 the process of reaching reasonable assurance.

24 One thing to bear in mind when evaluating the
25 evidence, and Mr. Kray alluded to this, is that the

AR 054899

1 technology and the methods for constructing the third
2 runway are well known. The port is not building a gold
3 mine on top of a mountain here. The port is importing
4 fill and placing impervious cover on it much like
5 building a roadway. While it's a large fill project,
6 it's not different in kind from many, many other projects
7 that are built every day around the country.

8 For example, you will hear a lot of testimony
9 probably about stormwater modelling. The model that's
10 being used here, which is called HSPF, is very common,
11 not only in the region but across the country.

12 The types of vaults that are being used and
13 stormwater detention ponds are the same types of
14 technologies that you see in large and small projects all
15 the time. The wetland science is no different than what
16 you see in many, many cases as well. The port is
17 mitigating in basin on a one-to-one basis and out of
18 basin on a two-to-one basis.

19 So the science and technology of this project are
20 simply not novel. Ecology has lots of experience in
21 dealing with these types of issues.

22 Issues 5 and 6 ask whether Ecology can have
23 reasonable assurance even though the 401 requires plans
24 or reports to be submitted in the future. Mr. Eglick
25 discussed this issue. It really has two components. One

AR 054900

1 is whether reasonable assurance requires that all of
2 those plans and reports exist when Ecology issues the
3 401, or, on the other side, whether, when the board
4 renders its decision, those reports need to exist.
5 That's issue number 5, it's a legal issue. We have
6 provided the authority that we believe shows that the
7 reasonable assurance needs to exist when this board makes
8 its decision.

9 But the other issue is whether Ecology or the board
10 can have reasonable assurance without having all plans,
11 reports and other documents finalized and approved at the
12 time that decision is made.

13 ACC's experts contend that Ecology, and presumably
14 this board, cannot have reasonable assurance without
15 having all of those completed plans and reports. Many of
16 the details in those plans that are still outstanding are
17 quite minor. There are many examples of these minor
18 criticisms in the testimony of ACC's witnesses. I would
19 urge you to ask yourselves or ask the witnesses whether
20 these criticisms that they are pointing out are minor
21 issues or are they significant enough to prevent Ecology
22 from having reasonable assurance.

23 What Ann Kenny says in her testimony is that the
24 port provided enough information to get past step 1, to
25 complete step 1 of the reasonable assurance analysis, was

AR 054901

1 there a preponderance of evidence that water quality
2 standards were being met; yes. Secondly, if there are
3 additional details, additional uncertainties, those are
4 covered by conditions in the 401, and that's what we're
5 dealing with now is those additional uncertainties, we
6 are not dealing with the primary decision of reasonable
7 assurance.

8 Issue number 7 relates to monitoring. The first
9 part of it asks whether there can be reasonable assurance
10 if the 401 certification relies on future monitoring.

11 ACC seems to believe it requiring future monitoring
12 means the port and Ecology don't know anything about the
13 impacts of the project; that they're going to approve it
14 first and then study it. I think that's what Mr. Eglick
15 referred to in the stay hearing by the term IOU. If you
16 look closely at those monitoring plans, however, I think
17 what you'll find is that they are not meant to determine
18 what the impacts are. Those monitoring plans are
19 intended to confirm that the mitigation is functioning as
20 designed.

21 The monitoring plans are part of what is called
22 adaptive management. Adaptive management recognizes that
23 no prediction of future events will ever be perfect.
24 Adaptive management provides means to make adjustments so
25 that the projected mitigation matches what's actually

AR 054902

1 built. It doesn't mean that the impacts haven't been
2 studied and quantified.

3 Now, adaptive management is applied all the time in
4 the NPDES program, that BMPs are put in place and they
5 are revised as the knowledge increases to reduce the
6 impacts of the project. A good example of this with
7 regard to this proposal is in the stormwater modelling
8 area. As Mr. Eglick I think alluded to, two of ACC's
9 experts don't even necessarily agree with regard to
10 whether or not the models are appropriately calibrated.
11 What that tells you is that a number of these issues are
12 subject to professional judgment. That doesn't mean that
13 the model is no good, it just means that the results can
14 be interpreted differently by qualified professionals.

15 To account for that, the adaptive management system
16 builds in flexibility to deal with actual conditions if
17 they don't match the model's perfectly.

18 Paul Fendt will testify about this. What Mr. Fendt
19 says, for example, on low flow is that if a stream flow
20 turns out to be less than the model predicted, there are
21 measures that can be taken to adjust the system, and
22 these are set out in the contingency plan which is a part
23 of the low-flow plan.

24 A couple of those measures are altering the
25 schedules for filling the vaults or, secondly, altering

AR 054903

1 the schedule for releasing the water from the vaults so
2 that the streams get the proper amount of water at the
3 proper time.

4 The adaptive management approach adds a lot to
5 reasonable assurance. The monitoring aids that process.
6 That's why monitoring is used. It's not because Ecology
7 did not know the answers before issuing the 401.

8 Now, backing up the adaptive management approach is
9 Ecology's continued oversight of the project. Mr. Kray
10 addressed this issue of Ecology's enforcement powers, so
11 I won't go into that again.

12 An additional point, however, is that the port has
13 agreed to pay for three to five full-time employees for
14 Ecology to make sure that the reviews get done on a
15 timely basis. By these means, Ecology can assure that
16 the 401 conditions are being met and that adaptive
17 management is working, and a combination of all these
18 factors leads to reasonable assurance.

19 Thank you.

20 MS. COTTINGHAM: Mr. Eglick. Would you like
21 to call your first witness.

22 MR. EGLICK: Yes. Thank you. Sally Nelson.

23 MS. COTTINGHAM: And witnesses will be sworn,
24 when we get the podium out of the way, by the court
25 reporter.

AR 054904

1 A. Yes. Briefly. As you know, the cities of Des Moines,
2 Burien, Normandy Park, and the school district of
3 Highline, and the City of Federal Way and Tukwila, merged
4 together to be part of the governmental process to
5 provide review process, participation, on the proposed
6 third runway expansion and the port's master plan.

7 And we did that, Peter, to empower us to have more
8 leverage and to be able to extend to the community some
9 assurance that we were working as a group throughout the
10 region most impacted by the proposed third runway.

11 Q. Can you explain what the jurisdiction is of the Highline
12 School District, how does that relate to the cities or
13 members of ACC?

14 A. Yes. Most of the Highline School District covers all the
15 cities, with the exception of Tukwila, which has its own
16 school district.

17 Q. Okay. I'm wondering if you could --

18 MS. COTTINGHAM: I am going to suggest that we
19 move that easel over to here.

20 Q. Ms. Nelson, if you could take a look, and this is for
21 illustrative purposes, it's a map, I assume you would
22 agree, showing the general area of the airport?

23 A. Yes.

24 Q. And could you perhaps just go to the board and locate for
25 the board some salient landmarks for where the cities are

AR 054906

1 located and so on.

2 A. Okay. Well, you see 509 up here, and this is kind of
3 challenging without roads on it, but there is a circle
4 here, so the city of Burien - I'm going to rely on this
5 map, too, to help me out - approximately comes down here
6 down along this boundary, comes back up here, going
7 through the Walker Creek wetland area and comes along
8 here paralleling the Miller Creek area. So it's
9 approximately like that. And then up here across
10 approximately like that, and includes all the shoreline
11 here.

12 The city of Des Moines abuts the city of Burien to
13 the south and it includes Miller Creek. Here is Walker
14 Creek and it includes this area up here. Let me see how
15 exact I can be. I'm sorry, Normandy Park. Comes down
16 like this approximately to here and includes the
17 shoreline here.

18 This is the city of SeaTac, which is not included in
19 the ACC organization and which of course supports the
20 expansion of the third runway, and gets millions of
21 dollars from the Port of Seattle.

22 The city of Tukwila is roughly up here and comes
23 down and parallels the Port of Seattle, comes down like
24 this and circles around I-5.

25 And then Des Moines is approximately this area down

AR 054907

1 here, approximately in that area and comes over to the
2 waterfront here.

3 The importance here of several parks, I might add,
4 one is here where the Walker and Miller Creek have the
5 mouth of their rivers, that is Normandy Park Community
6 Park which is very pristine. You can see these two
7 rivers flow into the sound there. There are many
8 amenities for the community of Normandy Park there, a
9 pristine shoreline, lots of trees, natural habitat. A
10 lot of restoration projects go on along that creek for
11 the Highline School District.

12 Down here in the city of Des Moines where the Des
13 Moines Creek empties, that's the mouth of the Des Moines
14 Creek, there's also a lovely park. It has a senior
15 center in it, many historical buildings. It's a park
16 that's a regional park in nature, it's not just limited
17 to the people of Des Moines, it's well served. There's
18 many areas. I was there yesterday. It's a lovely,
19 lovely pristine area.

20 In the city of Burien, of course, we have Lake
21 Burien Park, and if I could just guess, 160th along here,
22 there's a Sylvester Hospital back on the west side of
23 that and there is a Kiwanis park in here where the
24 Kiwanis have a day camp for children and they enjoy the
25 Miller Creek basin here and have a lot of studies and

AR 054908

1 trails along that area.

2 So I think, Peter, if this is helpful, if you would
3 like me to add something.

4 Q. Well, I think it is helpful. Are there any schools in
5 the area or near the area for construction of the third
6 runway that you know of?

7 A. Right. As a former school teacher, I did teach in
8 Sunnydale School, which is an historical school right on
9 Des Moines Way, just across from the proposed great wall
10 of SeaTac. And that school is particularly significant
11 because in front of that school is a World War I
12 memorial, and we have wonderful pictures of French coming
13 over after the conclusion of the war, planting trees
14 there that go along Des Moines Memorial Drive. That is
15 an historical drive and of great importance not only to
16 the cities around SeaTac Airport but, of course, to the
17 region as well.

18 Q. Is there a way you could put an "X" or maybe an "S" for
19 school or --

20 A. Let me see here. If this is 509, I'm trying to guess
21 where Des Moines Way is here, Peter. Maybe you could
22 help me out. I'm not sure where Des Moines Way is. But
23 it's right on Des Moines Way and approximately 156th, I
24 believe.

25 Q. Okay.

AR 054909

1 A. Right about there.

2 Q. Can you also tell us - you mentioned fish in your
3 prefiled - have you ever actually seen any fish in any --

4 A. Yes, I have. As a former teacher, prior to the expansion
5 of SeaTac Airport, we usually and often did walks along
6 those trails. Recently, more recently, Trout Unlimited
7 has been busy with restoration projects. I meet
8 regularly with teachers and am asked to lecture in
9 classrooms about the pristine nature of the salmon
10 habitat, et cetera, of these areas, and I have seen fish
11 there and I have actually fished there some 15 years ago.

12 Q. Okay. I did want to ask you also, and then I think we're
13 just about done, but could you summarize for the board
14 what ACC's position is with regard to the third runway.
15 I think you heard some reference there, for example,
16 some of the briefs have some characterizations of why
17 there's opposition and so on. Can you summarize ACC's
18 position from your experience as an elected official and
19 a member of ACC?

20 A. Well, the ACC has undertaken what I consider a major
21 effort on behalf of its citizens and I would say the
22 larger community. And we have been characterized
23 frequently as nimbies. This is not the case. We are a
24 group of communities who have opposed expansion of the
25 third runway for the impacts and environmental

AR 054910

1 degradation of some of the areas I have mentioned, the
2 streams, the watershed areas, the basins, the schools,
3 the memorials. This is a community that has long existed
4 in partnership, I might say, with the Port of Seattle and
5 we would like to be good stewards with them of our
6 environment.

7 The ACC cities have undertaken many projects to be
8 good stewards of their environment. Part of the reason
9 we formed was because of a continuing overriding cynicism
10 about the port's lack of good stewardship of their
11 environment.

12 I might say that in a time of public cynicism, it is
13 more difficult than ever to find many of the port's
14 so-called statements insuring water quality, for example,
15 that in fact they're doing so. And I think the record
16 would show, and I don't pretend to be an attorney here,
17 but the record would show that they have not met the
18 quality standards that all other institutions are meant
19 to bear.

20 So these communities are together trying to insure
21 their constituents that there will be safety and, for
22 example, in the building of the great wall, that the
23 water quality will be protected and that it will meet the
24 same rigorous standards all other institutions have to
25 meet.

AR 054910.01

1 Q. Okay. Thank you.

2 That's all I have in terms of direct.

3 MS. COTTINGHAM: Mr. Poulin, do you have any
4 questions?

5 MR. POULIN: No questions from CASE, Your
6 Honor.

7

8 EXAMINATION

9 BY MR. REAVIS:

10 Q. Ms. Nelson, I'm Gil Reavis. I'd like to show you an
11 exhibit, and since this is the first one, we're going to
12 see if we have this process working. It's Volume 5,
13 Exhibit 1062.

14 MS. COTTINGHAM: And it's yellow.

15 MR. REAVIS: It's yellow and Volume 5.

16 MR. REAVIS: 1068, my error.

17 MR. PEARCE: That's in Volume 6.

18 MR. REAVIS: I would have to be the first one
19 to demonstrate the efficiency of this system.

20 Q. I just have a couple of questions about that, Ms. Nelson.
21 That exhibit appears to be an agreement among various
22 cities that you discussed forming the ACC; is that
23 correct?

24 A. Yes.

25 MR. REAVIS: We would like to offer this

AR 054911

1 exhibit. I think there is an original hearsay objection
2 to it. I don't know if that still is the objection.

3 MR. EGLICK: Well, I think the problem is that
4 there have been a number of, as I understand it,
5 iterations of the ACC interlocal agreement, and I don't
6 think a foundation has been laid with this witness as to
7 whether this is one that was entered when she was on the
8 ACC executive committee. And, in addition, the one that
9 is presented here is not signed or dated. Almost all
10 the signature blocks are blank and it's not dated. I
11 don't know whether this is a final version of agreement
12 or a draft version that was not finalized. So I don't
13 think a foundation has been laid for its admission.

14 MR. REAVIS: I will ask her those questions,
15 but I thought the purpose of the exhibit list was at
16 least to determine whether there are authenticity
17 objections, and there weren't any authenticity objections
18 made to this. I would be happy to ask the questions, but
19 I'm not sure that would mean it would be inadmissible if
20 she doesn't have the right answer to those questions.

21 MR. EGLICK: I think we did assert an
22 objection to the admission and there was an admission for
23 a limited purpose over our objection, and that was, I
24 think, how all of them were dealt with practically,
25 hundreds of exhibits, but we had asserted an objection

AR 054912

1 and if the foundation is attempting to be laid now to
2 admit this document, then I think there has to be one.

3 MR. REAVIS: I think we may have to take this
4 up later with Mr. Lucas because the limited-purpose
5 admission only relates to a hearsay objection, not to an
6 authenticity objection.

7 MS. COTTINGHAM: That is my understanding of
8 the limited ruling.

9 MR. REAVIS: With the board's indulgence, what
10 I would like to do is just get Ms. Nelson to read in two
11 or three lines of this document, and then if the board
12 decides later that it's inadmissible, then it can be
13 removed from the record.

14 MS. COTTINGHAM: Proceed.

15 Q. (Continuing By Mr. Reavis): Ms. Nelson, I'd just like
16 you to read there on page 1 under recitals. Before I ask
17 you that, these communities did enter into an interlocal
18 agreement to form the ACC, is that correct?

19 A. That's correct.

20 Q. And that occurred in about what year, do you recall?

21 A. Well, on the back, page 8, there is a date dated February
22 27th, 1995.

23 Q. Okay. Does that seem, to your recollection, about the
24 right time when ACC was formed?

25 A. Yes. However, the dates below for the signatures, which

AR 054913

1 are missing, are 1996.

2 Q. Well, if you would then, please, subject to the objection
3 that's been made, read from the first page the line
4 number 4 and the line immediately following that letter
5 A?

6 A. Number 4 beginning, "The parties agree"?

7 Q. Yes.

8 A. "The parties agree to promote the following goals. A.
9 To stop the construction of any additional runways at
10 Seattle Tacoma International Airport."

11 Q. Okay. I just have a couple of other questions or areas
12 to discuss with you. Your prefiled direct testimony
13 states that Mr. Tom Luster was abruptly removed from the
14 Department of Ecology. Do you recall that testimony?

15 A. Yes, I do.

16 MR. EGLICK: Objection to the form of the
17 question.

18 MS. COTTINGHAM: Can you give some more --

19 MR. EGLICK: Yes. I didn't want to make a
20 speaking objection. I think the wording of the question
21 is not accurate as to what the witness' prefiled
22 testimony actually states. I think it refers to abrupt
23 removal from the third runway project, not from the
24 Department of Ecology.

25 Q. (Continuing By Mr. Reavis): With that clarification,

AR 054914

1 your testimony is that Mr. Luster was abruptly removed
2 from the third runway project; is that correct?

3 A. I'm just trying to find it here.

4 Q. Page 3, toward the bottom, the last paragraph.

5 A. Yes, I have it, thank you.

6 Q. My question for you is, were you aware that the
7 Department of Ecology in about 1998 made a decision to
8 regionalize the 401 function within the department; does
9 that ring a bell at all?

10 A. No.

11 Q. Mr. Luster's office was at headquarters in Ecology in
12 Lacey, correct?

13 A. As far as I know.

14 Q. Okay. Do you know who replaced Mr. Luster on the
15 project; that was Ann Kenny?

16 A. Correct, yes.

17 Q. And Ann Kenny works in the Northwest Region of Ecology;
18 is that your understanding?

19 A. Yes.

20 Q. Now, the switch from Mr. Luster to Miss Kenny occurred in
21 about October of 2000; does that sound about right?

22 A. Yes.

23 Q. And that was about the time that the Port of Seattle
24 withdrew its application for a 401 certification?

25 A. Correct.

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1 Q. I want to switch subjects now and ask you whether you
2 recall a lawsuit that was filed by the ACC against the
3 FAA and the Port of Seattle over the Endangered Species
4 Act; do you recall that?

5 A. I do not specifically recall that, no.

6 Q. Let me show you an exhibit and see if this refreshes your
7 recollection. It's Exhibit 1252, which is in Volume 22.
8 And this, again, is one of the yellow ones.

9 MR. EGLICK: My Volume 22 says Exhibit 1286.

10 Q. (Continuing By Mr. Reavis): While we're looking for
11 that, can I just ask you if that document refreshes your
12 recollection at all?

13 A. Yes, it does.

14 Q. So do you recall now that there was a lawsuit filed over
15 the over endangered species?

16 A. Yes.

17 Q. And was Mr. Eglick's firm representing the ACC in that
18 case?

19 A. I believe they were, yes.

20 Q. And this document purports to be a petition for review or
21 a motion for voluntary dismissal of that case, does it
22 not, is that what it says on the first page of the
23 document?

24 A. At the conclusion.

25 MR. REAVIS: Again, we'd like to offer this

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1 exhibit. The objections here were hearsay and relevance.
2 I think the relevance, I can explain, is that the issue
3 of the Fish & Wildlife Service's biological opinion will
4 be discussed later in the case in other testimony and we
5 believe that this document is relevant to ACC's view of
6 that exhibit.

7 MR. EGLICK: Well, first of all, the relevance
8 of a petition for review or dismissal, as the document
9 says, as moot of a petition for review concerning the
10 Endangered Species Act is open to question. The issue
11 before the board here is compliance with water quality
12 standards. The fact that for Chinook salmon habitat, not
13 for any other salmon aquatic species or for water quality
14 standards, but for purposes of Chinook salmon habitat,
15 there was a petition and it was dismissed as moot, has no
16 bearing on this case, none whatsoever. So we don't see
17 any relevance to it.

18 No one is alleging here that the Endangered Species
19 Act affects the 401. The allegation is that the 401 is
20 infirm because of its failure to comply with water
21 quality standards, which affects a lot more than one
22 endangered species and one little area of habitat.

23 And bringing it in through this witness I think is
24 very inappropriate. I mean, the witness can say, yes,
25 Mr. Eglick's firm represented, but, in fact, the document

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1 that she's been asked to say that about doesn't have
2 Mr. Eglick's firm on it, it's somebody else's letterhead.
3 So it's irrelevant, it's not been brought in
4 appropriately and we think it should be rejected as an
5 exhibit. It's really not germane.

6 MR. REAVIS: Let me address the relevance.
7 The witness has testified about fish in the streams and
8 some of those fish may be species listed under the
9 Endangered Species Act. We believe this document is an
10 admission by a party and can be read into the record for
11 the benefit that it has to this board. Mr. Eglick's firm
12 is listed on the last page here, in fact, it appears
13 Mr. Stock signed his name for Mr. Eglick, so I don't see
14 that there's any real issue about this being a statement
15 by ACC. It's an admission by a party opponent, it's
16 relevant to the issue of the fish in the streams.

17 All I would like to do is have the witness read a
18 couple paragraphs into the record.

19 MR. EGLICK: That's exactly our objection is
20 here is a witness who is a city council member and former
21 mayor and ACC member, and she's testified concerning the
22 fact that, yes, she has seen fish and, yes, they exist
23 and this is not some damaged environment that doesn't
24 merit protection, and what the port is doing is offering
25 an exhibit which is a legal pleading having to do with

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1 dismissal as moot of an Endangered Species Act petition
2 in the 9th Circuit and asking this witness to read it
3 into the record. It's not something that this witness is
4 competent to testify on. If it's an admission, it could
5 have been handled and could still be handled in some
6 other way, but I don't think it's an admission of
7 anything. How will this witness be testifying other than
8 acting as a mouth piece for the port to have something
9 inserted in the record, and what is the relevance of a
10 dismissal as moot of an Endangered Species Act petition
11 to whether or not water quality standards will be
12 violated. Sure, it mentions fish, but that's a common
13 word, not a nexus to the issues before the board.

14 MS. COTTINGHAM: I'm having trouble seeing the
15 direct relevance especially with this witness.

16 MR. REAVIS: The relevance is demonstrated by
17 the last full paragraph of this decision. ACC
18 acknowledges that a biological opinion is exactly what
19 ACC had sought, and it provides substantial additional
20 protections for bull trout, Chinook salmon and marbled
21 murrelet. The biological opinion contains the fill
22 criteria that we're dealing with in the 401
23 certification. So we believe it's a statement by ACC
24 that they concurred with the biological opinion and its
25 protection for those species in these particular streams.

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1 We believe it's directly relevant.

