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AR 024424

JUNE 5, 2001

MORNING SESSION

10:29 A.M.

* * * * *

THE COURT: I understand that it's been unbearable. Well, it was very hot, and then it was very hot this morning. So we're going to try to do -- keep this open. And it's not that bad right now.

MS. JONES: No. Thank you, your Honor. It helped a lot.

THE COURT: So maybe we're going to go post a sign.

THE BAILIFF: I did.

THE COURT: All right. And we're at the end of the hall, so it shouldn't be too bad with the door open.

Anyway, again, I apologize for being a little bit late, Counsel. My dentist found something and so he had to do something, and so it's bad news for me, but not bad -- not as bad news for you, all right? Thank you.

Counsel, we're ready for our next witness, then.

MS. JONES: Thank you, your Honor. The Port calls James Kelley.

1 THE COURT: Okay. Mr. Kelley, could you
2 step forward, please, and stand right in front of the
3 court reporter and raise your right hand?

4 JAMES C. KELLEY, PH.D., called as a witness on
5 behalf of the Petitioner,
6 after being first duly
sworn, was examined and
7 testified as follows:

7 THE COURT: Thank you. Please be seated in
8 that first chair there. And watch your step as
9 you're stepping up.

10 DIRECT EXAMINATION

11 MS. JONES:

12 Q. Mr. Kelley, please state your name.

13 A. James C. Kelley.

14 Q. And what is your job title?

15 A. I'm a senior wetland ecologist at Parametrix,
16 Incorporated.

17 Q. Okay. What is your job description, other than your
18 title?

19 A. I'm a wetland biologist.

20 Q. And what does that involve?

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21 A. That involves evaluating property for -- to identify
22 wetland conditions, areas that meet the Federal and
23 state criteria for wetlands, and to advise property
24 owners and state and government agencies on how the
25 presence of wetlands might affect the development

1 potential or the ability for them to implement a
2 project.

3 Q. Mr. Kelley, you said that you worked for Parametrix.
4 Can you explain a little bit about what Parametrix is
5 or what its business is?

6 A. Yes. We're an environmental consulting and
7 engineering design firm. And we assist property
8 owners, public agencies, and others in the design and
9 permitting of environmental and engineering projects.

10 Q. Okay. Can you talk a bit about who -- you said you
11 advise public and other clients. Who are some of the
12 public clients that you have had that you kind of
13 advise work for?

14 A. We're currently working on permitting projects with
15 the Port of Seattle. We work with the Washington
16 State Department of Transportation on transportation
17 roadway projects, interchange improvement projects,
18 and work with Sound Transit, local communities,
19 public works departments that need to change or
20 replace bridges, culverts, add lanes to roads, et
21 cetera.

22 Q. You also said you worked for other clients, as well.
23 Do you work for private -- does Parametrix still do
24 work for private clients?

25 A. Yes, we do work for private clients. I have

1 specifically been involved in conducting -- we had
2 land evaluations on property that's under
3 consideration as private development. I've worked on
4 projects such as the South Hill Village Mall in
5 Puyallup. I've worked on numerous housing
6 developments, short plat type developments, in King
7 County, Snohomish County, and in Pierce County;
8 worked for industries such as the Simpson Tacoma
9 Craftmill in Tacoma, and Alcoa Aluminum.

10 Q. Thank you.

11 Have you been retained to reach an expert
12 opinion with regard to wetlands being taken on
13 property being taken by the Port of Seattle for the
14 third runway?

15 A. Yes, I have.

16 Q. Okay. And does that work include delineation of
17 wetlands on Parcel 92?

18 A. Yes, it has.

19 Q. And do you understand that Parcel 92 is one piece of
20 property that is owned by a corporation called RST?

21 A. Yes.

22 Q. Okay. Have you reached an opinion as to the
23 existence of wetlands on Parcel 92?

24 A. Yes, I have.

25 Q. Okay. And have you reached an opinion as to the

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1 existence of agricultural wetlands on Parcel 92 as
2 those are defined in the SeaTac City Code?

3 A. Yes.

4 Q. Okay. We'll talk about your opinions in a moment,
5 and the basis for them, but first I'd like to talk
6 briefly about your qualifications, please. Can you
7 describe briefly your education?

8 A. Yes. I have a Bachelor's of Science degree from the
9 University of Vermont, which I obtained in 1978. And
10 at that time, I studied plant ecology and botany.
11 Then I went to graduate school at Michigan State
12 University, where I obtained a master's degree in
13 plant biology, specifically ecology and botany. And
14 I received a doctoral degree from Michigan State
15 University, where I studied wetland ecology and
16 wetland ecosystems near Lake Michigan.

17 Q. Was your dissertation on wetland ecosystems near Lake
18 Michigan?

19 A. Yes, that's correct.

20 Q. Have you done any postdoctoral research?

21 A. I was employed at the University of Minnesota in
22 Duluth for two years, where I worked on some
23 postdoctoral research project investigating wetlands
24 in Voyageurs National Park.

25 Q. Okay. And could you just talk briefly about your

1 work history since you left your postdoctoral work at
2 Minnesota?

3 A. Yes. I've been in the Seattle area since 1987. And
4 at that time, upon moving here, I started working in
5 the consulting industry and have been essentially
6 conducting the job description that I provided a few
7 moments ago since 1987.

8 Q. Okay. You said a few moments ago that you have --
9 are doing work for the Port of Seattle on wetlands
10 for the third runway project. Can you explain in a
11 little more detail the kind of work that you've been
12 retained to do on the Third Runway Project?

13 A. Yes. This work has involved identifying where the
14 Port's third runway and other master plan projects
15 may impact wetlands or may require the filling of
16 wetlands, identifying the regulatory criteria or the
17 development criteria that apply to those wetlands,
18 and assisting the Port in designing a strategy and
19 plan to mitigate those environmental impacts to
20 wetlands so that they can obtain the required permits
21 and proceed with the master plan projects.

22 Q. Have you reached an opinion as to the existence of
23 wetlands on the property that is being -- all the
24 property that is being taken for the third runway?

25 A. Yes, we have.

AR 024430

1 Q. And does that opinion include wetlands on Parcel 92?

2 A. Wetlands on Parcel 92 are not being filled by the
3 Third Runway Project. Wetlands on Parcel 92 are
4 incorporated into part of the mitigation that's
5 proposed for the Third Runway Project.

6 Q. Okay. Let's talk about that. You have in front of
7 you, Mr. Kelley, three books of exhibits. And I'm
8 going to draw your attention to Exhibit No. 19. Do
9 you recognize that Exhibit No. 19?

10 A. Yes, I do.

11 Q. And what is that, please?

12 A. This is a map of wetlands and prior converted
13 cropland at the -- what we call the Vacca Farm area,
14 which includes Parcel 92 and several other land
15 parcels in the same general area.

16 Q. Okay. And is this map that is represented by Exhibit
17 No. 19 a part of a larger wetland delineation report
18 that you have --

19 A. Yes, that's correct.

20 Q. Can you show the Court on the -- well, let's look --
21 actually, let's also look at Exhibit No. 21, please,
22 just a couple tabs. I think, actually, that Exhibit
23 21 looks closer to the blow-up; is that right? I'm
24 sorry.

25 A. That's correct.

1 Q. Can you tell -- could you explain the difference
2 between Exhibit No. 19 and Exhibit No. 21?

3 A. Exhibit No. 19 is indicating wetlands that the Corps
4 of Engineers takes jurisdiction over in the case of
5 the permit application that is under consideration
6 for the Port of Seattle.

7 Q. Okay.

8 A. And Exhibit 21 was prepared in assisting the Corps in
9 determining what is jurisdictional wetland, and
10 identifies a category of wetland called prior
11 converted cropland, which the Corps does not take
12 jurisdiction over. However, the prior converted
13 cropland does still have wet soils and hydric soil
14 conditions.

15 MS. JONES: Okay. We'll talk about that
16 for a moment. But before we do that, your Honor, I
17 move to admit Exhibit Nos. 19 and 21.

18 THE COURT: Any objection?

19 MR. ARAMBURU: Voir dire, your Honor.

20 THE COURT: Sure.

21 VOIR DIRE EXAMINATION

AR 024432

22 BY MR. ARAMBURU:

23 Q. I notice that, some of the data plots are missing on
24 Exhibit 21 that are found on Exhibit 19, could you
25 tell me why that is?

1 A. I think that the explanation of that would be that
2 figure 19 was prepared at a later date, compared to
3 21, and some additional data have been collected in
4 the field and mapped on that figure at that time.

5 Q. Actually, Exhibit 21 appears to be several days later
6 by the date at the bottom?

7 A. That would -- that would be the print date and not
8 necessarily the date that the figure was actually
9 prepared.

10 Q. Okay. So the data show on Exhibit 21 was more
11 preliminary information than shown on 19?

12 A. I don't know that I would characterize it as
13 preliminary.

14 Q. But the additional data plots that are shown on 19
15 were taken after the data plots shown on 21?

16 A. Yes, that's what I -- yes.

17 MR. ARAMBURU: No objection to 19 and 21.

18 THE COURT: Exhibit Nos. 19 and 21 are
19 admitted.

20 CONTINUED DIRECT EXAMINATION

21 BY MS. JONES:

22 Q. Mr. Kelley, looking at Exhibit No. 19, just to carry
23 on Mr. Aramburu's comments for a moment, are those
24 data plots on number 19 all placed in areas -- or
25 primarily placed in areas where you appear to have

1 delineated wetland boundaries?

2 A. Yes, that's -- that's correct. When we conduct
3 wetland delineations and prepare wetland reports, we
4 need to collect -- collect data sheets and include
5 those in our reports that characterize the general or
6 typical conditions of the wetland. And typically, we
7 identify a data sheet within a wetland boundary and
8 outside the wetland boundary to kind of contrast
9 the -- those two conditions. That helps the Corps of
10 Engineers, in their evaluation of the record, review
11 the information on the wetland and come to their
12 jurisdictional decision.

13 Q. Okay. And --

14 THE COURT: Counsel, hold on just a minute.
15 I take it, when you're talking about data plots,
16 those are the red marks?

17 MS. JONES: That's right. I'll ask the
18 witness.

19 A. That is correct.

AR 024434

20 MS. JONES: Thank you, your Honor.

21 Q. (By Ms. Jones:) What are data plots, Mr. Kelley?

22 A. Well, those are specific locations where we dig a
23 hole generally 18 inches deep. We examine soil
24 conditions for hydric soil. The criteria -- there's
25 specific criteria that the Corps uses to identify

1 whether a soil is wetland or non-wetland. The
2 wetland soils are termed hydric soils. Also, in
3 the -- in those locations, we examine and identify
4 very specifically what kind of plants are growing at
5 that location and whether they're classified as
6 wetland plants by the Army Corps of Engineers. And
7 we also examine the hydrology of the site and
8 determine whether site conditions are wet or not, and
9 whether they meet the criteria for wetland hydrology.

10 Q. Mr. Kelley, could you turn to Exhibit No. 24 in your
11 exhibit book there?

12 A. Yes.

13 Q. Can you identify this document?

14 A. Yes. This is a Wetland Delineation Report for Master
15 Plan Update Improvements at Seattle-Tacoma
16 International Airport.

17 Q. And was this prepared by you?

18 A. Yes, it was.

19 Q. Okay. And does it anywhere in that document show the
20 worksheets that coincide with the data plots that you
21 indicated on the maps that are Exhibit 19 and 21?

22 A. Yes. There's an appendix to this report that
23 provides the data sheets. And there's a methodology
24 section that explains the process of collecting data
25 required for the wetland delineation.

1 Q. Now, this is entitled Revised Draft. Is this the
2 final wetland delineation report that was submitted
3 to the -- prepared for the Port of Seattle?

4 A. No. This is a -- a final draft was prepared in
5 December of 2000. And there were some minor changes
6 to that draft and other areas -- for other areas of
7 the Port's projects, but there were no changes to
8 condition -- wetland conditions on Parcel 92.

9 Q. Thank you.

10 MS. JONES: The Port moves for the
11 admission of Exhibit 24.

AR 024436

12 THE COURT: Any objection?

13 MR. ARAMBURU: No objection, your Honor.

14 THE COURT: Exhibit No. 24 is admitted.

15 Q. (By Ms. Jones:) On Exhibit No. 21, the one that you
16 call -- that's called figure C1 at the top, Mr.
17 Kelley. Can you -- I know, actually I want to back
18 up and ask a question. You said that the Port does
19 not take -- or that the Corps of Engineers does not
20 take jurisdiction over what are called prior
21 converted croplands, which you've outlined on Exhibit
22 21. Can you explain a little more detail what it
23 means for the Corps of Engineers to take jurisdiction
24 of a wetland?

25 A. Yes. Taking jurisdiction would be meaning that the

1 Corps -- environmental staff have evaluated
2 conditions on a site, determined conditions to be
3 wetland, and determined that that wetland is under --
4 is under regulation of the Clean Water Act, section
5 404.

6 Q. And what does it mean, just to make it real clear, if
7 the Corps does not take jurisdiction?

8 A. If the Corps does not take jurisdiction, then they
9 reach a conclusion that the area is neither wetland
10 or for some other reason is exempt from -- from
11 regulation by the Corps under section 404 of the
12 Clean Water Act.

13 Q. Okay. Why do the Corps -- why does the Corps of
14 Engineers for permitting purposes want to know about
15 wetlands so that people like you get hired to
16 delineate them? What's the point?

17 A. Well, the larger point is for environmental
18 protection, that wetlands are important ecological
19 areas that help maintain stream, wildlife habitat,
20 and other ecosystem functions or conditions that
21 society values.

22 Q. And so having found the information that the Corps of
23 Engineers want -- the Corps of Engineers wants for
24 issuing a permit, is there something that the Port of
25 Seattle must do once that information is made clear?

1 A. Yes. Once we identify what is a wetland and provide
2 the Corps with that information and they concur with
3 that, then we evaluate project impacts to wetlands.
4 And if there are impacts to important natural
5 resources as a result of filling or altering
6 wetlands, then mitigation is planned to compensate or
7 replace those environmental impacts.

