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4 AIRPORT COMMUNITIES)
5 COALITION,)
6 Appellant,)
7 v.)
8 STATE OF WASHINGTON,)
9 DEPARTMENT OF ECOLOGY; and)
10 THE PORT OF SEATTLE,)
11 Respondents.)

No. 01-133

NOTICE OF APPEAL

(Section 401 Certification No.
1996-4-02325 and CZMA
concurrency statement, issued August
10, 2001, Related to Construction of a
Third Runway and related projects at
Seattle Tacoma International Airport)

12
13
14 I. APPEALING PARTY

15 The appealing party is:

16 Airport Communities Coalition
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19 Fax (206) 870-7225

20
21 The appealing party is represented by:

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NOTICE OF APPEAL - 1

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10 Appellant Airport Communities Coalition (ACC) is an entity established by
11 interlocal agreement and composed of the Cities of Burien, Des Moines, Federal Way,
12 Normandy Park, and Tukwila, and the Highline School District, with a combined
13 population of over 150,000 citizens. ACC was formed for the purpose of, *inter alia*,
14 participating in the governmental review process related to the Port of Seattle's
15 proposed third runway and related Master Plan developments ("Third Runway
16 Project") at Seattle-Tacoma International Airport ("Sea-Tac Airport" or STIA"). The
17 ACC municipalities and school district would be particularly adversely affected by
18 construction of the Third Runway Project because they are the communities closest to
19 Sea-Tac Airport (excluding the City of SeaTac itself, which receives millions of dollars
20 a year from the Port and supports the Third Runway Project).
21

22 The ACC municipalities have particular stewardship responsibilities per state
23 law and their municipal codes and comprehensive plans for the streams and
24

25 NOTICE OF APPEAL - 2

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1 watersheds within their boundaries, including Des Moines Creek, Miller Creek,
2 Walker Creek, and Gilliam Creek. ACC has been actively engaged (to the extent that
3 true opportunities have been provided) in the Washington Department of Ecology's
4 review of the Third Runway Project. For example, upwards of ten independent
5 scientists and aviation technology experts commissioned by ACC have submitted
6 numerous comments to the Department of Ecology concerning the lack of necessary
7 information and substantive scientific flaws in the Port of Seattle's application for a
8 Clean Water Act Section 401 certification and Coastal Zone Management Act
9 concurrency for the Third Runway Project. ACC and its members have a vital interest
10 in ensuring that the Port's proposed project complies with the requirements of the
11 Clean Water Act, the Coastal Zone Management Act and state water quality laws.
12
13

14 II. ADDITIONAL PARTIES

15 In addition to the appealing party, the parties to this appeal are the Washington
16 Department of Ecology, P.O. Box 47600, Olympia, WA 98504-7600, which issued the
17 decisions for which review is sought, and the Port of Seattle, P.O. Box 68727, Seattle,
18 WA 98168, the applicant.
19

20 III. ORDER OR DECISION APPEALED FROM

21 Appellant appeals from the Washington Department of Ecology's August 10,
22 2001, issuance of Clean Water Act Section 401 Certification No. 1996-4-02325 and the
23 accompanying Coastal Zone Management Act Section 307(c)(3) concurrence statement
24

1 to the Port of Seattle. These decisions find that the Port's Third Runway Project will
2 comply with state and federal water quality standards and coastal zone requirements.
3 A copy of the concurrence statement and certification is Attachment 1 to this Notice
4 of Appeal and will be referred to as the "Section 401 Certification." Also included in
5 Attachment 1 is a copy of the Port's application for the Section 401 Certification.
6

7 The Third Runway Project, from concept through mitigation, involves design,
8 engineering, and construction activities at an unprecedented scale and with the
9 potential for unprecedented impacts on the water quality of the nearby streams and
10 wetlands. The Port proposes to spend over one billion dollars to fill a canyon on the
11 western edge of the airport with 20 million cubic yards of fill (retained in part by a
12 1,500-foot-long, 15-story-high retaining wall) upon which it plans to construct an
13 8,500-foot dependent runway. Tom Fitzsimmons, Director of the Department of
14 Ecology, recognized the enormity of the Project in a press release issued with the
15 Section 401 decision, when he stated that, "This is one of the largest public-works
16 projects ever attempted in the state of Washington. The potential effects on water
17 quality and the natural environment are enormous . . ."
18

19 IV. FACTS

20 A. The Local Hydrology Will Be Impacted by the Third Runway Project.

21 Section 401 certifications are addressed to the need for compliance by project
22 proponents with state surface water quality standards. The section 401 certification
23
24

1 process represents an opportunity and a requirement for the State of Washington, on
2 behalf of its residents, to protect the significant water resources that surround Sea-Tac
3 International Airport from further and future degradation. The aquatic resources at
4 issue here involve four stream systems, including interrelated groundwater, wetland
5 and other surface and subsurface complexes that one typically associates with
6 western Washington hydrology.
7

8 Four streams embrace and flow across the airport: Des Moines, Miller, Walker
9 and Gilliam Creeks. The first three of these flow generally westward through the ACC
10 communities of Burien, Des Moines and Normandy Park, and discharge into Puget
11 Sound. Gilliam Creek flows northeasterly and discharges into the Green River. The
12 streams are alive with fish. Coho and chum salmon spawn and rear in Miller Creek,
13 Walker Creek, and Des Moines Creek. Chinook salmon, a federally listed threatened
14 species, frequent the outfalls of Miller and Des Moines Creeks in Puget Sound during
15 their out-migration. The streams support a diverse population of fish including
16 cutthroat trout, steelhead, yellow perch, black crappie, pumpkinseed sunfish,
17 largemouth bass, prickly sculpin and three-spine stickleback. Juvenile Chinook
18 salmon have been found in the lower reaches of Gilliam Creek.
19
20

21 Des Moines, Miller and Walker Creeks are classified as Class AA waters under
22 state water quality standards, a status that mandates protection from impacts that
23 degrade or impair the streams' ability to support fish life, wildlife habitat, and
24 recreational and aesthetic uses. WAC 173-201A-030(1)(b). Impacts to the quantity of
25

1 water flowing in-stream, as well as chemical and physical water quality, are protected
2 alike under state water quality standards.

3 The airport property (over 2,600 acres) is also surrounded by a complex system
4 of ponds, lakes and wetlands. One hundred seventeen delineated wetlands totaling
5 approximately 115 acres are associated with the Port's Master Plan Improvements and
6 lie within the Miller and Des Moines Creek basins. The largest of these wetlands is
7 over 35 acres. Class II wetlands abound. Heavily forested, scrub-shrub, emergent and
8 open-water wetland classes are all found within the Project area. The wetlands
9 within the Miller and Des Moines Creek watersheds are extremely important to the
10 health and well-being of the creeks because of the wetlands' production of organic
11 carbon and role in moderating nitrogen export to the creeks. Surrounding bodies of
12 water include Lake Reba, Tub and Lora Lakes and the Tyee and Northwest Ponds.
13 Like the streams, abundant fish life exists in the lakes and ponds. This system of
14 ponds and wetlands provides habitat for passerine birds and small mammals,
15 groundwater discharge and recharge for the watersheds, and nutrient sediment
16 trapping for stream health.

17
18
19 The Des Moines and Miller Creek watersheds are also notable for their
20 groundwater connections. The majority of the existing wetlands west of the airport
21 are hydrologically maintained by shallow groundwater and seeps that emanate from a
22 shallow groundwater aquifer that daylights along the western slope of the plateau that
23 the Port proposes to fill.
24

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The affected waters, Des Moines, Miller, Walker and Gilliam Creeks, all flow through ACC member cities. The lakes are situated within the boundaries of the cities. The residents of the ACC cities including the students of the Highline School District use these streams and lakes daily for recreational and aesthetic purposes. For example, the Normandy Park community recreation center sits at the mouth of Miller Creek. This community beach parcel includes a Community Club building, tennis courts, swim club, baseball fields, boat launch and picnic areas on the beach and near the streams. Miller and Walker Creeks flow around and through the community center property providing a beautiful, natural setting for community activities.