2 MR. EGLICK: Well, Your Honor, if that's the
3 point, this is not the witness to make that point with,
4 and I think Mr. Reavis' interpretation of dismissal as
5 moot is a little bit different than ours. This is a
6 document that this witness can't certify, authenticate,
7 testify to. She can say she recognizes the names of some
8 of the attorneys on it. If these folks wants to bring
9 this in as an exhibit in some other way and think they
10 can make a case for it, including with the biological
11 opinion attached, that might be something else, but this
12 is not the place or time to do it. I wouldn't know how
13 to redirect on this once she's asked to read it into the
14 record.

15 MS. COTTINGHAM: I tend to agree that this is
16 the wrong witness for bringing this exhibit in.

17 MR. REAVIS: That's all the questions we have
18 for this witness.

19 MS. COTTINGHAM: Does Ecology have any
20 questions?

21 MS. MARCHIORO: No, we do not.

22 MS. COTTINGHAM: Any redirect?

23 MR. EGLICK: Yes, briefly, I guess, subject to
24 determination -- well, as I understood it, Mr. Reavis has
25 said that a hearsay objection does not preserve an

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1 objection for lack of foundation and ask for this 1068, I
2 guess it is, to come in, and if that's the rule we are
3 going to operate on, I guess I'll go ahead and operate on
4 that rule as well and assume it's going to apply for
5 everyone, so I'll ask the witness questions then about
6 1068 if that's acceptable to the board.

7 MS. COTTINGHAM: That's fine.

8
9 EXAMINATION

10 BY MR. EGLICK:

11 Q. So, Ms. Nelson, could you look at the bottom of the first
12 page of 1068, and there's a number of recitals here, but
13 since Mr. Reavis asked you to read one in the record, I
14 guess I'll ask you to do the same thing, for the sake of
15 parity. If you look at the bottom and read letter F on
16 1068 into the record.

17 A. F. "To improve abatement and mitigation of airport
18 impacts in the coalition cities."

19 Q. And, by the way, is it the case that there have been
20 subsequent amendments to --

21 A. Yes.

22 Q. -- to this?

23 A. Yes.

24 Q. Thank you. Let me check my notes.

25 No other questions. Thank you.

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MS. COTTINGHAM: Any board questions?

MR. JENSEN: No.

MR. LYNCH: No.

MS. COTTINGHAM: You're excused.

MR. REAVIS: Could I address a procedural matter?

MS. COTTINGHAM: Could we stop the clock for a second.

MR. REAVIS: I guess what this whole colloquy between Mr. Eglick and me illustrated is I don't think the parties have an understanding of what objections are preserved in the order and, you know, I think we need to clarify some of those issues in order to expedite introduction of other exhibits.

For example, it's our understanding that authenticity of these exhibits is not questioned and that the only remaining objections are those that are listed on the matrix itself, which Judge Lucas has considered. So if we're going to be faced with authenticity concerns, we need to know that now. I think that the hearsay objections are very limited, too, so I think we just need to establish ground rules here about what we have to do to get some of these exhibits in, because, frankly, this is what we view to be a fairly minor exhibit. It's an admission by ACC's attorneys to whatever is contained in

1 the document, and we probably spent almost ten minutes
2 arguing over that. So at least I want a place holder for
3 whether or not that time should come out of the port's
4 time or ACC's time, but it seems to me we may need
5 another conference to discuss this particular issue so we
6 can expedite things in the future.

7 MR. EGLICK: Well, I guess I want to say, if
8 it's permissible to the board, I want to say one sentence
9 and then ask Mr. Stock to address it because he was there
10 with Mr. Lucas. I think the time consumption here was
11 because this was kind of from left field to try to bring
12 in this exhibit with this witness and that's why we
13 objected, it didn't seem appropriate. As far as what the
14 principle is going to be on hearsay objections does not
15 preserve an objection for lack of foundation, I will
16 defer to my colleague, Mr. Stock, but if that's going to
17 be the rule, then I guess we will live by that rule in
18 the future and assume it will apply to everyone.

19 Mr. Stock, does that --

20 MR. STOCK: I was at the hearing before Mr.
21 Lucas, and if the rule is going to apply to all parties,
22 that's fine, and that is, that there are no longer any
23 foundation objections to the different documents that are
24 going to be presented to the board. The issue of
25 authenticity I think has been resolved through the

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1 prehearing objection process, and the objections that are
2 noted in the matrix are the objections that the parties
3 have to the documents. Actually, all of the exhibits or
4 most of the exhibits have come in with the hearsay
5 limitation on them and, as I understand, Mr. Lucas'
6 ruling was that the parties, if they wanted to present
7 the document for more than context or purpose, that the
8 parties then could go ahead and apply the hearsay rule
9 under the board's own rules and show that that document
10 is something that a reasonably prudent person will rely
11 upon in the normal course of his or her affairs.

12 So to sum up, documents, I think, authenticity
13 objections are resolved and there shouldn't be any
14 throughout the course of this proceeding.

15 MS. COTTINGHAM: It was my understanding that
16 still left outstanding after the evidentiary hearing were
17 issues related to relevancy and issues relating to
18 broadening the scope on the hearsay as you've just
19 articulated. Was there anything else that you thought?

20 MR. STOCK: No, I think that is the extent of
21 the objection.

22 MR. REAVIS: That's our understanding. I
23 think if you look at the matrix, that reflects all of
24 those objections.

25 MR. KRAY: Sorry to rock the boat, but on

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1 behalf of Ecology, our understanding is that there were
2 foundational objections reserved with regard to certain
3 exhibits, and the exhibit in question here was one that
4 ACC had previously stipulated to and then during the
5 course of the hearing, I believe, withdrew that
6 stipulation, raised a hearsay objection, and it's
7 possible that this particular one, there was also
8 relevancy objection raised as well. But there are some
9 exhibits here where the transition was from stipulated to
10 hearsay objection. I don't think in that circumstance
11 you can broaden the hearsay objection to include these
12 additional objections, but I wanted to make clear
13 Ecology's understanding from the hearing is that there
14 were foundational objections reserved as well with regard
15 to many of the exhibits. And so I guess I would share in
16 that comment or concept that perhaps we need Mr. Lucas to
17 weigh in at some point in this matter.

18 MS. COTTINGHAM: I'm going to suggest that we
19 take a lunch break and that I keep the attorneys and grab
20 Mr. Lucas and that we iron out this to our satisfaction
21 without holding everyone else, including the board
22 members here. Is that acceptable? Maybe I don't need to
23 hold all of the attorneys, just the ones that are
24 necessary for this issue. And we will return at 1:15 or
25 1:30. What is the party's pleasure?

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1 MR. EGLICK: If we're going to be doing
2 business before we go to lunch, maybe 1:30.

3 MS. COTTINGHAM: 1:30 it is. We'll be back at
4 1:30.

5 (Off the record.)

6 (Judge Lucas in attendance.)

7 MS. COTTINGHAM: Back on the record.

8 In rereading the ruling, the evidentiary ruling, on
9 those where there were hearsay objections, in order to
10 offer the exhibits for the truth of the matter asserted,
11 you do need to lay the foundation and you need to show
12 the exception to the hearsay rule that it falls within.

13 So in both of these exhibits that were offered
14 earlier this morning, I assume that the port was offering
15 them for the truth of the matter asserted, they're both
16 statements against interest. So it is true that the port
17 would have had to lay the foundation.

18 MR. REAVIS: So lay the foundation for the
19 hearsay exception then, is that right, but authenticity
20 of the copy --

21 MS. COTTINGHAM: Is not at issue.

22 MR. STOCK: And in rereading the fourth
23 prehearing order, I see that everyone agreed to preserve
24 foundation questions to the time of the hearing. I am
25 concerned that the board is not going to be hearing any

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1 substantive testimony, or a limited amount of substantive
2 testimony, if the parties now are going to be continuing
3 to object on foundation grounds for the numerous exhibits
4 that are going to be coming in. None of the parties
5 asserted foundation objections on the exhibit matrix, and
6 I think we should be moving forward without having to lay
7 a foundation for the various exhibits by witness.

8 MR. KRAY: On behalf of Ecology, I think
9 that's a change of position for ACC, given the statements
10 made during the evidentiary hearing and as those are
11 reflected on the bottom of page 2, top of page 3 of the
12 evidentiary hearing order.

13 I do share Mr. Stock's concern about the length of
14 time that we took to address the first round of
15 objections, and the one point I would make very firmly is
16 I think the parties should be prohibited from making
17 speaking objections or lengthy objections, that
18 objections should be concise, and I would encourage the
19 board to limit the give-and-take on the particular
20 argument because that did take quite a bit of time and
21 we're going to run out of testimony very quickly if we do
22 that.

23 MR. JONES: On behalf of the port, I would
24 share in that position and just, Miss Cottingham, so you
25 are aware, I was the port attorney who participated in

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1 the evidentiary hearing on Tuesday so that's why I'm here
2 as opposed to Mr. Reavis.

3 The one other thing that I would note that has not
4 been stated is that we went through every single one of
5 those exhibits and preserved specific objections, and if
6 they weren't preserved, they were deemed waived. And on
7 this 1068, and I use it mostly as an example because it's
8 going to come up over and over again, ACC stipulated,
9 which means they don't have any relevance objections
10 that's preserved, they have a hearsay objection. And
11 that requires, per Judge Lucas' order, the laying of
12 foundation and meeting the board's hearsay rule and that
13 is it. And a lot of time that was spent was on an
14 objection that had already been waived. And so I would
15 encourage strongly, because I share Mr. Kray's concern
16 and Mr. Stock's concern about everyone's time, that those
17 objections that are preserved are the only ones that are
18 ruled on.

19 MR. POULIN: On behalf of CASE, the prehearing
20 order is clear that the parties also agree to reserve all
21 relevancy objections until the time of the hearing.
22 Those relevancy objections were not waived. That's the
23 top of page 3. But further, on behalf of CASE, I would
24 be more than happy to stipulate to the authenticity of
25 documents. I don't believe it's appropriate for the

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1 parties to eat up this board's valuable time in
2 considering evidentiary objections about authenticity. I
3 think it's much more important we devote the limited time
4 we have to the merits of the case, and if in fact it
5 becomes necessary to have any extended argument on the
6 reasons for objections, I believe it's most appropriate
7 that the party doing the arguing should have their clock
8 running at the time.

9 MR. STOCK: I will also note that the
10 objection that Mr. Eglick made was objection to the form,
11 it was not a speaking objection, so I would dispute what
12 Mr. Kray had to say about that, until the board asked for
13 further amplification.

14 Also, I would note that the bulk of the colloquy on
15 the objections was not with respect to the ACC interlocal
16 agreement, it was with respect to the stipulated
17 dismissal of the ESA case.

18 As Mr. Poulin pointed out, the parties did agree to
19 reserve all relevancy objections to the hearing and,
20 again, I will reiterate there are going to be a lot of
21 exhibits and if the parties are going to have to
22 establish authenticity and lay a foundation, there's
23 going to be limited testimony presented to this board
24 over the next two weeks.

25 MR. KRAY: Ms. Cottingham, on behalf of

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1 Ecology, Ecology would certainly stipulate to
2 authenticity. I don't want to confuse authenticity and
3 laying a foundation for a particular witness testifying
4 as to that particular document. I think the document is
5 authentic, but I still think you need to lay a foundation
6 about whether that witness is familiar with that document
7 enough to testify as to the document, and so I don't want
8 to agree to waiving foundational objections in that
9 regard, but with regard to authenticity, absolutely,
10 Ecology would stipulate to the authenticity of the
11 documents contained in this set.

12 MR. JONES: I want to just clarify the point I
13 made to relevance. I don't disagree in the abstract with
14 Mr. Poulin's point that relevancy objections were
15 preserved with respect to specific exhibits for which
16 they had been raised. And the easiest way to identify
17 those is to look at the matrix. The matrix calls those
18 out specifically, and if you look at 1068, there is no
19 relevancy objection. Just go down two more, 1070 does
20 have one. So with respect to that, I would have no
21 problem with raising a relevance objection, but with
22 respect to 1068, it has not been reserved.

23 JUDGE LUCAS: And that was my ruling. There
24 are only 35 exhibits that have a relevancy objection to
25 them, that's it. Those are preserved to hearing, not a

AR 054930

1 relevancy objection on every exhibit, that's not the
2 ruling.

3 And also just to address the hearsay issue, the
4 exhibits that are admitted for a limited purpose, that's
5 kind of a shorthand for referring to the ruling which
6 said that, with regard to hearsay, the presiding officer
7 ruled that all exhibits objected to for reasons of
8 hearsay will not be admitted for the truth of the matter
9 asserted; instead, they will be limited for the limited
10 uses of showing background purpose or context. For those
11 purposes, they are already admitted. But if you are
12 going to offer it for the truth of the matter, then you
13 have two routes to follow. You either have to show that
14 it meets the board's hearsay rule under WAC 371-08-500 or
15 you have to link it up with a specific hearsay exception,
16 and when you do that, you have to lay the proper
17 foundation. That's what we're talking about in terms of
18 foundation.

19 And so when you offer the exhibit, in my opinion,
20 you need to show the basis on which you're offering it.
21 Okay, here's a hearsay exception objection on this
22 exhibit, I'm offer offering it for the truth of the
23 matter based on WAC 371-08-500 and then you have to make
24 the reasonableness argument, or if that's not going to
25 work, you have to make a hearsay exception argument and

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1 make that specific argument for whatever exception you're
2 going to cite, like business records or whatever.

3 That should streamline it a little bit.

4 MR. REAVIS: One thing I might suggest, and
5 since I wasn't at the hearing I do this with a little bit
6 of trepidation, but it seems to me that there is kind of
7 a blanket objection for some of these as to hearsay, and
8 maybe it would streamline matters more if, for example,
9 we are offering an exhibit, we just offer it, and with
10 regard to that particular exhibit, and this would apply
11 to ACC, too, it is up to the party who is opposing it to
12 actually restate that objection, because I suspect that
13 there are a number of these hearsay blanket objections
14 that may not really be within each party's intent to
15 assert, and it gives the party another opportunity to say
16 even though we asserted kind of a blanket exception for
17 this particular document, we're not going to object.

18 Now, maybe that's not what happened at the hearing,
19 but just looking at the matrix, it sure likes like
20 there's a lot of them here that neither party -- speaking
21 for the port, I can say that maybe some of these I would
22 look at and say, yes, technically it was a hearsay
23 problem, but I just am not going to assert it because I
24 don't think it matters that much.

25 MR. KRAY: I don't think that's what we

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1 decided in the hearing, but sure sounds like a good idea
2 as far as expediting the course of the hearing.

3 JUDGE LUCAS: In my opinion, that would change
4 it from an exhibit where there is a hearsay objection to
5 one that's stipulated. That's basically what you're
6 talking about, withdrawing the hearsay objection, which
7 changes the status to stipulated admission and then you
8 can use it for any purpose.

9 MR. REAVIS: Well, I think reserving the right
10 of the party to assert a hearsay objection, but putting
11 the burden on them to assert it as opposed to putting the
12 burden on the offering party to go through a foundational
13 exercise when it may not be necessary.

14 MR. EGLICK: I guess I'm not clear on how
15 that's different than --

16 MS. COTTINGHAM: It shifts the burden.

17 MR. KRAY: You would just have an
18 obligation --

19 MS. COTTINGHAM: To restate.

20 MR. KRAY: -- flag it.

21 MR. REAVIS: All they would have to say is
22 hearsay and then we go into the foundation, but they
23 would have an opportunity to say, "No objection," which
24 might streamline things, and the same for us; I'm not
25 just saying them, it's the same for us.

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1 MR. STOCK: Originally --

2 JUDGE LUCAS: Can I respond to that first. I
3 think that's a good suggestion because it will streamline
4 the process for both sides, because once you hear the
5 party reiterate the objection, then you know whether you
6 have got to go through the foundation or not or whether
7 you can just skip that and go forward. So it could work
8 both ways, it could help both sides.

9 MR. EGLICK: Am I allowed to talk, too, or
10 just one?

11 MS. COTTINGHAM: Go ahead.

12 MR. EGLICK: I wasn't at the hearing, so both
13 Your Honors have to excuse me.

14 MS. COTTINGHAM: I wasn't at the hearing
15 either.

16 MR. EGLICK: I guess we're the lucky ones. My
17 understanding is that we originally were operating on
18 that basis and we were then surprised by what were broad
19 hearsay objections, so then we asserted broad hearsay
20 objections. If we want to kind of revert to where we
21 thought we were, I guess, does that --

22 MR. STOCK: Yes, and I was going to point that
23 out that ACC hearsay objections were reserved pursuant to
24 the footnote on the matrix, and that it was the port and
25 Ecology that had asserted most of the hearsay objections,

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1 but it's fine if we want to now reserve hearsay
2 objections to when the exhibit is offered, that may
3 streamline it.

4 JUDGE LUCAS: Well, it's not so much a
5 reservation as a reiteration. I think that's the right
6 concept to use. Basically, it's on the matrix that the
7 exhibit status at the current moment is that it's
8 admitted for background, that's how I think of it in
9 shorthand terms. If it's being offered and you say
10 "Hearsay," then that signals to the other side that they
11 have got to lay a foundation for the exception, one track
12 or the other, WAC or regular court rules.

13 MS. COTTINGHAM: And a third one to say we are
14 not offering this for the truth of the matter asserted.

15 JUDGE LUCAS: Yes.

16 MR. POULIN: On that point, Your Honor, if I
17 might, I believe a great number of the exhibits to which
18 a hearsay objection applies are actually non-hearsay
19 admissions under Rule 801. A statement, written or oral,
20 of a party is not hearsay under Rule 801, and there's a
21 great number of documents produced by Ecology, produced
22 by the port, some perhaps produced by ACC that are not
23 hearsay, they are admissions. And there should not be
24 any time wasted on trying to lay a foundation for a non-
25 hearsay exhibit that is properly an admission under 801.

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1 MR. STOCK: Or come within the business
2 records exception.

3 MR. REAVIS: Which is sort of what I thought
4 that motion to dismiss was, an admission by party, but
5 I'm not going to reargue that.

6 MR. KRAY: I think we had an agreement that we
7 flip it around so you have to reassert a hearsay
8 objection; otherwise, you can go ahead and use it for any
9 purpose.

10 MR. JONES: And, to be honest, that was the
11 position that the port took with respect to its hearsay
12 objections. We were noting them, but they weren't
13 necessarily -- we would certainly be comfortable
14 reiterating those.

15 MR. EGLICK: Well, I'll just say I wish we
16 could go further, because what I see happening is that we
17 won't know how each party is going to treat this, and so
18 to insure parity, we're going to have to be rigorous
19 because we don't want to be disadvantaged. It would be
20 better, I think, to come to even more of an understanding
21 than we appear to have so that we could get beyond where
22 we are now. Do you understand what I'm --

23 JUDGE LUCAS: I don't disagree with that, and
24 what happened during the hearing was we were first
25 presented with, you know, 1300-plus exhibits and a great

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1 many of them were stipulated to in advance, and then what
2 happened because of the kind of back-and-forth is that
3 the stipulations were withdrawn and then they were
4 objected to, and that probably doubled the amount of
5 exhibits that were objected to and to limit the way they
6 were introduced.

7 So if you want to go back to the stipulations, I
8 think that makes a lot of sense, but --

9 MR. EGLICK: If it were mutual, I think that
10 would be fine. The problem is we wanted mutuality, we
11 don't want to be the good guys to our detriment, and it
12 would take everyone agreeing that we're mutually going to
13 stipulate and, except for very few exhibits that I think
14 could be identified, we're not going to assert, you know,
15 hundreds of - we being everyone - not going to assert
16 hundreds of hearsay objections. But it has to be mutual,
17 because otherwise we're essentially disadvantaging
18 ourselves, and we can't do that.

19 MR. POULIN: Pragmatically, Your Honor, if the
20 burden is on the objecting party and if the clock runs
21 against the objecting party, I think a lot of these
22 objections are going to go away, particularly if we
23 eliminate the built-in delay on the clock.

24 MS. COTTINGHAM: Can I read what I think I
25 have heard you say. The burden would be on the person

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1 asserting the objection to indicate the preserved
2 objection by saying, on the matrix we reserved hearsay
3 for this exhibit. Then it shifts over to the offering
4 party to say, one, we are only offering this for
5 background, not for the truth of the matter asserted, or
6 that it falls within the board's hearsay rule, or that it
7 falls within an exception and then lay the foundation.
8 Is that what I hear you saying?

9 MR. KRAY: Yes.

10 MR. PEARCE: Yes.

11 MR. JONES: We'd concur with that.

12 MR. STOCK: As long as it's understood that
13 ACC's hearsay objection still applies as it's set forth
14 in the matrix.

15 MS. COTTINGHAM: What page is your footnote on?

16 MR. STOCK: The first page. And based upon
17 that reservation, then all of the port and Ecology
18 exhibits were admitted for the limited purpose.

19 JUDGE LUCAS: Right.

20 MR. KRAY: I think we have reached parity at
21 the end of the evidentiary hearing on this issue, so all
22 we are saying is now we are going to have parity in that
23 you have an obligation to identify that you're relying on
24 that objection, and if you don't identify it, then they
25 can go forward and use it for any purpose.

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1 JUDGE LUCAS: Right. This is more or less a
2 method for cutting down the open-ended argument on
3 objections.

4 MR. JONES: But I would note that this would
5 apply to the hearsay objections; that with respect to
6 relevancy objections that are specifically preserved,
7 those are the ones that are preserved, and otherwise
8 those aren't there anymore.

9 JUDGE LUCAS: Right.

10 MS. COTTINGHAM: But I think if you say that
11 you indicate the preserved objection, and if it's
12 relevancy, then it shifts to the other party.

13 MR. JONES: I have no problem with that.

14 MS. COTTINGHAM: So that would cover not only
15 hearsay, but it could cover any of the other objections.

16 MR. JONES: Right. The only reason I was
17 hesitant is it was the hearsay one that we went from
18 stipulation to literally hundreds of new hearsay
19 objections.

20 MS. COTTINGHAM: And I am going to rely on all
21 of you to be true to this matrix rather than having me
22 have to thumb through it every time there's an objection.

23 MR. REAVIS: Given that and given Mr. Poulin's
24 statement about whose time it should come out of, I would
25 like to at least ask the board at the end of the day to

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1 consider whether we get a little bit of time back for
2 this last witness and the introduction of these exhibits.