8 Q. Have you and Parametrix worked on a mitigation plan
9 for the wetlands that you have delineated for the
10 Port of Seattle for the Third Runway Project?

11 A. Yes, we have.

12 Q. Okay. And can you explain a little bit about what
13 wetland mitigation means? **AR 024438**

14 A. Well, mitigation is our actions that are taken to
15 compensate or replace for other environmental impacts
16 of a project. So in the case of wetlands, most
17 typically the projects may require filling wetland to
18 accommodate some development. And a mitigation plan
19 is proposed to either create new wetlands, to replace
20 those that have been filled, or to enhance or restore
21 some existing wetlands that may have been -- maybe
22 not totally eliminated, but partially destroyed by
23 some other previous land use activity.

24 Q. Will the construction of the third runway actually
25 result in the filling in of some wetlands in the area

1 where the runway's to be built?

2 A. Yes. The third runway construction would fill 18.37
3 acres of wetland.

4 Q. Okay. And what happens -- what is the Port required
5 to do as far as the Corps of Engineers is concerned
6 to mitigate the impact of the loss of those 18.37
7 acres of wetland?

8 A. Well, we're currently working on a mitigation plan
9 with the Corps of Engineers and Department of Ecology
10 that includes a variety of on-site mitigation near
11 the airport and off-site mitigation down near the
12 City of Auburn. The total area of this mitigation is
13 somewhat in excess of a hundred acres and includes
14 restoration of several wetlands and stream buffers
15 near the airport, as well as creating new wetlands
16 down at the City of Auburn.

17 Q. What's the process for creating wetlands at the City
18 of Auburn when you have wetlands that you're covering
19 up in SeaTac?

20 MR. ARAMBURU: I'm going to object, your
21 Honor. I'm not sure that that's a relevant question.

22 THE COURT: Counsel, what's the relevance
23 of that?

24 MS. JONES: Just -- it was actually sort of
25 background about mitigation, but I don't mind

1 withdrawing the question, your Honor, that's fine.

2 THE COURT: Okay.

3 Q. (By Ms. Jones:) Mr. Kelley, do you know -- actually,
4 what I want to do is to talk about the wetlands that
5 you've delineated here in the vicinity of Parcel 92.
6 And again, this would be looking at Exhibit No. 21 in
7 the blow-up here. There are particular numbers,
8 aren't there, on the wetlands that you've delineated?

9 A. Yes, that's correct.

10 Q. Now, for example, the one up in the top right-hand
11 corner is called Wetland A1. What is the purpose
12 for -- or can you explain what the extent of Wetland
13 A1 is? And you can come down here and actually show
14 the Court, if you'd like.

15 A. Well, Wetland A1 is a wetland area that occurs south
16 of this small lake called Lora Lake, extends actually
17 off this map to the east of the lake, and then
18 borders some agricultural drainage ditches through
19 the center of the property and connects into Miller
20 Creek down at the south portion of this Vacca Farm
21 area. Wetland A1 also extends around on the east
22 side and borders the periphery of Miller Creek, which
23 is this dash or dotted line down here.

24 Q. Why does -- why do you have Wetland A1 -- why is that
25 a single wetland all the way down to pretty much the

1 lower part of the map?

2 A. When you identify wetlands, you identify them
3 independent of any parcel boundaries, and you
4 identify them in this case as a continuous area with
5 meeting certain -- meeting the three parameters for
6 wetland, the hydric soil, the wetland, vegetation,
7 and the wetland hydrology. There's areas adjacent to
8 Wetland A1 that are called out separately as wetland,
9 and that's because those were identified as areas
10 that have wet soil, but they're farmland, and the
11 Corps evaluated those areas to make a determination
12 if they're wetland based on other criteria, then
13 vegetation, soils, and hydrology.

14 Q. Can you point out on this map the blow-up of Exhibit
15 21 where Parcel 92 is? It's not as clear as it
16 should be on the blow-up here.

17 A. Yeah. Parcel 92 would be located in this area,
18 roughly, down by what I'm outlining here.

19 Q. And I notice that at the southern part of Parcel 92,
20 there's a Wetland FW11?

21 A. Yes, that's correct.

22 Q. Can you point that out here?

23 A. That would be this area right here.

24 Q. And why is that separately designated from Wetland
25 A1, since it looks like it's right next to A1?

1 A. Well, it's actually designated separately, because we
2 in the Corps of Engineers reached a determination
3 that this was wetland based on different criteria
4 than for Wetland A1.

5 Q. And what were the different criteria?

6 A. And the differing criteria for these farmed wetlands
7 are that in areas that are farmed, wetlands are
8 designated as farmed wetland when the soils are
9 saturated to the surface, or there's standing
10 water -- actually standing water on the soil surface
11 for 14 days during the growing season, whereas -- and
12 there don't need to be wetland plants present in
13 farmed wetlands because they're farmed, and farmed
14 areas are typically plowed on an annual basis. From
15 the Wetland A1, we would be required to demonstrate
16 that there are wetland plants present, that there's
17 wetland soils present, and that there's wetland
18 hydrology present, whereas in the farmed wetland, we
19 have hydrology that is ponding, and we have wetland
20 soils present.

AR 024442

21 Q. Thank you.

22 Can you describe for the Court what these lines
23 that are called Water V1 and Water V2 are on the map?

24 A. These are drainage ditches that have been excavated
25 across the site to collect high groundwater and

1 convey that towards the creek and other drainage
2 ditches to -- presumably to facilitate a faster
3 drying out of the site and enhance farming.

4 Q. Now, this exhibit doesn't show those -- those Water
5 V1 and Water V2 going all the way to Miller Creek,
6 which you've previously shown the location of, do
7 they?

8 A. I think that we've portrayed them here as separated
9 until -- they're under Corps jurisdiction as a water
10 that was determined to be non-wetland. And then when
11 they reach the edge of the wetland where there's
12 remaining ditch, they're under Corps jurisdiction as
13 a wetland and as a stream or ditch.

14 Q. In other words, if they didn't go anywhere or go to a
15 wetland or go to a stream, they wouldn't come under
16 Corps jurisdiction?

17 A. The Corps specifically took jurisdiction of these
18 ditches because -- because historically this area was
19 a wetland, and the water that these ditches carry
20 flows down slope to adjacent wetlands and is apparent
21 in sustaining those wetlands.

22 Q. Could you look at -- or show the Court where Wetland
23 Ala is?

24 A. Ala is located on the western portion of the site.

25 Q. Is that right next to the road?

1 A. Yes. And most of this wetland is actually in the
2 right-of-way for Des Moines Memorial Drive and is
3 actually not on Parcel 92.

4 Q. Okay. Oh, why do you do a separate delineation of
5 that Ala?

6 A. Well, again, this was evaluating wetlands on the
7 project site. Ala is a vegetated wetland. It was in
8 an area that was non-farmed. And it's on the road
9 embankment at the very edge of the farmland where
10 natural vegetation occurs, but there's a high water
11 table there, and it's a place where groundwater
12 surfaces and then gradually flows near surface across
13 the site to the more extensive wetlands.

14 Q. Thanks. Mr. Kelley, you can have a chair for a
15 moment.

16 Did Parametrix also do an aerial photo of what
17 you'd call the Vacca Farmlands and superimpose the
18 wetlands that you delineated on that photo?

19 A. Yes, we did.

20 Q. Would you look at Exhibit No. 20, please?

21 A. (Witness complying.)

22 Q. Is this that photo, Exhibit 20, or one of the photos
23 that you took?

AR 024444

24 A. Yes, that's correct.

25 Q. Showing you the blow-up that I just put up here, it's

1 labeled Image #4. Is that the same label that's on
2 Exhibit 20?

3 A. Yes, that's correct.

4 Q. Keeping in mind that this looks more blurry than the
5 one that is in your book, is this an accurate blow-up
6 of Exhibit No. 21?

7 A. Yes.

8 Q. Or Exhibit 20? Excuse me.

9 A. Yes, it is.

10 Q. Is Exhibit 20 one of the exhibits that you placed in
11 the Wetland Delineation Report, Exhibit No. 24?

12 A. Yes.

13 MS. JONES: Your Honor, we move to admit
14 Exhibit No. 20.

15 MR. ARAMBURU: Voir dire, your Honor?

16 THE COURT: Sure.

17 VOIR DIRE EXAMINATION

18 BY MR. ARAMBURU:

19 Q. What is the date of the base map for this photograph?

20 A. The date of the photograph?

21 Q. Yes.

22 A. The date of the photograph is, I believe, 1995.

23 Q. And do I understand correctly that this is
24 illustrative of the material that you've done in
25 Exhibit 19 and 21?

1 A. Yes.

2 Q. It doesn't have an independent purpose? I'm trying
3 to understand the purpose of doing these drawings on
4 the aerial photograph.

5 A. Oh, the purpose of doing them on the aerial
6 photograph is primarily as an aid to the Corps of
7 Engineers, Department of Ecology, and other
8 regulatory staff. It helps them walk out to a
9 project site and understand -- on the ground they can
10 look at the aerial photograph and understand where a
11 house is in relation to a wetland or where a
12 particular ditch system might be in relation to a
13 wetland. The photograph helps them orient themselves
14 to a site. And in a large project area like this,
15 these were very useful to the regulators.

16 Q. Okay. But as I understand it, the -- how am I going
17 to describe this? The central blue line here that we
18 see on the photograph, that runs into a farm wetland,
19 does it not?

20 A. That's correct.

21 Q. And the other area down here is also a farmed
22 wetland, correct?

23 A. That's correct.

24 Q. And you don't make that distinction here on your
25 drawing; is that right?

AR 024446

1 A. No, we don't, so this is somewhat of a simplification
2 of the map for -- which accompanies this image on the
3 very next page in our wetland delineation report.

4 Q. And can you show us where the lot 92 is on here?

5 A. (Witness complying.) Yes. The lot 92 would be
6 approximated by what I'm outlining here. Excuse me,
7 it would come up to about here on its easterly point
8 along Des Moines Memorial Drive, approximately across
9 here on the south, and on the north approximately
10 across like this.

11 Q. So the boundary between lot 92 and 93 goes -- goes
12 through the wetland that's FW11 on your other
13 drawings; is that correct?

14 A. I believe it does, yes.

15 MR. ARAMBURU: No objection, your Honor.

16 THE COURT: All right. Let's see, Exhibit
17 No. 20 is admitted.

18 CONTINUED DIRECT EXAMINATION

19 BY MS. JONES:

20 Q. You talked a moment ago and actually mentioned
21 prior -- the term prior converted cropland, Mr.
22 Kelley, and that shows as the lines on Exhibit No. 21
23 with vertical lines, is that correct, the prior
24 converted cropland?

25 A. With --

1 Q. I'm sorry, horizontal lines.

2 A. The horizontal lines.

3 Q. Excuse me.

4 A. Yes, that's correct.

5 Q. Thank you.

6 How did you reach the opinion that the property
7 indicated by the horizontal lines was prior converted
8 cropland?

9 A. Well, the criteria for prior converted cropland is
10 that an area has been in farm production since 1982
11 or later. And that -- actually, prior to 1982, the
12 area was put into farm production and has remained in
13 farm production since then, and that there is -- the
14 area lacks standing water for 14 consecutive days.
15 And under those conditions, for section 404, Clean
16 Water Act purposes, the Corps identifies wetlands as
17 prior converted.

18 Q. Okay. And I think you said before that for purposes
19 of -- when it's prior converted, that the Corps does
20 not take jurisdiction?

21 A. That's correct.

22 Q. Do you know why the Corps does not regard prior
23 converted wetlands as jurisdictional for purposes of
24 the 404 permit?

25 MR. ARAMBURU: Objection, speculative; lack

AR 024448

1 of foundation.

2 Q. (By Ms. Jones:) Well, you've worked on 404 permits
3 for how many years now, Mr. Kelley?

4 A. 13, 14 years, I guess.

5 Q. Okay. And are you responsible for knowing the
6 regulations that govern the granting of the 404
7 permit?

8 A. Yes, that's correct.

9 Q. And does that inform the work that you do when you
10 are delineating wetlands for purposes of assisting a
11 client in getting a 404 permit?

12 A. Yes.

13 Q. And I'm just -- I'll repeat my question, how do
14 you -- since you know that the Corps of Engineers
15 does not take jurisdiction over prior converted
16 croplands, you previously testified to, my question
17 is, do you know why the Corps does not?

18 MR. ARAMBURU: Same objection, your Honor,
19 lack of foundation. The witness is apparently being
20 asked to provide some legislative history here, and
21 he's not qualified to do that.

22 THE COURT: Objection's overruled.

23 Q. (By Ms. Jones:) You may answer.

24 A. Well, these areas are regulated under the Food
25 Security Act.

1 Q. What is the Food Security Act?

2 A. It's a department of agriculture regulation that
3 effects -- effects funding for farmers and farmland
4 and certain cropping procedures, whether they're in
5 wetlands or not, may or may not be eligible for
6 funding. So there's -- the Food Security Act sets up
7 a structure with regards to wetlands of providing
8 crop subsidies under various circumstances for
9 farmers, among other things.

10 Q. So does the fact -- just the simple fact that a
11 property may be described as prior converted cropland
12 mean that it is not a wetland under the definitions
13 that you work under in delineating the lands?

14 A. No, it does not mean that. And if an area was
15 non-wetland -- if an area that was under -- was being
16 farmed was non-wetland, if it didn't have the wetland
17 hydrology criteria, if it didn't have the wetland
18 soil criteria, we would just simply map it as upland.
19 And on a -- on our wetland map, it would remain
20 white, like the remaining areas. In this particular
21 case, there's hydric soils on the site, and there's
22 wetland hydrology on the site, so we had to bring
23 this to the Corps -- Corps's attention. And they had
24 to make a special determination to determine whether
25 this prior converted cropland criteria was applicable

1 to this particular piece of farmland.

2 Q. And in this case, they did conclude --

3 A. In this case, they did, because the Corps and
4 ourselves utilized the extensive history of aerial
5 photographs that are available to demonstrate
6 conclusively that since 1939, this site has been
7 farmed.