The communities' affection and deep-seated concern for these streams and lakes are very real. From an early age children are taught in the communities' schools about the surrounding streams and lakes through field trips to the streams and special stream restoration projects. Over the years, community groups have undertaken significant efforts to restore these salmon-bearing streams to levels of purity in which aquatic biota may thrive. Residents flock to the streams in October to see the annual return of the salmon. Many residents fish in the streams and lakes.

The headwaters and associated wetlands of the streams also lie within the boundaries of ACC cities and provide low summer flow for salmon habitat in Walker and Miller Creeks. These headwaters and wetlands are in the construction impact area for the Third Runway Project and their drainage would be impacted by Third Runway fill if the project were ever built. The effect of the Third Runway Project on

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1 the quantity and quality of water in the streams, headwaters and wetlands is a matter
2 of great concern to the downstream population within the ACC communities. The
3 streams and lakes are valuable resources to the communities through which they
4 flow.

5
6 **B. The Port's Proposed Project Is of Immense Proportion.**

7 The Third Runway Project is immense. The Port proposes to construct an
8 8,500-foot-long parallel runway by importing an additional 17 million cubic yards of
9 fill to the already 3 million cubic yards it has imported onto the site over the past
10 three years. In its press release announcing the 401 Certification, the Department of
11 Ecology compares the embankment that would be created by this additional fill to "40
12 football fields, each stacked 300 feet high with material." The Port estimates that
13 transport of this amount of fill to the proposed third runway site will take five years at
14 the projected rate of 66 dump trucks per hour for 16 hours a day. The Port also
15 proposes to excavate over 7.9 million cubic yards of fill from on-site, open-pit strip
16 mines or "borrow pits" to construct portions of the runway embankment. Underneath
17 the 20 million cubic yards of fill, the Port proposes to construct an enormous rock
18 drainfield to "capture" groundwater and transport it downslope in the hope of
19 supporting the streams and wetlands below.

20
21
22 In addition to the embankment itself, the Port plans to construct several
23 retaining walls to support portions of the embankment. The largest of these structures
24

1 is a monolithic, mechanically stabilized earth (MSE) wall over 150 feet high and
2 approaching a third of a mile in length. Dubbed the "Great Wall of SeaTac," the Port
3 proposes to construct the MSE wall on soils subject to liquefaction during
4 earthquakes.

5 Other major elements of the Project include new taxiways connecting the
6 proposed third runway, a 600-foot extension of an existing runway, new Runway
7 Safety Areas, a new air traffic control tower, development of a North Unit Terminal,
8 and a new South Aviation Support Area (SASA) that will house airport support and
9 maintenance facilities. In order to facilitate transport of fill and construction
10 materials to the Third Runway Project site, the project involves significant alterations
11 to the local road and highway infrastructure. Of note, the Port is now constructing a
12 temporary interchange off of State Route 509 and plans to create another interchange
13 off of State Route 518.

14
15
16
17 **C. The Proposed Project Will Substantially Impact Water Quality.**

18 The proposed Project's potential impact on water quality and resources cannot
19 be overstated. The Third Runway project would consume over 700 acres, create over
20 300 acres of new impervious surfaces with associated stormwater runoff, fill all or
21 portions of 50 wetlands totaling 18.37 acres and permanently impact an additional 12
22 wetlands totaling 2.05 acres. The Port also proposes to fill and move 980 linear feet of
23 Miller Creek itself, 1,290 linear feet of drainage channels in the Miller Creek basin,
24

1 and 100 linear feet of drainage channels in the Des Moines Creek basin. In sum, the
2 Third Runway Project, if built, will literally re-plumb the Miller, Des Moines and
3 Walker Creeks watersheds.

4 The Section 401 Certification grants the Port permission to capture and detain,
5 without an approved water right, approximately 390 acre-feet of stormwater in fifteen
6 stormwater vaults and earthen-dam detention ponds to be later released and used
7 during the dry summer months for low streamflow augmentation. Ecology describes
8 the largest of the stormwater detention vaults as detaining 88 acre-feet of stormwater
9 -- equal to nearly 30 Olympic-sized swimming pools. Several of the detention ponds
10 will detain as much as 40 acre-feet of stormwater.
11

12 The Port's stormwater system is and will be a significant source of impacts
13 associated with the Third Runway Project. The system is composed of the Industrial
14 Waste System (IWS) and includes three lagoons for the storage of industrial
15 wastewater prior to treatment in the treatment plant. Treated discharge flows into an
16 outfall pipeline that ultimately discharges into Puget Sound via a marine outfall. In
17 order to capture and treat greater quantities of industrial stormwater, the Port will re-
18 construct, expand and re-line portions of STIA's Industrial Waste System. Because of
19 significant leakage in the IWS pipelines and lagoons, this upgrade is expected to have
20 an impact on the local hydrology.
21

22 In addition, the placement of 20 million cubic yards of embankment fill
23 material will alter groundwater flow paths that feed and discharge water to the local
24

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1 streams. In an effort to prevent settling and erosion caused by subsurface flow, the
2 embankment will be constructed on top of an underdrain that will capture and re-
3 route groundwater flowing from beneath the existing airport to the foot of the
4 embankment. The underdrain will function as a conduit to transport polluted
5 groundwater to local streams.
6

7 The Port's low streamflow analysis predicts that the surface and sub-surface
8 hydrologic alterations associated with embankment and impervious surface
9 construction will result in depletion of flow in Miller, Des Moines and Walker Creeks
10 during low-flow times of year (i.e., July through October). According to the Port's
11 modeling efforts, Des Moines Creek would be the hardest hit, with a low flow
12 depletion equal to fully one-third of the stream's late summer flow.
13

14 Flow depletion will impact the characteristic uses of these streams, including
15 their aquatic habitat, recreational and aesthetic functions. Moreover, the creation of
16 preferential flow paths for contaminated groundwater and the direct discharge of
17 polluted stormwater will threaten the quality of receiving waters, i.e., the four streams
18 surrounding the airport. Continuing violations of state water quality standards are
19 expected.
20

21 Notwithstanding its magnitude and impacts, Ecology's water quality permit
22 review for the Third Runway Project has been typified by a persistent unwillingness
23 on the part of the Port to provide complete and accurate technical information by
24 which the impacts of the Project and "appropriate" mitigation could be determined.
25

1 To be sure, the Port has taken care to fill the file cabinets at Ecology with many yards
2 of reports and "data." However, these have consistently avoided providing concrete
3 answers to key water-quality-related questions. Despite this stunning lack of basic
4 data and analysis, Ecology ultimately succumbed to pressure to issue a Section 401
5 certification based upon studies, reports, and plans that have yet to be completed and
6 in many instances have not been initiated. In doing so, Ecology effectively discarded
7 public participation in the 401 review. Independent experts commissioned by ACC to
8 comment on Port submissions as part of the Ecology 401 review process could not
9 critique reports and data which did not yet exist -- yet their future existence and
10 validity were relied upon by Ecology as a basis for granting approval in the here and
11 now.
12

14 How this Ecology decision came to be is a cautionary tale. It illustrates what
15 can happen when an agency's mandate for stream, wetland, and water quality
16 protection based on sound science collides with political pressures to just say yes.
17 There are casualties (Ecology's longtime statewide Clean Water Act section 401
18 coordinator, Tom Luster, was abruptly reassigned after two years on the Third
19 Runway Project when he persisted in questioning the Port's submissions: a few
20 months later he quit DOE entirely and moved to California where he now works for
21 the California Coastal Commission). There are lapses in judgment (prior to issuing its
22 certification, key Ecology officials worked assiduously with the Department's public
23 relations expert on the wording of a press release and memo justifying approval, even
24

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1 while neglecting to review key documents or insist on their completion by the Port
2 before issuance of a decision). And, ultimately, there are losers, as Ecology offers a
3 concept of reasonable assurance under the Clean Water Act that would leave local
4 streams unprotected and undercut the public's right to clean water.

5
6 **D. The Procedural and Permitting Background Demonstrates Ongoing Problems**
7 **with the Port's Application.**

8 In December 1997, the Port of Seattle first applied for Clean Water Act
9 approvals necessary to construct a dependent third runway at Seattle-Tacoma
10 International Airport. Among the approvals sought were a Section 404 permit from
11 the Corps of Engineers, required to fill wetlands at the project site, and a related
12 Section 401 certification from the Department of Ecology certifying that the project
13 would, with reasonable assurance, comply with state water quality standards.