3 MS. COTTINGHAM: To be honest with you, we
4 weren't going to start testimony of witnesses until 1
5 o'clock today, so all this morning was kind of gratis.

6 MR. REAVIS: So it's not coming out of their
7 22 and half hours.

8 MS. COTTINGHAM: At the end of the hearing, we
9 might have a couple of extra hours that we'll divy up.
10 That's if everything goes according to --

11 MR. KRAY: Mr. Poulin made another suggestion
12 that I think has some merit, and that is to take the one-
13 minute delay out of the clock. And my concern is that if
14 we have a one-minute delay built in there, give and take
15 over time is going to build up quite a bit of -- that
16 delay is going to become significant, so either --

17 MS. COTTINGHAM: By eating up time, you mean?

18 MR. KRAY: Right. Well, there will be
19 unaccounted-for time.

20 MR. EGLICK: I don't want to gainsay Brother
21 Poulin, but just one attorney stands down, the other gets
22 up, gets the exhibits, you know, set for the witness and
23 all that, that's what that one minute does, it's kind of
24 downtime. It's not somebody's fault that the witness has
25 to switch spots and all that, so that gives a minute for

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1 that to happen that penalizes neither party.

2 MR. KRAY: If I may, just sitting in the back,
3 a minute was quite a bit of delay. The parties seemed to
4 be moving more quickly than a minute.

5 MR. EGLICK: These were easy witnesses.
6 You're going to have witnesses that are going to have
7 multiple exhibits, multiple notebooks out, and that's all
8 going to have to be cleared away, the detritus, from one
9 and the next one brought up. I think Sally Nelson is not
10 a good example. Maybe at the end of the day or tomorrow
11 you will have a better sense, but just the housekeeping
12 between witnesses I think eats up a minute. And this
13 doesn't advantage us or the other side, it's just, I
14 think, otherwise, people are going to be running around,
15 "Hey, get out of my way, I got to start."

16 MR. KRAY: I agree with the concept that there
17 is parity on this. My concern is if we have a set block
18 of time that we've identified and this delay is built
19 into it, I am fearful we are going to get to the end and
20 we're going to say we haven't used our time but the days
21 are over.

22 MR. EGLICK: Then the board is either going to
23 have a pizza party or some extra time. I think it's
24 going to be one or other I think is what the board is
25 saying.

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1 MS. COTTINGHAM: So you're telling me that
2 every time we change sides, we lose a minute.

3 MR. KRAY: That's correct.

4 MR. POULIN: Each time we switch the clock.

5 MR. JONES: So if you go along the suggestion
6 that if you object and you want to really argue an
7 exhibit, every single time you have that argument, you
8 lose a minute.

9 MS. COTTINGHAM: I don't think we have agreed
10 to hit the clock every time.

11 MR. KRAY: Just when you switch from one
12 party's examining a witness to the other party's
13 examining a witness, there is one minute that is not
14 accounted for in that changeover.

15 MR. PEARCE: So if there is any redirect, you
16 lose two minutes per witness.

17 MR. EGLICK: That's true, but nobody, not one
18 side or the other loses it, it is just lost to the
19 accounting, and I am, I guess, saying I think that's
20 appropriate given the logistics and all of that. It's
21 not a big advocacy issue either way, but I think it is an
22 appropriate way to go at least for the first day to see
23 how it looks to the board.

24 MR. KRAY: I am okay with the idea of let's
25 wait and see.

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1 MS. COTTINGHAM: Let's just keep it. It's got
2 the one-minute delay. Does it seem to be working, are
3 you guys remembering to --

4 MR. POULIN: I just wanted to show you. I
5 don't know if you can see the elapsed time.

6 MS. COTTINGHAM: Fourteen?

7 MR. KRAY: Fourteen minutes to 11 minutes
8 right now.

9 MS. COTTINGHAM: Is the elapsed time?

10 MR. KRAY: Right. So it would be half an hour
11 has elapsed essentially.

12 MR. EGLICK: My son tells me that in chess
13 tournaments, these things break after awhile because
14 people slap them so hard, so just telling you all to go
15 easy.

16 MS. COTTINGHAM: Do you need me to reiterate
17 or is everyone comfortable with the way we are going to
18 deal with the exhibit objections?

19 MR. PEARCE: I think we understand it.

20 MS. COTTINGHAM: Great. And with that, we'll
21 go off the record and go have lunch. Be back at 1:30.

22 (Whereupon, a recess was taken.)

23 MS. COTTINGHAM: We'll go back on the record.

24 Over the noon hour we clarified the evidentiary
25 ruling as to objections to the introduction of exhibits.

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1 And just for purposes of everyone else, the burden will
2 be on the person asserting the objection to indicate that
3 they have preserved an objection and that it's clearly
4 articulated on the matrix. Then it shifts back to the
5 person offering the exhibit to either indicate that
6 they're offering the exhibit only for background, not for
7 the truth of the matter asserted, or that it's within the
8 board's hearsay rule, or that it's within an exception,
9 and then they have to lay the foundation. So we shifted
10 the burden slightly to the person who is making the
11 objection to clarify.

12 So with that, we will go back to ACC's next witness.
13 And the court reporter will swear the witness.

14
15 ANN KENNY, having been first duly sworn on oath or
16 affirmed to tell the truth, the whole truth and nothing
17 but the truth, testified as follows:

18
19 EXAMINATION

20 BY MR. STOCK:

21 Q. Could you state your name for the record, please.

22 A. My name is Ann Kenny.

23 Q. And, Ms. Kenny, what is the current position you hold
24 with the Department of Ecology?

25 A. I am an environmental planner 4 with the Department of

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1 Ecology.

2 Q. How long have you held that position?

3 A. I started that job on January 18th, 2002.

4 Q. And prior to that, what position did you hold?

5 A. Prior to that, I was formerly with the permit assistance
6 center as an environmental specialist 4. I held that job
7 from the middle of 1999 to mid-January of this year.

8 Q. And was it in that capacity that you coordinated the
9 review of the port's 401 application for the third runway
10 project?

11 A. I was basically placed on assignment from that position
12 to take on the responsibility of coordinating the review
13 for the port's 401 application.

14 Q. And in that capacity, who did you report to?

15 A. My supervisor was Jeannie Summerhays.

16 Q. What relationship did you have with Ray Hellwig on the
17 third runway project application?

18 A. Ray Hellwig is our Northwest Regional Office's regional
19 director, and he started as the management liaison to the
20 third runway project. Sometime in 1998, and then when he
21 moved into the regional director position from being the
22 shorelands and environmental assistant supervisor, he
23 took that project with him. So I reported to him as the
24 manager responsible for coordinating on the third runway.

25 Q. Why don't you describe for us briefly your educational

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1 background.

2 A. I have a bachelor's degree in political science and a
3 master's degree in public administration from the
4 University of Washington.

5 Q. And what year did you get your bachelor's?

6 A. The bachelor's I got in 1990, I'm sorry, 1980.

7 Q. Where did you get that degree?

8 A. Montana State University.

9 Q. And you got your master's in public administration from
10 the University of Washington in 1990; is that right?

11 A. I got my master's in 1990.

12 Q. When did you start working on the port's application for
13 a 401 permit?

14 A. I started working on that application about the last week
15 of October 2000.

16 Q. And is the port's application the largest development
17 project you've worked on where Ecology had to come to a
18 conclusion of reasonable assurance?

19 A. Yes.

20 Q. And, in fact, the port's 401 application and the 401
21 certificate that the Department of Ecology issued is the
22 most complex certification that the state has ever
23 issued; isn't that right?

24 A. That's my opinion.

25 Q. That's how you described it in your deposition?

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1 A. That's how I described it. I haven't read the Battle
2 Mountain Gold 401, but certainly, in my experience, of
3 the 401s I have seen, it is the most complex 401
4 decision.

5 Q. You can't think of any others that are more complex than
6 the certification issued for the third runway project?

7 A. No, I can't.

8 Q. What have been your responsibilities with respect to
9 review of the port's application?

10 A. My primary responsibility was to serve as a team lead of
11 Ecology specialists who were pulled together specifically
12 to review the technical aspects of this project. So I
13 coordinated meetings, I was the transmittal point for
14 receipt of documents from the port, I would provide those
15 to various staff reviewing them. I was responsible for
16 understanding the procedural requirements of 401 and also
17 the procedural requirements of the Coastal Zone
18 Management Act.

19 Q. Is it fair to say that your role in reviewing the port's
20 application was more administrative in nature as opposed
21 to a technical review?

22 A. I was not responsible for the technical aspects of the
23 review; however, I was expected to have a solid
24 understanding of the technical issues involved so that I
25 could be a good project manager and make sure that issues

AR 054947

1 that came up were appropriately addressed.

2 Q. You're not a wetlands biologist, are you?

3 A. No, I am not.

4 Q. And you're not a wetland scientist?

5 A. No, I am not, but I have taken the course wetland
6 delineation class and I have accompanied Ecology wetland
7 specialist staff on numerous field visits, so I have a
8 good solid understanding of the basics of wetland
9 science.

10 Q. And you're not a hydrologist?

11 A. No, I am not.

12 Q. And you're not a hydrogeologist?

13 A. No, I am not.

14 Q. You're also not a botanist, are you?

15 A. No, I am not.

16 Q. You're also not a fish biologist?

17 A. No, I am not.

18 Q. You're not a chemist, are you?

19 A. No, I am not.

20 Q. Nor are you an engineer of any sort, isn't that right?

21 A. No, that's correct.

22 Q. Is it your understanding that Ecology needed to have
23 reasonable assurance when it issued the 401 certification
24 on August 10, 2001?

25 A. Yes.

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1 Q. Let me go back now and talk about the time that you got
2 involved with the 401 application. That was in October
3 2000; is that right?

4 A. That's correct.

5 Q. And when you became involved, you had conversations, I
6 gather, with Mr. Hellwig about what had happened?

7 MS. MARCHIORO: Objection: Vague.

8 A. My first inkling --

9 MS. COTTINGHAM: Why don't you let him
10 rephrase the question.

11 Q. (Continuing By Mr. Stock): When you first got involved
12 with the 401 application, what did you understand was the
13 status of the application?

14 A. When I first became involved, my understanding was that
15 the port had withdrawn their previous application prior
16 to the expiration of the one-year deadline, and that we
17 were in the process of preparing for the port to resubmit
18 a third application on the project.

19 Q. In fact, Ecology was going to deny the port's prior
20 application, was it not, and that's the reason why the
21 port withdrew the application before Ecology denied it?

22 MR. PEARCE: Objection: Lack of personal
23 knowledge. I don't believe the witness knows what the
24 port intended.

25 MS. COTTINGHAM: Sustained.

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1 Q. (Continuing By Mr. Stock): Didn't Ray Hellwig tell you
2 that the Department of Ecology was going to deny the
3 port's application?

4 A. I was told by Mr. Hellwig and others that we were in a
5 position to deny that application.

6 Q. And that's because there were problems with the
7 stormwater management plan?

8 A. That's correct.

9 Q. And there were also problems with the low-flow plan; is
10 that right?

11 A. I don't recall anything specifically about the low-flow
12 plan; I recall the major issue was the stormwater
13 management plan.

14 Q. When you became involved, there began a facilitated
15 process with the Port of Seattle; is that right?

16 A. That's correct.

17 Q. And who coordinated those facilitated meetings?

18 A. That process was set up several weeks prior to my
19 beginning on the project. It's my understanding that
20 that project was established by mutual agreement between
21 the port and Ecology as a means for facilitating
22 communication between both agencies so that we could
23 clarify the issues that needed to be addressed so that
24 Ecology could eventually make a decision on this project.

25 Q. Those meetings were facilitated by the Floyd & Snider

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1 firm; is that correct?

2 A. That's correct.

3 Q. And the Port of Seattle paid the Floyd & Snider firm to
4 facilitate those meetings?

5 A. That's correct.

6 Q. Did Ecology make any investigation concerning the
7 independence of the Floyd & Snider firm from the Port of
8 Seattle?

9 A. I don't know. I wasn't involved in that selection
10 process.

11 Q. In fact, didn't the Floyd & Snider firm work for the Port
12 of Seattle on other projects?

13 A. I think they might have, but I really am not sure the
14 extent of their involvement with the port.

15 Q. When you started back in October 2000, the port was
16 anxious to get the 401 certification issued, was it not?

17 A. I'd say that the port certainly was interested in getting
18 their application in and getting the process started.

19 Q. Well, in fact, the port was anxious throughout the
20 process that Ecology was reviewing the 401 certification
21 to get the certification issued; isn't that right?

22 A. The port had, like many other applicants, made it clear
23 to Ecology that they were very serious about pursuing
24 their application and that, of course, the outcome of
25 that application would be the issuance of a 401

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1 certification, they hoped.

2 Q. You started working weekends in July 2000 to get the 401
3 certification issued, correct?

4 A. At some point, I did spend several weekends working on
5 drafting the 401 certification.

6 Q. Actually, July, 2001. The certification was issued
7 August 10, 2001, correct?

8 A. That's correct.

9 Q. And for the month before, you were working weekends to
10 get the certification issued; is that right?

11 A. I was working weekends to get it drafted, to get the
12 portions of the certification drafted that I knew we
13 could get drafted.

14 Q. You knew from conversations with Mr. Hellwig that there
15 was certainly continued concern from the Governor's
16 Office as to the timing of the permit, correct?

17 A. Yes.

18 Q. And the pressure was coming from the Governor's Office
19 because of the pressure being put on the Governor's
20 Office by the Port of Seattle; isn't that right?

21 MS. MARCHIORO: Objection: Lack of foundation.

22 Q. That's what Ray Hellwig told you?

23 MS. MARCHIORO: Objection: Hearsay.

24 MS. COTTINGHAM: Sustained.

25 MR. STOCK: It's an admission of a party

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1 opponent to get over the hearsay objection.

2 MS. MARCHIORO: I guess I'm not sure how it's
3 an admission of a party opponent if it's asking Ms. Kenny
4 to testify as to what Mr. Hellwig may or may not have
5 said to her.

6 Q. (Continuing By Mr. Stock): You had day-to-day
7 conversations with Mr. Hellwig, did you not?

8 A. I did.

9 Q. And you relied upon those conversations in the normal
10 course of your reviewing the port's application; is that
11 right?

12 A. I did.

13 Q. And on that basis, wasn't it your understanding that the
14 Governor's Office was putting pressure on Ecology because
15 the port was putting pressure on the Governor's Office?

16 A. No.

17 Q. Do you recall me asking you this question in your
18 deposition, and you giving this answer? This is on page
19 33 of the deposition.

20 MS. MARCHIORO: Thank you.

21 Q. (Continuing By Mr. Stock): We were talking about
22 conversations you had or that Ecology had with the
23 Governor's Office, and you answered, "But the pressure
24 was coming from a higher level," and my question was,
25 "From the Governor's Office?" And you answered, "From

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1 the Governor's Office, because of the pressure being put
2 on the Governor's Office by the Port of Seattle."

3 Do you recall me asking that question and you giving
4 that answer in your deposition?

5 A. I do.

6 Q. And you were under oath when you made that answer,
7 correct?

8 A. I was.

9 Q. In fact, you, yourself, participated in a meeting in the
10 Governor's Office where the governor's chief of staff,
11 Paul Isaki, was present; is that right?

12 A. I did.

13 Q. And the topic of that meeting in the Governor's Office
14 was the port's 401 application?

15 A. It was.

16 Q. Mick Dinsmore, the executive director of the port, was
17 present, wasn't he?

18 A. He was.

19 Q. Who else from the Port of Seattle was present?

20 A. Gina Marie Lindsey and Elizabeth Leavitt.

21 Q. And this was in July 2001?

22 A. About that time; I don't recall the specific date.

23 Q. You had never before been in the Governor's Office on a
24 401 application?

25 A. That's true.

AR 054954

1 Q. And, in fact, that was very unusual that you were in the
2 Governor's Office talking about a 401 application, wasn't
3 it?

4 A. It was certainly unusual in my experience.

5 Q. And the pressure that you were receiving in July to issue
6 the 401 was intense, wasn't it?

7 A. It was continual, it was certainly intense, but it's not
8 unusual for a 401 applicant to be concerned about when
9 they might be receiving their permit.

10 Q. You were under intense pressure to get the 401
11 application and the 401 certificate issued, weren't you?

12 A. I was under pressure to get to a decision. I was never
13 under pressure to make a decision to issue the 401
14 permit.

15 Q. Page 36 of your deposition, do you recall me asking you
16 this question and you giving these answers: Question:
17 "I am going to move on, but, in any event, to sum up, you
18 were under intense pressure to get the 401 certification
19 issued, weren't you?" Answer: "I was under pressure."
20 Question: "Intense pressure?" Answer: "Intense
21 pressure. I also wanted to have a summer vacation."

22 Do you recall that series of questions and answers?

23 A. I do. And I might add that part of that pressure was
24 because I wanted a vacation, so --

25 MR. STOCK: Miss Cottingham, to the extent that

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1 a question is not outstanding, could you ask the witness
2 not to volunteer.

3 MS. COTTINGHAM: Just stick to the questions.

4 Q. (Continuing By Mr. Stock): Ecology committed to the
5 Governor's Office that the 401 would be ready for release
6 in early August; isn't that right?

7 A. I don't know that I would characterize it as Ecology
8 committing. I know that I told Ray Hellwig that it was
9 my hope that we would have enough of the work completed
10 or the work completed so that we would be able to issue
11 it in early August.

12 Q. Page 107 of your deposition, do you recall me asking this
13 question and you giving this answer: "What time
14 constraints are you referring to in that sentence," and
15 I'm referring to a sentence that you had written.

16 Answer: "This was the commitment that had been passed
17 on of the estimate of time that had been passed on
18 through the upper management to the Governor's Office
19 that the certification would be ready for release
20 sometime in early August."

21 Do you recall that question and answer?

22 A. I do.

23 Q. So, in fact, Ecology did tell the Governor's Office that
24 it would issue the certification in early August; isn't
25 that correct?

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1 A. It gave them an estimate of time.

2 Q. You prepared a draft 401 certification and circulated it
3 to the 401 team on July 29, did you not?

4 A. I believe that I did. I don't recall the exact date.

5 Q. Let me refer you to Exhibit 446. And I have copies here.
6 The exhibit notebooks didn't get copied and they're in
7 the process of being copied that has Exhibit 446 in it.
8 So I have copies for everyone.

9 You've been handed Exhibit 446, Ms. Kenny. Do you
10 recognize that as an email that you sent to the 401 team
11 on July 29 attaching a draft of the 401 certification?

12 A. I do.

13 MR. STOCK: I'd go ahead and move that this be
14 admitted.

15 MS. COTTINGHAM: How was it dealt with on the
16 matrix?

17 MR. STOCK: I believe it was admitted under a
18 reservation.

19 MR. REAVIS: Let me say the port has no
20 objection. And let me explain so you don't think Mr.
21 Pearce and I are tag teaming here. We had to work out
22 our issues on who was covering this witness and I'm going
23 to be making the objections. We have no objection.

24 MS. COTTINGHAM: Ecology.

25 MS. MARCHIORO: No, no objection.

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1 MS. COTTINGHAM: Then it is admitted pursuant
2 to the evidentiary ruling.

3 MR. STOCK: I also see on the matrix it's
4 admitted for a limited purpose and now I'll offer it for
5 all purposes.

6 MS. COTTINGHAM: Since there was no
7 objections, that's how the lunchtime discussion makes it
8 so.

9 Q. (Continuing By Mr. Stock): In your first sentence, Ms.
10 Kenny, of your July 29 email, you state, "It is still
11 very rough, but given the time constraints ahead of us, I
12 want to get this to you so that you can start looking it
13 over and provide me with feedback."

14 Did I read that correctly?

15 A. Yes, you did.

16 Q. And what time constraints were you talking about?

17 A. Those were the estimates of time provided through my
18 management that we would hope to have a 401 decision made
19 by the first week of August, first or second week,
20 actually, I can't remember.

21 Q. And that's why you were working weekends in July because
22 of that time constraint; is that right?

23 A. That's correct.

24 Q. Now, you've got before you on the desk an exhibit
25 notebook that's starting with Exhibit 1. I want you to

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1 turn to Exhibit 2 and, for the record, Exhibit 2 is a
2 copy of the 401 certification that was issued in August
3 2001, August 10, 2001.

4 And that exhibit has been stipulated to by all
5 parties, so I would move that it be admitted.

6 MS. COTTINGHAM: I'm not sure that you need to
7 move for all the exhibits to be admitted since we did
8 that already in the evidentiary ruling.

9 MR. STOCK: That's what I am used to doing and
10 that will certainly make it easier.

11 Q. Could you identify Exhibit 2, Ms. Kenny?

12 A. Exhibit 2 is the 401 certification that I drafted and was
13 signed off on by Gordon White on August 10th, 2001.

14 Q. And did you try to be as complete as possible in drafting
15 the August 401 certification?

16 A. Yes, I did.

17 Q. Did you try to be as accurate as possible in drafting the
18 401 certification issued in August?

19 A. I did.

20 Q. Did you give it considered thought as to whether it was
21 ready to be issued on August 10, 2001?

22 A. I did.

23 Q. Yet Ecology rescinded the August 10 certification, did it
24 not, and reissued a certification on September 21, 2001?

25 A. It did.

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1 Q. And turn to Exhibit 1. Is Exhibit 1, which has been
2 stipulated to by all parties, the September 21, 2001
3 certification?

4 A. That's correct.

5 Q. And the reason that Ecology reissued the certification in
6 September was because the port came back to Ecology with
7 concerns that some of the conditions that were contained
8 in the August certification would be operationally
9 difficult for the port to comply with; is that right?

10 A. Those were some of the reasons, yes.

11 Q. That's what you told me was the reason in your
12 deposition, was it not?

13 A. I believe that's what I said.

14 Q. The Department of Ecology met with the port to discuss
15 the conditions that the port found operationally
16 difficult in the August certification; is that right?

17 A. We did.

18 Q. And what was discussed in those meetings?

19 A. We sat down and went through the certification, and the
20 port asked questions about the intent of certain
21 language, and pointed out areas where they had concerns.

22 Q. And based upon those concerns, Ecology reissued the
23 certification and that reissued certificate is the
24 September certification, correct?

25 A. I believe it was a little more complicated than that, in

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1 that we entered into a stipulated agreement with the
2 port.

3 Q. Well, there had to be some legal maneuvering, didn't
4 there, between Ecology and the port to get the
5 certification reissued; is that what you are referring
6 to?