8 Q. Okay. Thank you.

9 Let me ask you this: In your work delineating
10 wetlands, you've testified already to your work with
11 the Corps of Engineers, do you also work with the
12 state -- Washington State Department of Ecology when
13 you're doing wetland work?

14 A. Yes, we do.

15 Q. And why is that?

16 A. Because under the -- under the Clean Water Act,
17 section 404, there's also another section of the
18 code, section 401, which relates to water. Section
19 404 relates to wetland themselves. And to obtain a
20 permit to fill wetlands, you also need to meet the
21 criteria of section 401, which is to protect water
22 quality. And in Washington State, the Department of
23 Ecology is responsible for implementing that program.

24 Q. So you have worked actually with the State Department
25 of Ecology on this particular Port of Seattle Third

1 Runway Project?

2 A. Yes, we have.

3 Q. Okay. Does the state -- or does the Port need to get
4 a permit from the state in order to carry on the
5 Third Runway Project with respect to wetlands?

6 A. Yes. We need to obtain the section 401 Water Quality
7 Certificate, and then we have to obtain hydrologic
8 project approvals from the state for modification of
9 wetlands and drainage networks, streams.

10 Q. Would you please turn to page -- or Exhibit 6,
11 rather, in your notebook there?

12 A. (Witness complying.)

13 Q. Have you seen this document before?

14 A. Yes, I have.

AR 024452

15 Q. What is this, please?

16 A. This is the Public Notice for the Port's permit
17 application for the third runway and other master
18 plan projects.

19 Q. And what's the function of the Public Notice, do you
20 know?

21 A. The Public Notice is to alert the interested public
22 that the Corps of Engineers and the Department of
23 Ecology are considering the Port's permit request to
24 fill and develop these wetlands.

25 Q. Would you look at the last page of that Exhibit No.

1 6, please? The seventh paragraph, sort of the first
2 large-ish paragraph there, contains a reference to
3 the State of Washington and the Vacca Farm site. And
4 it basically says that -- well, could you tell us
5 what it says, please?

6 A. Would you like me to read it or --

7 Q. Well --

8 A. Okay.

9 Q. You can read it or give me --

10 A. It states that the State of Washington is reviewing
11 the project to comply with the water quality
12 standards. This would be section 401. And that the
13 State has determined that they will extend
14 jurisdiction as a waters of the State over 7.88 acres
15 of land that's considered prior converted by the
16 Corps of Engineers.

17 Q. Do you know how this paragraph got into the Public
18 Notice that was issued by the Corps of Engineers?

19 A. Yes. In a general sense, we reviewed this area with
20 the Department of Ecology, and they evaluated the
21 soils and the hydrology on the site, the land use,
22 and they evaluated the determination that the Corps
23 had made, and the Department of Ecology determined
24 that this area was wetland and met the criteria of
25 being a wetland and should be considered a waters of

1 the State.

2 MS. JONES: Move to admit Exhibit No. 6.

3 THE COURT: Counsel?

4 VOIR DIRE EXAMINATION

5 BY MR. ARAMBURU:

6 Q. Is this the current notice?

7 THE COURT: I'm sorry, are you requesting
8 voir dire, Counsel?

9 MR. ARAMBURU: Yes, please, your Honor.

10 THE COURT: Go ahead.

11 MR. KELLEY: There -- should I answer that
12 question or --

13 THE COURT: If you can.

14 A. Okay. There was a public notice issued in December
15 of 2000 for the project, as well.

16 Q. (By Mr. Aramburu:) So this isn't the current public
17 notice for the 404 permit, is it?

18 A. I don't know that this notice or any information in
19 it would have been withdrawn. I guess I don't --
20 legally, I don't know the answer to that question.

21 Q. But this is --

AR 024454

22 A. There was a new notice that was done in December of
23 2000, and that new notice identified some additional
24 mitigation steps that had been taken and some changes
25 to the project had changed slightly, some of the

1 amounts of wetland impact, but there was no change in
2 the state's determination of what was jurisdictional
3 and what was not jurisdictional. And I would
4 anticipate that this exact same paragraph -- is this
5 the 2000 public notice?

6 Q. But you have looked at that notice recently?

7 A. I have not verified that this statement is in that
8 notice.

9 MR. ARAMBURU: I have no objection to this
10 document being the 1999 notice.

11 THE COURT: All right. Thank you.

12 Well, the document is admitted. As to what it
13 is, that's not the real question here, Counsel,
14 that's for your cross-examination, but the document
15 is admitted in terms of admissibility.

16 MS. JONES: Thank you, your Honor.

17 CONTINUED DIRECT EXAMINATION

18 BY MS. JONES:

19 Q. Mr. Kelley, turning now from the Corps of Engineers
20 and the state to the City of SeaTac, do you know how
21 the City of SeaTac Code treats formerly farmed
22 wetlands that may exhibit some wetland
23 characteristics?

24 A. Yes. The City of SeaTac Code identifies that if
25 vegetation of a site has been altered such as would

1 happen through normal farming practices, that a
2 wetland determination would be made on the basis of
3 evaluating soils for certain hydric soil conditions,
4 and evaluating water conditions on the site to
5 determine that the wetland hydrology parameters are
6 met.

7 Q. Have you reviewed the definition of wetlands in the
8 City's code?

9 A. Yes, I have.

10 Q. Would you turn, please, to Exhibit No. 26?

11 A. (Witness complying.)

12 MS. JONES: Exhibit No. 26 is, just for
13 everyone's information, a portion of the land use
14 code or the City's code relating to land use.

15 Q. (By Ms. Jones:) And what I'm interested in, Mr.
16 Kelley, is if you'll turn to page 15-46.

17 A. (Witness complying.)

18 Q. Mr. Kelley, do you have a page 15-47 in your --

19 A. No, I do not. Oh, yes, I do, it follows 15-50.

20 MS. JONES: Your Honor, I apologize, we
21 apparently -- it should go 15-46, 15-47, 15-48,
22 15-49, 15-50, et cetera. I believe I covered
23 yesterday that we had placed it in the wrong order.

24 Thank you, Counsel.

25 THE COURT: And he's going to fix that in

AR 024456

1 the original?

2 Q. (By Ms. Jones:) Can you do that?

3 A. It's corrected.

4 Q. Actually, before we look at that exhibit -- or that
5 provision of the code, Mr. Kelley, are you familiar
6 with the term "altered wetland"?

7 A. With respect to City of SeaTac Code or --

8 Q. Yes, uh-huh.

9 A. I'm not really. I mean, in general parlance, we
10 would say a wetland has been altered or changed, and
11 I -- I don't recall specifically how that might be
12 defined in the City's code.

13 Q. Okay. And when you talk -- when you say generally
14 you understand what an altered wetland is, what would
15 be some examples of an altered wetland?

16 A. It could be farming of a wetland area; it could be
17 ditching or attempting to drain a wetland; it could
18 be partial filling of a wetland area that might occur
19 either legally or illegally as part of some
20 construction. So some kind of human cause, usually
21 human cause, construction activity, or clearing --
22 land clearing in a wetland.

23 Q. Do you have any knowledge of what farming would do to
24 a wetland that would alter the wetland?

25 A. Well, typically, farming would remove wetland

1 vegetation and eliminate wetland vegetation,
2 depending on frequency and type of plowing. Other
3 times, farming involves attempting to drain wetlands,
4 either through excavation of surface ditches or
5 installation of underground drainage pipes and tile
6 to keep groundwater from saturating the soil and
7 effecting the ability to plow the soil.

8 Q. A moment ago when you were describing the work on
9 Exhibit No. 21, you referred to a wetland as -- or
10 referred to Wetland FW11 as a farmed wetland. Is a
11 farmed wetland the same thing as an altered wetland?

12 A. It would be a type of altered wetland. I would
13 consider a farmed wetland an altered wetland.

14 Q. Is there any difference between a farmed wetland or
15 is there a specific meaning to a farmed wetland that
16 isn't -- that is more -- more narrow than the generic
17 term "altered wetland"?

18 A. Yes, it is. It would be a narrow -- more narrow than
19 altered wetland, and it would be area that was in
20 agricultural production since at least 1982 and had
21 had continuous farming, and that it had standing
22 water present for at least 14 consecutive days during
23 the growing season.

24 Q. And that might not necessarily be true of a wetland
25 that was altered in a more general sense?

1 A. That's right; other wetland alterations might not
2 result in a farmed wetland. Or if farming started in
3 1990, for example, the area would not be classified
4 as a farmed wetland.

5 Q. Is a farmed wetland a Corps of Engineers' term?

6 A. Yes, it is. And part of the Food Security Act, as
7 well, identifies that.

8 Q. Okay. Thank you.

9 Now, looking back at page 15-56, Exhibit 26, do
10 you know what this -- what this provision is?

11 A. Yes. This is the City's definition of wetlands and
12 City of SeaTac zoning definition of wetlands and
13 their classification of wetlands into varying types,
14 based upon ecological value.

15 Q. Okay. And can you describe generally what you
16 understand a Class I Wetland to be under the City's
17 code?

18 A. Yes. Class I Wetlands are the highest quality type
19 wetlands that would be in the City of SeaTac. And
20 there's six criteria that are listed here for them.
21 They generally would include wetlands that might have
22 endangered species, wetlands that might have a high
23 diversity of plant and vegetation types in them,
24 wetlands that have rare plants in them, some of the
25 larger wetlands, especially if they're associated

1 with lakes or other water bodies, and also, wetlands
2 that have formed on organic or peat-type soils.
3 Also, finally, the larger forested wetland systems
4 that provide habitat for more diverse array of birds
5 would be classified as Class I.

6 Q. And you understand what a Class II Wetland is
7 generally?

8 A. Yes.

9 Q. And what is that?

10 A. Those would be wetlands that the City would still
11 consider quite valuable. They're somewhat less
12 diverse and probably smaller in size than the Class I
13 Wetlands. They must be greater than one acre in
14 size, but they have less diversity -- or they have
15 less wetland classes than a Class I Wetland might
16 have.

17 Q. Were you asked by the Port to reach a conclusion
18 as -- by the Port to reach a conclusion as to whether
19 the prior converted cropland on Parcel 92 met the
20 definition of wetlands for purposes of the City's
21 code, section 15.10.675?

22 A. At the time we prepared our wetland delineation
23 report and our mitigation plans, I was not asked to
24 do that.

25 Q. Have you subsequently been asked to do that?

1 A. Yes, I have.

2 Q. Okay. And what did you conclude?

3 A. I concluded that this wetland area would be a Class I
4 Wetland.

5 Q. Including Parcel 92?

6 A. Including wetlands on Parcel 92.

7 Q. Okay. And can you explain why it is that you
8 conclude that Parcel 92 is a Class I Wetland under
9 the City's code?

10 A. Yes. The Parcel 92 wetland is contiguous with
11 wetlands on adjacent parcels, and that total area of
12 wetlands, including Lora Lake, is 16.8 acres in size.

13 Q. And why is that important for your conclusion as to
14 Class I?

15 A. Well, the criteria number three identifies wetlands
16 that are equal to or greater than 10 acres in size.
17 So in classifying the wetland, I wanted to know what
18 the total size of the wetland is and whether this
19 criteria might be met or might not be met.

20 Q. And -- but we're, of course, only talking about
21 Parcel 92. Doesn't that constrain you in finding 10
22 acres?

23 A. Well, in classifying wetlands, and as indicated here
24 in the code, there's no criteria to evaluate wetlands
25 only on a single land parcel. In other words, you

1 classify wetlands irrespective of parcel boundaries.

2 Q. Okay. Is there any other reason besides the extent
3 of the wetland being greater than 10 acres that you
4 found that helped you reach your conclusion that
5 Parcel 92 is part of a Class I Wetland?

6 A. Yes. It's -- as I said, it's greater than 10 acres
7 in size, it's 16.8 acres, and it's also a rather
8 diverse wetland. There are actually four wetland
9 classes on the site -- or the wetland consists of
10 four wetland classes. And those classes include open
11 water, which is the Lora Lake area to the north. It
12 includes forested wetlands, which are around the
13 south side of Lora Lake. There are shrub dominated
14 wetland classes that are present on the south side of
15 Lora Lake, and also along the perimeter of some of
16 the agricultural drainage ditches that extend down
17 through the central portion of the wetland. And then
18 there are emergent wetland classes which occur along
19 some of the fringes of the wetland, particularly
20 adjacent to the farmed areas.

21 Q. When you say, "emergent wetland classes," what does
22 that mean?

23 A. Emergent wetlands are -- it's just simply a type of
24 wetland that's dominated by herbaceous or non-woody
25 plants, so grasses and cattails and sedges and rushes

1 are classified as emergent wetlands.

2 Q. Can you describe some of the kinds of vegetation that
3 you observed on the Vacca Farm wetland?

4 A. Yes. From the northern portion of the site, south of
5 Lora Lake, are forested wetlands that contain black
6 cottonwood trees and, also, willow shrubs and
7 blackberry. There are shrub wetlands that parallel
8 some of the agricultural drainage ditches that are
9 dominated by willow shrubs. In the center of some of
10 the agricultural drainage ditches are cattail and
11 rush. Along the margins of the wetland, particularly
12 adjacent to farmland, there's horsetail, reed
13 canarygrass, willow herb, and a variety of other
14 wetland grasses. There's some common rush in that
15 area.

16 Q. Are there any other criteria in the City's code,
17 other than number three, which you've just been
18 testifying to, that helped you to make your
19 conclusion that Parcel 92 is included in a Class I
20 Wetland?

21 A. The other criteria that would be relevant here would
22 be that it is mapped as a peat soil type. And my
23 observations on the site confirmed that the area is a
24 peat soil and a peat wetland. And the mapping
25 sources include a text, Peat Resources of Washington,

1 and also in 1953, I believe, a county soil survey
2 identified this area as peat.

3 Q. Thank you very much, Mr. Kelley.

4 MS. JONES: Your Honor, before I forget,
5 I'd like to move to admit Exhibit No. 24, which is
6 the City of SeaTac's code revisions.

