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November 29, 1999

U.S. Army Corps of Engineers
Regulatory Branch
P.O. Box 3755
Seattle, WA 98124-2255
ATTN: Jonathan Freedman, Project Manager

Re: File No. 1999-4-02325, Seattle, Port of
File No. 1996-4-02325, Seattle, Port of

Greetings:

The following comments are submitted to the Army Corps of Engineers (Corps) on behalf of Citizens Against Seatac Expansion (CASE). CASE believes that granting the Port of Seattle (Port) a permit under section 404 of the Clean Water Act (CWA) for the above-referenced application, as revised, would be contrary to the public interest, impermissible under the controlling federal regulations, and arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Most specifically, as discussed below, the proposed activity, as revised, cannot be permitted because it would cause or contribute to violations of State water quality standards. *See,* 40 CFR 230.10(b)(1). In addition, the proposed activity, as revised, cannot be permitted because it would result in the violation of toxic effluent standards for copper and zinc. *See,* 40 CFR 230.10(b)(2), and WAC 173-201A-040. Further, the proposed activity, as revised, cannot be permitted because it would cause or contribute to significant degradation of the waters of the United States. *See,* 40 CFR 230.10(c).

As required by the Corps' own regulations, "a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines." *See,* 33 CFR 320.4(a)(1). And "[i]n evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 CFR part 230.10(a) (1), (2), (3))." 33 CFR 320.4(b)(4).

The Corps Must Consider the Cumulative Impacts of All Current and Proposed Activities at Sea-Tac Airport in Evaluating the Proposed Discharge

At the outset, it is important to consider the scope of the analysis required of the Corps. The regulations emphasize a "fundamental" precept – that:

> dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.

40 CFR 230.1(c) (emphasis added). This requirement is a "presumption against discharge" which applies to the Corps' decision-making process. 40 CFR 230.6(c).

Further, in evaluating the impacts the Corps must "determine in writing" the potential short-term and long-term effects of the proposed discharge on the physical, chemical, and biological components of the aquatic environment, including a determination of "secondary effects on the aquatic ecosystem." 40 CFR 230.11(h). As the regulations explain,

> (1) Secondary effects are effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material. Information about secondary effects on aquatic ecosystems shall be considered prior to the time final section 404 action is taken by permitting authorities.
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> (2) Some examples of secondary effects on an aquatic ecosystem are . . . surface runoff from . . . commercial developments on fill . . . . Activities to be conducted on fast land created by the discharge of dredged or fill material in waters of the United States may have secondary impacts within those waters which should be considered in evaluating the impact of creating those fast lands.

40 CFR 230.11(h) (emphasis added).

In short, the law requires the Corps to consider not just the adverse environmental impacts of the fill itself, but also the adverse environmental impacts of the activities to be conducted on the fill. These "secondary effects" of the proposal, as revised, include all of the impacts on the aquatic ecosystem that will result from the activities to be conducted on the Third Runway, in the Runway Safety Areas, and in the South Aviation Support Area. Further, because the regulations require the consideration of cumulative impacts on the ecosystem – *see* 40 CFR 230.1(c) and 230.11(g) – the Corps must also consider the ongoing impacts of the operations at Sea-Tac Airport as presently configured. And because one purpose of the proposed fill, as revised, is to meet future demand for air transportation, the Corps must also consider the impacts of projected growth at Sea-Tac.

Consideration of these ongoing and projected impacts confirms that the proposed discharge cannot lawfully be permitted.

Washington's Water Quality Standards and Toxic Effluent Standards

Under the law, "No discharge of dredged or fill material shall be permitted if it: (1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard; [or] (2) Violates any applicable toxic effluent standard or prohibition under [CWA] section 307 . . . ." 40 CFR 230.10(b)(1)-(2). Washington's water quality standards are set forth in WAC 173-201A. Washington's water quality standards for toxic substances are set forth in WAC 173-201A-040. Both copper and zinc are regulated as toxic substances under Washington's water quality standards. *Id.*

With respect to ongoing violations of water quality standards resulting from the Port's current operations at Sea-Tac Airport, CASE adopts and incorporates by reference the separate comments and exhibits of Greg Wingard, dated November 29, 1999. In light of this and other evidence of ongoing water quality violations resulting from the Port's operations, (*e.g.*, the inclusion of Des Moines Creek on the list of water-quality impaired water bodies issued pursuant to CWA section 303(d)), the proposed permit cannot be granted.

Moreover, where "there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines[,]" the regulations require that the proposed disposal site must be specified as failing to comply with the requirements of the guidelines. *See,* 40 CFR Part 230.12(a)(3)(iv). Accordingly, the applicant – not the public – bears the burden of proof on this issue.

Significant Degradation of Waters

The law likewise prohibits the permitting of discharges of dredged or fill material which will cause or contribute to significant degradation of the waters of the United States. *See,* 40 CFR 230.10(c). Under the guidelines, such effects include significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability – including the "loss of fish and wildlife habitat."

As revised, the proposed fill expressly involves the loss of wildlife habitat which will not be mitigated in the impacted Miller Creek and Des Moines Creek watersheds. Specifically, the Port proposes to destroy – without on-site mitigation – valuable bird habitat functions. The proposed "Auburn wetland mitigation site" will do nothing to ameliorate the significant degradation of the impacted waters of the United States. Rather, the proposed mitigation is insufficient because it fails to avoid the destruction of remnant natural sites within areas already affected by development. *See,* 40 CFR 230.75(f).

The Corps Must Prohibit Violation of State Water Quality Standards and Toxic Effluent Standards as a Condition of any Permit Issued

The Port's NPDES permit covering operations at Sea-Tac Airport does not explicitly prohibit discharges of pollutants that would violate – or contribute to violations of – state water quality standards. As a result, the Port presently enjoys a "permit shield" enabling it to violate such standards with impunity. In light of this glaring deficiency, a special condition expressly prohibiting discharges of pollutants that would violate or contribute to violations of state water quality standards is necessary to "satisfy legal requirements or to otherwise satisfy the public interest requirement." *See,* 33 CFR 325.4(a).

The foregoing comments are not meant to be exhaustive. CASE reserves the right to supplement its comments, and urges the Army Corps of Engineers to deny the above-referenced permit application.

Very truly yours,

Smith & Lowney, P.L.L.C.

By: /s/
Richard A. Poulin
Of Counsel