7 A. Yes.

8 Q. There's only been one other time at the request of an
9 applicant where Ecology made revisions to a 401 after it
10 was issued, and that time was for the purpose of changing
11 the time line for submitting as-built drawings, correct?

12 A. I believe what I testified to was, or in my deposition
13 what I spoke to was, in my experience with the 401
14 certifications that I have issued, that is the only time.

15 Q. Right. You can't think of any other occasion where
16 Ecology issued a 401 certification and then rescinded it
17 based upon operational difficulties that the applicant
18 had with the conditions and then reissued the
19 certification; you can't think of any other time where
20 that has happened?

21 A. Not in my experience. Other 401 reviewers may have done
22 so, but I'm not aware of what they might have done.

23 Q. Let's start going through the September certification,
24 which is Exhibit 1. Turn to page 2 of the certification.
25 And at the top of the page you've written, in exercising

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1 authority under the Clean Water Act and the State of
2 Washington equivalent, Ecology has investigated this
3 application pursuant to the following, and then you list
4 out different things there. What is reference A
5 referring to?

6 A. Well, I'll just read it. A says, "Conformance with
7 applicable water quality based, technology based, and
8 toxic or pretreatment effluent limitations as provided
9 under 33 USC Section 1311," et cetera.

10 Q. And it's your understanding that that's the federal Clean
11 Water Act?

12 A. That's correct.

13 Q. And so by writing this, when you issued the 401, Ecology
14 believed that the proposed project was in conformance
15 with the requirements of the Clean Water Act, correct?

16 A. That's correct.

17 Q. And the same with respect to subsection B there; when
18 Ecology issued the 401 certification, it believed that
19 the proposed project was in conformance with the
20 requirements of the state water quality standards,
21 correct?

22 A. That's correct.

23 Q. And the same with respect to subsection C there; when
24 Ecology issued the 401 certification, Ecology believed
25 that the proposed project was in conformance with the

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1 requirements to use all known, available and reasonable
2 methods to prevent and control pollution of state waters?
3 A. That's correct.
4 Q. A short way of saying that is that Ecology believed that
5 the 401 certification was in conformance with AKART; is
6 that right?
7 A. I'm not certain that I would use the term AKART. What I
8 would say and what I have said, that we issued this
9 certification with the understanding that it was in
10 compliance with state water quality laws.
11 Q. Ms. Kenny, under subsection C, it says, "Conformance with
12 the requirement to use all known, available, and
13 reasonable methods to prevent and control pollution of
14 state waters." A short way of saying that is AKART,
15 isn't it?
16 A. It could be read that way.
17 Q. Well, you've heard that term, AKART, have you not?
18 A. Yes, I have.
19 Q. And you understand that AKART means all known, available
20 and reasonable methods to prevent and control pollution?
21 A. That is the shorthand that's used for that term.
22 Q. You, yourself, didn't make the determination whether or
23 not the project components comported with AKART, did you?
24 A. No, I did not.
25 Q. And, in fact, you relied upon Kelley Whiting in that

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1 regard; is that right?

2 A. I relied on several people with regards to whether or not
3 this project complied with water quality standards; that
4 included Kevin Fitzpatrick in our water quality program,
5 John Drabek in our water quality program, Dave Garland in
6 our water quality program, and Kelley Whiting, who works
7 for King County.

8 Q. I'm going to show you Exhibit 451 and, again, it falls in
9 the category where I'm going to need to hand out copies.
10 It's double sided.

11 We are arranging to get the exhibit notebooks
12 supplemented to include these other exhibits.

13 Do you recognize Exhibit 451, Ms. Kenny?

14 A. Yes, I do.

15 Q. And this document has been stipulated to by all parties.
16 First of all, what is Exhibit 451?

17 A. This exhibit is a fax from KCR, which stands for King
18 County Reviewer, otherwise known as Kelley Whiting, to
19 myself, with I believe he's made suggested changes for
20 the draft language that I proposed in one of the earlier
21 versions of the draft versions of the 401.

22 Q. This is Kelley Whiting's response to the draft 401 that
23 you sent, which has previously been identified as Exhibit
24 446, correct?

25 A. I believe that's correct.

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1 Q. And if you look over on the back page of Exhibit 451, the
2 first two underlined sentences, could you read those into
3 the record, please.

4 A. "CSMP could easily be challenged as not being AKART.
5 SWDM is not AKART. Rather, see a tie to the monitoring
6 results that might require AKART to meet applicable water
7 quality standards and this order."

8 Q. Was it your understanding that Kelley Whiting was
9 advising Ecology that the comprehensive stormwater
10 management plan could easily be challenged as not being
11 AKART; is that right?

12 A. That's what he's saying.

13 Q. And he was also advising Ecology that the King County
14 stormwater design manual is not AKART, correct?

15 A. That's what it appears to say.

16 Q. And, yet, despite what Mr. Whiting wrote to you here,
17 Ecology went ahead and issued the 401 certification on
18 August 10, 2001, correct?

19 A. I don't know that it was an issue of despite what was
20 written here. Kelley Whiting's review was not the end-
21 all and be-all of our analysis of water quality related
22 issues. And he was certainly not in a position to speak
23 for the Department of Ecology as to whether or not the
24 state was going to certify that this project met water
25 quality standards. This is his opinion.

AR 054965

1 Q. Ecology retained King County to review the comprehensive
2 stormwater management plan, didn't it?

3 A. We retained the county to review the port's stormwater
4 plan to the technical provisions of King County's surface
5 water design manual.

6 Q. Right. And Mr. Whiting did that review for King County,
7 did he not?

8 A. He did that on our behalf.

9 Q. And you relied upon King County for that review?

10 A. For the design aspects of the stormwater plan, yes.

11 Q. And Mr. Whiting is advising you that the comprehensive
12 stormwater management plan could easily be challenged as
13 not being AKART, correct?

14 A. That's what he says.

15 Q. Turn to page 3 of the September 2001 certification, and
16 this is under condition A of the certification, "Water
17 Quality Standard Conditions," A(2), "Instream Shoreline
18 Work Monitoring Plan." In general, what is that
19 condition referring to?

20 A. This provision was specifically written to address the
21 portions of the port's project that would occur in water
22 or adjacent to water along the shoreline.

23 Q. And look over to page 3, subsection D, where it states,
24 "In the monitoring plan the port shall demonstrate to
25 Ecology that any mixing zone is minimized in conformance

AR 054966

1 with WAC 173-201A-100(6)." And then subpart G on that
2 page, "If monitoring indicates turbidity standards are
3 not being met at the boundary of the mixing zone,
4 measures shall immediately be taken to reduce turbidity
5 rates such as slowing the rate of work, placement of
6 additional sediment curtains, et cetera."

7 Based upon those two provisions, subsection D and
8 subsection G, do you agree that, given the scope of
9 construction of this project, there is a likelihood that
10 there will be temporary turbidity mixing zones on this
11 project?

12 A. What I would like to say about that is that you cannot
13 read section A to D and G without reading what I've also
14 written in part A(1) where I reference the sentence that
15 said, "This water does not authorize temporary
16 exceedances of water quality standards beyond the limits
17 established in WAC 173-201A-110(3)." That section of the
18 WAC specifically makes allowance for the suspension, the
19 temporary suspension during construction of in-water
20 projects of the turbidity standards.

21 Q. Do you recall me asking this question and you giving this
22 answer in your deposition at page 137. Question: "So if
23 I can cut through all of that, what I understood you to
24 say is that, yes, based upon the water quality program's
25 experience, mixing zones are expected to occur during the

AR 054967

1 construction of this project?" Answer: "There's a
2 likelihood that they may occur."

3 Do you recall that question and answer?

4 A. I recall it.

5 Q. It's on page 137 if you want to see it.

6 A. I recall it.

7 Q. And you were under oath when you said that there was a
8 likelihood that mixing zones will occur; isn't that
9 right?

10 MS. MARCHIORO: Objection: Misstates the
11 testimony of the witness.

12 Q. (Continuing By Mr. Stock): You were under oath when you
13 answered there's a likelihood that they may occur, were
14 you not?

15 A. The only likelihood for mixing zone --

16 Q. Miss Kenny, excuse me for interrupting, but the question
17 is, you were under oath when you stated, in response to
18 my question, that there's a likelihood that they may
19 occur?

20 A. I was under oath.

21 Q. As part of your and Ecology's reasonable assurance
22 review, Ecology did not require or do any sort of review
23 and approval of mixing zones that were expected to occur
24 through construction of this project; is that right?

25 A. We didn't do any such review because that is not what is

AR 054968

1 required by this particular statute.

2 Q. Ecology didn't require the port to provide any supporting
3 information regarding the impact of temporary turbidity
4 mixing zones; isn't that true?

5 A. No.

6 Q. No, Ecology did not require the port to submit any
7 supporting information regarding the impact of temporary
8 turbidity mixing zones, correct?

9 A. What I did with this particular issue was ask the port
10 whether they thought they would be able to construct
11 their projects, do the in-water work and meet the
12 criteria of WAC 173-201A-110(3), and that allows a
13 temporary mixing zone only for the purposes of
14 construction where the turbidity standards are
15 temporarily suspended, and they said that they thought
16 that they would be able to meet those requirements.

17 Q. It's a simple question, Ms. Kenny. The question is,
18 Ecology did not require the port to provide any
19 supporting information regarding the impact of temporary
20 turbidity mixing zones; isn't that right?

21 MR. REAVIS: Objection. I think that's the
22 question she just answered. It's asked and answered.

23 MR. STOCK: It is not the question that she
24 just answered.

25 MS. COTTINGHAM: You want to simplify your

AR 054969

1 question.

2 MR. STOCK: Sure.

3 Q. It is a simple question. All I want to know, and all I
4 want the board to hear, is that Ecology did not require
5 the port to submit any supporting information regarding
6 the impact of temporary turbidity mixing zones; isn't
7 that right?

8 A. Other than the information that we already had in front
9 of us in terms of the proposed construction methodologies
10 for their in-water work, I don't believe we required any
11 more detailed analysis of that issue.

12 Q. And what the certification does is it defers to the
13 monitoring plan that the port must demonstrate that any
14 mixing zone is minimized, correct? That's subsection D
15 on page 3.

16 A. The subsection D refers to WAC 173-201A-100(6), and that
17 is -- 100 deals with mixing zones in general or in a
18 larger sense where outfalls from specific sources of
19 pollution.

20 Q. Ms. Kenny, my question is very focused, and my question
21 is really just with respect to the certification and the
22 interpretation of the language in the certification, and
23 that is, that the certification defers to the monitoring
24 plan that the port must demonstrate that any mixing zone
25 is minimized?

AR 054970

1 MS. MARCHIORO: Counsel is not allowing the
2 witness to answer the question. She was answering the
3 question specifically as to question D and he cut her
4 off. I would ask the board to allow the witness to
5 answer the question.

6 MR. STOCK: The problem I have got, and I had
7 this during Ms. Kenny's deposition, Ms. Kenny wants to
8 explain, and I can understand her desire to do that, she
9 wants to explain issues, the general issues. Here we are
10 talking about temporary turbidity mixing zones, and there
11 is a natural inclination for her to want to explain that
12 whole issue, but if we are going to get through this
13 hearing, the witnesses have to focus on and listen to the
14 question, and it's a simple question here as to whether
15 under the 401 certification, the certification defers to
16 the monitoring plan that's to be submitted the issue of
17 the impact of the temporary turbidity mixing zone.

18 MS. COTTINGHAM: What I'm going to ask the
19 parties to do is I would ask you to be as clear as you
20 can, and ask the witness to answer the question, not
21 explain around the margins, and you will have the
22 opportunity on cross examination to bring out your
23 arguments on this.

24 Q. (Continuing By Mr. Stock): So the simple question is the
25 401 certification defers to the monitoring plan that the

AR 054971

1 port must demonstrate that any mixing zone is minimized,
2 correct?

3 A. That's correct.

4 Q. And the 401 certification also defers to the monitoring
5 plan any description of BMPs to be followed; that's all
6 deferred to the monitoring plan for instream work,
7 correct?

8 A. That's correct.

9 Q. Okay, let's switch subjects. Turn back to Exhibit 2,
10 which is the August 10 certification, and turn to page 3,
11 at the very bottom under "Permit Duration." Could you
12 read into the record item number 1?

13 A. Item number 1 says, "This order shall be valid during
14 construction and long-term operation and maintenance of
15 the project."

16 Q. And this is the August 10 certification, correct?

17 A. That's correct.

18 Q. Your understanding is that Ecology included this permit
19 duration provision in the August 10 certification because
20 you understood that the Clean Water Act applies to
21 long-term operation of the facility?

22 A. I believe that's how I responded at my deposition.

23 Q. It is. Now, you also understood that the state water
24 quality standards apply to long-term operation and
25 maintenance of the facility, whatever those standards are

AR 054972

1 at the time?

2 A. That's correct.

3 Q. And for that reason, you also included in the August 10
4 certification that the permit duration would include and
5 cover long-term operation and maintenance of the project,
6 correct?

7 A. That's correct.

8 Q. Now, turn to page 4 of Exhibit 1, which is the September
9 reissued certification. At the very top of page 4, which
10 is the permit duration for the September certification,
11 read the very first sentence.

12 A. "This order shall be valid during construction of the
13 project."

14 Q. And that is a change from the August 10 certification,
15 isn't it?

16 A. Yes.

17 Q. Ecology deleted from the permit duration phrase from the
18 August certification the phrase "And long-term operation
19 and maintenance," correct?

20 A. That's correct.

21 Q. And as a result, that is a lesser standard, provides
22 lesser protection than the August certification; isn't
23 that right?

24 MR. REAVIS: Ms. Cottingham, I would like to
25 object just because of the reading of that first

AR 054973

1 paragraph on page 4, under the rule of what's sometimes
2 called optional completeness, that the first sentence
3 spoke --

4 MR. STOCK: Is this a speaking objection?

5 MR. REAVIS: I'm trying to explain that
6 Mr. Stock did not read the entirety of that paragraph in
7 his question, and oftentimes it's appropriate to have the
8 entire thing read to explain.

9 MS. COTTINGHAM: I'm going to overrule the
10 objection and allow you to bring that out in cross
11 examination.

12 Q. (Continuing By Mr. Stock): Let's walk through some of
13 these just so we put these into context, Ms. Kenny. Look
14 at item B(1)(d) as in David.

15 A. All right.

16 Q. Focusing on that, under the September 401 certification,
17 the port has the right to stop monitoring potential
18 contaminant transport to soil and groundwater via
19 subsurface utility lines after eight years; is that
20 correct?

21 A. What the sentence says is that the monitoring shall
22 remain in effect as specified in that plan but in no
23 event for duration less than eight years.

24 Q. And so in eight years plus one day, under the 401
25 certification issued in September, the port has the right

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1 to stop that monitoring of the potential contaminant
2 transport to soil and groundwater via subsurface utility
3 lines, correct?

4 A. That's correct.

5 Q. And under the August 10 certification, the port didn't
6 have that right, did it?

7 A. We hadn't specified any time frame for the expiration of
8 that monitoring.

9 Q. That's right. So it's a lesser standard in the September
10 401 than in the August 401 with respect to monitoring the
11 transport of contaminants via subsurface utility lines;
12 isn't that right?

13 A. It's a different standard.

14 Q. It's a lesser standard, isn't it?

15 A. Yes, it is.

16 Q. And that's what you told me in your deposition, isn't it?

17 A. That's correct.

18 MR. STOCK: That's on page 148, Counsel.

19 MS. MARCHIORO: Pardon?

20 MR. STOCK: Page 148.

21 Q. Look at B(1)(c) on page 4 of the certification. That's
22 also true with respect to surface and groundwater
23 monitoring under the 401 certification issued in
24 September, the port can cease monitoring surface and
25 groundwater after eight years?

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1 A. That's correct.

2 Q. And the port didn't have that right in the August
3 certification, did it?

4 A. No.

5 Q. And so, the same thing, as a result, it's a lesser
6 standard in the September 401 certification than the
7 August certification, correct?

8 A. Yes.

9 Q. Take a look at B(1)(f), which is still on page 4 of the
10 401 certification, and explain to us what B(1)(f) relates
11 to.

12 A. Well, for the aid of the board and those listening in
13 this room, I'll read it. It says, regarding the
14 operational stormwater requirements, "Those provisions of
15 this condition including the comprehensive stormwater
16 management plan that are incorporated into and superseded
17 by any future Ecology-approved NPDES permit for the
18 Seattle Tacoma International Airport, shall be superseded
19 as determined in that permit. Any conditions not
20 incorporated into a future Ecology-approved NPDES permit
21 for STIA shall remain in effect as provided in this
22 condition."

23 Now, what that means is that a future NPDES permit,
24 which is the National Pollution Discharge Elimination
25 System Permit, which the port does have a current permit

AR 054976

1 for their industrial waste waters, a future permit could
2 supersede the provisions of this certification.

3 Q. Right. To say it simply for everyone in the room, the
4 September 401 certification can be modified and
5 superseded by conditions in a future NPDES permit,
6 correct?

7 A. That's correct.

8 Q. And given that, in theory, then, the conditions in this
9 401 certification can be modified by a future NPDES that
10 would result in lesser protection of water quality than
11 what this 401 certification provides; isn't that right?

12 A. I believe I recall answering that that was correct, but
13 it was highly unlikely that we would issue an NPDES
14 permit that would lessen the standards of this 401.

15 Q. The question was, and you agreed with me at the
16 deposition, in theory, this September 401 certification
17 can be modified to a lesser standard through issuance of
18 a future NPDES permit; isn't that right?

19 MS. MARCHIORO: Objection: Asked and
20 answered.

21 MR. STOCK: She changed her answer.

22 MS. MARCHIORO: No, you didn't like the
23 answer. She gave an answer to that question.

24 MS. COTTINGHAM: Can you read back her answer
25 for me.

AR 054977

1 MR. STOCK: What I can do, Miss Cottingham, is
2 simply impeach her with her deposition testimony and
3 that's probably the most efficient way to do it.

4 Q. Do you recall me asking you this question and you giving
5 this answer. It's on page 150 of the deposition.

6 Question: "You agree that the potential exists for the
7 conditions in the 401 certificate to be modified to
8 result in a lesser protection of water quality because it
9 can be modified by future NPDES permit?" And you
10 answered, Ms. Kenny, under oath, "In theory the
11 conditions could be modified to a lesser standard."

12 Do you recall that question?

13 A. I do.

14 Q. And giving that answer?

15 A. I do.

16 Q. And the reason that is, that it can be modified to a
17 lesser standard through a future NPDES permit, is because
18 NPDES permits are governed by and issued pursuant to a
19 different standard than for issuing a 401 permit; isn't
20 that right? Ecology doesn't need reasonable assurance to
21 issue an NPDES permit, does it?

22 A. Well, it's my understanding that what Ecology does when
23 we issue an NPDES permit, we do make an assertion of
24 reasonable assurance or compliance with the state water
25 quality laws with the permit and the conditions that are

AR 054978

1 in that permit.

2 Q. Ms. Kenny, do you recall me asking you these questions
3 and you giving these answers in your deposition, that's
4 still on page 150: Question: "And that's because the
5 standards for reviewing and approving NPDES permits are
6 different than the standards for reviewing and approving
7 401 certifications?" Answer: "I can't speak to the
8 exact standards used for reviewing 402." Question:
9 "Sure. At a minimum, you know you don't need reasonable
10 assurance to issue a 402 permit." And you answered,
11 "That's my understanding."

12 Do you recall those questions and those answers?

13 A. I do.

14 Q. Let's talk about the reasonable assurance standard for a
15 few minutes, so we're going to shift gears here a little.

16 The 401 is conditioned on the port providing
17 additional reports; is that right?

18 A. The 401 contains conditions requiring the port to submit
19 additional information in reports.

20 Q. And the 401 also provides that Ecology can revoke the 401
21 if the port does not submit any document required by the
22 401 condition?

23 A. That's correct.

24 Q. The reason Ecology reserved its right to revoke the 401
25 if the port doesn't follow through with providing these

AR 054979

1 reports is because Ecology needs the additional
2 information to have reasonable assurance, it's part of
3 the picture; is that right?

4 A. That's correct.

5 Q. Ecology also retained the right in the 401 certification
6 to reject the additional deliverables by requiring in the
7 401 that no document, report or plan required by this
8 order shall be deemed approved until the port receives
9 written approval from Ecology?

10 A. That's correct.

11 Q. And, again, the reason why Ecology retained that right to
12 reject the plan and to insist upon written approval was
13 because Ecology needs that additional information to have
14 reasonable assurance?

15 A. That's correct.

16 Q. In your prefiled testimony at page 5 you say that, "Where
17 there are uncertainties, Ecology imposes conditions in
18 the 401 certification." Did you write that?

19 A. Yes, I did.

20 Q. So everywhere Ecology provided a condition, that was
21 because Ecology was uncertain whether water quality
22 standards would be complied with without the condition
23 present, correct?

24 A. There might be some degree of uncertainty.

25 Q. Right. That's why Ecology puts conditions in the 401

AR 054980

1 certification; that's what you said in your prefiled?

2 A. Right. Some of the conditions are also standard
3 conditions; you know, you need to notify Ecology if
4 there's a spill. A lot of those conditions are standard.
5 So not all the conditions in the 401 are related to the
6 reasonable assurance determination.

7 Q. For those conditions that are related to the reasonable
8 assurance finding and that are in there to reduce or
9 remove uncertainty, to the extent that those conditions
10 aren't fulfilled, you agree that that uncertainty
11 remains; that's a matter of logic, isn't it?

12 A. Yes.

13 Q. And the reason why Ecology retained the right to review
14 and approve in writing all of these additional reports is
15 because it's important that Ecology verify that any
16 additional information that it requires has been
17 submitted and is adequate?

18 A. That's correct.

19 Q. Let's talk about the conditions related to the natural
20 resources mitigation plan and the certification.

21 MS. MARCHIORO: Can you identify which
22 certification? Are you referring to a specific exhibit?

23 MR. STOCK: Sure, I'm talking about the
24 September 2001 certification, that's Exhibit 1. And
25 unless I specifically say that I'm referring to the

AR 054981

1 August certification, I'll be referring to the 401
2 certification as the one that we're here about.

3 Q. Let's talk about the natural resources mitigation plan.
4 When Ecology issued the 401 certification in August,
5 Ecology did not have a complete and final natural
6 resources mitigation plan; isn't that right?