14
15 The Port's 1997 application was the first in a series of attempts to meet the
16 requirements of state and federal water quality law. Ironically, Ecology issued a 401
17 certification to the Port in July 1998, but the Port appealed that decision to the
18 Pollution Control Hearings Board (PCHB No. 98-150), thereby becoming the agent of
19 delay to the Project. The Port's 1998 appeal and the underlying Section 401
20 certification were both withdrawn later that year when the Port discovered that it had
21 substantially underestimated the number of wetlands that would be impacted by the
22 Project.
23
24

1 The Port re-applied for its Section 404/401 approvals in September 1999. After
2 a yearlong investigation, and facing denial of certification by Ecology, the Port
3 withdrew the second application in late September 2000. Attachment 2 hereto is a
4 copy of the Department of Ecology's draft denial letter that forced the Port to
5 withdraw its second application. The same issues relied upon by Ecology in its
6 September 2000 draft denial letter remain today even after another year of submittals
7 by the Port and review by Ecology.
8

9 The Port applied yet a third time for a Section 404 permit and Section 401
10 certification in October 2000. See Attachment No. 3. (Corps of Engineers Public
11 Notice dated December 27, 2000). Ecology issued the requested Section 401
12 certificate on August 10, 2001, and that decision is the subject of this appeal. See
13 Attachment No. 1.
14

15 The Third Runway Project proposal has generated a series of studies and
16 reports, many of which will be submitted as evidence at later phases of this
17 proceeding. These include the Comprehensive Stormwater Management Plan
18 (December 2000), Natural Resource Mitigation Plan (December, 2000), Wetland
19 Functional Assessment and Impact Analysis (December, 2000), and Wetland
20 Delineation Report (December, 2000). Each of these reports is a component of the
21 Seattle-Tacoma International Airport Master Plan Update Improvements, the Port's
22 "comprehensive plan" for the airport. Most of these reports were issued in new or
23 revised form in December 2000, at the time public notice was sent on the Port's third
24

1 application for Section 404/401 permits. The application and supporting materials
2 engendered significant public comment, including from ACC and its experts.

3 However, several reports that are integral to the Section 401 decision were
4 either not issued for public review or were issued in incomplete form. In particular,
5 the Port's revised Low Streamflow Analysis and Flow Impact Offset Facility Proposal
6 were not issued until July 23, 2001, and then only in draft form. Stormwater
7 detention associated with the Port's low flow mitigation proposal is another new
8 element of the project, and design details for the stormwater detention vaults have yet
9 to be included in the Stormwater Management Plan. These late submittals deprived
10 ACC, the public, and most importantly, the Department of Ecology of the ability to
11 fully analyze the impacts of the Project as well as the feasibility of the mitigation
12 proposals. In fact, review of the Section 401 decision reveals that there are at least
13 two dozen reports and plans that have not been completed for the Project, but which
14 Ecology has cited as integral elements of the Section 401 mitigation conditions.

15 The Port's Third Runway Project is not written on a clean slate. STIA has been
16 the subject of numerous permits, enforcement orders, and other administrative and
17 executive activities for many years. STIA operates under an individual NPDES permit
18 that authorizes discharge of significant stormwater quantities to local streams.
19 Discharge monitoring reports establish that the Port routinely violates state water
20 quality standards.
21
22
23
24

1 The Port has recently obtained a major modification to its existing NPDES
2 stormwater permit to govern stormwater discharges caused by Third Runway Project
3 construction activities including the new interchange off of State Route 509. This
4 highway construction has been undertaken for the express purpose of facilitating the
5 Port's transport of fill materials to the third runway embankment site. The NPDES
6 permit modification authorizes discharge into fish-bearing creeks and streams that
7 cross the site of the proposed third runway. The modification was issued by the
8 Department of Ecology on May 29, 2001, and is the subject of an appeal and stay
9 request now pending before the Board in PCHB No. 01-090.

11 The water quality associated with past and future discharges authorized by the
12 Port's stormwater permit is integrally related to the question of whether Ecology's
13 Section 401 certification is appropriately issued. In issuing the NPDES permit
14 modification prior to Section 401 certification, Ecology has violated requirements
15 regarding interrelated timing, content and conditions of the two processes.

17 **V. GROUND'S FOR APPEAL**

18 Notwithstanding the enormity of the Third Runway Project and the Port's
19 continuing failure to provide data and analysis necessary to determine whether the
20 standards for Clean Water Act Section 401 Certification and Coastal Zone
21 Management Act (CZMA) consistency are met, Ecology ultimately succumbed to
22 political pressure to issue these approvals. The resulting decision is irretrievably
23 compromised as a basis for determining whether water quality standards will be met

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1 and is riddled with violations of the requirements and intent of the federal Clean
2 Water Act, 33 U.S.C. § 1251, *et seq.*, the Coastal Zone Management Act, 16 U.S.C.
3 §1451, *et seq.*, the Washington State Water Pollution Control Act, RCW Ch. 90.48, the
4 State Environmental Policy Act, RCW Ch. 43.21C, the State Water Code, RCW Ch.
5 90.03, and applicable and implementing regulations for each of these statutes. These
6 violations include, *inter alia*, the following:
7

8 **1) Lack of Reasonable Assurance.**

9 The Section 401 Certification violates the fundamental tenet that there must be
10 reasonable assurance that the project will not violate state water quality standards in
11 affected surface waters, pursuant to, *inter alia*, 33 U.S.C. § 1341; 40 CFR § 121.2; RCW
12 90.48.080; and WAC Ch. 173-201A. *See Friends of the Earth, et al. v. Department of*
13 *Ecology*, PCHB Nos. 87-63 and 87-64, Final Findings of Fact, Conclusions of Law and
14 Order at 25-26 (1988).
15

16 **2) The Section 401 Certification Relies on Incomplete Data and Analysis.**

17 The Port has failed in three years to complete key data, reports, and plans
18 necessary for a determination that the project will not violate water quality standards.
19 Ecology's decision, on its face, acknowledges the Port's continuing failure to produce
20 the necessary information, but nevertheless grants approval based on incomplete
21 reports and promises to complete work in the future.
22
23
24
25

1 a. **Technical Analysis, Design and Implementation Plans**

2 The Section 401 Certification is not based on reasonable assurance that the
3 Third Runway Project will comply with water quality standards because of its
4 “reliance” upon grossly incomplete and unavailable data, designs, and reports.
5 Ecology acknowledges this in many instances. The following documents are
6 examples of Ecology’s acceptance of promises from the Port for information needed to
7 make the Section 401 certification and CZMA consistency decisions:
8

- 9 • mitigation plan for impacts to wetlands in Miller Creek that have
10 been determined to be permanent, rather than temporary (Section
11 401 Certification, p. 9);
- 12 • plan to prevent interception and discharge to streams of existing
13 contaminated groundwater by utility corridors and an associated
14 monitoring plan to assess contaminant transport (Section 401
15 Certification, pp. 18-19);
- 16 • Low Streamflow Analysis and Summer Low Flow Impact Offset
17 Facility Proposal (Section 401 Certification, p. 21, *et seq.*);
- 18 • plan to offset reduced groundwater recharge to local streams in light
19 of doubts that groundwater will flow through the project’s massive
20 embankment as modeled by the Port (Section 401 Certification, p.
21 22);
- 22 • plan demonstrating that low flow augmentation releases are not lost
23 to percolation (Section 401 Certification, p. 22);
- 24 • plan for pilot program to determine whether the Port’s (incomplete)
25 low flow augmentation plan will even work (Section 401
26 Certification, pp. 22, 23);

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- plan to identify impacts to wetlands from the low flow augmentation plan (Section 401 Certification, p. 22);
- plan to determine the water quality treatment requirements for the low flow augmentation plan (Section 401 Certification, p. 22);
- “water effects ratio study” to determine the limits and monitoring requirements for the Port’s NPDES permit (Section 401 Certification, p. 26);
- final design for stormwater treatment and flow control facilities, with particular review of groundwater interception factors (Section 401 Certification, p. 26);
- stormwater facility retrofitting requirements to control the Port’s existing discharges which violate water quality standards (Section 401 Certification, p. 25);
- stormwater facilities operation and maintenance plan that includes methods to prevent “overtopping” of stormwater facilities during storm events (Section 401 Certification, pp. 26-27);
- stormwater pollution prevention plans (Section 401 Certification, p. 27); and
- spill prevention and containment plan (Section 401 Certification, p. 29).