7 THE COURT: Counsel?

8 MR. ARAMBURU: You mean 26?

9 MS. JONES: I'm sorry, I do mean 26.

10 THE COURT: All right.

11 MR. ARAMBURU: No objection, your Honor, to
12 Exhibit 26, the SeaTac Code Revision.

13 THE COURT: All right. Thank you. Exhibit
14 No. 26 is admitted. Thank you.

15 Q. (By Ms. Jones:) Would you please turn to page -- or
16 tab number 14, Mr. Kelley?

17 A. (Witness complying.)

18 Q. This is entitled King County Washington Soil Survey,
19 and it's dated 1952. Do you see that?

20 A. Yes.

21 Q. Is that the source that you consulted in making your
22 conclusion that there were peat soils on the
23 property?

24 A. Yes, that's correct.

25 Q. Okay. And what does this soil survey from King

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1 County in 1952 say about the soils on the property?

2 A. The soil survey includes a map of soil types in the
3 county. And it indicates that the area of Parcel 92
4 and the Vacca Farm area more generally is mapped as a
5 peat soil. There's two types of peat soil mapped in
6 this area, one of them is Rifle peat, and I believe
7 the other type is a Carbondale muck, which is also
8 classified as a peat soil.

9 Q. Thank you.

10 Other than the City's definition, which you have
11 just testified to with respect to Exhibit No. 26, do
12 you have other sources which assist you in
13 determining whether or not you have a wetland?

14 A. Yes. And the City code requires that you utilize
15 those other sources to identify wetlands. The City
16 code refers to the Federal manual -- the 1987 federal
17 manual for identifying wetlands, and also the State
18 Department of Ecology manual for identifying
19 wetlands. And those manuals provide very specific
20 criteria and procedures for evaluating site
21 conditions and reaching a determination as to whether
22 wetlands are present or not.

23 Q. Does the -- do the manuals that you're talking about
24 discuss the issue of what appears to be a wetland,
25 but there is no vegetation or little vegetation on

1 it?

2 A. Yes, they do. There's -- there's a term in the
3 manual that refers to normal circumstances, and
4 that's actually part of the wetland definition that
5 under normal circumstances, a wetland must have
6 hydric soil, it must have wetland hydrology, and it
7 must have wetland vegetation. And then it provides
8 guidance in what they mean by normal circumstances.
9 And the intent of using that word is that if, for
10 some reason, through some alteration, either natural
11 or manmade, vegetation were removed by farming or
12 plowing or land clearing, bull dozing, timber
13 removal, that an area can still be classified as
14 wetland without vegetation if soils and wetland
15 hydrology still meet the criteria for being wetland.

16 Q. Let's talk about those terms for a moment. You said
17 hydric soils, I believe. Could you describe what you
18 understand the Corps and the state's manual to mean
19 by "hydric soils"?

20 A. Yes. Hydric soils are soils that have formed over
21 relatively long periods of time, in wetlands or in a
22 condition of poor drainage, where at least for 14
23 days during the growing season they are saturated to
24 near the surface, or there's a high water table.

25 Q. And have you concluded with respect to Parcel 92 that

1 there are hydric soils?

2 A. Yes, I have.

3 Q. And how have you done that?

4 A. I have gone out onto Parcel 92 and dug soil pits
5 during the growing season and examined high water
6 tables. When we identify -- when we prepared these
7 maps for our reports, we walked the perimeter of the
8 area that has high water table and identified very
9 clearly the edge of the wetland based on hydric soil
10 characteristics, but also by high water table. So,
11 in essence --

12 Q. Please do.

13 A. In essence --

14 Q. The record should show that the witness is
15 approaching the blow-up of Exhibit No. 21.

16 A. In essence, this mapping of this wetland edge here
17 is -- represents a series of flags that were hung in
18 the field. And at each location where that flag was
19 hung, we examined the soils and came to a conclusion
20 that soils in the interior portion of the wetland had
21 wetland hydrology and soils exterior to the wetland
22 lacked wetland hydrology.

23 Q. I was just going to ask you what hydrology was, as
24 opposed to hydric soils. Can you explain what
25 hydrology is for the Court, please?

1 A. So, yes, wetland hydrology is the presence of
2 saturated soils or a high water table for at least 14
3 consecutive days during the growing season. And the
4 Federal manual identifies very specific ways to
5 determine whether this is present on a site or not.
6 For our studies, this involved walking -- determining
7 where the edge of the wetland is, walking that edge,
8 and identifying whether soils were saturated or had a
9 high water table.

10 Q. Did you submit those results to the Corps of
11 Engineers?

12 A. Yes, we did. This map is essentially those results.
13 It includes the data points that were checked in
14 their specific locations that provide more detailed
15 information for the entire Vacca Farm area. And then
16 the flagged data points and the mapping of those data
17 points delineate exactly where the edge of that
18 wetland is.

19 Q. Other than all of the matters you've just testified
20 to in support of your opinion that Parcel 92 is a
21 wetland, are there any other things you haven't
22 mentioned yet that would lead you to that conclusion?

23 A. I'm not aware of any.

24 Q. You think you've covered it?

AR 024468

25 A. I think I've covered it.

1 Q. All right. Great. Thank you.

2 I just want to talk briefly about a new topic,
3 which is what you referred to earlier as the ditches
4 or Water V1 and Water V2 on Exhibit 20 here. Are you
5 familiar with the requirements in some jurisdictions
6 that there must be a buffer between a wetland and any
7 area that needs to be developed?

8 A. Yes, I am.

9 Q. Okay. And what's the basis of that familiarity?

10 A. Well, we -- I have evaluated local regulations and
11 assisted clients in development issues near wetlands.
12 And these wetland protection codes typically have
13 protected buffers and criteria to modify or develop
14 in or near wetlands.

15 Q. When you've assisted clients with that kind of
16 effort, do you know if it's ever possible to move
17 wetlands, such as Water V1 or Water V2 in, or to
18 reduce the need for buffers and, therefore, enhance
19 development on the property?

20 A. Yes, in some cases, that's feasible.

21 Q. Okay. Are there issues raised by an application to
22 move wetland areas or ditches in a wetland to another
23 area?

24 A. The issues that would be raised would be a more
25 detailed review process by the City or county

1 government.

2 Q. Can you -- excuse me, go ahead.

3 A. That they would just simply -- they would have to
4 review the proposal, understand site conditions,
5 understand that the proposal was in compliance with
6 their code, and that it would, overall, provide some
7 kind of mitigation or benefit typically to the
8 resources.

9 Q. Are you aware if there are any permits that are
10 required when one seeks to move a wetland?

11 A. Well, locally, there might be -- depending on how the
12 regulations were structured, there might be a variety
13 of permits, such as a grading permit would be
14 commonly where this proposal would be removed --
15 would be reviewed, at the state level. It could
16 involve a hydrologic permit approval from the
17 Washington Department of Fish and Wildlife.

18 Q. What's that?

19 A. That is a requirement to comply with state law, HPA
20 review for any project that involves the -- the use
21 or the diversion -- a change in flow of waters,
22 waters of the State. So relocating a stream or
23 relocating certain drainage ditches would require
24 review with the state under HPA.

25 Q. And HPA, what did you say that was?

AR 024470

1 A. Hydrologic Project Approval.

2 Q. And what's the state department that approves that?

3 A. The Washington Department of Fish and Wildlife.

4 Q. Okay. Are there any other state agencies that might
5 be interested in the removal -- or the moving of a
6 wetland, if you know?

7 A. Especially if you -- certainly if moving of the
8 wetland required the -- triggered section 404 of the
9 Clean Water Act, which would involve the Corps of
10 Engineers, then Washington Department of Ecology
11 would have to review and issue a section 401 Water
12 Quality Certificate for the project.

13 Q. If you worked -- just going back for a minute to the
14 Hydrolic Project Approval from Fish and Wildlife,
15 have you ever applied or assisted a client in
16 applying for an HPA permit?

17 A. Yes, we have; I have.

18 Q. Okay. And can you tell me how long that process took
19 to -- let me ask you this, did you acquire the
20 permit, and how long did the process take?

21 A. I've assisted and obtained a number of these. And
22 the length of time is somewhat unpredictable, and
23 it's variable, depending upon the complexity of the
24 projects and the types of issues involved. So a very
25 simple project that might involve modification of a

1 drainage ditch that also has been determined to be a
2 waters of the State might take several weeks to a
3 month. And a more complex project that might involve
4 concerns over fish habitat and protection of water
5 quality and perhaps the loss of wetlands might take
6 several months or longer, even.

7 Q. How about the Department of Ecology, if it got its
8 nose in looking at that, the timing there?

9 A. Well, like-wise the timing is dependent on the
10 complexity of the project and the significance of the
11 environmental change or the potential impact to the
12 environment. But in a 404, 401 permit review that
13 the Corps and Ecology would do, that timing I would
14 typically expect to be in the order of several months
15 to perhaps several years.

16 Q. Have you had a recent experience with Ecology in
17 trying to fill a parcel that Ecology is going to have
18 to approve?

19 A. I have an ongoing experience.

20 Q. Well, why don't you describe one -- do you have one
21 involving PCC farmland, what the Corps calls PCC
22 farmland?

23 A. A number of years ago, I worked on a project in
24 Eastern Washington at the City of Colville. The City
25 was proposing to construct a new airport that was on

1 farmland, nearly 100 percent plowed farmland, and
2 portions of this farmland had standing water on it
3 and met the criteria for prior converted cropland.
4 And I worked on this project probably for two and a
5 half years before a Corps of Engineers' permit was
6 obtained.

7 Q. Okay. Have you been out to Parcel 92 recently?

8 A. Yes, I have been.

9 Q. When was that?

10 A. I was out on Parcel 92 last Friday.

11 Q. Okay. Can you tell us any observations that would be
12 useful for your analysis of Parcel 92 as a wetland?

13 A. On Friday, I observed that there was standing
14 water -- excuse me, there was -- I did not observe
15 standing water in the wetland areas. I dug holes and
16 observed a high water table on the site. In one
17 case, the water was within four to six inches of the
18 soil surface, and the soil surface itself was wet
19 and --

20 MR. ARAMBURU: Your Honor, I want to
21 object. We asked specifically during the course of
22 discovery that all information regarding evaluation
23 by Mr. Kelley be turned over to us, so that we would
24 have an opportunity to review it with our expert.
25 This is new testimony and results that have not been

1 disclosed to us, and I would object to the testimony
2 as being material that would be in violation of the
3 discovery order.

4 THE COURT: Counsel, it is --

5 MS. JONES: I will withdraw that last
6 question, your Honor, that's fine.

7 THE COURT: Thank you.

8 Q. (By Ms. Jones:) Let me just conclude, Mr. Kelley,
9 have you concluded, in light of the testimony that
10 you've given, that the area that is described as --
11 or that is mapped as prior converted cropland on
12 Parcel 92 is a wetland for the purposes of the code
13 for the City of SeaTac?

14 A. Yes, I have.

15 Q. And what is the class that you have concluded?

16 A. That it's a Class I Wetland.

17 MS. JONES: Thank you. I have no further
18 questions.

19 THE COURT: Thank you.

20 Counsel?

21 CROSS-EXAMINATION

AR 024474

22 BY MR. ARAMBURU:

23 Q. Mr. Kelley, your description of this as a Class I
24 Wetland, have you expressed that to the Corps of
25 Engineers, the Department of Ecology, or anyone else

1 before today?

2 A. It's not -- it's a Class I Wetland under the City of
3 SeaTac Code, and the Corps of Engineers and the
4 Department of Ecology are not responsible for
5 implementing the City of SeaTac Code.

6 Q. I understand that.

7 A. So I have not discussed it with them.

8 Q. So you've not told anyone else before today that this
9 is a Class I Wetland?

10 MS. JONES: Objection, vague as to "anyone
11 else," your Honor.

12 A. I discussed the matter --

13 THE COURT: The objection's -- well, the
14 objection's overruled.

15 Answer the question, please.

16 A. I've told other people before today that this is a
17 Class I Wetland.

18 Q. (By Mr. Aramburu:) Okay. And when did you reach
19 that conclusion?

20 A. Probably in late March.

21 Q. Of 2001?

22 A. Of 2001.

23 Q. And how long have you been working on this project?

24 A. I've been working on this project since about 1995.

25 Q. So as a Class I Wetland, do we generally try to stay

1 away from alter ratings of Class I Wetlands?

2 A. Yes, we do.

3 Q. And is that the Port's plan, to leave this in its
4 current condition?

5 A. Actually, no, it's not.

6 Q. So, of this area that you're showing us as Wetland
7 A1, what's going to happen to that?

8 A. The Port's plan for Wetland A1 and nearly all the
9 wetlands that are indicated on this map is to -- as
10 part of their mitigation for filling other wetlands,
11 to improve and enhance the wetland -- the wetland
12 site. So, for example, in Wetland A1, there are
13 areas that are dominated by blackberry, which is a
14 relatively low quality invasive plant. And the Port
15 would remove that blackberry and re-vegetate the area
16 with native trees and shrubs. The areas of farmland
17 on Parcel 92 and the rest of this area that are
18 mapped as prior converted cropland would be taken out
19 of annual crop production and would be replanted with
20 native trees and shrubs to provide habitat, and
21 particularly to help function as a floodplain
22 ecosystem that would benefit Miller Creek.

23 Q. Well, there's going to be lot of grading in there,
24 isn't there?

25 A. There will not be any grading on Parcel 92. There

1 would be some grading on some of the other sites to
2 increase and provide flood storage, and there would
3 be some grading to relocate Miller Creek and
4 construct a natural stream channel for Miller Creek.

5 Q. So a lot of the area that's shown as Wetland A1 will
6 be graded?

7 A. A portion, I don't recall the exact number.

8 Q. And when we're talking about grading, we're talking
9 about digging down and removing of soil so there'll
10 be additional areas for floodplain storage; is that
11 right?

12 A. The floodplain storage is actually planned to occur
13 on the west side of the site from the -- primarily in
14 the prior converted cropland. And in the upland
15 areas just west of the wetland edge that is higher up
16 and elevated, that area would be excavated down to
17 create new flood storage.