7 A. We had a plan that the port had submitted to us that was
8 for all purposes complete and final.

9 Q. The 401 certification issued in August and also the 401
10 certification issued in September contains page after
11 page of additional requirements that the port needed to
12 submit to amend and clarify the natural resources
13 mitigation plan; isn't that right?

14 A. That's correct.

15 Q. So the NRMP, which I'll refer to in short, was not
16 complete when Ecology issued the August certification;
17 isn't that right?

18 A. Most of these conditions that are related to the NRMP are
19 clarifications and minor substantive issues, plan sheet
20 details. It's not a matter that we didn't have a
21 complete plan before us. This is very usual for a
22 complex document to require additional submittal in a
23 final format that wraps up all of our final comments on a
24 plan, and we ask for a final NRMP to be submitted to us.

25 Q. Well, Ms. Kenny, I don't mean to mince words with you,

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1 it's a simple question, and regardless of whether I want
2 to characterize them as major additions or you want to
3 characterize them as minor clarifications, the reality is
4 that when Ecology issued the 401 certification in August,
5 it did not have before it a complete natural resources
6 mitigation plan; isn't that right:

7 MR. REAVIS: Objection: Argumentative and
8 asked and answered.

9 MS. COTTINGHAM: I haven't heard a complete
10 answer, so why don't you go ahead and answer his
11 question.

12 Q. (Continuing By Mr. Stock): It's a simple question: The
13 NRMP wasn't complete when Ecology issued the 401 in
14 August, correct?

15 A. I'm having a hard time with that question because I
16 believe it was complete. There were areas where we had
17 some concerns that needed to be corrected, and, in my
18 mind, those were areas more of an editorial or a
19 typographical area, where we wanted to insure that
20 changes were made, but we had a complete plan. We knew
21 what the impacts were, we knew what mitigation was being
22 proposed, we had confidence in the port's ability to
23 provide this mitigation, so, in my mind, the decision
24 that we based this certification on, we had a complete
25 mitigation plan.

AR 054983

1 Q. Let me ask this, Ms. Kenny, who is Jim Kelley?

2 A. Jim Kelley is the port's consultant for the wetland
3 issues on this project.

4 Q. And who prepared the natural resources mitigation plan?

5 A. I believe it was authored primarily by Dr. Kelley and Jan
6 Cassin of Parametrix.

7 Q. And you, yourself, did not have any technical discussions
8 with Jim Kelley on the merits of the natural resources
9 mitigation plan, did you?

10 A. I would disagree with that. I participated in several
11 meetings with Dr. Kelley, Eric Stockdale, Katie Walter,
12 where we went over in great detail the technical merits
13 of the NRMP.

14 Q. Page 48 of your deposition, Ms. Kenny, do you recall me
15 asking you this question and you giving this answer:
16 The question is, "So no technical discussions with him"
17 -- that's referring to Jim Kelley, and counsel can check
18 me on that. "So no technical discussions with him; more
19 administrative in terms of when you expected work product
20 from him?" Answer: "I did not enter into discussions
21 with him regarding the technical merits of the work."

22 Do you recall that question and that answer?

23 A. I do.

24 Q. Turn to page 6 of the September 401 certification,
25 Exhibit 1, midway down. The certification requires the

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1 port to submit amendments and clarifications to the
2 natural resources mitigation plan; is that right?

3 A. That's correct.

4 Q. Take a look at subpart (e), so it's D(1)(e). And what is
5 that amendment or clarification to the NRMP that that
6 provision is requiring?

7 A. The subsection refers to a table in the plan that states
8 that shade cloth will be placed over the new channel, and
9 then we require that the port will require a map of the
10 location for the shade cloth, details on how it will be
11 installed and a schedule of installation and removal.

12 Q. Why is a shade cloth important for the new Miller Creek
13 channel?

14 A. As I discussed at my deposition in great detail, you
15 recall --

16 Q. I do recall, and that's why we're going down this road.

17 A. Oh, good. Part of the proposal along the Miller Creek
18 channel is to revegetate, and there was a concern that
19 some of the coniferous species being planted, if they
20 were exposed directly to sunlight, could be scorched and
21 burn and die. And so it is important that we have the
22 detail on the shade cloth.

23 Q. I summed it up, didn't I, by saying basically you want
24 the shade cloth so the baby plants can grow into big
25 plants to shade the stream, is that right?

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1 A. That's right.

2 Q. And Ecology needed to know the details of the shade cloth
3 to decide whether the baby plants will be sufficiently
4 protected to grow into big plants and shade the stream?

5 A. That's correct.

6 Q. And Ecology needed the details of the shade cloth to have
7 reasonable assurance that the temperature in that part of
8 the stream wasn't going to rise and violate water quality
9 standards; isn't that right?

10 A. I don't recall how I answered that question specifically.

11 Q. Let me read it to you then. It's on page 161 of your
12 deposition. Question: "And you needed the details on
13 that component to have reasonable assurance that the
14 temperature in that part of the stream wasn't going to
15 rise and violate state water quality standards; isn't
16 that right?" Answer: "Yes."

17 A. Was going to rise or was not going to rise?

18 Q. Question: "And you needed the details on that component
19 to have reasonable assurance that the temperatures in
20 that part of the stream wasn't going to rise and violate
21 state water quality standards, isn't that right?"
22 Answer: "Yes."

23 Do you recall that question and answer?

24 A. I do.

25 Q. And so Ecology needed the details of the shade cloth to

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1 have reasonable assurance that water quality standards
2 would not be violated and in that part of Miller Creek,
3 correct?

4 A. I recall I answered that that was correct for that one
5 small detail in that one small section of the creek.

6 Q. Take a look at D(1)(h), which is on page 7 of the
7 certification. Is that provision requiring an amendment
8 to the NRMP to require that wetland boundaries be
9 delineated at years five, 10 and 15?

10 A. That's what this condition requires.

11 Q. And is it your understanding that wetland boundaries will
12 increase or decrease based on the amount of water going
13 to the site?

14 A. Well, my understanding is that this mitigation plan
15 should be designed to maintain the existing conditions at
16 the site, so the idea is that the same amount of water
17 will be going.

18 Q. And so that's why that condition (h), the last sentence
19 provides, "If the delineation shows the wetland
20 boundaries have decreased, then additional in-basin
21 mitigation may be required by Ecology," correct?

22 A. That's correct.

23 Q. And so you agree, don't you, that if the delineation
24 shows the wetland boundaries have decreased, then the 401
25 certification says that additional in-basin mitigation

AR 054987

1 should be required in order to have reasonable assurance
2 that water quality standards will be met?

3 A. Yes.

4 Q. And that condition doesn't require that it happen, it
5 says may, doesn't it?

6 A. That's what it says.

7 Q. And if it said shall, then that would have been a greater
8 standard?

9 A. Yes.

10 Q. Turn to page 8, under subsection O. What is subsection O
11 relating to?

12 A. This subsection applies to the Vacca Farm mitigation
13 site.

14 Q. And how is the NRMP supposed to be amended with respect
15 to the Vacca Farm mitigation site?

16 A. We are adding another performance standard to the final
17 performance standards for that particular site, and what
18 we've required is that observable surface flow must be
19 present in the created channel at all times.

20 Q. And the purpose of that amendment is to insure that the
21 channel is functioning well enough to support a stream,
22 correct?

23 A. That's correct.

24 Q. And you agree that there has to be observable surface
25 flow present in the created channel at all times in order

AR 054988

1 for Ecology to have reasonable assurance?

2 A. Yes.

3 Q. And the NRMP upon which the August and the September 401
4 certification was issued didn't have that requirement in
5 it when Ecology issued the certifications, correct?

6 A. I believe the NRMP had other standards that would pertain
7 to the functioning of the creek.

8 Q. Ms. Kenny, my question is very specific: The NRMP that
9 Ecology relied upon to issue the August certification and
10 the September certification did not have that requirement
11 that observable surface flow must be present in the
12 created channel at all times, did it?

13 A. I'm going to answer that by saying I don't know for sure
14 because I didn't read every sentence of the NRMP, but I
15 would say that your assumption is correct; otherwise, we
16 wouldn't have added this as a standard.

17 Q. And without the requirement that you have here now as a
18 standard specified in the NRMP, Ecology doesn't have
19 reasonable assurance with respect to the relocated
20 channel of Miller Creek, correct?

21 A. Well, observable flow is certainly a prime consideration
22 for whether or not that channel is functioning as a
23 creek, so that's an important factor that we need to see.

24 Q. Do you recall me asking you these questions and you
25 giving these answers in your deposition, that's on page

AR 054989

1 177. Question: "It wasn't in the plan when you issued
2 the certification and that requirement is needed for
3 reasonable assurance, isn't that right?" Answer: "It's
4 one of the factors that's needed for reasonable
5 assurance." Question: "Without it, you don't have
6 reasonable assurance with respect to the relocated
7 channel of Miller Creek; is that right?" Answer:
8 "That's correct."

9 Do you recall me asking those questions and you
10 giving that answer?

11 A. I do.

12 Q. Page 9 of the certification, please, condition D(3),
13 requires the port to revise the NRMP to include revised
14 plan sheets; is that right?

15 A. That's correct.

16 Q. And these revised plan sheets are to address the
17 corrections required in attachment B to the 401
18 certification?

19 A. That's correct.

20 Q. So in order to see what those changes are, we need to
21 turn to attachment B of the certification; is that right?

22 A. Yes.

23 Q. So turning to attachment B, under the first page of
24 attachment B, under appendix A of the NRMP, what are
25 those plan sheets relating to?

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1 A. These relate to the drawings for the Miller Creek
2 relocation and floodplain enhancement.

3 Q. And what revision needed to be made to plan sheet C-3?

4 A. There was a correction that needed to be made in note 13
5 to state that provide -- what we wanted was the port to
6 provide a revised sheet showing design of irrigation
7 system and discuss irrigation plan in NRMP, parens,
8 timing, amount of water, et cetera.

9 Q. And the reason Ecology wanted it specified on the plan
10 sheet is for Ecology's experts to assess whether the
11 proposal to irrigate looks reasonable or not, correct?

12 A. I believe that's how I answered in my deposition.

13 Q. Well, and that's the case, you answered that under oath?

14 A. Yes, that's correct.

15 Q. And without the information on the irrigation plan,
16 Ecology's experts can't decide whether it's sufficient to
17 support the mitigation plan; isn't that true?

18 A. For that one portion of the project, that's true.

19 Q. And that portion of the project is with respect to the
20 irrigation system for the relocation of Miller Creek?

21 A. I'm not sure exactly how comprehensive this sheet C-3 is,
22 I would have to look at it, but it's certainly a portion
23 of the Miller Creek relocation.

24 Q. And the Miller Creek relocation and the floodplain
25 enhancement is a major component of the port's mitigation

AR 054991

1 plan; isn't that correct?

2 A. Yes, it is.

3 Q. An if it's an irrigation system, can't you conclude from
4 that that it relates to the plants along the relocated
5 Miller Creek and in the floodplain enhancements; you know
6 that to be the case, don't you?

7 A. It's certainly going to be within that vicinity.

8 Q. And without the information on the irrigation system,
9 Ecology couldn't have reasonable assurance that the
10 irrigation system was appropriate to support the
11 mitigation for the Miller Creek relocation and
12 floodplain; isn't that right?

13 A. That's correct.

14 Q. What is the change required to sheet TE-1? And, by the
15 way, what is that sheet TE? Is that referring to
16 temporary erosion control?

17 A. Right, TE stands for temporary erosion. We required the
18 submittal of a revised sheet with a note on how the
19 ditches will be blocked to prevent sediment migration.

20 Q. And sediment control standards are a critical part of the
21 water quality standards, are they not?

22 A. That's correct.

23 Q. And so until Ecology's experts saw how the ditches will
24 be blocked to prevent sediment migration, there was no
25 way that Ecology experts could have reasonable assurance

AR 054992

1 that the sediment control standards in the WAC would not
2 be violated, correct?

3 A. What I recall is that we discussed this with the port and
4 they had given us some verbal description of how they
5 would be doing that. The reason you want to see it in
6 the plan sheet is so that when these plans are used for
7 construction, the construction company does it right. It
8 also gives us that reasonable assurance.

9 Q. Here is what you said in your deposition in response to
10 that question, Ms. Kenny. It's on page 181, Counsel.

11 Question: "And so until Ecology's experts saw how the
12 ditches will be blocked to prevent sediment migration,
13 there was no way that Ecology's experts could have
14 reasonable assurance that the sediment control standards
15 in the WAC could not be violated?" And you answered:
16 "Yes. I think maybe she should reread the question. It
17 was a long question." She reread the question, and you
18 answered, "Yes, or I agree."

19 Do you recall that question and answer?

20 A. I believe I do.

21 Q. Let's go back to attachment B, the first page of
22 attachment B, and look under appendix B. What is
23 appendix B to the natural resources mitigation plan
24 sheets referring to?

25 A. This pertains to the improvements to Miller Creek and

AR 054993

1 buffer enhancements.

2 Q. And if you look at sheet, the change to sheet C-3, and
3 the change to sheet C-7, is Ecology requiring the revised
4 plans to show how the port would access the stream areas
5 to do the work, because along portions of Miller Creek,
6 the stream is abutted by wetlands?

7 A. That's correct.

8 Q. And you agree that in the absence of that detail, given
9 that Miller Creek is abutted by wetlands, there is no way
10 for Ecology to have reasonable assurance that water
11 quality standards won't be violated in regard to this
12 portion of the NRMP?

13 A. That's correct, for this small portion of the NRMP.

14 Q. Well, you didn't modify it in your deposition, did you,
15 Ms. Kenny?

16 A. I recall in my deposition that after the end of an
17 afternoon of being questioned about plan sheet changes,
18 that what I described was the fact that we had discussed
19 these plan sheet changes in detail with the port, they
20 are relatively minor compared to the overall aspects of
21 the NRMP, and the port had agreed to make these changes
22 and incorporated them into their plan.

23 MR. STOCK: Miss Cottingham, I would like to
24 move to strike as non-responsive. It was a simple
25 question asking her that she didn't modify her answer in

AR 054994

1 the deposition, and I certainly can read her answer to
2 the deposition to show that she didn't have this long-
3 winded explanation.

4 MS. MARCHIORO: I believe that the answer was
5 responsive. Counsel gave Ms. Kenny a wide-open question,
6 and the court reporter can read it back, and it was
7 responding to her summary of the testimony at the end of
8 the deposition. I think if we did read it back, you
9 would get the flavor of the exact answer Ms. Kenny
10 just --

11 MS. COTTINGHAM: I need to remind you to have
12 your questions be clear. You are asking very long
13 questions. So be mindful that his question is asking
14 usually a simple question rather than a complex one. You
15 try and keep your questions a little narrower.

16 Q. (Continuing By Mr. Stock): Okay. Page 182. Here is how
17 you answered the question, Ms. Kenny. Question: "And
18 you agree that in the absence of that detail, given that
19 Miller Creek in this area is abutted by wetlands, there
20 is no way for you to have reasonable assurance that water
21 quality standards won't be violated in regard to this
22 Miller Creek instream and buffer enhancement?" And you
23 answered: "I agree."

24 Do you recall that question and that answer?

25 A. I do.

AR 054995

1 Q. If you turn to page 2 of attachment B, what is the change
2 required to sheet TE-2, which is in the middle of the
3 page?

4 A. We required the submittal of a revised sheet showing
5 details for stream-diversion structure and flow-
6 diversion structure, a revised sheet showing detail for
7 the flexible bypass pipe, a sheet with -- indicated on
8 plan sheet direction of sump discharge water with note
9 that it is pumped to a treatment pond, provide specific
10 pond.

11 Q. And you agree that in the absence of the details on how
12 the stream would be diverted, there is no way to
13 determine with reasonable assurance that the stream
14 diversion will not result in a violation of water quality
15 standards, correct?

16 A. Yes.

17 Q. Page 3 of attachment B. What is appendix D of the plan
18 sheets in reference to?

19 A. Appendix D refers to replacement drainage channels and
20 restoration of temporarily-impacted wetlands.

21 Q. And what's the change required on sheet C-3?

22 A. We have asked for clarification of how hydrologic support
23 will be provided to wetland 11 and wetland 9 after
24 construction.

25 Q. And you agree without that information detailing how

AR 054996

1 wetlands 11 and 9 would be hydrologically supported after
2 construction, there's no way that Ecology could have
3 reasonable assurance that state water quality standards
4 would not be violated with respect to those wetlands?

5 A. That's correct.

6 Q. And sheet C-7 requires details on how wetland 44-A is
7 going to be hydrologically supported post construction
8 after the temporary erosion sediment control channel is
9 removed; is that right?

10 A. That's correct.

11 Q. And unless Ecology knows the answer to that question,
12 Ecology cannot have reasonable assurance that state water
13 quality standards won't be violated with respect to
14 wetland 44-A after construction; isn't that true?

15 A. That's correct.

16 Q. Sheet C-8. Does that require details on how the drainage
17 channel discharge structure controls flow to the wetlands
18 depicted on that sheet?

19 A. That's correct.

20 Q. And the goal is to make sure the hydrology is maintained
21 to those wetlands and that those channels and structures
22 are appropriately monitored and maintained?

23 A. That's correct.

24 Q. And so Ecology needs that information to have reasonable
25 assurance that the wetland would be supported

AR 054997

1 hydrologically and that water quality standards would not
2 be violated, correct?

3 A. That's correct.

4 Q. Let's turn back now to page 10 of the certification
5 itself now that we've gone through those plan revisions.
6 And under item condition D(4) on page 10, is Ecology
7 requiring the port to submit a conceptual plan with
8 respect to the mitigation for the 2.05 acres of wetlands
9 affected by construction of stormwater ponds?

10 A. That's correct.

11 Q. And, in fact, the port has now submitted that conceptual
12 plan, has it not?

13 A. That's correct.

14 Q. And you agree that Ecology needs the conceptual
15 mitigation plan for the 2.5 acres to have reasonable
16 assurance?

17 A. That's correct.

18 Q. And as of February 20, when I took your deposition,
19 Ecology had not provided written approval to that plan;
20 is that right?

21 A. That's correct.

22 Q. And is that still the case today, that Ecology has not
23 provided written approval to that conceptual plan for the
24 2.05 acres?

25 A. That's correct.

AR 054998

1 Q. And, in fact, you're waiting for Katie Walter of Shannon
2 & Wilson to review that conceptual plan?

3 A. That's correct.

4 Q. Who is Katie Walter?

5 A. She is a wetland specialist who is under contract to
6 Ecology to provide review of the NRMP.

7 Q. And Ecology isn't going to decide whether to approve
8 those revisions and the conceptual plan for the 2.05
9 acres until it has received Miss Walter's written
10 comments and those comments are reviewed by Ecology's
11 Eric Stockdale; is that right?

12 A. That's correct.

13 Q. And is the plan that you're waiting for a memo or a
14 report from Miss Walter with respect to the conceptual
15 mitigation of this 2.05 acres?

16 A. We'd expect that she would provide us with a memo or a
17 letter outlining her review.

18 Q. And Mr. Stockdale will also most likely provide you with
19 a memo or a report regarding the port's revisions to the
20 NRMP and this conceptual plan; is that right?

21 A. He might; he might simply concur with what Miss Walter
22 says, and I will know when we get that report.

23 Q. Right. And when you get that report, you will decide
24 whether to issue a letter to the port that asks for
25 further clarifications and amendments to the NRMP and the

AR 054999

1 conceptual mitigation plan for these 2.05 acres, or
2 whether you'll go ahead and provide the written approval
3 that's required under 401 certification; is that right?

4 A. We will provide -- that was a long question.

5 Q. Let me break it down then. All I want to know is once
6 you get Miss Walter's report and Mr. Stockdale's report,
7 you're going to turn that around and you're going to
8 write a letter to the port, correct?

9 A. That's correct.

10 Q. And that letter to the port is either going to say, wait
11 a minute, we have some additional concerns with respect
12 to this conceptual plan and your clarifications, so you
13 need to go back to the drawing board and provide us
14 additional information, or you're going to write a letter
15 of approval and say, Ecology now passes off on these
16 clarifications and the conceptual plan?

17 MS. MARCHIORO: Objection: Compound question.

18 MR. STOCK: Just trying to speed things up. I
19 will break it down.

20 Q. You have one of two choices for that letter to the port,
21 right; you can either tell them we need some additional
22 information or you can approve it, correct?

23 A. That's correct, we will do one or the other.

24 Q. And you haven't done that yet?

25 A. No, we haven't.

AR 055000

1 Q. Is there any time frame for you to do that, any time
2 estimate?

3 A. Well, we're certainly not going to be looking at it over
4 the next two weeks. Once we're done with the hearing, we
5 will be able to move forward with our review of all of
6 the outstanding reports that are before us.

7 Q. Let's talk about --

8 MS. COTTINGHAM: Would this be a good
9 opportunity for us to take about a 15-minute break?

10 MR. STOCK: Yes, it would. My voice will
11 appreciate that.

12 MS. COTTINGHAM: We'll take a 15-minute break
13 and come back at quarter after 3:00.

14 (Whereupon, a recess was taken.)

15 MS. COTTINGHAM: I have two general
16 announcements before we go on with this examination. The
17 first one is, just so you know, the microphones on your
18 desk are only for the tape recorder. And we're having
19 people who are having trouble hearing in the back of the
20 room, so just project.

21 And the second one is, in case calls come in for
22 anybody here, the receptionist is posting them on a
23 little green thing right by the front door, so check that
24 occasionally if you think you might have a phone message.

25 MR. POULIN: Can I object to the suggestion

AR 055001

1 that Kevin speaks up?

2 [Laughter]

3 MS. COTTINGHAM: I don't know who that they
4 cannot hear. These are not broadcast microphones.

5 Q. (Continuing By Mr. Stock): Ms. Kenny, let's now talk
6 about the conditions related to the acceptable fill
7 criteria. If you'll turn to page 14 of the September 401
8 certification, which is Exhibit 1. What is the purpose
9 of the conditions in section E of the 401 certification?

10 A. Section E pertains to the conditions that we placed on
11 the port for importing fill to be placed in waters of the
12 state for this project, and the purpose is to provide
13 reasonable assurance that water quality standards will be
14 met.

15 Q. And when you say water quality standards, you're also
16 including groundwater standards; is that right?

17 A. That's correct.

18 Q. That's a part of the state water quality standards that
19 are applicable to this 401 certification?

20 A. Yes.

21 Q. I saw that you spent 6 of your 26 pages in your prefilled
22 testimony talking about the fill acceptance criteria. Do
23 you recall that testimony generally in your prefilled?