The studies and plans identified above are addressed to essential components of the Third Runway Project. Without them, it is pure speculation, not reasonable

1 assurance, to say that the project will not result in violation of quality standards. 33
2 U.S.C. § 1341; 40 CFR § 121.2; RCW Ch. 90.48; WAC 173-201A.

3 **b. Monitoring Plans**

4 In addition to its speculative reliance on the Port's promises to provide
5 essential data and information necessary for Section 401 certification, Ecology's
6 decision substitutes future monitoring for current assurance that water quality
7 standards will not be violated. In so doing, the decision implicitly acknowledges that
8 such assurance does not now exist, and instead finds that post-approval monitoring to
9 determine the extent of harm and to provide a basis for future discussions of
10 mitigation is equivalent to current reasonable assurance. Worse yet, even assuming
11 this design/build/assess approach were legal and appropriate for a project of this scale,
12 complexity, and proximity to fragile streams and wetlands, Ecology's decision leaves
13 inchoate the nature of the monitoring and the Port's obligations in the face of its
14 results.
15

16
17 The result is a project approved based on speculative, incomplete, and
18 infeasible monitoring fig leaves, such as those listed below, which do little to cure the
19 project's obvious flaws and whose main utility, if any, will be to provide some after-
20 the-fact record of the harm to water quality standards caused by the project.
21

- 22 • monitoring to attempt to determine after-the-fact effectiveness of
23 wetland mitigation (Section 401 Certification, p. 12, *et seq.*);
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- monitoring to detect impacts of contaminated leachate from embankment fill on ground and surface water resources (Section 401 Certification, p. 18);
- monitoring of contaminated groundwater transport via subsurface utility lines to determine whether as-yet-undeveloped BMPs will prevent future contamination (Section 401 Certification, p. 18-19);
- monitoring to determine whether embankment fill meets assumptions regarding groundwater infiltration and flow-through rates (Section 401 Certification, p. 22);
- a “comprehensive protocol” to determine whether the low flow mitigation plan will work, including elaborate in-stream biological monitoring (Section 401 Certification, p. 24);
- future review to determine the seasonality of low flow impacts (Section 401 Certification, p. 24);
- monitoring to determine whether additional stormwater BMPs are needed (Section 401 Certification, pp. 26 and 28); and
- a plan to assess stormwater and construction “de-watering” discharges from construction projects (Section 401 Certification, p. 29).

A Section 401 certification, especially for what is one of largest single public works projects ever built in Washington, cannot be based on a design/build/assess/fix approach. The project is too big, the impacts too gross, the ability to correct mistakes too limited once 20 million cubic yards of fill have been dumped.

1 Monitoring cannot serve as a basis for reasonable assurance of compliance with
2 water quality standards. Even if monitoring were appropriate, the proposals here fall
3 far short. Ecology's failure to require development and review of these monitoring
4 plans prior to issuance of the Section 401 Certification means that there is very little
5 assurance, much less reasonable assurance, that state water quality standards will not
6 be violated. 33 U.S.C. § 1341; 40 CFR § 121.2.
7

8 **3) The Third Runway Project Will Diminish Flows in Local Streams,
9 Violating Water Quality Standards.**

10 The Section 401 Certification does not rest on reasonable assurance that the
11 low flow impacts of the proposed project will be permanently and adequately
12 compensated, nor that water quality standards will be met. The Section 401
13 Certification therefore violates, *inter alia*, 33 U.S.C. § 1341; 40 CFR § 121.2; RCW Ch.
14 43.21C; RCW 90.03.010; RCW 90.03.250; and RCW 90.48.080.
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16 A central concern arising from the Third Runway Project is its impact on local
17 streams and wetlands. It has been understood since the Project was first proposed
18 years ago that construction of the embankment, filling of wetlands and headwaters,
19 and creation of hundreds of acres of new impervious surfaces would alter streamflow
20 in Des Moines and Miller Creeks. In the course of seeking agency approval, the Port
21 downplayed the extent of diminution in streamflow, even as it proved unable to offer
22 an approvable basis for mitigating the small diminution that it acknowledged would
23 occur. It was not until the Port's last-minute submittal (July 23, 2001) of a summary
24

1 of a new draft low flow analysis and low flow mitigation proposal that the Port
2 admitted that the Project if approved would deplete up to 35% of the summertime
3 streamflow in Des Moines Creek, and that yet a third stream, Walker Creek, would
4 also be affected.

5 Des Moines, Miller and Walker Creeks are classified as Class AA waters and are
6 known to host a variety of aquatic species, including cutthroat trout, coho and chum,
7 as well as a diversity of warm water species such as yellow perch, large mouth bass
8 and pumpkinseed sunfish. The disruptions to stream hydrology will occur during
9 the summer and early autumn period, when salmonid and recreational use of the
10 streams is at its highest.

11 Ecology has chosen to accept the Port's belated and still incomplete low flow
12 analysis as a basis for determining that water quality standards can be met. This
13 constitutes speculative approval that will require for justification post hoc submission
14 of technical analyses and plans. This is borne out by the text of the low flow section
15 of the 401 decision, which resembles a review of a draft document rather than a
16 rigorous imposition of science-based conditions to assure that key elements of water
17 quality compliance are met.

18 The Port's low flow analysis, which has yet to be released in final form, still
19 rests on inaccurate and incomplete data and assumptions. For example, questions
20 remain regarding lack of calibration data for flow modeling, use of incorrect model
21 calibration points, and poor correlation to recorded data; failure to properly model the

1 impacts of airport activities and projects that will reduce natural stream flow,
2 including upgrades to the Industrial Waste System (lagoon linings and leak reduction
3 efforts) and development of a business park at the site of proposed borrow pits
4 (eliminating forested areas in the Des Moines Creek basin); and inconsistent
5 accounting for runoff (e.g., assertions that runoff will infiltrate to groundwater and
6 minimize streamflow impacts versus proposals to capture the same runoff for reserve
7 storage and release to the streams).

9 The Section 401 Certification's adoption of the Port's Draft Low Flow Impact
10 Offset Plan (Parametrix, July 2001) is similarly flawed. Rather than rely on proven
11 methods, it proposes to capture stormwater running off the airport property (including
12 from contaminated areas of present or former industrial and aviation use), detain it in
13 dead storage in large vaults for several months between December and July, and then
14 meter it into the three depleted streams during the late-summer low-flow period.
15 Because the proposal is incomplete, it is impossible to fully assess it. However, from
16 what has been disclosed to date (and was relied upon by Ecology in its decision), it
17 suffers from critical environmental and legal flaws, and therefore provides no basis for
18 Section 401 certification. Although it was referred to in a submittal letter as a "final"
19 proposal, it lacks important information about the design and operation of the
20 mitigation proposal, information that is necessary to determine whether the proposal
21 will actually work. It is also inconsistent with the Port's Stormwater Management
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1 Plan, which identifies different stormwater reserve vaults from those described in the
2 mitigation proposal.