18 Q. And can you show us where that would be on exhibit --
19 what is this, 19?

20 A. Yeah. The area that would be graded for flood
21 storage is primarily in this area here, and then this
22 higher land to the west of the wetland.

23 MS. JONES: 21.

24 Q. (By Mr. Aramburu:) And what are the plans for Water
25 V1 and V2?

1 A. The -- those would be -- those would simply be left
2 as is with native vegetation planted around them and
3 over that area, over the entire area of Parcel 92.

4 Q. So I conclude from this that these wetlands you're
5 talking about aren't valuable enough to be saved in
6 their current condition; is that correct?

7 MS. JONES: Objection. I don't know that
8 it's germane what counsel concludes.

9 THE COURT: Objection sustained, vague.

10 Q. (By Mr. Aramburu:) Do I understand, notwithstanding
11 your classification of Wetland A1 as a Class I
12 Wetland, that there will still be substantial
13 alteration to that area?

14 MS. JONES: Objection, vague as to the
15 meaning of substantial.

16 THE COURT: Objection overruled.

17 You may answer if you can.

AR 024478

18 A. There are alterations planned for Wetland A1 that
19 would involve alterations to improve its habitat or
20 its value. And then there would also be some
21 alterations to Wetland A1 to accommodate the Port's
22 project proposal.

23 Q. (By Mr. Aramburu:) And that is some filling of A1?

24 A. That would be some filling of A1.

25 Q. And does -- what does the City of SeaTac say about

1 filling this Class I Wetland?

2 A. I have not asked them.

3 Q. Aren't you going to process this through -- this
4 permit of yours through the City of SeaTac?

5 A. No.

6 Q. Why not?

7 A. It's not a requirement to do that.

8 Q. It's not -- why isn't it a requirement?

9 A. The Port has entered into an Interlocal Agreement
10 with the City of SeaTac that exempts third runway and
11 master plan projects from the City of SeaTac
12 ordinance.

13 Q. So it's your testimony the Port doesn't have to
14 comply with the SeaTac requirements, but the private
15 property owner, RST, would; is that right?

16 A. I don't know what the private property owner is
17 proposing or would need to do.

18 Q. Now, let me ask you about the work that's actually
19 been done out on this property. You've shown us a
20 number of your -- Exhibits 19 and 21 show a number of
21 data plots; is that correct?

22 A. Yes, that's correct.

23 Q. And let's take a look at Exhibit 19, please. I think
24 we have 21 on the board.

25 Now, the red marks that are shown here are the

1 data plots --

2 A. Yes.

3 Q. -- what's the purpose of taking those data plots?

4 A. The Corps requests that we collect from wetland and
5 adjacent non-wetland areas information that
6 characterizes the environmental conditions on the
7 site.

8 Q. And how are those wetland plots -- how is it decided
9 where to put those?

10 A. They are put in areas that generalize site
11 conditions. And where site conditions are variable,
12 we would take additional data plots. But where site
13 conditions are uniform, we would tend to take less
14 data plots. So the data plots are meant to
15 generalize site conditions over a fairly broad area,
16 and they're also meant to discriminate between upland
17 conditions and wetland conditions.

18 Q. And would you look at Exhibit 24, please?

19 A. Yes.

20 Q. And at the back of Exhibit 24, these wetland
21 determination -- are these wetland data plots
22 identified?

23 A. Yes.

24 Q. And are all the records for each data plot shown on
25 Exhibit 19 found in the appendix to Exhibit 24?

AR 024480

1 A. I'm not sure exactly what you're asking, could you --

2 Q. Are all the data sheets --

3 A. That are here?

4 Q. -- that correspond to the data points shown on
5 Exhibit 19 found in Exhibit 24?

6 A. I believe they are.

7 Q. Now, the plots that were done, on how many days were
8 those plots done?

9 A. I don't recall specifically what days the data was
10 collected.

11 Q. And was the data collected for more than a single day
12 on any of the plots?

13 A. On any single plot, the data would have been
14 collected on one day.

15 Q. Okay. And can we tell which day that is by looking
16 at the data sheets?

17 A. Yes. We do have a date on those data sheets.

18 Q. And can you tell us when that is?

19 A. These were on 4/19/1998.

20 Q. Now, I notice that there are no data plots found on
21 Wetland FW3; is that correct?

22 A. Yes, that's correct.

23 Q. And are there any -- and that's a farmed wetland?

24 A. Yes, that's correct.

25 Q. And are there any data plots for Wetland A1 in the

1 vicinity of the Parcel 92?

2 A. No, there are not.

3 Q. And are there any wetland plots that would be
4 adjacent or close by Wetland FW11?

5 A. No, there are not.

6 MR. ARAMBURU: It's Exhibit 19, your Honor,
7 that we're looking at here.

8 THE COURT: Right.

9 Q. (By Mr. Aramburu:) Now, looking at Exhibit 19, does
10 Exhibit 19 have the rough outline of the Parcel 92
11 property?

12 A. Yes, it does.

13 Q. Okay. Specified by 092?

14 A. That's correct.

15 Q. Now, in fact, I don't see any data plots at all on
16 lot 92; is that right?

AR 024482

17 A. That's correct.

18 Q. So there's never been any data plots gathered for lot
19 92?

20 A. There's been data collected on lot 92. They haven't
21 been recorded on these data plots and included in our
22 report. The data collected when -- the wetland
23 boundaries were identified when we had access to the
24 site in 1999 and flagged the edges of the PC
25 wetland -- was collected to identify where hydric

1 soil was present and where wetland hydrology was
2 present. And those areas were flagged in the field
3 and presented to the Army Corps of Engineers to make
4 a determination on the presence of wetlands.

5 Q. Was that information turned over to the property
6 owner in this case?

7 A. It's right here in front of you. The edge of the
8 wetland on our map is my testimony as to where hydric
9 soil and wetland hydrology occurs on the site.

10 Q. So there's not any other data, other than this map --

11 A. That's correct.

12 Q. -- for lot number two?

13 A. That's correct.

14 Q. And has there been an observation -- you were
15 describing the necessity to observe wetland hydrology
16 for a period of 14 days?

17 A. Yes, that's correct.

18 Q. And has that been done on lot 92?

19 A. Yes, it has. The area that is identified as farmed
20 wetland on lot 92 has been observed repeatedly by
21 myself and by the Corps of Engineers and by others in
22 my office and the Port as an area that has
23 long-standing flooding for actually several months or
24 more.

25 Q. And have you made any written recordings of that?

1 A. I -- only in the designation of it as farmed wetland
2 and recording that that area has greater than 14 days
3 inundation.

4 Q. And how was Wetland FW11 actually delineated?

5 A. That was delineated from an aerial photograph that
6 showed standing water present at -- during the early
7 part of the growing season in March of the year.

8 Q. And how many aerial photographs did you use?

9 A. We examined probably a dozen or so aerial photographs
10 of the area.

11 Q. Did you use one of those to make your determination?

12 A. Yes, that's correct.

13 Q. And what -- and which one was that?

14 A. I believe that it was a 1974 aerial photograph that
15 showed standing water on the site.

16 Q. And would you look at Exhibit 39-C, please?

17 THE COURT: It's in a different notebook.

18 Q. (By Mr. Aramburu:) Now, Mr. Kelley, they're
19 individually tabbed with the numbers on them. Do you
20 have that?

AR 024484

21 A. Yes.

22 Q. And is that the aerial photograph you used?

23 A. No, it's not.

24 Q. It's not. Did you use a different photograph?

25 A. This is dated 1946.

1 Q. Excuse me. It would be under tab C, Mr. Kelley.
2 There's four -- there's five photographs under
3 Exhibit 39.

4 A. I'm sorry. I understand. This is a 1985 photograph.

5 Q. Well, perhaps our notebooks -- would you look on the
6 back of the photographs? And I think we've tried to
7 put the dates there.

8 THE COURT: It may be your -- our courtesy
9 ones are different from the original ones, so you
10 might want to just go up and check on that.

11 (Off the record.)

12 Q. (By Mr. Aramburu:) Okay. Now we're looking at 39-C.
13 Is this the photograph you used?

14 A. Yes, it is.

15 Q. And tell us how we can tell where wetland -- where
16 the precise boundaries of Wetland FW11 are on that
17 photograph.

18 A. Well, the actual photograph that we used was of
19 somewhat better quality than this, but there --

20 Q. Well, now, let me -- we've made copies of the
21 photographs and you may have a copy.

22 A. I have a copy.

23 Q. You have a copy. Let's --

24 MR. ARAMBURU: I think your Honor may have
25 a copy, as well.

1 Q. (By Mr. Aramburu:) We're going to lend you the
2 Court's copy here. The notebook you have contains a
3 copy of the photograph, and I think this is an
4 original photograph. Does that look more like what
5 you looked at?

6 A. Yes, it does. But I do believe that is still a Xerox
7 copy, but we had it printed on graphic paper, you
8 know, the same kind of paper that you would have a
9 snapshot-type printed on. And this is a color Xerox
10 medium.

11 Q. Okay. Did you have more than one of these --

12 A. No.

13 Q. -- made?

14 A. No. This is the right size. It had the Walker
15 designation on it, but it was on graphic paper.

16 MR. ARAMBURU: We have an original of this
17 photograph, your Honor, and that's what we're trying
18 to find.

19 THE COURT: Well, why don't -- let's take
20 our lunch recess at this time, we're fairly close,
21 and then you could probably find that. Thank you
22 very much, Counsel.

23 MR. ARAMBURU: Okay.

24 THE COURT: Let's make sure we don't mix up
25 the original from my copy.

AR 024486

1 MR. ARAMBURU: Correct.

2 THE COURT: But go ahead and take a look at
3 those.

4 MR. ARAMBURU: We'll take a look.

5 THE COURT: All right. Thank you. We'll
6 be in recess.

7 12:00 P.M.

8 (Court at recess.)

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1 JUNE 5, 2001

2 AFTERNOON SESSION

3 1:39 P.M.

4 * * * * *

5 THE COURT: Counsel, go ahead.

6 CONTINUED CROSS-EXAMINATION

7 BY MR. ARAMBURU:

8 Q. Mr. Kelley, before the noon recess, we were looking
9 at Exhibit 39-C. We were as yet unable to find the
10 original photograph, and we're going to keep looking
11 for that, but help us out, if you would, as to how --
12 the process that you went through with Exhibit 39-C
13 in delineating Wetland FW11. Now, I recall that the
14 testimony up until now has been that that delineation
15 was made by using this map; is that right?

16 A. Well, in part.

AR 024488

17 Q. Using this aerial photograph?

18 A. It was made, in part, by this map, using the aerial
19 photograph. But prior to using the aerial photograph
20 in -- in -- I believe it would have been December and
21 January of -- and February of 1999, we were in the
22 area with the Corps of Engineers. We were reviewing
23 some of our other delineation work, and we were
24 examining the Vacca Farm area and Parcel 92. And on
25 several occasions at that time, we identified

1 standing water on Parcel 92 and standing water in the
2 other farmed wetlands, such as Farmed Wetland 3 and
3 Farmed Wetland 2. And the Corps identified a need to
4 distinguish those farmed wetlands from the prior
5 converted cropland, because there was standing water
6 on these sites. And they indicated to us that
7 because of the standing water, these areas will not
8 meet the prior converted cropland criteria. And I
9 believe --

10 Q. Okay.

11 A. I believe at that time that we did not have access --
12 the Port did not have access to the property. And we
13 obtained access later on in the year, and at that
14 time identified this aerial photograph as useful in
15 showing where standing water on that -- this would be
16 useful in helping us map standing water on that site,
17 which we had previously observed.

18 Q. But this -- this map is now about 25 years old or
19 more, isn't it? Or, excuse me, this aerial
20 photograph?

21 A. Yes, it is.

22 Q. Why didn't you use a later aerial photograph?

23 A. Well, this was the aerial photograph that we found --
24 could find in the record that was taken in the early
25 part of the growing season, the rainy part of the

1 growing season, when we would expect these farmed
2 wetlands to actually contain inundation. And it also
3 had patterns in the Farmed Wetland 11 that the Corps
4 and myself felt would be useful in mapping the aerial
5 extent of that area.

6 Q. Okay. But I notice that Wetland V1 and V2 don't seem
7 to be in existence in 1974.

8 A. That's correct; they're not on this photograph.

9 Q. And so the typical method of determining wetland
10 delineation is the flag, is that not correct?

11 A. That's correct.

12 Q. Did you ever flag Wetland 11?

13 A. No. I believe Wetland 11 was mapped based on this
14 aerial photograph.

15 Q. I meant to say FW11.

16 A. FW11, yeah.

AR 024490

17 Q. In looking at the photograph here, this was taken on
18 March 20, 1974, can you show us the areas that you
19 used to make your determination? Can you point those
20 out for us?

21 A. Yes. If you look at that photograph -- can I come up
22 to this exhibit? This may be -- how am I going to
23 show -- show you this? It's so tiny.

24 Q. Well, first of all, the photograph you used is the
25 one you had -- the same size you have in your hand,

1 correct?

2 A. Yes, that's correct.

3 Q. And you didn't get a blow-up of it or anything?

4 A. No, we did not.

5 Q. Okay.

6 A. We examined it under magnification.

7 Q. Okay. But using that same size?

8 A. Yes.

9 MR. ARAMBURU: Perhaps the thing to do,
10 your Honor, would be to have the witness come up here
11 and help us out with where that is.

12 THE COURT: You want to present it,
13 Counsel?

14 MR. ARAMBURU: Okay. Good.

15 MR. KELLEY: I would like to use the
16 photograph that I believe is in the -- one of the
17 other notebooks that's slightly higher quality than
18 this one.

19 MR. ARAMBURU: Okay.

20 THE COURT: Here's the other notebook,
21 Counsel.

22 MR. KELLEY: Or, actually, it's right here.
23 There's a notebook right here with it in it too,
24 so --

25 MR. ARAMBURU: Okay.

1 THE COURT: Ms. Jones, do you want to come
2 up here?

3 MS. JONES: I do.

4 THE COURT: You want to do it?

5 MR. KELLEY: I'm not sure.

6 MS. JONES: I will just look over Mr.
7 Aramburu's shoulder.

8 (Off the record.)

