

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,	)	No. _____
)	
Appellant,	)	ACC'S NOTICE OF APPEAL OF
	)	REISSUED/AMENDED SECTION 401
v.	)	CERTIFICATION, INCORPORATING
	)	ACC'S PRIOR NOTICE OF APPEAL
DEPARTMENT OF ECOLOGY; and	)	AND ACCOMPANYING EXHIBITS
THE PORT OF SEATTLE,	)	AND DOCUMENTS
)	
Respondents.	)	(Department of Ecology "Order No. 1996-
	)	4-02325 (Amended - 1)," Issued
	)	September 21, 2001)

Pursuant to the Agreement and Order Re Rescission of 401 Certification, signed by the Board on September 20, 2001, under PCHB Nos. 01-133 and 01-150, and pursuant to the Department of Ecology's rescission and reissuance of the (amended) Clean Water Act Section 401 Certification Order No. 1996-4-02325 (Amended - 1) on September 21, 2001 ("Amended Certification"), the Airport Communities Coalition hereby files its Notice of Appeal of the Amended Certification. A copy of the Amended Certification is attached to this Notice of Appeal.

This Notice of Appeal incorporates by reference ACC's previous Notice of Appeal and accompanying exhibits and documents, filed with the Board (PCHB No. 01-133) and served on the Port and Ecology on August 23, 2001, as contemplated on page 3 of the Board's September 20 Order. In general, changes reflected in the Amended Certification reduce or eviscerate already inadequate

ACC'S NOTICE OF APPEAL OF AMENDED SECTION
401 CERTIFICATION - 1

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

1 "protections" provided under the original 401 Certification. ACC therefore submits the following
2 supplemental grounds for appeal:

3 1. The Amended Certification was issued in violation of applicable regulations in WAC
4 Chapter 173-225, including but not limited to WAC 173-225-030(1) (public notice requirements), -
5 030(2) (opportunity for public comment), and -030(3) (requirement for departmental determination
6 concerning public hearing), and without opportunity for comment by the public and agencies with
7 jurisdiction.
8

9 2. The Amended Certification is invalid for failure to comply with applicable federal
10 regulations, including but not limited to 40 C.F.R. §121.2(a)3 and §121.2(b).
11

12 3. The Amended Certification has been limited to "Port 404 projects," withholding all of
13 the "protections" (which have fundamental defects in any event) touted in the Certification from
14 significant portions of the overall work which the Port proposes to perform at the site. This change
15 violates the requirement for reasonable assurance that the project as a whole will not result in a
16 violation of state water quality standards.
17

18 4. The Amended Certification further improperly limits its scope (including its
19 geographical, operational, and temporal reach), all in violation of Section 401 of the Clean Water Act,
20 and in doing so fails to address "direct and indirect, short and long term, upstream and downstream,
21 construction and operation" impacts, all of which must be a part of the State's 401 certification review
22 and order. In doing so, the Amended Certification allows the Port to unilaterally commence activities
23 impacting the waters of the state without Section 401 review and certification.
24

25 ACC'S NOTICE OF APPEAL OF AMENDED SECTION
401 CERTIFICATION - 2

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 023882

1 5. The Amended Certification violates the requirement in WAC 173-201A-160(3)(a) and
2 (b), that "violation of water quality criteria shall be prevented."

3 6. The Amended Certification impermissibly limits the protections afforded under Section
4 401 of the Clean Water Act by stating the 401 conditions will be superseded "by any future Ecology-
5 approved NPDES permit for the Seattle-Tacoma International Airport (STIA), ... as determined in that
6 permit." *See, e.g.*, Amended Certification at p. 4, § 1.f.

7 7. The Amended Certification dispenses with the requirement for pre-construction
8 hydrologic monitoring (underscoring Ecology's failure to require adequate baseline data) and further
9 impermissibly reduces monitoring and buffering protection for wetlands, all necessary for reasonable
10 assurance that water quality standards will not be violated with regard to wetlands.

11 8. The Amended Certification further reduces the application of the already-deficient
12 conditions (including testing, content and locational criteria) for acceptance of fill in violation of the
13 Clean Water Act, eliminating even the pretense of reasonable assurance. It reduces Ecology's time and
14 authority to review proposed fill, eliminating as a practical matter the ability to prevent placement of
15 contaminated fill, all inconsistent with reasonable assurance necessary for 401 certification. *See, e.g.*,
16 Amended Certification at pp. 14-19, Condition E.

17 9. The Amended Certification substitutes fill criteria and fill acceptance conditions which
18 further weaken the inadequate conditions in the original Certification. *See, e.g.*, Amended Certification
19 at pp. 14-19, Condition E.

20
21
22
23
24
25 ACC'S NOTICE OF APPEAL OF AMENDED SECTION
401 CERTIFICATION - 3

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201

AR 023883

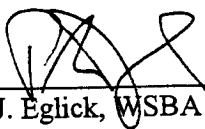
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

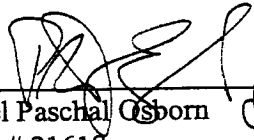
(3) An order directing the Department, upon proper application by the Port, to commence a new Section 401 process that assures Appellant and the public the opportunity to submit informed comments.

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

DATED this 1 day of October, 2001.

HELSELL FETTERMAN LLP

By: 
Peter J. Eglick, WSBA #8809
Kevin L. Stock, WSBA #14541
Michael P. Witek, WSBA #26598
Attorneys for Appellant


Rachael Paschal Osborn
WSBA # 21618
Attorneys for Appellant

g:\u\acc\pchb\noticeofappeal-100101.doc

ACC'S NOTICE OF APPEAL OF AMENDED SECTION 401 CERTIFICATION - 5

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Ave.
Spokane, WA 99201