



STATE OF WASHINGTON

DEPARTMENT OF ECOLOGY

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TO: Kathy Gerla
Assistant Attorney General

THRU: Steve Alexander
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FROM: Roger Nye

SUBJECT: Request for Ruling

The Port of Seattle has requested that a full-time prepaid position (me) be reinstated for Sea-Tac Airport. Given issues that have been associated with the prepaid position for the airport in the past and also some new issues, I think there needs to be consideration of reinstating that position from a legal perspective.

There was a prepaid position for Sea-Tac Airport from about 1992 through August 1996. No Consent Decree or Agreed Order with the Port and/or tenants at the airport was consummated during that time. My predecessor in the prepaid position for the airport, Linda Priddy, attempted to put some sites at the airport under Agreed Orders, but she eventually left Ecology when relations between her and the Port deteriorated during the process. The PLP's for the sites Linda tried to put under Orders (United, Continental, and Northwest Airlines) subsequently promised to be more aggressive in pursuing independent cleanup actions if Ecology would not put them under formal Orders. That was the situation when I became the prepaid for the airport in February 1994.

My role as a prepaid evolved into that of providing a constant regulatory "presence" and proactive technical assistance concerning the many independent cleanup actions that were underway at the airport (Mike Gallagher called it the "gorilla in the closet" role). This role actually worked quite well in moving the various independent cleanup actions along. I became increasingly concerned however, whether this was an appropriate use of a prepaid position and also about my level of involvement in the independent cleanup actions. I presented my concerns through Mike Gallagher, and during April 1995, Mary Burg, Mike, you, and I met to discuss whether or not the prepaid position should continue for Sea-Tac Airport. There were two decisions that came out of that meeting. (1) The role of full-time technical assistance was acceptable. This was based on the fact that, although the Prepaid Position Policy did not provide for this, there was specific language in the attendant Interagency Agreement that did provide for ongoing technical assistance.

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(2) There had to be an Agreed Order at least about something concerning Sea-Tac Airport for the prepaid position to continue.

The concept of doing a comprehensive model and study of groundwater at Sea-Tac Airport was being formulated about this time. This project presented an opportunity to have an Agreed Order at the airport, and the Port agreed to do the work under an Order. As it turned out however, there were many issues, both technical and regarding the scope of work, that were difficult to resolve. Progress on the language of the Agreed Order was very slow. Finally, during July 1996, Mike Gallagher and I met with Mary Burg (I don't think you were there), and the decision was to cancel the prepaid position since there was still no signed Agreed Order for Sea-Tac Airport.

What was the justification?

Work did continue without a prepaid position on the Agreed Order for the groundwater project however, and finally it was finished and went out for public comment. Many comments were received that strongly objected to and expressed skepticism about Ecology's prepaid position at the airport (a perceived process where Ecology was "paid" and thus influenced by the Port). There were more specific comments that expressed the position that, as per Ecology's own Prepaid Position Policy, it was illegal for the prepaid person to be involved in cleanup actions at the airport that weren't under an Order or Decree. Or, all cleanup actions that the prepaid person was involved in at the airport were open to public participation.

Why require order?

The Port specifically wants a new prepaid position to (1) carry on the groundwater project under the Agreed Order (the project will take about another two years), and (2) attend to putting several sites at the airport through the Voluntary Cleanup Program process. The Port's expectation for the position is also (as it's always been) that the prepaid person be involved as a regulatory presence and provide technical assistance as requested in many other environmental issues that come up at the airport (for example, the construction of a new aircraft fueling system).

There are some issues that, I think, need to be considered before Ecology agrees to reinstate the prepaid position. (1) The agency should make sure it is on firm legal ground before allowing the prepaid position to be used for purposes outside the Agreed Order. Anti-airport groups perhaps would legally challenge this use of the prepaid position. (2) Should there be a new Interagency Agreement established with the Port or is the one from 1992 still applicable (the current boilerplate is not the same)? (3) Would a reinstated prepaid position at the airport have to go out for public comment? If so, there would probably be strong public opposition to it and if that happened, what would we do?

(4) Can pre-paid positions be maintained outside the SCA bucket? If not, giving the Agreed Order will be signed during this month or early April and the Port wants the prepaid position reinstated at Sea-Tac Airport at that time. Thank you in advance for your attention to this matter.

to the Port is not signed

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