24 A. I don't recall the number of pages, but I did testify on
25 the fill criteria.

AR 055002

1 Q. If Ecology's counsel wants to make a copy of your
2 prefiled testimony available for your review, that's fine
3 with me. I counted six pages. Does that sound about
4 right to you?

5 A. I would have to look at the testimony to recall the
6 number of pages, Mr. Stock.

7 MR. STOCK: May I ask Ecology's counsel to
8 provide a copy of Ms. Kenny's prefiled since I do not
9 have it. I've got my copy, but --

10 Q. Do you have it in front of you?

11 A. Yes, I do.

12 Q. And you start talking about acceptable fill criteria on
13 page 12, and then, by my count, you go over six pages of
14 the 26 pages and end on page 17; is that right?

15 A. Looks like five and half to me.

16 Q. I'll accept five and a half. You weren't involved in the
17 development of the criteria, the acceptable fill
18 criteria, were you?

19 A. No, I was not.

20 Q. And you relied, in fact, exclusively on Kevin Fitzpatrick
21 to make your recommendation to Ray Hellwig and Gordon
22 White that the conditions in this part of the
23 certification provided Ecology reasonable assurance?

24 A. I did.

25 Q. You didn't do any independent assessment of those

AR 055003

1 conditions yourself, did you?

2 A. No, I did not.

3 Q. And who is Pete Kmet?

4 A. Peter Kmet is an employee of Ecology who works for our
5 toxics cleanup program in the Lacey office.

6 Q. Is he the lead person in the toxics cleanup program at
7 headquarters?

8 A. I really don't know his position.

9 Q. In any event, you didn't talk to him about the fill
10 acceptance criteria in the 401 certification, did you?

11 A. No, I didn't.

12 Q. If you'll turn to page 14 of the certification, September
13 certification, the first paragraph under section E
14 provides that, "The use of imported fill for projects for
15 which the 404 permit was sought, examples, third runway,
16 runway safety areas, south aviation support area, and
17 other appropriate master plan update improvements as
18 determined by Ecology" -- and you label those port 404
19 projects, is that right?

20 A. That's correct.

21 Q. -- "may result in impacts to wetlands and other waters of
22 the state." And my question is and what I want to focus
23 on is what Ecology meant when it said, "and other
24 appropriate master plan update improvements as determined
25 by Ecology," what did Ecology mean?

AR 055004

1 A. I'm going to take a moment to look back at the August
2 10th certification, if I might.

3 Q. Sure. That's Exhibit 2.

4 A. In the August 10th certification, the language was
5 similar but, in some respects, broader, and the language
6 in the September 21st certification was clarified to
7 provide greater clarity as to exactly which projects out
8 at the port the fill criteria would apply to.

9 Q. That raises a question for me, Ms. Kenny. How is Ecology
10 determining to which master plan update projects these
11 fill criteria are applicable?

12 A. We are using as a basis for that determination the
13 projects that are directly impacting waters of the state,
14 that is, those parts of the project that are filling
15 wetlands or impacting streams are clearly covered under
16 this provision. There are other projects at the airport
17 that are in proximity to streams or groundwater where
18 there may be a potential for impact from the fill, and
19 that's what we've meant by other appropriate master plan
20 update improvements as determined by Ecology.

21 Q. In fact, Ecology is still in the process of reviewing a
22 list of MPU improvements against a set of criteria that
23 Ecology still is in the process of developing; isn't that
24 correct?

25 A. That's correct.

AR 055005

1 Q. And Ecology hasn't made a final determination of what MPU
2 projects are going to be subjected to these fill
3 acceptance conditions in section E of the certification;
4 isn't that right?

5 A. That's correct.

6 Q. And Ecology has yet to work out the criteria in detail
7 that it's going to apply to determine whether MPU project
8 is subject to this condition?

9 A. We've already advised the port of the preliminary
10 criteria that we are going to be looking at.

11 Q. You haven't provided these criterion in writing, have
12 you?

13 A. No, we haven't.

14 Q. In fact, the criteria to determine whether these
15 conditions apply to particular MPU projects is still
16 under discussion with the port?

17 A. That's correct.

18 Q. And the fill criteria conditions contained in condition E
19 of the certification have yet to be applied at all out at
20 the third runway site; isn't that true?

21 A. I believe that I was not in total understanding of what
22 was actually happening at the airport when you took my
23 deposition on February 20th. It's my understanding,
24 based on what the port has told me, that they are in fact
25 applying the September 21st criteria out there.

AR 055006

1 Q. So on February 20 when you told me under oath that the
2 conditions in section E have yet to be applied, that
3 wasn't true, correct?

4 MS. MARCHIORO: Objection. It's argumentative
5 to assert that Miss Kenny is under oath. There is no
6 dispute that she was under oath at her deposition.

7 MS. COTTINGHAM: I'm going to sustain.

8 MR. STOCK: Well, I am glad Ecology will
9 stipulate to that. I'll ask another question then.

10 Q. It wasn't true what you told me in your deposition in
11 that regard, was it?

12 A. I believe it was true in that the port at that point in
13 time -- I will go back to February 20th. I can't
14 remember exactly when the stay was put in place, but at
15 that point in time, the 401 was suspended. There is no
16 obligation for the port to be implementing any of the
17 conditions of this 401, the way I understand it. So I
18 simply wasn't aware of what the port was doing out there
19 on February 20th, when you asked me that question.

20 Q. Okay. On February 20, you told me that the conditions in
21 section E weren't being applied by the port. Are you
22 saying today the conditions are being applied by the
23 port?

24 A. I have been advised by the port that they are being
25 applied out there. I was mistaken at that point.

AR 055007

1 Q. The 401 certification was issued on September 21,
2 correct?

3 A. That's correct.

4 Q. And do you have any idea what the volume of fill that has
5 been imported to the third runway site since September 21
6 is?

7 A. No, I don't.

8 Q. Is it your understanding that close to 5 million cubic
9 yards of fill have been imported out to the site?

10 A. To date?

11 Q. Yes.

12 A. For the total embankment?

13 Q. Yes.

14 A. The last meeting I went to where that was discussed was a
15 month or two ago, and it was somewhere in the order of 3
16 million cubic yards is what I recall.

17 Q. What percent of that 3 million cubic yards have been
18 subjected to the fill criteria conditions set out in
19 section E of the September 401 certification?

20 A. I have no idea, Mr. Stock.

21 Q. You understand that there has been a significant amount
22 of fill that was placed out at the third runway site
23 prior to September 2001, correct?

24 A. That's correct.

25 Q. And what criteria were applied to the fill that was

AR 055008

1 imported prior to September 2001?

2 A. It's my understanding that fill placed out at the airport
3 which has not been placed in wetlands or waters of the
4 state was subject to criteria agreed to by the port and
5 Ecology in two memorandums of agreement, one was 1998 and
6 one was 1999, where some preliminary fill criteria were
7 developed.

8 Q. Does the criteria set out in condition E of the September
9 certification provide more protection than the 1998 or
10 1999 fill acceptance criteria?

11 A. I'm not certain I can answer that question since I wasn't
12 involved in the development of any of these sets of
13 criteria.

14 Q. Under condition E of the 401 certification, from where
15 can the port obtain its fill? If you will turn to page
16 18, I think the answer will be provided there.

17 A. This is basically a two-part question. There are places
18 where the port is allowed to obtain fill and that's the
19 subpart C.

20 Q. At the bottom of the page?

21 A. At the bottom of the page. They can get fill from state-
22 certified borrow pits, contractor-certified construction
23 sites, and Port of Seattle-owned properties.

24 The second part of the equation is that there are
25 specific sources that are prohibited.

AR 055009

1 Q. And what sources are prohibited under condition E of the
2 401 certification?

3 A. The subpart D pertains to prohibited fill sources. They
4 are prohibited from obtaining fill which consists in
5 whole or in part of soils or materials that are
6 determined to be contaminated following a phase I or
7 phase II site assessment, and they are also prohibited
8 from using any material that's been determined to be
9 contaminated after this phase I or phase II site
10 assessment has gone through a remediation process.

11 Q. I'm sorry, I didn't mean to interrupt.

12 A. So even if it's been cleaned up, they can't use it.

13 Q. What is your understanding of what was meant by state-
14 certified borrow pit?

15 A. I believe there are sand and gravel pits out there that
16 have gone through some certification process in terms of
17 the type of fill and material that they're offering.

18 Q. When you wrote that, did you have any idea what is meant
19 by state-certified borrow pits?

20 A. I didn't write this section.

21 Q. But, yet, you wrote about it in five and half pages of
22 your prefiled testimony?

23 A. I believe that my testimony is pretty much reiterating
24 what's clearly written in the language.

25 Q. Do you have any understanding sitting here today, Ms.

AR 055010

1 Kenny, that the state-certified borrow pits are those
2 pits that are certified by the Washington State
3 Department of Transportation?

4 A. No.

5 Q. You don't know whether it means that or not?

6 A. I don't know whether it means that or not.

7 Q. Do you have any understanding as to what is required by
8 the Department of Transportation to certify a borrow pit
9 for transportation purposes?

10 A. No, I do not.

11 Q. You have no idea whether that just applies to the
12 geotechnical qualifications of the fill or whether it
13 applies to any contamination in the borrow pit; is that
14 right?

15 A. No, I don't.

16 Q. And do you have any idea what you meant when you wrote
17 contractor-certified construction sites?

18 A. Again, I would clarify that I did not write this
19 language, this language was provided to me by Kevin
20 Fitzpatrick. It's been explained to me by
21 Mr. Fitzpatrick that a contractor can certify that the
22 fill that they are offering for use at the third runway
23 site meets the conditions and the criteria set forth in
24 this water quality certification. That's what we meant
25 in that section by contractor certified.

AR 055011

1 Q. So the five and half pages that you wrote in your
2 prefiled testimony about the fill acceptance criteria is
3 all based upon what Kevin Fitzpatrick told you?

4 A. That's correct.

5 Q. How does Ecology expect to determine under condition E
6 whether fill from a particular source is acceptable?

7 A. Well, we don't make that preliminary determination, that
8 is an obligation of the port, and they're required by the
9 conditions in this certification to produce documentation
10 to Ecology for its review that shows that that fill will
11 meet the criteria that we have set forth in this
12 condition.

13 Q. And what documentation does the condition require the
14 port to submit?

15 A. That documentation is described in E(1)(a). Do you want
16 me to read from it, which I can?

17 Q. Well, I don't think you need to go there for my next
18 question. My next question is, how is Ecology going to
19 review the documentation that the port provides to decide
20 whether the fill relating to that documentation is
21 acceptable for use out at the proposed third runway site?

22 A. Our intent under the interlocal agreement that we signed
23 with the port, to provide Ecology with 3 to 5 FTEs, is to
24 use a portion of that money to hire a consultant to
25 review the actual fill reports that are coming in and

AR 055012

1 then we will have senior staff at Ecology reviewing the
2 work of the contractor in order to determine whether this
3 material is acceptable.

4 Q. Does the 401 require the comparison of any contaminants
5 found at a fill source pursuant to a phase II site
6 assessment to be compared against the fill criteria on
7 page 17 of the certification?

8 A. Subpart B says, "The result of the phase II environmental
9 site assessment sampling and testing shall be compared to
10 the fill criteria to determine the suitability of the
11 fill source for port 404 projects."

12 Q. Ms. Kenny, at your deposition do you recall me asking
13 this question and you giving this answer. It's on page
14 278 overflowing to page 279. Question: "Does the 401
15 certification require the comparison of any contaminants
16 found at a fill source pursuant to a phase II site
17 assessment to be compared against the fill criteria on
18 page 17 of the 401 certification?" And your answer was,
19 "Well, no, because if it's found to be contaminated under
20 phase II, it's prohibited from use."

21 Do you recall that question and answer?

22 A. I do.

23 Q. And so which is correct, Ms. Kenny, what you just told us
24 today or what you told us under oath in your deposition?

25 A. Well, again, I don't think I can give you a simple answer

AR 055013

1 to what you're portraying as a simple question. These
2 fill criteria on page 17, I believe I explained at my
3 deposition, were superseded -- these are the same
4 criteria that were in the August 10th certification.

5 Q. Right.

6 A. When we reissued it on the 21st, the criteria on page 17
7 were superseded by table 1 of attachment E, and it's this
8 table that we need to be comparing the sampling results
9 that are required under the phase II site assessment.

10 Q. So is it your testimony, consistent with what you told me
11 at your deposition, that the table on page 17 of the
12 September certification is a relic from the August
13 certification?

14 A. No, that's not correct.

15 Q. That's how you characterized it in your deposition.

16 A. The table on page 17?

17 Q. Yes.

18 A. Okay.

19 Q. You agree with me that you characterized it in your
20 deposition that it was a relic from the August
21 certification?

22 A. No, what I recall you asking specifically was the
23 criteria pertaining to diesel and heavy oils. I believe
24 the standards haven't changed that much in the rest of
25 the table.

AR 055014

1 Q. Is it your testimony that the table on page 17 is not the
2 final criteria that are now being applied?

3 A. That is my testimony.

4 Q. And it's Ecology's position that the table in attachment
5 E supersedes the table on page 17 of the certification,
6 correct?

7 A. That's correct.

8 Q. So if we turn to attachment E, is it Ecology's position
9 that the table, which is the last page of the
10 certification, is the criteria the port must apply in
11 order to determine whether their fill source is
12 acceptable?

13 A. That's correct.

14 Q. And this attachment E was not in the August
15 certification, correct?

16 A. That's correct.

17 Q. But it is in the September certification?

18 A. That's correct.

19 Q. And attachment E was put in there pursuant to a request
20 by the port?

21 A. It was put in there pursuant to the stipulated agreement
22 between Ecology and the port.

23 Q. So if the table on page 17 is a relic from the August
24 certification, why is it even in the September 401
25 certification?

AR 055015

1 A. I believe I testified at my deposition that I really
2 don't know the answer to that.

3 Q. You don't, do you?

4 A. No. Except that we were under a very short turnaround
5 time to get this new certification issued.

6 Q. Right. The reality is that you relied upon Kevin
7 Fitzpatrick and you don't have an understanding of the
8 conditions for the fill acceptance criteria and how they
9 are to be applied under the September 401 certification;
10 isn't that true?

11 A. I don't agree with that. I don't have an understanding
12 of the precise technical and scientific analysis that
13 went into determining that it was appropriate to set the
14 standard for lead or arsenic at a particular level and
15 the determination that that level would be protective of
16 water quality. I have tried to understand the process
17 that the port needs to use, the documentation that they
18 need to submit, the things that they need to do to
19 demonstrate compliance with this particular section.

20 Q. If a phase II site assessment finds TPH -- do you know
21 what TPH is?

22 A. Yes, I do, total petroleum hydrocarbons.

23 Q. If a phase II site assessment finds TPH contamination at
24 a fill source, is it Ecology's position that fill from
25 that source cannot be imported to the third runway site

AR 055016

1 under the current 401?

2 A. In my testimony at my last deposition, that was my
3 testimony. We intended that only naturally-occurring
4 soils be brought to the third runway site.

5 Q. And is that your testimony today?

6 A. That's correct.

7 Q. And so for any source where there is TPH contamination in
8 a sample, the port is precluded from importing any fill
9 from that source, correct; that's Ecology's position?

10 A. That's correct.

11 Q. So table 1 in attachment E, identifies gasoline, diesel
12 and heavy oils, correct?

13 A. That's true.

14 Q. And so those lines are no longer applicable?

15 A. I believe that is correct.

16 Q. Do you understand what an SPLP testing procedure or
17 protocol is?

18 A. I know that that acronym stands for synthetic
19 precipitation leaching procedure and it is a test
20 procedure to test whether chemical constituents in soil
21 will leach under acid conditions.

22 Q. Can the port use the SPLP to try to pass the fill source
23 where samples from a fill source contain greater than 20
24 milligrams per kilogram of arsenic?

25 A. That's kind of a trick question.

AR 055017

1 Q. Well, I don't mean it to be a trick question. It's a
2 straightforward question. Say I come to you and I have a
3 fill source and the sampling shows that there's greater
4 than 20 milligrams per kilogram of arsenic. The question
5 is, is Ecology going to allow that fill to be imported to
6 the third runway site if it passes an SPLP test?

7 A. No, because this attachment E really incorporates by
8 reference the biological opinion prepared by the U.S.
9 Fish & Wildlife Service, which they developed a similar
10 comprehensive set of fill requirements, and in that
11 biological opinion, they established MTCA level A
12 standards as the upper bound limit, so that -- and my
13 understanding is that that upper bound limit is 20
14 milligrams per kilogram.

15 And so if the port came in with a sample that showed
16 22 or 25, they wouldn't be able to use the SPLP procedure
17 to bring in that particular load of dirt.

18 Q. Ms. Kenny, you have on the desk in front of you a
19 notebook that contains Exhibit 262, which is the
20 biological opinion. Can you look at Exhibit 262 and
21 point out for us where in Exhibit 262 Fish & Wildlife has
22 set upper bound limits.

23 (Pause in the proceedings.)

24 Q. And maybe to short-circuit this, I'll tell you, Ms.
25 Kenny, I looked through the biological opinion and I

AR 055018

1 A. It's a part of our reasonable assurance determination.

2 Q. It's needed for reasonable assurance, is it not?

3 A. Yes, it is.

4 Q. And the port has submitted that surface water and
5 groundwater monitoring report, but Ecology is still in
6 the process of reviewing that plan, correct?

7 A. That's correct.

8 Q. Ecology has not provided written approval to that plan?

9 A. That's correct.

10 Q. And was this one of the conditions that Ecology imposed
11 on the port to deal with uncertainty on the part of the
12 Department of Ecology with respect to reasonable
13 assurance?

14 A. Yes.

15 Q. And so it's logical, isn't it, that as long as that plan
16 has not been approved, that uncertainty remains?

17 A. It's logical.

18 Q. Let's talk about the stormwater management plan. You,
19 yourself, don't have the expertise to decide whether the
20 BMPs that the port is using at the airport are adequate
21 to prevent violations of water quality standards, do you?

22 A. I'm not a water quality specialist, no.

23 Q. And so I take it, just to follow up on that question,
24 you, yourself, can't decide whether the BMPs currently
25 being utilized out at the airport are sufficient to

AR 055019

1 A. No.

2 Q. And so this table 1 in attachment E is the maximum levels
3 for the constituents listed that the port is allowed to
4 import to the third runway site; is that Ecology's
5 position?

6 A. Yes.

7 Q. Let's shift gears a little and stick with the fill
8 criteria. Turn to page 19 of the certification,
9 condition E(3)?

10 MR. REAVIS: Excuse me, Mr. Stock. Could I
11 get a clarification on that biological opinion, because
12 it wasn't offered. We were referring to it. I'm not
13 exactly sure whether that means it's in evidence now or
14 not. We have no objection.

15 MR. PEARCE: ACC had objected to it.

16 MR. STOCK: I am using it for the limited
17 purpose of asking Ms. Kenny to show where the upper bound
18 limits were, so that portion of the biological opinion
19 that she refers to, I have no objection to that page
20 coming into the record.

21 MR. REAVIS: I'm not sure that's a limited
22 purpose; I think it's using it for what's contained in
23 the document, and I'm not sure we can excerpt a page out
24 of it. It seems to me the whole exhibit ought to be
25 admitted.

AR 055020

1 MS. COTTINGHAM: We did talk earlier that the
2 person who had raised the objection in the matrix would
3 have the duty of maintaining that objection, but here you
4 offered the exhibit essentially through this testimony.

5 MR. STOCK: That particular excerpt, page 41,
6 and so I will offer it for the limited purpose.

7 MS. COTTINGHAM: As background, not as --

8 MR. STOCK: As context and background for
9 whether there's an upper bound limit or not.

10 MR. REAVIS: I guess if I could respond to
11 that. I think that is offering it for the purpose of
12 what the document says, it's not background, he is
13 offering it to prove that the document establishes an
14 upper bound limit, which is clearly for the substance of
15 the document. I don't think that's a limited purpose.

16 MS. COTTINGHAM: I'm going to allow the
17 exhibit to be used in its entirety.

18 Q. (Continuing By Mr. Stock): Turn to page 19 of the
19 certification, Ms. Kenny, condition E(3). What does
20 condition E(3) require the port to submit?

21 A. We require the port to submit a plan to monitor runoff
22 and seepage from port 404 projects where fill is placed,
23 et cetera.

24 Q. And is this surface water and groundwater monitoring
25 report needed for reasonable assurance under the 401?

AR 055021

1 protect water quality standards?

2 A. No.

3 Q. Turn to page 27 of the certification. What is the
4 condition requirement under subsection 2 with respect to
5 discharge of operational storm water to state receiving
6 waters?

7 A. Are you referring to subsection A?

8 Q. Yes, I am.

9 A. This subsection states, "No storm water generated by
10 operation of new pollution-generating impervious surfaces
11 for projects for which the section 404 permit was sought
12 shall be discharged to state receiving waters until a
13 site-specific study, e.g., a water effects ratio study
14 has been completed and approved by Ecology and
15 appropriate limitations and monitoring requirements have
16 been established in the port's NPDES permit."

17 Q. So to simplify it for everyone, this condition prohibits
18 the port from releasing any storm water from pollution-
19 generating impervious surfaces until a site-specific
20 study is performed establishing effluent limitations in a
21 future NPDES permit, correct?

22 MS. MARCHIORO: Objection: Mischaracterizes
23 the document.

24 MS. COTTINGHAM: You want to restate your
25 question.

AR 055022

1 Q. (Continuing By Mr. Stock): Well, that's my question, did
2 I properly characterize what's required under this
3 provision?

4 A. You did with one exception. Your question would lead one
5 to believe that this covers pollution from all of the
6 runway surfaces. This is limited only to the new
7 pollution-generating impervious surfaces that for
8 projects that are directly related to construction of the
9 third runway and the other related projects that are part
10 of the master plan update projects.

11 Q. Right. So until the port submits a site-specific study
12 and new effluent limitations have been set in a future
13 NPDES permit, this condition prohibits the port from
14 releasing storm water from any new pollution-generating
15 impervious surface?

16 A. That's correct.

17 Q. And is the purpose of the site-specific study to get
18 effluent limitations established so that Ecology knows
19 whether the port is in compliance with their NPDES permit
20 or not?