3 Feasibility of design is not yet established for the low flow mitigation plan.
4 Problems include, but are not limited to, water quality treatment, management of
5 accumulated contaminated sediments in the reserve vaults, aeration, loss of water in
6 transit between stormwater vaults and streams, and mechanisms for metered release
7 (e.g., blocked nozzles).
8

9 Environmentally, there is no reasonable assurance that water quality standards
10 can and will be met while injecting the contents of stormwater vault dead storage into
11 Class AA streams. This is particularly so in light of the Port's documented history of
12 violating water quality criteria in area streams, relating to, *inter alia*, fecal coliforms,
13 total suspended solids, sediments (turbidity), biological oxygen demand,
14 petrochemicals, zinc, copper, glycols, and airplane wastewater. Moreover, anoxic
15 conditions in the reserve vaults may result in greater bioavailability and toxicity of
16 metals once stormwater is released to streams. Ecology's approach of approve now
17 and sort out later the viability of the use of airport stormwater is inconsistent with the
18 requirements for Section 401 certification and CZMA consistency.
19

20 While the Port's draft plan does recognize that stormwater must be treated
21 before release to local streams, it does not address the full spectrum of pollutants
22 known to be present in the stormwater nor does it explain how they will be treated to
23 bring the stormwater up to water quality standards. Implicitly acknowledging that
24

1 this hit and miss approach would result in harm to the streams, the Section 401
2 decision calls for an as-yet-undeveloped monitoring plan which would use a long-
3 term assessment method, the Benthic Index of Biotic Integrity or BIBI. That method is
4 inappropriate for this type of project; among other flaws, it will not detect early
5 problems with the use of stormwater mitigation and, lacking baseline data on aquatic
6 biota in the affected streams, will provide meaningless results. Under Ecology's
7 decision, the streams will become laboratories for a Port experiment in the use of
8 stormwater, with the after-the-fact indicia of harm designed to preclude early
9 detection.
10

11 The legal flaw in the Port's stormwater proposal is as fundamental as its
12 environmental shortcomings. Finding a source of water to augment low stream flows
13 has been particularly problematic for the Port. The failure to provide a secure source
14 of low flow augmentation water was a major factor in the last-minute withdrawal of
15 the Port's Section 401 application in September 2000. Over the years, several
16 proposals have been examined and abandoned, including transfer of local
17 groundwater rights and purchase of water from Seattle Public Utilities. In each case,
18 the proposed method was ultimately rejected due to issues relating to water rights
19 transfers (i.e., questions related to relinquishment and quantification of claims). In
20 the case of the Port's latest (captured stormwater) proposal, the Port and Ecology have
21 effectively decided to ignore the water rights issues that sank prior proposals.
22
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1 Thus, although the Port is required by the Section 401 decision to capture and
2 detain stormwater in specially designated vaults between December and July, and
3 then release it during low flow periods to augment stream flow, Ecology has not
4 required that the Port obtain a water right to do so. Because the use of water to
5 augment streamflow is a beneficial use, Ecology should have required the Port to
6 obtain such a right as a prerequisite to Section 401 certification. In the absence of
7 such a right, it is legally impossible to find reasonable assurance in the Port's plan for
8 use of stormwater.
9

10 Finally, because water right decisions are subject to the SEPA review process,
11 Ecology's decision not to require a water right means that the Project does not comply
12 with the requirements of SEPA. This is particularly important in the context of
13 analyzing cumulative impacts to local streams, an analysis that has not been done.
14 No environmental review of the low flow mitigation proposal has been conducted.
15

16 **4) Stormwater Peak Flow Releases Will Violate Water Quality Standards.**

17 The Section 401 Certification is not based on reasonable assurance that the
18 Third Runway Project will not violate state water quality standards in affected surface
19 waters, because it allows discharge of polluted stormwater during peak flow periods.
20 33 U.S.C. § 1341; 40 CFR § 121.2; RCW 90.48.080; WAC Ch. 173-201A.
21

22 The Port's stormwater discharges already violate water quality standards at
23 Sea-Tac. These violations are not limited to the late summer low-flow period. The
24 Port's Discharge Monitoring Reports and whole effluent toxicity (WET) testing
25

1 indicate that significant quantities and varieties of contaminants are transported
2 through the Port's local stormwater system and discharged to Des Moines, Miller and
3 Walker Creeks during peak flow periods, to the detriment of aquatic biota. The new
4 and expanded stormwater discharges anticipated from the Third Runway Project will
5 be similar to those currently discharged by the Port. Therefore, the (in)effectiveness
6 of existing BMPs and resulting water quality exceedances are likely to be similar as
7 well.
8

9 The Section 401 Certification adopts the Port's Comprehensive Stormwater
10 Management Plan (CSMP), submitted in piecemeal fashion to Ecology up until the
11 time of issuance of the 401 decision. Capture and detention of stormwater to
12 attenuate peak flows is the Port's "best management practice" of choice to prevent
13 pollutant loading to surface waters. Specifically, the Port would route stormwater
14 through swales, natural "filter strips," and settling basins in order to capture the
15 numerous pollutants transported via stormwater runoff.
16

17 On initial reading, it appears the Certification requires the Port to control its
18 water quality violations in two ways: through a program of retrofitting of existing
19 stormwater facilities and construction of new facilities to handle additional runoff
20 from the additional 300-plus acres of impervious surfaces created by the Third
21 Runway Project. However, upon close inspection of the Certification, it turns out that
22 the retrofit plan is illusory - it need only be implemented if the Port (not Ecology)
23 determines that it is feasible (Section 401 Certification at p. 25). In fact, the Port has
24

1 already stated that the retrofit plan is infeasible due to cost. Thus, the Section 401
2 Certification is predicated on a "condition" that is virtually certain not to be met.
3 Moreover, even were the Port to meet its retrofit ratios, the Project is not likely to be in
4 compliance with water quality standards for many years. Ecology may not issue a
5 Section 401 certification when the applicant is in violation of water quality standards
6 and the violations are not cured as a prerequisite to 401 approval.
7

8 The Port's proposed stormwater control facilities also raise serious questions.
9 The 401 Certification requires the Port to construct at least 15 stormwater vaults and
10 detention ponds for the purpose of capturing and detaining about 390 acre-feet, or 127
11 million gallons of water. The number and size of these facilities is unprecedented,
12 rendering the mitigation requirements a highly speculative undertaking, from both
13 technical and financing perspectives. For example, the Port proposes to build a vault
14 with a capacity of 88 acre-feet – making it the largest stormwater vault in the country.
15 The stormwater system is expected to cost hundreds of millions of dollars.
16

17 The Section 401 Certification conditions relating to operational stormwater
18 requirements contain serious deficiencies, including but not limited to a failure to
19 impose "all known available and reasonable treatment methods" for stormwater
20 discharges, i.e., effluent limitations as required by federal law; numerous approvals
21 that defer analysis and monitoring to later dates (for example, analysis of groundwater
22 interception by stormwater facilities and its impact on facility sizing will occur at
23
24

1 final design stage, rather than in preliminary designs, even though such interception
2 is inevitable and should have been considered beforehand).

3 **5) Existing Contaminants Beneath the Airport Are at Risk of Migration**
4 **and Discharge to Surface Waters.**

5 The Section 401 Certification is not based on reasonable assurance that the
6 Third Runway Project will not violate water quality standards in affected surface
7 waters because of the failure and inability of the Port to fulfill the terms of the Agreed
8 Order for Sea-Tac International Airport, No. 97TC-N122, dated May 25, 1999
9 (Attachment 4), in violation of standards for reasonable assurance set forth in the
10 Governor's June 30, 1997, letter (Attachment 5). 33 U.S.C. § 1341; 40 CFR § 121.2.
11

12 The Section 401 Certification is not based on reasonable assurance that the
13 Third Runway Project will not exceed water quality standards in affected surface
14 waters because of the risk of migration and discharge of groundwater polluted by
15 hazardous substances, originating in and around Sea-Tac Airport, to surface waters as
16 a result of the Third Runway Project. 33 U.S.C. § 1341; 40 CFR § 121.2; RCW
17 90.48.080; WAC Ch. 173-201A.
18

19 ACC's objections to the Third Runway Project are predicated, in part, on the
20 Port's past performance at STIA, particularly its negligence in the area of hazardous
21 substance control and cleanup. The Port's history is partially revealed in a MTCA
22 "Agreed Order" issued by Ecology on May 25, 1999, which requires the Port to assess
23
24

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1 the risk of known and existing contamination at the airport reaching nearby water
2 resources. See Attachment 4 (Agreed Order).

3 In sum, the Port and its tenants have, over many decades, caused numerous
4 releases of large quantities of hazardous substances at STIA, including jet fuel,
5 industrial solvents, mineral spirits, lubricating oil, and de-icing fluids. The Agreed
6 Order identified thirteen sites where contaminants are present in significant
7 quantities. In addition, several dozen sites of known or suspected contamination are
8 not addressed in the Agreed Order.