9 A. So it's this dark soil area in here that was examined
10 under magnification and determined to coincide with
11 the areas that we have observed as being flooded in
12 the winter of 1999 with the Corps of Engineers. And
13 oftentimes on farm sites, areas that are -- where the
14 soil is wet, it shows up as being darker colored in
15 aerial photographs, and where there's surface water
16 on a soil, it shows up as being dark on aerial
17 photographs. So in viewing this aerial photograph
18 myself personally and with a Corps of Engineers, they
19 determined that that was an acceptable method for
20 mapping FW11.

21 Q. (By Mr. Aramburu:) Okay. And there seems to be a
22 darker area just to the west of that, was that also
23 mapped?

24 A. Could you point to which?

25 Q. Is that a dark area there, too?

AR 024492

1 A. No, that was not mapped.

2 Q. Does that look like that's wet?

3 A. It could have been inundated, but it's not where we
4 observed water in the winter of 1999, in the early
5 spring of 1999, so the Corps -- so the Corps did not
6 call that farmed wetland. So they -- what actually
7 happened is we observed water on the site, and the
8 Corps determined there's farmed wetland present. And
9 then we were asked to map it, and the available
10 information to map it when we had access to the site
11 was these aerial photographs. We had access to the
12 site later on in the summer, and the surface water
13 had drained by that time.

14 Q. So -- and did you make consecutive observations over
15 14 days?

16 A. Yes. I believe we would have observed over probably
17 a several month period. And I observed water in the
18 winter of 2001 over a several month period on this
19 site, as well.

20 Q. But it's not the wintertime that counts, is it, Mr.
21 Kelley?

22 A. No, it's the growing season.

23 Q. In the early growing season?

24 A. In the early growing season.

25 Q. Did you make consecutive recorded observations over

1 14 days of water in the area of FW11?

2 A. Yes.

3 Q. And those are recorded?

4 A. No, they're not recorded.

5 Q. And -- and that's just what you remember; is that
6 right?

7 A. That's correct.

8 Q. And was the -- was the area of inundation the same
9 each day?

10 A. I would say yes, for all practical purposes, it's the
11 same each day, with the exception of several periods
12 of time where it was very wet, it had rained a lot.
13 And on those days, the area of inundation was visibly
14 larger.

15 Q. And in the aerial photograph that you've looked at
16 here, do you know what the wetland conditions were
17 the next day after -- on March 21, 1974?

18 A. No, I do not.

19 Q. Now, there was some testimony about Wetland A1 or 1A,
20 I guess it is?

21 A. Which one is it?

22 Q. You testified about A1?

23 A. A1?

AR 024494

24 Q. Yeah. And how big is A1?

25 A. A1, I believe, is approximately two acres in size. I

1 would have to look at a table in our report to answer
2 that exactly. Actually, it's identified here on
3 Exhibit 19. It's 4.59 acres.

4 Q. Okay. It's not 10 acres, correct?

5 A. No; it's 4.59 acres.

6 Q. So it doesn't meet the 10 acre criteria under the
7 City of SeaTac Code; is that correct?

8 A. That's correct.

9 Q. Okay. Now, we're talking a little bit about the --
10 about the wetland situation here. And can you tell
11 us whether or not there's any rare or endangered
12 species found in this location?

13 A. We have not found any rare or endangered species at
14 this location.

15 Q. So would you look back again at page 15-46 of Exhibit
16 26?

17 A. (Witness complying.)

18 Q. Now, your testimony is that this is a Class I
19 Wetland. Have you consulted with the Department of
20 Ecology as to what class of wetland they believe it
21 is?

22 A. I have not consulted with them.

23 Q. Did you not tell us during the deposition that you
24 thought the Department of Ecology had classified this
25 as a Class II Wetland?

1 A. Yes. We classified it in our report as a Class II
2 Wetland, and the Department of Ecology has not opined
3 on that classification.

4 Q. So your original classification was a Class II
5 Wetland?

6 A. That was under the Department of Ecology
7 classification criteria, which may be different from
8 the City of SeaTac criteria.

9 Q. So in terms of looking at the wetlands, and let's
10 focus now, if we may, on those wetlands found on lot
11 92, those are -- those -- would it be fair to
12 characterize those as degraded wetlands?

13 A. Yes, it would.

14 Q. And degraded because of the agricultural activities?

15 A. Yes.

16 Q. And you've concluded those agricultural activities
17 have gone on for years; is that correct?

18 A. That's correct.

19 Q. And have you found any plant associations of
20 infrequent occurrence?

21 A. No, I have not.

22 Q. And on lot 92, are there any forested wetlands
23 greater than one acre in size?

24 A. No, there are not.

25 Q. Are there forested wetlands greater than one acre in

AR 024496

- 1 size for Wetland A1?
- 2 A. Yes, there is forested wetland in Wetland A1.
- 3 Q. Is it greater than an acre?
- 4 A. I'm not certain the actual acreage that's forested.
- 5 I suspect it's greater than an acre.
- 6 Q. Now, would you look at Exhibit 24 and page 3-27,
- 7 please?
- 8 A. (Witness complying.)
- 9 Q. That indicates, does it not, that the -- go back.
- 10 Does -- is the information shown on page 3-27 done
- 11 under your direction?
- 12 A. Yes, it was.
- 13 Q. Did you write it?
- 14 A. I wrote portions of it, and I reviewed the entire
- 15 text.
- 16 Q. And indicates that the emergent communities in the
- 17 Wetland A1 are predominantly reed canarygrass?
- 18 A. That's correct.
- 19 Q. Is that a wetland species?
- 20 A. Yes, it is.
- 21 Q. Is that a native species?
- 22 A. No, it's not.
- 23 Q. And was Wetland A1 delineated on-site?
- 24 A. Yes, it was.
- 25 Q. It was flagged in the environment of lot 92?

1 A. Yes, it was.

2 Q. Now, you've provided testimony about the Department
3 of Ecology's involvement in the wetland delineation
4 work. What was the question that was put to the
5 Department of Ecology? What were they asked to do?

6 A. For the Port's permit application, the Department of
7 Ecology needs to determine that the functions and
8 values of impacts to wetlands are adequately
9 mitigated.

10 Q. And in the area that we're talking about on lot 92
11 and in the vicinity of lot 92, there wasn't going to
12 be filling for the third runway, was there?

13 A. That's correct.

14 Q. And so the question that was asked the Department of
15 Ecology was whether they would agree that the areas
16 in this vicinity could be used as mitigation; is that
17 correct?

18 A. Well, in a general sense, we talked to the Department
19 of Ecology about mitigation on this site and how that
20 mitigation would be characterized, whether it would
21 be characterized as wetland restoration or wetland
22 enhancement. So we -- in addition to -- we wanted to
23 discuss some of the specifics about how to -- how
24 they would like to see mitigation accomplished on
25 this site.

AR 024498

1 Q. So the Department of Ecology wasn't presented with a
2 development project such as you have for your private
3 clients, were they?

4 A. No, they were not.

5 Q. So the only question they were asked is whether or
6 not this was going to be a suitable area for a
7 wetland mitigation?

8 A. Yes, that's correct, for parcel --

9 Q. And then they asked you to give advice or opinions on
10 the ratios of wetland enhancement that might be
11 available on these properties?

12 A. That's correct. They were --

13 Q. And --

14 A. They were also concerned about wetland impacts to the
15 prior converted cropland that's identified in this
16 location, because the project would fill a portion of
17 this prior converted cropland. So in -- that was an
18 area where they had an interest that went beyond
19 simply mitigation.

20 Q. But that's not near the lot 92 parcel?

21 A. It's a few thousand feet from lot 92.

22 Q. Is it your testimony that the wetlands on lot 92
23 cannot be moved or modified in any fashion?

24 A. No.

25 Q. And we've talked about Waters V1 and V2, the ditches?

1 A. Uh-huh.

2 Q. Could those be moved and relocated on the site?

3 A. Under certain circumstances.

4 Q. And what would that be?

5 A. It would be preparing a development plan -- a
6 mitigation plan that met -- would meet HPA and local
7 zoning code requirements.

8 Q. And would it not be the case that one might have to
9 mitigate for the loss of area in those two ditches?

10 A. In those -- could you rephrase that question?

11 Q. If they were to be filled, would you expect that
12 someone would ask for replacement -- wetlands
13 enhancement?

14 A. Yes. I think you would need to replace the area of
15 those ditches that was lost, as well as the functions
16 that they provide, the ecological benefits that they
17 provide.

18 Q. And what are those?

19 A. Primarily, in this case, the conveyance of water
20 across the site of groundwater.

21 Q. That could be done with a pipe?

22 A. It could be -- an engineer would do it with a pipe, a
23 biologist would do it differently.

24 Q. Is there anything unique or important about the
25 vegetation that's found in those two ditches?

AR 024500

1 A. The vegetation helps stabilize the edges of the
2 ditches and helps keep sediment from moving across
3 the site and moving into Miller Creek.

4 Q. But is there any kind of desirable vegetation that
5 we'd want to save out of those two ditches?

6 A. No.

7 Q. And so in terms of mitigating for the loss of the
8 ditches, we'd have to replace that on a ratio of
9 one-to-one, two-to-one, three-to-one, something like
10 that?

11 A. Perhaps three-to-one would be a starting point.

12 Q. And how big are Wetlands V1 -- or ditches V1 and V2?

13 A. They're a few hundredths of an acre in size,
14 probably.

15 Q. I recall, and correct me if I'm wrong, that each one
16 of them is counted on your information as 1/100th of
17 an acre. Take a moment if you'd like to consult your
18 material. I think that's found on exhibit --

19 A. They're on Exhibit 19. And that's correct, they're
20 each identified as 1/100th of an acre.

21 Q. And so that would be about 436 square feet, each --

22 A. Roughly.

23 Q. -- acre being 43,560 square feet.

24 So if we replace those, we might have to have an
25 area on a three-to-one mitigation of, say, 3,000

1 square feet?

2 A. Yes.

3 Q. Now, is it your testimony that the point of -- again,
4 let's look at Exhibit 19, because that's useful, I
5 think, to help us here. Is it your testimony that
6 the point of Wetland A1 that goes into lot 92, that
7 that area could not be filled?

8 A. No, I did not testify to that.

9 Q. So that area could be filled?

10 A. Under certain circumstances.

11 Q. And that would be the same circumstances as the
12 filling of Waters V1 and V2?

13 A. Yes, with the addition that that would require
14 compliance with section 404, because that's not
15 exempt from 404 jurisdiction.

16 Q. Okay. And what about the filling of FW11?

17 A. That would be -- that it would be part of 404
18 jurisdiction, and that would require section 404
19 permitting, in addition to local permitting.

20 Q. Any reason why that couldn't be filled if it complied
21 with the other provisions?

22 A. No.

23 Q. Is there anything so unique or desirable on any of
24 these wetlands that we wouldn't want to fill them
25 under any circumstances?

AR 024502

1 A. Well, any condition for filling them under section
2 404 would require demonstration of no practicable
3 alternatives for a project, and that would apply to
4 Wetland FW11 and A1, so that -- whether those were
5 filled or not would be very dependent on specifically
6 what was proposed for the site and why the only --
7 why this was the only site where that particular
8 project could occur on. If -- and then in the local
9 regulation in reviewing permits and determining
10 whether wetland fill should be approved or not, the
11 quality and quantity of mitigation and whether that
12 mitigation functionally replaced what was occurring
13 on-site would be the critical review point. That
14 would be what the agencies would decide on. So the
15 functions of flood storage that Wetland FW11
16 provides, the water quality benefits that wetlands --
17 vegetative wetlands provide, the collection and
18 conveyance of groundwater across the site would be
19 one of the functions that the wetlands provide. And
20 all of these would have to be incorporated into a
21 mitigation plan and reviewed -- agreed to and
22 reviewed and approved by a permitting authority.

23 Q. This is the kind of work you do all the time for your
24 private clients, isn't it?

25 A. That's correct.

AR 024503

1 Q. And we haven't -- from our materials here, we don't
2 have a total amount of wetlands on the Parcel 92
3 site. But from my sort of eyeballing it, it looks
4 like less than half an acre, would you agree with
5 that? And again, I'm not asking to be precise, but
6 that looks to be about the number?

7 A. No. I would -- I would agree that nearly the entire
8 site, if not the entire site, is wetland.

9 Q. Well, let's leave aside the issue of -- and I
10 understand your testimony on prior converted
11 croplands, but looking at Exhibit 19, would you agree
12 with necessity that the wetlands that are mapped
13 there would be less than half an acre?

14 A. The wetland that the Corps of Engineers has
15 determined are jurisdictional under their 404 program
16 may be less than half an acre.

17 Q. And are there any rules and regulations that relate
18 to filling less than half an acre of wetland?

19 A. Under the Corps of Engineers?

20 Q. Correct.

21 A. These wetlands would -- well, I think it would depend
22 on the development proposal. There are a variety of
23 nationwide permits that might allow a more -- that
24 might allow -- that may apply to this situation or
25 may require an individual permit. And it would

1 depend on the specific development proposal, what the
2 nature of the development was, and why you had to
3 fill these wetlands.

4 Q. And it would also not be the case that the Court
5 would take a close look at the functions that the
6 wetlands serve on the site?

7 A. That's correct.

8 Q. And we agree that these are degraded wetlands; is
9 that correct?

10 A. The habitat value of these wetlands has been
11 degraded. The function that the wetlands provide in
12 providing flood storage may not have been degraded,
13 portions of the wetlands still in the floodplain.
14 The functions that the wetlands provide in terms of
15 groundwater discharge, the movement of groundwater to
16 surface water, and the supplemental base flow to
17 Miller Creek downstream may not have been degraded by
18 farming. So some functions have been degraded and
19 others may not have been.

20 Q. So there might have to be some arrangement to
21 continue the drainage of water that's otherwise
22 conveyed by Waters V1, V2, and A1 on lot 92?