21 A. That is correct.

22 Q. So does this mean, given that effluent limitations, the
23 purpose is to establish effluent limitations for a future
24 NPDES permit, does this mean that Ecology must change the
25 water quality standards in Miller Creek, Walker Creek and

AR 055023

1 Des Moines Creek to accommodate these stormwater
2 discharges?

3 A. No.

4 Q. Well, does it require a change that will require a public
5 process to set effluent limitations for a future NPDES
6 permit?

7 A. As Kevin Fitzpatrick's prefiled testimony covers in
8 detail, the regulation of storm water is a complex issue,
9 and part of the purpose of requiring the site-specific
10 study is to really, truly characterize the nature of the
11 storm water coming from the port's property and evaluate
12 that and evaluate it relative to the creeks that are the
13 receiving waters for that storm water. So as much as
14 that study is going to show a need for effluent limits to
15 be established, it would have to go -- and for those
16 effluent limits to be incorporated into the port's NPDES
17 permit, yes, a public process would be required to do
18 that.

19 Q. Right. And because you are establishing effluent
20 limitations in an NPDES permit, that's going to result in
21 a change to the water quality standards for the affected
22 creeks; isn't that right?

23 A. That's not my understanding.

24 Q. Well, what's your understanding, Ms. Kenny, of the
25 effluent limitations in NPDES permits?

AR 055024

1 A. Again, given that that's not my area of specialty, my
2 understanding is that we would look at the nature of the
3 port's storm water, we would look at the concentration of
4 pollutants in that storm water, we would look for ways
5 for the port to reduce those concentrations. First there
6 needs to be a determination that those concentrations are
7 having some kind of adverse effect on the receiving
8 waters. And that's really about as far as I can go. By
9 means of this condition, we've asked our water quality
10 program who oversees the port's NPDES permit to take on
11 that study and perform that analysis.

12 Q. So given there's that need for a site-specific study to
13 set effluent limitations, Ecology doesn't know whether
14 the port's discharges are currently violating water
15 quality standards, does it?

16 A. That's correct and that, I think, is Kevin Fitzpatrick's
17 testimony as well.

18 Q. And Ecology can't predict what the likely outcome is
19 going to be of a future public process for setting
20 effluent limitations in a future NPDES permit?

21 A. No.

22 Q. So that uncertainty still remains, agreed?

23 A. Yes.

24 Q. Ecology needs the site-specific study required under
25 condition J(2)(a) in order to have reasonable assurance

AR 055025

1 for the 401, doesn't it?

2 A. We need it if the port chooses to discharge that water
3 directly to streams. There are other options for the
4 port to manage that water.

5 Q. Do you recall me asking this question and you giving this
6 answer in your deposition at page 316, going over to page
7 317. Question: "Does Ecology need a site-specific study
8 under condition J(2)(a) of the 401 certification in order
9 to have reasonable assurance?" And, Ms. Kenny, you
10 answered, "Yes."

11 Do you recall that question and answer?

12 A. I do.

13 Q. In fact, hasn't the port already created new pollution-
14 generating impervious surfaces out at the third runway
15 site?

16 A. You'd have to be more specific --

17 Q. Well, I will give you an example.

18 A. -- in terms of what you're referring to.

19 Q. How about the entrances and exits on State Route 509, the
20 temporary interchange that has now been constructed and
21 has been in use since January; isn't that a new
22 pollution-generating impervious surface?

23 A. It's my understanding that that wasn't a port project, I
24 believe that was a Department of Transportation project.

25 Q. It's your testimony that the temporary interchange that

AR 055026

1 is being used by the port to import fill on to the
2 embankment for the third runway project is not a port
3 project associated with the third runway project?

4 A. I don't believe that project was included in the JARPA,
5 or the Joint Aquatic Resource Permit Application, or is
6 included in their list of master plan update projects.

7 Q. So as far as you're concerned, this provision of the
8 certification doesn't apply to those new pollution-
9 generating impervious surfaces?

10 A. That's correct.

11 Q. What about the impervious surfaces of the road going up
12 to the third runway embankment that we all took on the
13 site tour; is that a new pollution-generating impervious
14 surface?

15 A. I wasn't with you on that site tour. Can you be more
16 specific as to which road that was?

17 Q. Well, it's the road going up to the top of the embankment
18 on the west side of the airfield. You've been out there
19 doing site visits, have you not?

20 A. I've been out there doing site visits.

21 Q. And you've been up on top of the embankment; is that
22 correct?

23 A. That's correct.

24 Q. And you took a road to get to the top of the embankment,
25 did you not?

AR 055027

1 A. We got there, but I don't recall -- I don't recall
2 whether it had asphalt on it or what was there actually,
3 I don't recall.

4 Q. Sitting here, you don't know whether that's a new
5 pollution-generating impervious surface, correct?

6 A. No, I don't.

7 Q. What standard is Ecology going to apply to decide whether
8 there are new pollution-generating impervious surfaces to
9 which this condition J(2)(a) applies?

10 A. Well, this applies to the operation of new pollution-
11 generating impervious surfaces or projects for which the
12 404 permit was sought. Now, that is specifically the
13 third runway, the runway safety areas, the little back
14 and forth taxiways, SASA, should that ever be built, the
15 south aviation support area. As I explained to the port,
16 this is meant to apply when planes start landing on the
17 runway and they're taxiing around, that's what we mean by
18 operation. And that's where you have the risk of
19 pollution being generated.

20 Q. What standard is Ecology going to apply to determine
21 whether the road going up to the top of the third runway
22 embankment area is a new pollution-generating impervious
23 surface to which this provision and the certification
24 applies?

25 MR. REAVIS: Objection: Lack of foundation.

AR 055028

1 There's been no testimony that it's impervious.

2 MS. COTTINGHAM: Sustained.

3 Q. (Continuing By Mr. Stock): You don't know whether it's
4 impervious or not?

5 A. Sitting here today, I don't know at all whether it's
6 impervious.

7 Q. And other than what you have told us, you don't have any
8 idea of what standard Ecology will apply to determine
9 whether a potential impervious surface that is new will
10 this provision be applicable to?

11 A. I believe I already answered that question. It's
12 applicable to the third runway, the associated taxiways,
13 to SASA, to other operations that are new operations
14 related to the landing of airplanes at that facility.

15 Q. Until the site-specific study is completed and effluent
16 limitations are set in the NPDES, does the 401 prohibit
17 the port from releasing storm water from
18 pollution-generating impervious surfaces to nearby
19 streams?

20 A. This is a very -- this is a limited condition, a
21 condition that applies only to those surfaces that are
22 going to be related to the operation of the third runway
23 and the associated taxiways and SASA.

24 Q. Well, that was maybe unfair. I was reading from your
25 prefiled testimony, Ms. Kenny. That's still your

AR 055029

1 position, isn't it?

2 A. Perhaps you could read my prefiled testimony or point to
3 me where that is.

4 Q. On page 9 and 10 of your prefiled testimony.

5 A. What paragraph?

6 Q. It's at the bottom of page 9. "Until such time as these
7 two steps occur, Ecology prohibits the port from
8 releasing any storm water from pollution-generating
9 impervious surfaces related to the third runway and
10 associated projects to nearby streams."

11 A. That's correct.

12 Q. And is the embankment an associated project, in your
13 mind?

14 A. Yes, it is.

15 Q. And you go on and say, don't you, that "The port may
16 discharge storm water from the third runway and
17 associated projects with permission to municipal
18 stormwater management system or to the port's industrial
19 wastewater treatment system"?

20 A. That's correct.

21 Q. Do you see that? Is the port discharging to either a
22 municipal stormwater management system or the industrial
23 wastewater system a contingency plan for the release of
24 storm water from new pollution-generating impervious
25 surfaces?

AR 055030

1 A. You'll have to reask that question.

2 Q. Sure. You understand that the port is prohibited from
3 discharging the storm water into the streams until it
4 does a site-specific study and effluent limitations are
5 set, correct?

6 A. That's correct.

7 Q. And until that time, the 401 certification allows the
8 port to discharge that storm water to either a municipal
9 stormwater management system or to the IWS; is that
10 right?

11 A. That's correct.

12 Q. And where is that mentioned in the 401 certificate?

13 A. It's not.

14 Q. Why not?

15 A. I believe it should just be understood that those are
16 options that the port has available to it for management
17 of that water.

18 Q. When you refer to the port's industrial wastewater
19 treatment system, what are you referring to?

20 A. I'm referring to the system that is comprised of lagoons
21 1, 2 and 3 to treat the port's industrial wastewater.

22 Q. Will the industrial wastewater system, or IWS for short,
23 have to be upgraded to accept the discharges from the new
24 pollution-generating impervious surfaces?

25 A. I believe an evaluation would have to be made as to

AR 055031

1 whether or not the capacity existed to accept that storm
2 water through that system.

3 Q. And that study hasn't been done, has it?

4 A. That's correct.

5 Q. And doesn't your statement that the port may discharge
6 the storm water to the IWS make that a part of the third
7 runway project?

8 A. No.

9 Q. So you're telling the port that it has the option to take
10 storm water from new pollution-generating impervious
11 surfaces associated with the third runway project, dump
12 it into the IWS, and that doesn't make it a part of the
13 third runway project?

14 A. No more than telling them if they can get permission from
15 a municipal treatment plant, that that plant is now a
16 part of the third runway project.

17 Q. Did Ecology perform any sort of analysis to determine if
18 the municipal stormwater management systems had the
19 capacity to handle the additional flow from the port?

20 A. No, we didn't. And the purpose of this condition was
21 these surfaces, these new pollution-generating surfaces,
22 are not going to be constructed for another seven years,
23 six, seven years, maybe eight or nine, before there are
24 actually airplanes landing on them that would be
25 generating the kind of pollutants that we are concerned

AR 055032

1 about. And that is specifically the metals, the copper,
2 the zinc that might be related to the tires and the
3 brakes from the airplanes. That's what this condition
4 was designed to address.

5 Q. Okay. Let me just finish up on this area to make sure I
6 understand your testimony. Your testimony is that
7 Ecology left the IWS out of the 401 review process,
8 correct?

9 A. It's not a part of this project.

10 Q. But your prefiled testimony says that it is a contingency
11 that the port has available to it in the event that this
12 site-specific study and new effluent limitations don't
13 get established.

14 A. It's a contingency, but that the port would still have to
15 apply to Ecology's NPDES permit manager to get approval
16 to do that, and it would have to be carefully analyzed
17 before we would allow that to happen.

18 Q. All right. Turn to page 28 of the certification, and
19 under condition J(2)(f), which is the top paragraph on
20 page 28. Does that condition require the port to submit
21 a stormwater facilities operations and maintenance plan
22 which addresses maintenance and operation?

23 A. Of all STIA stormwater facilities, yes, it does.

24 Q. And Ecology needs that stormwater facilities operations
25 and maintenance plan for reasonable assurance, doesn't

AR 055033

1 it?

2 A. Yes.

3 Q. And the port has yet to submit that plan; isn't that
4 true?

5 A. That's correct.

6 Q. I didn't hear your answer.

7 A. That's correct.

8 Q. Let's shift gears and talk about low flow, which is
9 condition I of the 401 certification, and that starts on
10 page 22.

11 A. Okay.

12 Q. Your prefiled testimony at paragraphs 37 and 39, you
13 state that based on advice from Dave Garland and Kelley
14 Whiting, that the modelling that was performed and upon
15 which Ecology relied to issue the August 401
16 certification, that their concerns were resolved; is that
17 correct?

18 A. If you could point me to the page and the line.

19 MS. COTTINGHAM: What are you reading from,
20 Mr. Stock?

21 MR. STOCK: Her prefiled testimony, paragraph
22 37. She deals with it in paragraph 37 and 39.

23 Q. Line around 18 or 19 in paragraph 37 and on page 19 and
24 paragraph 39, line 4. "Mr. Whiting's review showed that
25 the impacts being predicted by the port's modelling were

AR 055034

1 reasonable." Then, again, down on line 13 of page 19 or
2 line 11, "Based upon these conclusions from Mr. Whiting
3 and Mr. Garland's opinion that the modelling concerns he
4 had about the integration of the slice had been fully
5 resolved, I had determined that we have reached a point
6 of reasonable assurance." Do you see that prefiled
7 testimony?

8 A. I do.

9 Q. And based upon the modelling, you determined that the
10 July 2001 low-flow analysis provided you with reasonable
11 assurance needed to issue the August 10 401
12 certification; is that correct?

13 A. That's correct.

14 Q. And, in fact, as you discuss in your prefiled testimony,
15 paragraph 41, in October 2001, the port discovered it had
16 made a modelling error; isn't that right?

17 A. That's correct.

18 Q. And subsequently the port issued a revised December 2001
19 low-flow plan; is that right?

20 A. That's correct.

21 Q. And over the course of December, January and February,
22 Kelley Whiting of King County has been reviewing that
23 revised December 2001 low-flow plan; is that right?

24 A. That's correct.

25 Q. And Mr. Whiting has now told Ecology that he has concerns

AR 055035

1 about the way in which the modelling was altered between
2 the July low-flow plan and the December 2001 low-flow
3 plan, correct?

4 A. That's correct.

5 Q. And, in fact, Mr. Whiting has requested and Ecology has
6 concurred that the port must submit to Ecology a
7 validation report; isn't that true?

8 A. That's correct.

9 Q. And this validation report is to verify the assumptions
10 made in the revised December 2001 low-flow model,
11 correct?

12 A. Not entirely correct.

13 Q. Well, let me read your deposition to see where I went
14 wrong. Actually, that's what you told me at page 215,
15 Ms. Kenny, line 17. "What he requested and Ecology
16 concurred with was that the port provide a validation
17 report of the modelling, that is, some tool to verify
18 that it would be a tool to verify the assumptions of the
19 modelling." And then my next question was, "So this
20 validation report has become a deliverable," and you
21 answered, "Yes."

22 Do you recall that statement and answer in your
23 deposition?

24 A. Yes, I do.

25 Q. And so this validation report is still outstanding, is it

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1 not?

2 A. No. We've received the validation reports for Walker and
3 Miller Creek. We are still waiting for the validation
4 report for Des Moines Creek.

5 Q. Ecology needs the validation report on the December 2001
6 revised low-flow plan to have reasonable assurance with
7 respect to the 401, doesn't it?

8 A. Yes.

9 Q. You also told me in your deposition, didn't you, that
10 Ecology will be asking the port to submit revisions and
11 corrections to the December report to correct the errors
12 in that report?

13 A. Yes, we did.

14 Q. And you're asking Dave Garland to review the modelling
15 portion of the December low-flow plan for the embankment,
16 correct?

17 A. That's correct.

18 Q. And you're asking Mr. Ed Abbasi -- who is Ed Abbasi?

19 A. Ed Abbasi is a senior engineer in the water quality
20 program with the Department of Ecology.

21 Q. And you've asked Mr. Abbasi to review the design details
22 for the low-flow facilities?

23 A. That's correct.

24 Q. The low-flow facilities set out in the revised December
25 2001 low-flow plan?

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1 A. That's correct.

2 Q. And so ultimately what Ecology is going to get from the
3 port is a corrected, revised December 2001 low-flow
4 analysis; is that right?

5 A. Yes.

6 Q. You're going to take the comments from Mr. Whiting, from
7 Mr. Garland and Mr. Abbasi and you're ultimately going to
8 be writing a letter to the port, asking the port to make
9 revisions to that corrected revised December 2001
10 low-flow plan?

11 A. That's correct.

12 Q. And Ecology needs those corrections to the revised
13 corrected December 2001 low-flow plan in order to have
14 reasonable assurance for purposes of the 401 that was
15 issued to the port; isn't that true?

16 A. That's correct.

17 MR. STOCK: I don't have any further questions.

18 MS. COTTINGHAM: Mr. Poulin, do you have any
19 questions?

20 MR. POULIN: I do, yes.

21 MR. STOCK: I guess we don't need to push the
22 clock.

23 MS. COTTINGHAM: The clock is still running.

24 MR. POULIN: It is indeed, yes.

25 ////

AR 055038

1 Q. So is it your belief that the scoping study and the
2 site-specific study itself can be completed in the next
3 three or four months?

4 A. I don't have enough knowledge about how that process is
5 proceeding to give you that answer specifically.

6 Q. There's no way to be sure that the site-specific study
7 will be completed before the port's NPDES permit is
8 renewed, is there?

9 A. No.

10 Q. The results of the site-specific study are uncertain,
11 aren't they?

12 A. We can't predict what the outcome is going to be sitting
13 here today.

14 Q. Ecology's ability to grant site-specific water quality
15 criteria is contingent on the port's implementation of
16 AKART, isn't it?

17 A. That's getting into an area where I don't have the
18 expertise to answer you.

19 Q. Ecology doesn't know whether the port will implement
20 AKART for its stormwater discharges, does it?

21 A. Again, that's not my area of responsibility.

22 Q. Wasn't it your deposition testimony that this permit
23 condition gives you reasonable assurance that stormwater
24 discharges from the proposed project will not violate
25 water quality standards?

AR 055040

1 A. That's correct.

2 Q. But you don't understand the site-specific study process?

3 A. I understand that when we discussed this condition
4 internally between myself and Kevin Fitzpatrick and
5 others, that we felt that doing this kind of a study
6 would give us the information that we needed to determine
7 whether effluent limits would be necessary so that we
8 could then complete this whole process of -- so that we
9 would really understand what the port's storm water
10 consisted of, how it was affecting the receiving waters
11 and whether or not there were violations of the water
12 quality standards out at the airport.

13 Q. You don't have that information now, do you?

14 A. No, I don't.

15 Q. And you don't have that understanding now, do you?

16 A. What I understand is that Ed Abbasi and two staff from
17 our headquarters office have been out to the airport
18 several times to meet with their staff and their
19 specialists and are defining the scope of that study and
20 that that work is proceeding.

21 Q. By understanding, I meant an understanding of whether the
22 port's stormwater discharges are exceeding state water
23 quality standards.

24 A. My understanding of that is that we don't have enough
25 information to say that they are exceeding state water

1 quality standards.

2 Q. Ecology doesn't know what effluent limits will result

3 from the site-specific study, does it?

4 A. No.

5 Q. Ecology would not impose effluent limits on the port's

6 stormwater discharges without giving the port a

7 compliance schedule, would it?

8 A. I don't know how that process would work.

9 Q. Isn't it true that Ecology can issue a ten-year

10 compliance schedule?

11 A. I don't know. I haven't been involved in NPDES permits

12 to know the answer to that question.

13 Q. Haven't you stated that the implementation of effluent

14 limits will assure that the port's discharges do not

15 violate state water quality standards?

16 A. Well, there are several ways that this site-specific

17 study could go. The study could show that there is no

18 need for effluent standards. I believe the term is, if

19 appropriate. We need to find out what that study shows

20 and go from there.

21 Q. Your 401 review did not include an evaluation of

22 discharges exceeding the effluent limits during a

23 compliance schedule, did it?

24 A. Could you repeat that question, please.

25 Q. Certainly. Your 401 review did not include any

AR 055042

1 evaluation of stormwater discharges exceeding the permit
2 effluent limits during the compliance schedule, did it?
3 A. I don't really understand that question.
4 Q. Haven't you assumed that if this site-specific study
5 results in new effluent limits for the permit, that those
6 effluent limits will prevent violations of state water
7 quality standards?
8 A. I believe that would be a correct assumption.
9 Q. Isn't it true that under a compliance schedule, the
10 port's stormwater discharges could exceed the effluent
11 limits in its permit without violating the permit?
12 A. Again, I am not a person who is responsible for
13 implementing or overseeing the NPDES permit. I don't
14 think I can answer that question for you.
15 Q. I'd like you to look at the 401 certification at page 27,
16 paragraph 2(b). First, did you write this provision?
17 A. I don't recall specifically if I wrote it or not.
18 Q. This provision states, "At the outset if monitoring
19 indicates a need for additional BMPs, the port may
20 propose other BMPs for stormwater treatment." Did I
21 read the introduction correctly?
22 A. Yes.
23 Q. So the 401 acknowledges that monitoring may indicate a
24 need for additional BMPs, doesn't it?
25 A. That's correct.

AR 055043

1 Q. The 401 does not authorize Ecology to require the port to
2 implement any specific BMP, does it?

3 A. The BMPs that are required to be implemented are the BMPs
4 that are clearly spelled out in the comprehensive
5 stormwater management plan, which we are requiring the
6 port to adopt and to use in its entirety.

7 Q. Ecology does not presently know what BMPs the port would
8 propose in the event that future monitoring indicates a
9 need for additional BMPs, does it?

10 A. That's not entirely correct. We discussed the
11 possibility that monitoring might show some problems, and
12 we discussed various options for additional treatment,
13 and Kelley Whiting can probably discuss that, but what we
14 did -- so we don't know what's going to be appropriate
15 today because we don't know if there's going to be a
16 problem, for one thing, and we don't know where the
17 problems are going to be. But we did insure in the
18 design of the stormwater management plan that the port
19 had the capacity within their plan and on the ground and
20 the landscape to install additional treatment BMPs if
21 those were determined to be necessary.

22 Q. Ecology does not presently know whether the BMPs that the
23 port would propose in the event of exceedances would
24 work, does it?

25 A. Well, I would disagree with that, because those who are

AR 055044

1 experienced with stormwater management know that there
2 are certain treatment technologies that you use for
3 certain pollutants that have a certain degree of success.
4 So we can say that, you know, if a sand filter is used --
5 I can't say it, because I'm not an engineer, but a
6 stormwater engineer could say if you use this kind of
7 treatment, we can expect this amount of reduction in
8 sedimentation or this much capturing of metals. We can
9 tell you that.

10 Q. In your prefiled testimony you state that the port may
11 discharge storm water from the third runway to a
12 municipal stormwater management system or to the port's
13 industrial wastewater system?

14 A. That's correct.

15 Q. The 401 does not authorize these discharges, does it?

16 A. No.

17 Q. And, yet, the 401 states that no storm water generated by
18 operation of new pollution-generating impervious surfaces
19 shall be discharged to state receiving waters until the
20 site-specific study has been completed and approved.

21 Aren't you asserting now that there's an undisclosed loop
22 hole that allows the port to do something else entirely?

23 A. I don't believe so, because the intent of this condition
24 was to insure that that storm water, if it had pollutants
25 of concern, was not released prior to being treated. So

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1 it's a different thing to be discharging that storm water
2 directly to stream than to route it through a treatment
3 system.