9
10 As a result of the Port's activities, both perched and regional aquifers
11 underlying the airport are polluted. Migration of contaminated groundwater further
12 threatens local and regional aquifers and surface water bodies. The quality and
13 movement of groundwater beneath STIA, and how the contamination problem has
14 been handled, closely informs the question whether Ecology has appropriately issued
15 the Section 401 certification.

16
17 Under the Agreed Order, signed more than two years ago, the Port agreed to
18 develop models to predict groundwater flow and contaminant fate and transport
19 beneath the airport. This essential MTCA task became a direct requirement of the
20 Third Runway Section 401 and CZMA decision processes when Governor Gary Locke
21 committed to the Secretary of the U.S. Department of Transportation that completion
22 of the groundwater flow and contaminant transport model was required in order for
23 the state to find, with "reasonable assurance," that the Third Runway Project would
24

1 “comply with applicable air and water quality standards.” See Attachment 5 (Letter
2 from Governor Gary Locke to Rodney Slater, Secretary, U.S. Department of
3 Transportation, 6/30/97). Thus, the Agreed Order establishes benchmarks and
4 standards for assessing whether the Third Runway Project meets the Section 401
5 requirement of reasonable assurance.
6

7 Notwithstanding the Governor’s commitment and the Agreed Order itself, the
8 groundwater flow and contaminant transport modeling contemplated by the Order
9 has not been done and is in fact nowhere near completion. Instead, the Port recently
10 prepared a technical memorandum, dubbed the Preferential Pathways Analysis (PPA),
11 to evaluate the potential for existing groundwater contaminants to migrate to the area
12 of the Third Runway embankment due to construction. This study is inadequate in its
13 scope and also is not complete.
14

15 The Section 401 Certification references neither the Agreed Order, the
16 Governor’s Letter nor the PPA. Instead, it directs the Port to prepare a BMP
17 construction plan, to train staff in the detection of hazardous materials and
18 contaminated soils and water, and to update the contaminant inventory.
19

20 This approach to preventing migration and discharge of known and unknown
21 contaminants to local surface water bodies is deficient in the extreme. While the
22 location of contaminants is known in some instances and not known in others, no
23 effort has been made to compare what is known with Third Runway construction
24 zones. The PPA technical memorandum, upon which the Section 401 decision
25

1 appears to rely, fails to address whole categories of pollutants, particularly organic
2 solvents, metals and glycols, that are suspected to lie beneath the airport.

3 The Port's analytic method has focused on transport of contaminants toward
4 drinking water aquifers. However, known contamination in perched aquifers is more
5 likely to be encountered in Third Runway Project construction, and is more likely to
6 discharge to surface waters. This is of particular concern because the many miles of
7 abandoned utility corridors beneath the airport are thought to be preferential
8 pathways for migration of contaminants, and are likely to be encountered during
9 Third Runway construction. Moreover, there is a serious risk that contaminants
10 mobilized by construction will not be detected at stormwater outfalls. This is because
11 the existing NPDES stormwater permit, adopted by reference into the Section 401
12 Certification, does not impose conditions adequate to identify all contaminants at
13 outfalls when they occur.
14

15
16 The purpose of the Agreed Order groundwater study is directly related to the
17 Section 401 process. There is a distinct risk that hazardous substances present in
18 groundwater beneath the airport will migrate and discharge to local streams as a
19 result of the Third Runway Project. Construction of the runway embankment and
20 especially the embankment underdrain provide pathways by which contaminated
21 groundwater may lead to violation of surface water quality standards. The Agreed
22 Order study, which would require the Port to determine ground water flow
23 characteristics and fate and transport of pollutants, and would model potential risks
24

1 to adjacent surface water bodies, is absolutely necessary to determine levels of risk
2 and whether Ecology can vouch for compliance with water quality standards. The
3 Port's failure to complete the study and Ecology's decision to issue the 401
4 Certification without it are omissions that undermine the reasonable assurance
5 requirements of the process.
6

7 **6) Embankment Fill Will Be Contaminated and at Risk of Leaching into
8 Wetlands and Surface Waters.**

9 The Section 401 Certification fails to provide reasonable assurance of
10 compliance with water quality standards because of the risk of migration and
11 discharge of groundwater polluted by contaminated leachate originating in the fill
12 materials utilized by the Port to construct the Third Runway Project. 33 U.S.C. §
13 1341; 40 CFR § 121.2; RCW 90.48.080; WAC Ch. 173-201A.

14 A fundamental component of the Project is the construction of an earthen
15 embankment to serve as a base upon which the third runway will sit. To do this, the
16 Port proposes to fill a canyon on the western edge of the airport with twenty (20)
17 million cubic yards of fill. The fill would be retained in part by the MSE wall (or, the
18 "Great Wall of Sea-Tac"), a retaining structure fifteen stories high. The embankment
19 would extend laterally 1.6 miles.
20

21 The Port has not received all permits to construct the project, including
22 specifically the Clean Water Act Section 404 permit that would allow it to fill
23 wetlands. However, to date the Port has already obtained and stockpiled three million
24

1 cubic yards of fill on airport property sites. In 1999, news broke that the Port's
2 stockpile included chemically contaminated soils, including polluted sediments from
3 the Seattle First Avenue Bridge and Hamm Creek dredge sites. It was further
4 determined that Washington has no specific standards that govern the quality of the
5 fill that the Port may place in its embankment. Lacking standards, the Port proposed
6 the use of MTCA Method 'A' Soil Cleanup Levels as a basis for assessing whether fill
7 is acceptable for the Third Runway Project. These criteria, partially modified, have
8 now been adopted into the Section 401 Certification.

10 MTCA Method A criteria are inappropriate standards in this setting. The
11 purpose of MTCA criteria is to determine when existing contaminated or hazardous
12 waste sites have been cleaned up to a reasonable level, taking into consideration
13 factors such as feasibility and future use. The proposed embankment area, including
14 the wetlands and streams to be filled, are now in relatively pristine condition.
15 Ecology's decision to allow the Port to use fill contaminated at Method A-type criteria
16 levels is basically a license to contaminate airport property up to a predetermined
17 level. This is a concept very much in conflict with the "anti-degradation"
18 requirements of state water quality standards.

21 ACC's concerns center on the fact that the use of chemical contaminants
22 associated with fill materials at the embankment site may percolate through the fill
23 pile to groundwater, ultimately discharging to and contaminating wetlands and
24

1 surface waters. Chemicals in the fill may also directly contaminate surface waters
2 through runoff following seasonal rains.

3 The Section 401 conditions relating to acceptance of fill are defective for many
4 reasons. These include the use of groundwater standards, rather than surface water
5 quality standards, as the basis for fill acceptance criteria; the failure to require
6 sampling for contaminants likely to be encountered under this approach; the failure to
7 establish criteria for said contaminants; and the lack of statistically meaningful
8 method to determine the location and extent of contamination in candidate fill
9 materials.
10

11 The Section 401 Certification is also deficient in its relationship to the NPDES
12 stormwater permit, which it adopts by reference, and which was recently modified to
13 address construction stormwater discharges caused by the Third Runway Project.¹
14 That permit, and the Section 401 Certification, impose BMP requirements designed to
15 control turbidity, pH, oil and grease, and temperature, but not the types of toxic
16 pollutants that are actually sampled for and expected to be found in the contaminated
17 fill used in the embankment.
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23 ¹ Ecology's major modification of the Port's NPDES Permit No. WA-002465-1, issued on May
24 29, 2001, is the subject of an appeal and request for stay now pending before the Board in the
25 matter of *CASE v. Ecology and Port of Seattle*, PCHB No. 01-090.

1 7) **Embankment Failure.**

2 The Section 401 Certification fails to provide reasonable assurance of
3 compliance with water quality standards because of its failure to address and provide
4 mitigation for potential failure during seismic events of all or portions of the MSE wall
5 and embankment structures. Any such failure will result in discharge of pollutants to
6 local streams, wetlands and other surface waters, and will lead to violation of state
7 water quality standards. 33 U.S.C. § 1341; 40 CFR § 121.2.