23 A. That's correct. And the agencies, in reviewing a
24 permit application, might require, instead of
25 mitigation, instead of a square area that might be

1 3,000 feet square, they may require a long linear
2 type mitigation wetland that would provide
3 groundwater collection and conveyance functions
4 similar to what these existing ditches do; however,
5 they might allow you to move that function to a
6 different location on the site.

7 Q. Is it unusual in Western Washington to deal with
8 wetlands on a commercial or residential site that are
9 less an half acre?

10 A. Yes. It's common to do -- excuse me, no, it's not
11 unusual to deal with.

12 Q. Would you turn to page 3-19 of Exhibit 24, please?

13 A. (Witness complying.)

14 Q. I had a question about the last paragraph that's
15 found on that page. There's a sentence that says
16 certain areas meet the criteria for PC cropland,
17 prior converted cropland, but it says these have
18 hydric soils and saturation within 12 inches of soil
19 surface for more than 15 consecutive days; is that
20 right?

AR 024506

21 A. That's what it says.

22 Q. And have you gone out to the site and have records of
23 observations of soil saturation for more than 15
24 consecutive days?

25 A. We've gone out to the site -- to all of these parcels

1 as a whole on numerous occasions during the spring
2 and early summer months. And when a site that
3 contains peat soils is observed to have saturation
4 during the late spring and summer months, as we
5 have -- early summer months, as we have observed on
6 this site, that observation alone is sufficient to
7 demonstrate long-term saturation, that if it hasn't
8 rained and the drainage characteristics of peat soil
9 is so slow that if -- when you observe water during
10 the non-rainy season, you know that that water has
11 been there for a substantial period of time, and it
12 will be there for a substantial period of time in the
13 future because it drains out of those soils so
14 slowly.

15 Q. Well, my question to you, however, is do you have
16 records that indicate observations in the prior
17 converted croplands for more than 15 consecutive
18 days?

19 A. No, I don't have those records.

20 Q. Then your next sentence says, however, these areas
21 lack inundation for at least 15 consecutive days and
22 therefore, the areas do not meet the criteria for
23 farmed wetlands according to the Food Security Act.
24 Do you see that sentence there?

25 A. Yes.

AR 024507

1 Q. So it indicates that they are not inundated for more
2 than 15 consecutive days; is that correct?

3 A. That's correct.

4 Q. Okay. And is that different than the previous
5 sentence?

6 A. The previous sentence, we're talking about saturation
7 of soils, which is walking out on the site and
8 observing that the soil water table is high, the
9 soils are squishy, in layman's terms. But in -- in
10 doing our testing, you dig a hole and you observe
11 where the pore space in the soil is fully -- 100
12 percent saturated with water, and that's the criteria
13 for wetlands. And that's what the first sentence is
14 stating, that the soils are saturated. Inundation is
15 the presence of water sitting on top of the soil two
16 inches deep, three inches deep, maybe deeper.

17 Q. So if you're off-site, can you see the inundation
18 because you can see surface water?

19 A. That's correct.

20 Q. However, for purposes of soil saturation for your
21 previous sentence, you'd have to go out and dig a
22 hole, wouldn't you?

23 A. That's correct.

AR 024508

24 Q. So isn't that the common way to do is to go dig a
25 hole and observe the water levels in the hole for a

1 consecutive period of days?

2 A. Well, it's not necessary to do it for a consecutive
3 period of time because of the drainage
4 characteristics of soils in our area, and
5 particularly peat soils that don't drain rapidly.

6 Q. Well, but did you go out to the site and set up a
7 number of observations or holes that you looked into
8 over a period of time and saw that there was
9 saturation within 12 inches?

10 A. We went out to the site and we observed the soil
11 characteristics and the hydrologic characteristics.
12 And based on those observations, we delineated
13 wetlands. We brought the Army Corps of Engineers out
14 and the Department of Ecology out, showed them the
15 work that we had done, the basis for our wetland
16 determination, how our data plots that we took
17 characterized the site conditions, and based on that
18 information, I personally, and agency staff,
19 concluded that the areas were wetland and met the
20 Federal criteria for wetlands.

21 Q. But as I understand it, the issue that you were
22 taking to the Corps was not a development proposal to
23 fill wetlands, but a proposal to alter them for
24 beneficial purposes; is that correct?

25 A. When we first started taking the Corps out to this

1 site, we had not been looking at this site as
2 mitigation, so it was -- they were making a
3 determination as to where wetlands occur on property
4 that the Port of Seattle owns or was acquiring.

5 Q. But that these were prior converted croplands was
6 fine with the Port for its purposes; isn't that
7 correct?

8 A. Well, whatever it was is fine for our purposes.

9 Q. But there wasn't a contest over this issue as to
10 whether they were or weren't?

11 A. Well, there was in the sense that we had to provide
12 to the agencies enough documentation so that they
13 would make that determination we requested. We
14 identified to the Corps that we felt this area met
15 the criteria for prior converted cropland. They
16 asked us to provide that information to them. We
17 have an appendix in our wetland delineation report
18 that addresses our determination on prior converted
19 cropland, and the Corps has accepted that. So we did
20 ask them to make this determination.

21 Q. But did you ask them to conclude that it was all
22 wetlands, the prior converted croplands were
23 wetlands?

AR 024510

24 A. No, we did not.

25 Q. And that would not have been in the best interests of

1 the mitigation plan, would it?

2 A. I don't think it would have mattered to the
3 mitigation plan. The agencies want a site that is --
4 that has a high probability of being able to
5 reestablish wetland functions on it. It's in the
6 best interests of the mitigation plan that this site
7 does, indeed, have high water tables in the spring
8 and doesn't need excavation or grading to create
9 hydrology. The hydrology is already there. So it
10 may have been in the best interests of the mitigation
11 plan if the Corps determined it was jurisdictional
12 wetland.

13 Q. But you get more benefit for restoring wetlands than
14 you do for enhancing existing wetland; is that not
15 correct?

16 A. The Corps is not -- or Ecology has not specifically
17 identified to me how they're going to credit our
18 mitigation proposal with benefit for this site.

19 Q. But there's different ratios for properties that are
20 existing enhancement of wetlands and the restoration
21 of other wetlands; is that correct?

22 A. Generally, mitigation ratios are accepted by the
23 Corps on a site-by-site basis, on a case-by-case
24 basis.

25 Q. And as I understand it, you don't have your Corps

1 permit yet for all this work?

2 A. That's correct.

3 Q. And how many times have you submitted material to the
4 Corps?

5 MS. JONES: Objection, irrelevant.

6 THE COURT: Overruled.

7 A. We submit information to the Corps on a monthly
8 basis.

9 Q. (By Mr. Aramburu:) Well, I notice that there were
10 two notices of Corps applications, one in 1999 and
11 one in 2000; is that right?

12 A. That's right.

13 Q. So there was a resubmission of material in 2000?

14 A. That's correct.

15 Q. Is that because the Corps told you, you needed to do
16 more work?

17 A. A lot of that was procedural in terms of not
18 obtaining a Corps' permit within -- and obtaining
19 section approval from Department of Ecology on the
20 Clean Water Act certification within a one year
21 period. But there's ongoing -- but we have work
22 ongoing.

23 Q. Would you turn to Exhibit 54, I guess it's 53-A,
24 please?

25 A. (Witness complying.)

AR 024512

1 Q. Does your firm work on the natural resource
2 mitigation plan for the third runway?

3 A. Yes, that's correct.

4 Q. And can you identify the materials that are found
5 under tab 53-A?

6 A. There is chapter two -- actually, there's various --
7 various pieces of a report, the Natural Resource
8 Mitigation Plan for Seattle-Tacoma International
9 Airport, Master Plan Update, prepared and finalized
10 in December of 2000.

11 Q. And did your office have a hand in preparing that?

12 A. Yes, that's correct.

13 Q. And were you substantially responsible for preparing
14 it?

15 A. Yes.

16 Q. Okay. Now, in that material, and this is the
17 mitigation plan that you've submitted to the Corps to
18 tell them that you should be permitted to fill the
19 wetlands for the third runway, this would be the
20 mitigation for that?

21 A. That's right.

22 Q. And in this material, do you make a distinction
23 between wetland restoration and wetland enhancement?

24 A. We do.

25 Q. And looking over, I think, on page 5-2, table 5.1-1,

AR 024513

1 does that summarize the mitigation areas?

2 A. Yes, it does.

3 Q. And wetland restoration, 6.60 acres, is that primary
4 to the prior converted cropland?

5 A. Yes, it is.

6 Q. Now, does -- this report also describes monitoring
7 wells that were put in; is that correct? Look over
8 at page 5-31 and 32?

9 A. Yes. We did place monitoring wells.

10 Q. And what was the purpose of that?

11 A. They were placed in -- near the location of
12 relocating a stream channel, and to evaluate the
13 hydrologic conditions and the feasibility
14 constructability of relocating the Miller Creek
15 stream channel.

16 Q. And those would give you groundwater levels?

17 A. Yes, that's correct.

18 Q. Any of those on lot 92, Parcel 92?

19 A. No, they aren't.

20 Q. Did you consider at all in your evaluations of the
21 wetlands on lot 92 the ability to transfer
22 development rights from that property to other
23 properties?

24 A. No, I did not.

25 Q. Do you know if that is permitted by local SeaTac

AR 024514

1 regulations?

2 A. I do not know.

3 Q. Is it -- is the concept of development or of transfer
4 of development rights in connection with wetland
5 preservation a common element found in wetland
6 regulation?

7 A. I've never used it on a project that I've worked on.

8 Q. Would you turn to Exhibit 6, please?

9 A. (Witness complying.)

10 Q. I have some testimony from you concerning a portion
11 of this Corps -- this Public Notice of the Corps'
12 application. And you didn't write this, I take it?

13 A. No; the Army Corps of Engineers wrote this.

14 Q. And you brought our attention to some language in the
15 notice on page 9; is that correct?

16 A. Yes.

17 Q. This says that -- it talks about the Vacca Farm, and
18 then it says, accordingly, impacts being considered
19 under water quality standards include certain
20 property to be filled at the Vacca Farm site, and an
21 additional 6.92 acres of waters of the State
22 temporarily impacted during construction of
23 mitigation. Do you know what's going to be filled at
24 the Vacca Farm site?

25 A. Yes, I do.

AR 024515

1 Q. What is that?

2 A. There's a portion of this prior converted cropland
3 that would be filled. Miller Creek, which flows
4 across this portion of this site, would be moved over
5 into a portion of Wetland A1, and that would
6 accommodate the runway embankment and the 154th
7 Street relocation.

8 Q. Okay. And then it says that there are waters of the
9 State that will be temporarily impacted during
10 construction of mitigation. Do you know what that
11 means?

12 A. That's referring to areas within Wetland A1, all
13 these farmed wetlands and other small wetlands, and
14 the prior converted cropland that would be restored
15 during the mitigation process. So taking trucks out
16 into the wetland, digging holes to plant wetland
17 vegetation, in some cases excavation for floodplain,
18 is what is referred to as those temporary impacts.

19 Q. And do I understand from this that the principal
20 concern of DOE has to do with the water quality
21 standards?

22 A. Their concern is with water quality standards and
23 wetland function, and how wetland function may
24 pertain to water quality, but habitat, as well,
25 aquatic habitat functions.

1 Q. So when it says water quality standards, then, would
2 the Department of Ecology be concerned that working
3 in the wetlands might cause downstream siltation to
4 harm fish and that kind of thing?

5 A. Yes, that's one of their concerns.

6 Q. That seems to be the one expressed here.

7 A. It's the one expressed here in this notice.

8 MR. ARAMBURU: Those are all the questions
9 I have for cross-examination. Thank you very much,
10 Mr. Kelley.

11 THE COURT: Counsel, redirect?

12 MS. JONES: Yes, I have a little redirect.
13 Thank you.

14 First, your Honor, I would like to move to admit
15 Exhibit No. 14, which I neglected to do on direct.
16 That's the soil survey of King County, Washington,
17 dated September 1952, Exhibit 14.

18 THE COURT: Thank you. Any objection?

19 MR. ARAMBURU: No objection to 14, your
20 Honor.

21 THE COURT: All right. Thank you. Exhibit
22 No. 14 is admitted.

23 MR. ARAMBURU: Your Honor, I'd like, also,
24 to ask for the admission of Exhibit 54-A, which the
25 witness discussed during his testimony. **AR 024517**

1 THE COURT: Hold on just a minute.

2 MS. JONES: No objection.

3 THE COURT: 54-A or 53-A?

4 MR. ARAMBURU: Excuse me, 53-A, your Honor.
5 Excuse me.

6 THE COURT: So that is the Natural Resource
7 Mitigation Plan for the third runway; is that
8 correct?

9 MR. ARAMBURU: That's correct.

10 MS. JONES: No objection, your Honor.

11 THE COURT: Okay. All right. Thank you.
12 Exhibit No. 53-A is admitted.

13 Thank you. All right. Counsel, go ahead.

14 MS. JONES: Thank you.

15 REDIRECT EXAMINATION

16 BY MS. JONES:

17 Q. Mr. Kelley, Mr. Aramburu asked you early in your
18 cross-examination whether the Port was going to
19 mitigate Wetland A1. Do you recall that?

20 A. Yes.

21 Q. Okay. And the question I have is, is the Port doing
22 any mitigation activities on Parcel 92?

23 A. Yes, we are.

AR 024518

24 Q. And what are they, please?

25 A. The mitigation activities are primarily planting that

1 area with native trees and shrubs that are adapted to
2 wetland conditions.

3 Q. Are you planting or does the Port's mitigation plan
4 include planting not only on what's been delineated
5 as wetland, but what you have testified is wetland
6 and what's been shown on your exhibits as prior
7 converted cropland?

8 A. Yes, that's correct.

9 Q. You also testified that the Port will be filling part
10 of exhibit -- of Wetland A1, and also restoring part
11 of it by relocating the creek and replanting some
12 native trees and shrubs there; is that right?

13 A. Yes.

14 Q. Is there -- is there a cost to doing that; that is,
15 does the Port have to expend money to do those
16 mitigation activities?