4 Q. That intent isn't captured in this language, is it?

5 A. Not if you read the strict reading of the language.

6 Q. You stated that the port has an option to route storm
7 water from new pollution-generating impervious surfaces
8 to the industrial wastewater system, but the potential
9 water quality impacts associated with increased
10 stormwater discharges to the IWS were not evaluated as
11 part of the 401 review, were they?

12 A. That's correct.

13 Q. Ecology did not review the potential environmental
14 impacts associated with increased frequency of overflow
15 discharges from the IWS?

16 A. First off, this condition was drafted because our
17 understanding is that the site-specific study and any
18 appropriate effluent limits will be established well
19 before the port has completed construction of the runway
20 and the embankment and well before they start landing
21 planes on that runway. So my intention in drafting this
22 condition was that in the very off case, inconceivable
23 case, that we hadn't managed to address the issue of
24 storm water and potential pollutants from these surfaces,
25 we would have prohibited the discharge, but the intent

AR 055046

1 and our understanding of the schedule of construction is
2 that this study will be completed, it's under way right
3 now, our water quality staff are investing a lot of time
4 in looking at this. I'm confident that this issue will
5 be addressed in the port's NPDES permit.

6 Q. On the following page of the 401 certification in
7 condition F, the 401 requires the port to submit a
8 stormwater facilities operation and maintenance plan,
9 doesn't it?

10 A. That's correct.

11 Q. And I believe you testified the port has not yet
12 submitted that report?

13 A. That's correct.

14 Q. So the port has not yet identified methods to prevent
15 over topping of stormwater facilities and the IWS; isn't
16 that right?

17 A. If they have, I haven't been provided that information.

18 Q. A final question with respect to the temporary turbidity
19 zone, temporary mixing zone for turbidity. The port has
20 not received all of the necessary local and state permits
21 and approvals for its instream construction activities,
22 has it?

23 A. I don't know.

24 Q. So you don't know whether Ecology has complied with the
25 specific provisions of the Washington Administrative Code

AR 055047

1 with respect to temporary turbidity mixing zones?

2 A. It's up to the port to comply with those requirements,
3 they're the entity that needs to attain and show that
4 they've received the appropriate permits such as the
5 hydraulic project approval or any grading permits that
6 they might need to construct that work. The way this
7 section works is that people, developers, don't come in,
8 every developer that wants to use this provision of the
9 WAC for temporary turbidity, suspension of those
10 temporary turbidity limits, they do it, and then we go
11 out and if we get a complaint, we check at that point to
12 see if those provisions have been complied with. But
13 there's no longer a provision under state law for
14 applicants to apply for a temporary suspension of the
15 water quality standards. And we specifically, when we
16 amended this section of the WAC, we allowed for temporary
17 short-term suspension of the turbidity standards,
18 appropriate to the water body size, to allow that in-
19 stream construction to work. And it's up to the port to
20 be sure that they've complied and they have obtained all
21 of their other permits.

22 What we did in this section of this permit that I
23 issued is to make that more restrictive, to provide more
24 clarity to that provision. For example, why we included
25 the reference to section 100.6 was to say, okay, the

AR 055048

1 mixing zone is 100 feet in streams under 10 cfs. Well,
2 if they can do it in ten feet, then they need to do it in
3 ten feet. It's more restrictive. And we have the
4 provisions --

5 MR. POULIN: Your Honor, this has gone far
6 beyond the question asked. I didn't ask for a speech
7 about the theory behind the various provisions. I asked
8 her if she received certain reports, as I recall.

9 MS. COTTINGHAM: Can you restate your
10 question, and answer on the narrowness of the question.

11 Q. (Continuing By Mr. Poulin): I received an answer to my
12 initial question. I'd like to ask, are you familiar with
13 WAC 173-201A-110, titled "Short-Term Modifications"?

14 A. Generally, yes.

15 Q. And are you familiar with provision in that section which
16 state that a temporary turbidity mixing zone is
17 authorized only after the activity has received all other
18 necessary local and state permits approval?

19 A. If that's what it says. I don't have it before me, but I
20 believe that's what it says.

21 Q. But the port doesn't have those approvals, does it?

22 A. The port needs to get the approvals from the appropriate
23 agency. They have the permits that they need from the
24 Department of Ecology. Obviously, they can't begin
25 constructing instream until they have a hydraulic project

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1 approval from Fish & Wildlife or they will be in
2 violation of that. But we can't compel Fish & Wildlife
3 to issue a hydraulic project approval. We can't compel
4 local government to issue a grading permit. The port
5 needs to obtain those. If they fail to obtain --

6 MR. POULIN: Again, Your Honor, I asked a
7 simple yes or no question. Didn't intend to invite a
8 recitation.

9 I have no further questions.

10 MS. COTTINGHAM: Before we move into cross, I
11 have a question. Since this was one of your witnesses
12 but called by opposing parties, I assume that you intend
13 to just cross examine her on the nature of the direct
14 exam and then recall her when you get to your case.

15 MS. MARCHIORO: That is true. I appreciate
16 your clarification of that.

17 MS. COTTINGHAM: Then we will move into cross
18 examination.

19 MS. MARCHIORO: Thank you.

20
21 EXAMINATION

22 BY MS. MARCHIORO:

23 Q. Good afternoon, Ms. Kenny. Can you tell me how many 401
24 certification applications you have reviewed in your
25 tenure at Ecology?

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1 A. I have reviewed probably 70.

2 Q. And in reviewing those applications, have you ever denied
3 an application for a 401 certification?

4 A. Yes, I have.

5 Q. Have you ever approved a 401 certification application?

6 A. Yes, I have.

7 Q. Have you ever placed conditions in a 401 certification
8 that was issued?

9 A. Yes, I have.

10 Q. Is it uncommon for a 401 certification to have conditions
11 in it?

12 A. Every 401 certification has conditions in it.

13 Q. Is it customary at Ecology to assemble a technical review
14 team when a 401 certification application is under
15 consideration?

16 A. Yes, it is.

17 Q. How many years did you serve as 401 certification
18 application reviewer?

19 A. I've done 401 certification reviews since February of
20 1998, and I never stopped doing that review when I took
21 on the permit assistant center responsibilities.

22 Q. And in that role, what's the type of function you perform
23 as a certification reviewer?

24 A. Basically to be a team lead for reviewing 401
25 applications to the state. I would assemble a team,

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1 usually those people were identified by technical
2 specialty and/or geographic area, and we would start
3 reviewing the project and eventually make a decision as
4 to whether or not this project could be approved. If it
5 could be, we would determine if there were any conditions
6 that needed to be applied to the project, and then we
7 would also determine in some cases that it couldn't be
8 and we would issue a denial.

9 Q. And what standard are you comparing the application
10 against?

11 A. The standard is that of reasonable assurance.

12 Q. And how is that standard determined whether it's been
13 satisfied?

14 A. It's a two-step process. The first step is looking at
15 the preponderance of the evidence before us, and that
16 means looking at all of the technical documents submitted
17 to us by an applicant, going out to the site to look at
18 site conditions, doing our own review, our own site
19 investigation, meeting with the applicant, and
20 determining in our judgment that a project can or won't
21 meet water quality standards.

22 If we determine that it can, we look for areas where
23 we still may have questions or need additional
24 information where we still have some uncertainty, and we
25 will develop conditions and place those conditions in the

AR 055052

1 401.

2 Q. And was that process followed here?

3 A. Yes, it was.

4 Q. And was a team assembled to review the 401 certification?

5 A. Yes, it was.

6 Q. Is it unusual for a permit applicant or certification
7 applicant to be anxious for the issuance of their 401
8 certification?

9 A. It's not at all unusual.

10 Q. And have you experienced that in other instances when you
11 have been reviewing a 401 certification?

12 A. It's invariable because the 401 is the last approval
13 needed before the U.S. Army Corps of Engineers can issue
14 the 404 permit which actually authorizes the discharge.

15 Q. So is the 401 certifications an operational permit or
16 document?

17 A. No, it's not.

18 Q. What is it?

19 A. It's primarily a construction-related document.

20 Q. But can an applicant, once it has the 401 certification,
21 go forward just by having obtained the 401 certification?

22 MR. STOCK: Object. Vague.

23 MS. COTTINGHAM: Hold on just a second.

24 Restate your question.

25 MS. MARCHIORO: I'd be happy to do that.

AR 055053

1 Q. If an applicant receives a 401 certification, may they go
2 forward then and construct their project?

3 A. No, not simply with a 401. There are a number of other
4 approvals that they may require before they can actually
5 begin to construct their project.

6 Q. In this instance, what other permit is the Port of
7 Seattle waiting for after the 401 certification has been
8 issued?

9 A. They are waiting for their section 404 permit from the
10 U.S. Army Corps of Engineers. There may also be other
11 local permits that they're waiting for and they may still
12 be waiting for their hydraulic project approval.

13 Q. So before the port can act, they need a 404 permit from
14 the Army Corps of Engineers, is that --

15 MR. STOCK: Object. Leading. This is her
16 witness.

17 MS. COTTINGHAM: It is cross examination,
18 though. I will allow the question.

19 MS. MARCHIORO: I will restate it.

20 Q. Is the port in need of a 404 permit to begin
21 construction?

22 A. Yes.

23 Q. And do these conditions in the 401 certification then
24 become conditions on the 404 permit?

25 A. They are adopted in whole into the 404.

AR 055054

1 Q. Do you know whether the 404 permit has a life or a term
2 of years that it's valid for?

3 MR. STOCK: Ms. Cottingham, I'm going to
4 object to this line of questions on foundational grounds.
5 Ms. Marchioro has not established any foundation that Ms.
6 Kenny is a section 404 expert.

7 MS. COTTINGHAM: Sustained.

8 Q. (Continuing By Ms. Marchioro): Ms. Kenny, are you
9 familiar with the Army Corps of Engineers?

10 A. Yes, I am.

11 Q. And how often do you interact with the Army Corps of
12 Engineers on a regular basis?

13 A. On a regular 401 project, it's frequent, because we're
14 often participating in preapplication meetings side by
15 side with the Corps; we do joint site visits, we talk to
16 the Corps staff openly about technical concerns that we
17 might have about the project.

18 Q. Have you ever reviewed or seen a 404 permit?

19 A. Actually, I haven't.

20 Q. Are you familiar with whether a 404 permit has a specific
21 term of years for which it's valid?

22 MR. STOCK: Objection: No foundation. She
23 said she hasn't seen one.

24 MS. MARCHIORO: I don't believe that goes to
25 her awareness, though, based on the fact that she's had

AR 055055

1 numerous conversations with Army Corps of Engineer
2 employees.

3 MS. COTTINGHAM: I'm going to sustain the
4 objection.

5 Q. (Continuing By Ms. Marchioro): Have you ever had the
6 opportunity to discuss with the Army Corps of Engineers
7 whether a 404 permit has a term of years?

8 A. Yes, I have.

9 Q. And what's your understanding of the term of years with a
10 404 permit?

11 A. I have been told by Michelle Walker at the U.S. Army
12 Corps of Engineers --

13 MR. STOCK: This is hearsay. I object, Miss
14 Cottingham.

15 MS. COTTINGHAM: Do you have a response to
16 that?

17 MS. MARCHIORO: Well, it is in Ms. Kenny's
18 practice, as she testified, that she's talked over time
19 with the Army Corps of Engineers, relies on what they
20 have to say and the dialogue about the impacts of a
21 project. I think it would be something similar to that
22 where she would be relying on them for what their 404
23 permit either requires or its regulatory authority.

24 MR. STOCK: But the way that counsel asked the
25 question was to assert it for the truth of the matter

AR 055056

1 asserted by Miss Walker, and that was the basis of my
2 hearsay objection.

3 MS. COTTINGHAM: I'll sustain the objection.

4 Q. (Continuing By Ms. Marchioro): There was quite a bit of
5 dialogue earlier about pressure, and I wanted to return
6 to that. Did you feel pressure to continue your work on
7 the 401 certification in the summer of 2001?

8 MR. STOCK: Miss Cottingham, I don't want to
9 appear to be an objectionable counsel, because I'm
10 normally not, but that question has been asked and
11 answered. We went over that during my examination of her
12 and she answered that question.

13 MS. MARCHIORO: Miss Cottingham, in several
14 instances, Mr. Stock did not permit the witness to
15 complete her answers or to fill in where beyond a yes or
16 a no was the answer he was driving at, and it seems to me
17 it's only appropriate on cross examination that, as you
18 indicated earlier, for example, portions of the
19 deposition, that I can inquire of Ms. Kenny to fill in
20 the gaps.

21 MS. COTTINGHAM: I am going to overrule the
22 objection.

23 A. Could you repeat the question.

24 Q. And I will try to do a better job. I apologize.

25 Did you in the summer of 2001 feel pressure to

AR 055057

1 continue your work on the 401 certification?

2 A. Yes, I did.

3 Q. Is that uncommon?

4 A. No, it's not.

5 Q. Did that pressure change your determination as to whether
6 there was reasonable assurance?

7 A. Absolutely not.

8 Q. What if the certification hadn't been issued on August
9 10th, 2001?

10 MR. STOCK: Object. Calls for speculation.

11 MS. COTTINGHAM: Sustained.

12 Q. (Continuing By Ms. Marchioro): There was a discussion
13 about a meeting that occurred with the governor's chief
14 of staff. Do you recall that meeting?

15 A. I do.

16 Q. And what happened at that meeting?

17 A. It was a meeting with Paul Isaki, the governor's then
18 chief of staff. He has moved into a different position.
19 I was there, Tom Fitzsimmons, Ray Hellwig, Gina Marie
20 Lindsey from the port, and Mick Dinsmore and Elizabeth
21 Leavitt, and we were there to discuss the status of the
22 project.

23 Q. And what did that discussion entail besides -- can you
24 describe the discussion, please.

25 A. The port, of course, expressed concern that Ecology was

AR 055058

1 taking too long in making its decision. We explained to
2 the port and to Mr. Isaki that part of the delay was
3 because of delays of the port's own consultants in
4 getting the work to us.

5 Q. Did Mr. Isaki instruct you to issue a 401 certification
6 to the Port of Seattle?

7 A. No, he didn't.

8 Q. Did Mr. Fitzsimmons instruct to you issue a 401
9 certification to the Port of Seattle?

10 A. No.

11 Q. Did Mr. Isaki instruct anyone to do anything?

12 MR. POULIN: Objection.

13 A. Yes, he did. He instructed the port.

14 MS. COTTINGHAM: Hang on a second. Mr. Poulin
15 has an objection.

16 MR. POULIN: Objection. Vague and quite likely
17 beyond the witness' personal knowledge.

18 MS. MARCHIORO: The witness was in the meeting.

19 MS. COTTINGHAM: Why don't you restate your
20 question.

21 Q. (Continuing By Ms. Marchioro): Did Mr. Isaki have any
22 instructions for any of the individuals that were in
23 attendance at the meeting?

24 A. Yes, he did. He advised the port that they needed to get
25 the information to Ecology so that we could review it

AR 055059

1 and Ecology just needed to stay its course and do its
2 review.

3 Q. Was the August 10th deadline a hard deadline or could it
4 have been extended?

5 A. It could have been extended.

6 Q. But by the time August 10th arrived, was Ecology in a
7 position to make a decision on this application?

8 A. Yes, it was, and we did.

9 Q. I'm going to have you look at Exhibit 1, and it's
10 condition B, so starts on the bottom of page 3 and goes
11 to the top of page 4. Would you read the first two
12 sentences into the record, please.

13 A. That's condition B(1)?

14 Q. Yes.

15 A. "This order shall be valid during construction of the
16 project. The following provisions of this order shall be
17 valid during long-term operation and maintenance of the
18 project."

19 Q. So there are aspects of the --

20 MR. STOCK: I am going to object because there
21 is a colon in that sentence and it goes on. The record
22 speaks for itself.

23 MS. MARCHIORO: I was simply trying to
24 complete the record where Mr. Stock read just the first
25 sentence in before, and to make a point that I think is

AR 055060

1 in dispute.

2 MS. COTTINGHAM: I think you did ask her to
3 read the first two sentences and she read one and a half
4 of a sentence, so why don't you read the entirety of the
5 sentence into the record.

6 MS. MARCHIORO: Excuse me, are you asking her
7 beyond the colon, to do letter A, sub A? She stopped at
8 the colon.

9 MS. COTTINGHAM: I think the point is you
10 asked her to read two sentences. He objected.

11 MS. MARCHIORO: Fine.

12 Q. Go ahead and please complete the --

13 A. All right. It continues. Subpart A. "In condition D
14 wetlands, stream and riparian mitigation as follows: The
15 mitigation areas to be protected by restrictive covenants
16 and the final natural resource mitigation plan as amended
17 shall remain in effect in perpetuity." B. "In condition
18 D(7), the provisions regarding wetlands, stream and
19 riparian mitigation, monitoring and reporting shall
20 remain in effect as specified therein."

21 Q. That's fine. I'm sorry, I think it was unclear as to
22 what the objection was asking us to stop at that point.

23 So there are aspects of the 401 certification that
24 do apply to the long-term operation and maintenance of
25 the project; is that your testimony?

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1 A. That's correct.

2 Q. And with respect to condition 1(c), where it describes
3 groundwater and surface water monitoring, can the port on
4 year 8, day 1, does it have a right to stop monitoring?

5 A. I'd say that really is going to depend on what those
6 monitoring reports are showing. We will be receiving
7 those monitoring reports, we will be reviewing them.
8 We're going to know if there are trends that point
9 towards a problem or not. If the trends are showing that
10 there's a problem, the condition very clearly says for
11 duration no less than eight years. We will be talking to
12 the port about extending that monitoring.

13 Q. And under what authority would Ecology be extending any
14 such monitoring?

15 A. It would be under the authority of our state's water
16 pollution control laws, RCW 90.48.

17 Q. You were asked some questions with respect to the plan
18 sheet revisions and other conditions regarding the NRMP,
19 and I believe Mr. Stock read some sections from your
20 deposition. Do you recall that?

21 A. I do.

22 Q. And at one instance, did you indicate that you had a more
23 full answer that was later in your deposition?

24 A. I did.

25 MR. STOCK: Miss Cottingham, this is an

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1 improper use of the deposition testimony. If she is
2 going to use it for purposes of impeachment, that's one
3 thing, but this is Ecology's witness. This goes directly
4 to ACC's motion to publish the deposition for all
5 purposes and admit them into the record for the board to
6 be able to read the full deposition. And this
7 illustrates the problem. But until the board has ruled
8 on that motion, I think this is an improper use of the
9 deposition testimony.

10 MS. COTTINGHAM: This might be a good time to
11 break, because I have decided how to deal with those
12 motions and I might as well tell you now. I'd like to
13 offer the parties the opportunity to have oral argument
14 first thing in the morning starting at 8:30 tomorrow
15 morning. And we'll do two of the motions, the motion to
16 publish and the motion to exclude documents, and we'll
17 dedicate a half hour to each and we will divide that half
18 hour in half, so 15 minutes per side on each of the
19 motions. And it will just be me and Eric Lucas and we'll
20 not have the other board members here. And we will deal
21 with that first thing in the morning and render a
22 decision forthwith so you could then perhaps continue
23 your questioning.

24 MS. MARCHIORO: I just want to make a
25 clarification. To the extent that if the depositions are

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1 excluded, it wasn't my intention to read from the
2 deposition, I just was trying to put Ms. Kenny in context
3 for the question I was asking.

4 MS. COTTINGHAM: My comments were more related
5 to his objection, but thank you for the clarification.

6 So before we go off the record for today, I would
7 like to know what the clock says.

8 MR. POULIN: Your Honor, the clock shows
9 elapsed for appellants three hours, four minutes and six
10 seconds. And elapsed for respondents, 30 minutes and 49
11 seconds.

12 MS. COTTINGHAM: Okay. The second thing
13 before we go is we have a list of witnesses and we have
14 gone through one and three quarters probably and who do
15 you have on deck for tomorrow?

16 MR. STOCK: Mr. Luster will follow Ms. Kenny.

17 MR. EGLICK: Amanda Azous was here, she left,
18 but she will be returning tomorrow. And then I haven't
19 spoken with Ms. Sheldon, but I understand that she was
20 told she didn't need to come today but she should be
21 available tomorrow.

22 MS. COTTINGHAM: So we'll finish up with Ms.
23 Kenny and then start through Mr. Luster, Miss Azous and
24 Miss Sheldon.

25 Is there any other business before us?

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MR. STOCK: Quickly, there is also a motion to exclude Mr. Garland.

MS. COTTINGHAM: Because Ecology said they did not plan to call him for a couple of days, I am going to deal with him a little bit later. So we'll deal with just those two tomorrow. And with that, we'll go off the record.

MR. PEARCE: One thing, Ms. Cottingham, while we are still -- I am not sure we still need to be on the record. I was wondering if counsel for ACC have any idea of how far we'll get with -- if we will be able to get past Miss Sheldon tomorrow, if you know.

MR. EGLICK: I guess we don't. It really depends on the cross examination. Today went a little slower than we expected. I think is Dr. Leytham going -- Dr. Leytham, I guess, is planning on coming, although maybe we'll wait to call him until the noon hour or something.

MR. PEARCE: Thank you.

MS. COTTINGHAM: And with that, we'll now go off the record.

(Hearing adjourned at 5:00 p.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON)

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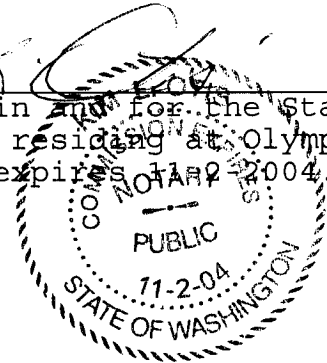
COUNTY OF THURSTON)

I, Kim L. Otis, a duly authorized Notary Public and Certified Court Reporter in and for the State of Washington, residing at Olympia, do hereby certify:

That the annexed and foregoing Transcript of Proceedings, consisting of pages 1-1 through 1-221, was reported by me and later reduced to typewriting by means of computer-aided transcription; that said transcript as above transcribed is a full, true and correct transcript of my machine shorthand notes of said proceedings heard on the 18th day of March, 2002, before the Pollution Control Hearings Board.

WITNESS MY HAND AND OFFICIAL SEAL this 15th day of April, 2002.

Kim L. Otis
Notary Public in and for the State of Washington, residing at Olympia. My commission expires 11-2-04.



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