8 The Port of Seattle proposes to construct in a seismically sensitive area a
9 fifteen-story-high retaining wall 1500 feet in length to retain part of the 20 million
10 cubic yards of fill. While a project of this magnitude and importance should be held
11 to the highest standards, in fact, the seismic modeling and analyses conducted for the
12 MSE wall, particularly the potential for liquefaction of unstable fill materials, are
13 incomplete and incorrect. As a result, design specifications overestimate post-
14 earthquake stability, and the embankment is at risk of failure following a large seismic
15 event.

16 Because of the proximity of the embankment to local streams, failure of even a
17 part of the structure would likely have disastrous consequences to downstream water
18 bodies. In such an event, erosion and collapse of portions of the wall would result in
19 sediment loads and inundation to local streams that would be expected to violate
20 water quality standards. This risk is not trivial but has not been adequately addressed
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1 in the technical studies prepared for the Project. Moreover, the Section 401
2 Certification contains no mention of or conditions or mitigation for this risk.

3 **8) Wetland Impacts & Mitigation.**

4 The Section 401 Certification fails to provide reasonable assurance of
5 compliance with water quality standards because of its failure to address the impacts
6 of in-basin wetland fill and concomitant mitigation activities on water quality in the
7 streams surrounding Sea-Tac Airport. The proposed wetland mitigation activities are
8 likely to cause violations of state water quality standards. The Section 401
9 Certification also relies upon the Port's Natural Resources Mitigation Plan (NRMP),
10 which provides for both on-site and out-of-subbasin wetland creation and
11 enhancement. The NRMP fails to ensure adequate and appropriate mitigation for the
12 aquatic resources impacts caused by the Third Runway Project. 33 U.S.C. § 1341; 40
13 CFR § 121.2.
14

15
16 Under the Clean Water Act, the Port must mitigate for permanent obliteration
17 of approximately 20 acres of wetlands in and around the Third Runway site. The
18 Section 401 certification adopts the Port's proposal to enhance and create new
19 wetlands both on-site and at a site in Auburn, Washington, over 15 miles away from
20 the airport. Specifically, the Section 401 decision adopts, with modifications, the
21 Port's Natural Resources Mitigation Plan (NRMP) and performance standards, requires
22 the creation of a new (i.e., not in existence) plan to address impacts to additional lost
23
24

1 wetland acreage, requires imposition of restrictive covenants, and establishes
2 monitoring protocols.

3 While these requirements appear to mitigate, in terms of absolute numbers, the
4 wetland impacts of the Project, in fact the NRMP will not fully offset impacts to
5 streams, wetlands and riparian zones. By adopting the Port's NRMP, the 401
6 conditions ignore the lack of equivalence between the quality of the wetlands to be
7 destroyed, and those that are proposed in compensation. As a result, the Port's
8 mitigation results in a net loss in wetland functionality. This net loss occurs both as a
9 result of flawed proposals for on-site enhanced and replacement wetlands and failure
10 to identify and assess wetland functionality at the Auburn mitigation site.
11

12 The NRMP and the 401 Certification also fail to recognize the impacts of the
13 Third Runway Project on Miller Creek watershed hydrology, a degraded system where
14 watershed function is already compromised. The loss of wetlands representing 27%
15 of the remaining wetlands in the upper watershed will directly contribute to a decline
16 in aquatic ecosystem function, which is likely to result in violation of state water
17 quality standards. Cumulative effects analysis that would capture and consider this
18 problem is absent from the Port's wetlands impact studies.
19

20 Other problems with the Section 401 conditions include, but are not limited to,
21 failure to identify all permanent wetland impacts and to provide adequate
22 compensation for losses; inappropriate time frames for hydrologic monitoring (the
23 certificate requires monitoring between November and May, however the key time to
24

1 assess biologic communities in wetlands is March through June and saturation may
2 occur later in the summer); failure to require mitigation if wetland boundaries
3 decrease; lack of specificity in standards for conditions; and vague, incomplete and
4 inconsistent monitoring requirements.

5
6 **9) The Ecology Decision Was Issued Based on a Process which Violated
7 Applicable Regulations for Public Notice and Comment, and which Did
8 Not Comport with Due Process Requirements.**

9 The Section 401/404 application and associated public notice lacked sufficient
10 information to generate meaningful comments regarding essential elements of the
11 Third Runway Project and entirely excluded information on other projects and
12 activities which are reasonably related to the Third Runway project. For example, no
13 reference is made in the public notice to Gilliam Creek, the relationship to the Port's
14 application for a major modification to its NPDES permit, or to the planned temporary
15 interchange off of SR 509. In addition, the Port's piecemeal approach to assessing the
16 environmental impacts of the project to water quality has denied the public a
17 meaningful and timely opportunity to comment. One particularly egregious example
18 is the Port and Ecology releasing a still yet-to-be-completed Low Streamflow Analysis
19 only two weeks prior to issuance of the 401 Certification. 33 CFR §§ 325.3(a),
20 325.2(a)(2), 325.1(d)(3); 33 U.S.C. § 1341; 40 CFR § 121.2.

21
22 **10) The Section 401/402 Interface.**

23 The Section 401 Certification fails to provide reasonable assurance of
24 compliance with water quality standards because of its reliance upon previously and

1 prematurely issued NPDES permits, which do not specify with particularity that the
2 Port must, and how it will, prevent discharges which violate water quality standards.
3 The Section 401 Certification is also defective for its failure to specify performance
4 standards governing NPDES permits related to discharges from the Third Runway
5 Project that will prevent violation of water quality standards in receiving waters. 33
6 U.S.C. § 1341(d).
7

8 The Section 401 Certification adopts by reference two NPDES permits recently
9 issued for the Third Runway Project, a stormwater permit governing construction at
10 the Auburn wetlands mitigation site, and a major modification to the existing
11 stormwater permit for the airport site. The latter permit is the subject of an appeal
12 and stay motion now pending before the Board.
13

14 The Section 401 Certification and the NPDES permits for the Third Runway are
15 integrally linked. NPDES permits should be designed to control discharges in a
16 manner that leads to compliance with water quality standards. The 401 Certification
17 may rely upon the permit, but must do so in a manner that is consistent with Section
18 401 law, which requires the imposition of effluent limitations and contemporaneous
19 compliance with water quality standards at the time the Certification issues.
20

21 Ecology issued a modification of the Port's NPDES stormwater permit in May
22 2001. That permit, standing alone, is deficient. It fails to identify discharge points,
23 fails to control for all pollutants that may reasonably be predicted to be present in
24 Third Runway construction stormwater (such as toxic chemicals imported in the
25

1 embankment fill), and fails to provide for monitoring to determine compliance with
2 standards. Without this information it is impossible to determine the quality and
3 impacts of permitted discharges. By adopting these permits into the Section 401
4 Certification, Ecology has duplicated and compounded its original error in issuing the
5 permits. Lacking specific performance standards, the Section 401 Certification cannot
6 guarantee that the discharges from the Third Runway Project will not violate water
7 quality standards.
8

9 The NPDES permit is also deficient as a mechanism to implement Section 401
10 requirements. For example, it fails to provide for all known available and reasonable
11 treatment for construction stormwater and operational stormwater discharges. This
12 higher standard of pollution control is required under Section 401(d) of the Clean
13 Water Act, 33 U.S.C. § 1341(d), which requires the imposition of effluent limitations
14 to control point source discharges. It is also necessary because the Port's existing
15 stormwater discharges, historically and at present, violate water quality standards.
16

17 The Section 401 decision is also defective and illegal because it authorizes a de
18 facto mixing zone. Mixing zones are authorized under WAC 173-201A-100, which
19 establishes stringent standards for the creation and implementation of this tool. The
20 Section 401 Certification does not comply with the requirements of this regulation, in
21 that the location of discharges is unknown, types of pollutants are not identified, no
22 study has been conducted to determine potential loss of habitat, and AKART has not
23 been applied.
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NOTICE OF APPEAL - 42

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1 **11) The 401 Certificate Fails to Provide Reasonable Assurance That Water**
2 **Quality Standards Will Not Be Violated in Gilliam Creek.**

3 The Section 401 Certification fails to provide reasonable assurance of
4 compliance with water quality standards because of its failure to identify and mitigate
5 for Third Runway Project construction-related discharges and other impacts to
6 Gilliam Creek, a stream system adjacent to Sea-Tac International Airport. 33 U.S.C. §
7 1341; 40 CFR § 121.2.

8 The existing NPDES permit for the airport also establishes unspecified points
9 along Gilliam Creek as new points of stormwater discharge. This authorization thus
10 connects Gilliam Creek as a surface water body potentially impacted by the Third
11 Runway Project. The Port's own Biological Assessment also acknowledges that Third
12 Runway construction or other activities will generate runoff to Gilliam Creek.
13 Notwithstanding this new information, neither the Port's submittals nor the Section
14 401 certification itself address impacts to Gilliam Creek and mitigation to ensure
15 compliance with water quality standards.
16
17

18 **12) Dam Safety.**

19 The Section 401 Certification fails to provide reasonable assurance of
20 compliance with water quality standards because of its failure to identify and specify
21 performance standards for structures subject to Dam Safety requirements. 33 U.S.C.
22 §1341; 40 CFR § 121.2; and WAC 173-1175-010, *et seq.*
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1 **13) Ecology's Concurrence With the Port's Certification of Consistency**
2 **With the Coastal Zone Management Act Fails to Comply With the Act.**

3 The concurrence issued by Ecology pursuant to the Coastal Zone Management
4 Act of 1972, 16 U.S.C. §§1451 to 1464 ("CZMA"), for the Port's consistency
5 certification fails to comply with procedural and substantive requirements of the
6 CZMA and Washington's approved Coastal Zone Management Plan. See Managing
7 Washington's Coast - Washington's Coastal Zone Management Program, Department
8 of Ecology Publication Number 00-06-029 (February 2001) (the "CZMP").

9 The Port's certification failed to provide all necessary data and information
10 required by the CZMA and the CZMP. The regulations implementing the CZMA
11 require an applicant to submit with its certification, among other things, necessary
12 data and information that is adequate to permit an assessment of a project's probable
13 coastal zone effects; a brief assessment relating those effects to the relevant elements
14 of the CZMP; and a set of findings, derived from the assessment, indicating that the
15 proposed project is consistent with the enforceable provisions of the CZMP.
16 See 15 C.F.R. § 930.58(1)-(4); see also CZMP at 116. Further, the findings must
17 demonstrate adequate consideration of policies that are "in the nature of
18 recommendations." 15 C.F.R. § 930.58(4); CZMP at 103-107 (discussion of
19 complementary state policies and programs).
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1 The Port's certification failed to meet these requirements and accordingly,
2 Ecology's concurrency should be reversed and the Board should issue an objection to
3 the Port's certification.

4 The Port's certification failed to demonstrate consistency with the enforceable
5 policies of the CZMP, including the Shoreline Management Act, Ch. 90.58 RCW
6 ("SMA"); the Clean Water Act, 33 U.S.C. §§1251 to 1387 ("CWA"), and its State
7 counterpart, Ch. 90.48 RCW; the Clean Air Act, 42 U.S.C. §§ 7401 to 17671 ("CAA"),
8 and its State counterpart, Ch. 70.94 RCW; and the State Environmental Policy Act, Ch.
9 43.21C RCW ("SEPA").

10 The Port obtained a SMA exemption (from the Substantial Development Permit
11 requirement) for the Auburn Wetland Mitigation Site. The Port's actions are not
12 consistent with the SMA because the Port has improperly segmented review of the
13 Auburn Mitigation site from all other elements of the third runway project. *See e.g.*
14 *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 850-851, 509 P.2d 390 (1973). Further,
15 an exemption from the substantial development permit requirement is not an
16 exemption from compliance with the SMA and local master programs. WAC 173-27-
17 040. Accordingly, even if the exemption were properly issued, the Port's CZMA
18 certification is inadequate for failing to analyze the consistency of the Third Runway
19 Project with the goals and policies of the SMA and each applicable local jurisdiction
20 master plan.
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1 The Port's certification fails to demonstrate consistency with the Clean Water
2 Act. If the Project is denied Section 401 certification for failure to provide reasonable
3 assurances of compliance with state water quality standards, then the Port's CZMA
4 certification is also inadequate for failure to establish consistency with the Clean
5 Water Act, an enforceable policy of the CZMP.
6

7 The Port's certification fails to demonstrate the consistency of the third runway
8 project with SEPA. Environmental review is inadequate because it fails to analyze
9 impacts of changes to the third runway that are different from the impacts analyzed in
10 the SEIS or the FSEIS for the project. A supplemental impact statement should be
11 used when "there are substantial changes so that the proposal is likely to have
12 significant adverse impacts . . . [or there is] new information indicating a proposal's
13 probable significant adverse impacts." WAC 197-11-600(4)(d). Rather than issue an
14 additional SEIS, the Port has segmented environmental review through
15 determinations of nonsignificance and by the issuance of four separate addenda when
16 one more detailed Supplemental EIS should have been prepared. In this case, the
17 issuance of four addenda violates SEPA because it also avoids discussion of
18 cumulative impacts of all changes contemplated in the four addenda. *See e.g., Indian*
19 *Trails Property Owner's Association v. City of Spokane*, 76 Wn. App. 430,443, 886 P.2d
20 209 (1994) (noting that phased review is inappropriate where it results in the
21 avoidance of discussion of cumulative impacts).
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1 **14) The Port's Failure to Update Environmental Review for the Project**
2 **Pursuant to SEPA Requirements Renders the Section 401 Certification**
3 **Invalid.**

4 The Port has conducted incomplete environmental review of the Third Runway
5 Project. The Port and the Federal Aviation Administration jointly issued a final
6 environmental impact statement for the STLA Master Plan Update in February 1996.
7 A final supplemental EIS was issued in May 1997. While these initial EISes
8 considered a variety of issues related to the Project (e.g., airport demand, traffic,
9 general runway design), they did not consider a number of major design elements that
10 were incorporated into the project post-EIS. For example, the Port has not conducted
11 subsequent SEPA/NEPA review for the Stormwater Management Plan, the Low
12 Streamflow Analysis and Flow Impact Offset Proposal, the use of contaminated fill for
13 the embankment, and a number of newly disclosed impacts to local streams.

14 While Ecology's action of certifying compliance with Section 401 is exempt
15 from SEPA requirements, Ecology's decision necessarily rests on complete and
16 comprehensive environmental review conducted by the third-party applicant.
17 Because the Port has failed to supplement the Master Plan Update Final and
18 Supplemental EISes with information about new elements of the construction and
19 newly discovered impacts of the Project, Ecology has no environmental review upon
20 which to base its Section 401 decision. The Section 401 decision is therefore invalid
21 for lack of compliance by the Port with the requirements of the state and federal
22 environmental policy acts. RCW Ch. 43.21C; 42 U.S.C. §4321, *et seq.*

1 **VI. RELIEF SOUGHT**

2 Appellant seeks a stay of the August 10, 2001, Section 401 Certificate and
3 CZMA concurrence based both on a likelihood of success on the merits and on the
4 irreparable harm that will occur if the project is allowed to go forward while this
5 appeal is pending. A request for a scheduling conference to set expedited briefing and
6 hearing for Appellant's request for stay accompanies this Notice of Appeal.
7

8 Appellant seeks an order of the Board determining that the Section 401
9 Certificate No. 1996-4-02325 is invalid and vacating the Department of Ecology's
10 issuance of the Certificate.

11 Appellant further seeks an order directing the Department to commence a new
12 Section 401 process that assures Appellant and the public the opportunity to submit
13 informed comments in the event the Port of Seattle seeks re-issuance of a Section 401
14 certification.
15

16 Appellant reserves the right to amend its appeal in any respect, and to plead
17 and present additional legal theories and errors over those alleged herein, and to
18 request that the pleadings be amended to conform to the evidence.
19

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NOTICE OF APPEAL - 48

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Appellant requests that all further notices and pleadings in this matter be served upon its attorneys at the address given in section 1 above.

DATED this 27th day of August, 2001.

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