17 A. Yes, they do.

18 Q. I believe Mr. Aramburu asked you how many days that
19 you -- how many days the data plots were done as you
20 were delineating the wetlands. Do you recall that?

21 A. Yes.

22 Q. Would you normally go out and do data plots for more
23 than one day before you made your conclusion on a
24 particular data plot?

25 A. It's usually only in -- in -- it's unusual

1 circumstances where wetland consultants and wetland
2 regulatory agencies have to observe sites for 14
3 consecutive days. On a site like this, where it's
4 obviously wet during much of the year, we can very
5 readily examine the soils and examine the hydrologic
6 conditions of the site and determine that the site
7 meets the criteria for wetland.

8 Q. When you were doing data points, does the Army Corps
9 of Engineers' Wetland Delineation Manual require you
10 to mark data points for more than one day before you
11 have a conclusion based on those data points?

12 A. No, it does not require that.

13 Q. What about the State of Washington, Department of
14 Ecology Wetland Delineation Manual?

15 A. No, for general determinations, it does not.

16 Q. Now, there was some question about the lack of data
17 points on Parcel 92, even though there are some data
18 points in prior converted cropland to the north. Do
19 you recall that?

AR 024520

20 A. Yes.

21 Q. Why do data points -- or do data points -- why don't
22 you explain that, why did you not do them on 92 when
23 you had done them prior to the north in the area that
24 you've described as wetland, but also has been
25 delineated as prior converted cropland?

1 A. Well, generally, what the Corps wants to see in a
2 delineation report are data plots that are
3 representative of the variety of conditions that
4 might be on a site, and so that they don't require a
5 data point at every wetland delineation flag which
6 might be hung around the perimeter of a wetland.
7 They don't require a data point on every square foot
8 of the delineation site. They require a -- enough
9 data plots in the wetland and around the perimeter of
10 the wetland to sufficiently characterize the larger
11 or the broader changes that may be present on a site.

12 And so in this particular case, where we
13 identified wetlands and prior converted cropland, it
14 was determined that the data plots that we have to
15 the north of Parcel 92 in prior converted cropland
16 adequately characterize the presence of hydric soil,
17 the presence of peat soil. And the hydrology of the
18 site, when we obtained access to Parcel 92 and
19 examined those conditions, we found them
20 substantially the same as areas to the north.

21 Q. What were the conditions that you examined on Parcel
22 92 when you did get access that made you think they
23 were the same as the ones you had done data points on
24 farther north?

25 A. We dug holes and determined that the soils were peat

1 soils, and we determined that there was the same type
2 of peat that occurs to the north on other parcels.
3 We observed water flowing into those holes and water
4 flowing almost to the soil surface and determined
5 that the wetland hydrology criteria was met. In the
6 case of the prior converted cropland, the plowing was
7 the same as the plowing further north. In the case
8 of Wetland A1, the vegetation along the perimeter of
9 the wetland was the same as -- as vegetation in other
10 portions of that area.

11 Q. Thank you.

12 Now, in response to a question from Mr.
13 Aramburu, you indicated that Wetland A1 is less than
14 10 acres in size; is that right?

15 A. That's what I said, yes.

16 Q. Okay. In your correct testimony, you had indicated
17 that you were -- had concluded that there was a Class
18 I Wetland here because there was in excess of 10
19 acres for a wetland?

AR 024522

20 A. Yes.

21 Q. Can you explain why -- or explain if there is a
22 discrepancy, what that -- how you reconcile that?

23 A. Yeah. I think that this figure that we have here in
24 the 4.59 acreage, I think that we -- that I stated
25 for Wetland A1, consider that particular unit of

1 wetland, which is Wetland A1, where a wetland
2 determination was based on the presence of three
3 parameters, according to the routine delineation
4 approach identified in the Federal manual and in the
5 State manual.

6 So in this area, we found undisturbed wetland
7 vegetation, we found hydric soil, we found a high
8 water table, so all three parameters were met. Then
9 on other portions of this site -- and so that area
10 was called out as Wetland A1, 4.59 acres. Then as we
11 continued to study the site, we found places where
12 there was ponding and places with hydric soil and
13 water, but no vegetation, and so we started
14 identifying out some of the little nuances of the
15 site that we need to bring to the attention to the
16 Corps so they can make a determination on wetlands,
17 and so these other areas were identified and called
18 out. Then -- and that's why our map is a little
19 mosaic of different things, because it represents the
20 different criteria that were used in the field to
21 identify these different areas. We had the vegetated
22 wetlands with these perimeters, we had prior
23 converted croplands soils, but no inundation present.
24 And then we had the farmed wetlands that had hydric
25 soil, no plants, 'cause they're plowed, and they had

1 inundation. That's independent of how this wetland
2 is classified according to the City of SeaTac zoning
3 code. If you're classifying this wetland according
4 to the City of SeaTac zoning code, all the little
5 detail, the boundaries that separate out this area
6 are just simply dissolved, and it becomes one big
7 wetland, which is 16.8 acres in size.

8 Q. Thank you.

9 Mr. Aramburu asked you to -- asked you whether
10 or not Parcel 92 is degraded wetland. Do you recall
11 that?

12 A. Yes.

13 Q. Is there a difference between degraded wetland and
14 altered wetland, do you know?

15 A. No, it's just -- there's no technical difference,
16 it's just a matter of common usage. They both would
17 refer and imply -- well, degraded to me implies that
18 the wetland functions may be impaired, altered just
19 means maybe something is changed, things have
20 changed, it may or may not imply that functions have
21 been degraded. But it's just a nuance, and there's
22 no technical definition that I'm aware of.

23 Q. All right. Is there -- do you know if the SeaTac
24 City Code includes the term or uses the term degraded
25 wetland?

AR 024524

1 A. I'm not aware that they do.

2 Q. Okay. Mr. Aramburu asked you if the wetland point --
3 on Parcel 92, that point that we've talked about on
4 A1, Wetland A1, and also FW11, can be moved. Do you
5 recall that?

6 A. Yes.

7 Q. Okay. And I believe your answer was that there
8 would -- yes, but there would have to be compliance
9 with section 404; is that right?

10 A. Yes, that's right.

11 Q. Okay. What kinds of things would be required to
12 comply with section 404 if you wanted to move those
13 wetlands?

14 A. Well, you would need to delineate the wetland,
15 prepare a wetland delineation report, have that
16 delineation approved by the Corps. You would need to
17 prepare -- presumably with an engineer or a real
18 estate developer, you would need to prepare a
19 development plan and determine the acreage of impact
20 to that wetland, the acreage of direct impact. You
21 would have to review with the Corps whether there are
22 any indirect impacts to that wetland, whether
23 developing the -- developing the non -- the PC
24 portion of that site near the wetland might intercept
25 hydrology and cause indirect impacts to a greater

1 area of wetland than was just being filled by the
2 project. So impact issues would need to be reviewed
3 and approved by the Corps.

4 The Corps would be requesting information on
5 what the ecological functions and values of that
6 wetland were, so an evaluation of wildlife habitat,
7 aquatic habitat, groundwater functions, storm water
8 functions, flood storage functions, would need to be
9 prepared and summarized in a report. And I think key
10 on this site in getting a key permit would be
11 evaluation of purpose and need, and demonstrating
12 that you did not have alternatives to developing a
13 project that avoided wetlands, and that can be a very
14 difficult -- a very difficult hurdle, or it takes
15 extensive information to demonstrate to the Corps
16 that this is the only project site in -- available to
17 you to accomplish this particular development. And
18 for private development, it's very difficult to make
19 that demonstration to the Corps.

20 Q. Do you have any estimate of the time it would take if
21 you were to provide such a request to the Corps to
22 move the wetlands we just talked about, getting a
23 determination from the Corps about whether you could
24 do it or not?

25 A. Well, I would think it would be in excess of 12

1 months to get all the information together and all
2 the issues resolved and approved.

3 Q. Now, you talked about the moving of the ditches, as
4 well, the ones -- the things we've referred to as
5 Water V1 and Water V2. And I believe that your
6 testimony was that these were a very small portion of
7 the land, what did we say, .01?

8 A. .02, I believe.

9 Q. 436 square feet, each of them?

10 A. Yes, yes.

11 Q. Okay. And then I believe you testified that you
12 might be able to -- in the moving of those particular
13 ditches, you might -- that the nationwide permits
14 might apply. Do you recall that?

15 A. Yes.

16 Q. What is a nationwide permit?

17 A. It's a -- there's a series of nationwide permits
18 which are essentially permits that the Corps -- I
19 believe that they're essentially permits that the
20 Corps has issued to themselves to allow a more
21 streamlined approval, compared to -- and so in
22 requesting a nationwide permit, you are asking the
23 Corps to review your development proposal and concur
24 that you meet these pre-specified terms and
25 conditions. And an individual permit is a more

1 lengthy process, where there's much more focus on
2 individual project review.

3 Q. If a developer were to come along and, again, just
4 based on your work with private individuals or
5 smaller projects and didn't want to move FW -- or do
6 anything to FW11 or A1, but did want to move those
7 ditches, and therefore sought to do it through a
8 nationwide permit, can you estimate the length of
9 time that that process could take?

10 A. Well, it is an estimate. I would think it would be
11 probably several months. I think that the Corps
12 would ask you to provide information on endangered
13 species, being Chinook salmon and bull trout, which
14 don't occur on this site, but these streams connect
15 to waterways that connect to Puget Sound where
16 there's water quality concerns for these species, and
17 that's -- these kinds of issues have -- are not clear
18 cut. And it can take -- they're unpredictable. And
19 so I hate to -- I'm hesitant to say three months,
20 because it could take longer, but it would be -- I
21 would be pleased if I could get it resolved in three
22 months for a client.

23 Q. Would there be any other permits required that you
24 know of in this particular site to move these
25 ditches?

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1 A. It would.

2 Q. If the developer wanted to do that?

3 A. It would require, as we discussed earlier, hydrolic
4 project approval from the Department of Fish and
5 Wildlife, the state Department of Fish and Wildlife.
6 And these are protected under the City of SeaTac
7 ordinances, I believe, as a stream.

8 Q. Thank you.

9 Mr. Aramburu asked you about the fact that you
10 have assisted the Port in resubmitting -- in
11 submitting new information to the Corps of Engineers
12 at its request as it considers the 404 permit. Did
13 any of the new information that you or Parametrix
14 provided to the Corps apply to Parcel 92?

15 A. It applied -- what we submitted in December applied
16 to Parcel 92.

17 Q. And was it changed?

18 A. It was not changed information.

19 Q. Thank you.

20 You said that the Port was doing some filling in
21 the area northeast of Parcel 92, and I believe that
22 you talked about this prior converted cropland area
23 here that's designated as having .92 acres. Is that
24 the area?

25 A. That's the area.

1 Q. Okay. What kind of -- did the Port have to receive a
2 permit to do that work, filling of that prior
3 converted cropland area?

4 A. Well, they haven't done it yet.

5 Q. They haven't done it yet, excuse me, of course they
6 haven't. What do they have to do to do that?

7 A. It is included in our permit application. And
8 Ecology has told myself and the Port that that area
9 is a water of the State and that our mitigation has
10 to include area to compensate for that impact. Our
11 mitigation plan has specific -- it's larger because
12 we have .98 acres of impact to that prior converted
13 cropland.

14 MS. JONES: Okay. Thanks. I don't have
15 any more.

16 THE COURT: All right. Thank you.

17 MR. ARAMBURU: May I have --

18 THE COURT: Sure, just brief rebuttal.

19 RE-CROSS-EXAMINATION

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20 BY MR. ARAMBURU:

21 Q. Mr. Kelley, you talked about the mitigation plan for
22 the facility. And would you look at Exhibit 54-A?
23 And that would be, I guess, following page 3-10 of
24 that document.

25 (Off the record.)

1 THE COURT: 54-A, Counsel?

2 MR. ARAMBURU: 53, your Honor. I've got a
3 hang-up here with 53 and 54. Excuse me.

4 Q. (By Mr. Aramburu:) 53-A, looking at figure 3.2-1, do
5 you see that? We've excerpted your report, which is
6 much longer than this. In my copy, it stops page
7 3-10.

8 A. Yes, I have it.

9 MR. ARAMBURU: Okay. About ten pages in,
10 your Honor.

11 THE COURT: All right. So you're looking
12 at the --

13 MR. ARAMBURU: 3.2-1.

14 THE COURT: Got it.

15 Q. (By Mr. Aramburu:) Now, does this indicate in
16 general the -- what's going to happen at the Vacca
17 Farm site?

18 A. Well, it doesn't show the vegetation replant --
19 there's a lot of detail it doesn't show.

20 Q. Okay. But this shows that essentially pretty much
21 the entire area to the east of the drainage ditch is
22 going to be excavated for floodplain purposes; is
23 that right?

24 A. Yes, it does.

25 Q. Okay. And as I see here on the drawing, 9,589 cubic

1 yards of material is going to be removed from that
2 area. So that's digging down, what, two or three or
3 four feet?

4 A. That's digging down more than that at the northwest
5 portion of the site that's currently upland, and
6 digging down one to two feet, in general, or less
7 over the broader central portion of the site. And
8 then on Parcel 92, we aren't doing any excavation.

9 Q. Well, I noticed that there appears to be some work
10 outlined here on lot 92.

11 A. Yeah. That work would be temporary berm to control
12 runoff and to assure that, if there was a heavy rain
13 that would generate erosion or mobilize soil
14 particles, that it would not run off-site onto the
15 lot 94, which is south of Parcel 92, and that the
16 water would be directed into the sedimentation ponds
17 that would be present on the site during
18 construction.

19 Q. And that -- and would that be removed after
20 destruction?

21 A. Yes, most likely it would be removed.

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22 Q. And would that -- would that area -- that would be an
23 area of fill -- fill material brought in?

24 A. I suspect it would be fill material brought in.

25 Q. And that goes right through FW11, doesn't it?

- 1 A. Yes, it does.
- 2 Q. And it goes into exhibit -- or into A1?
- 3 A. Yes, it would.
- 4 Q. You discussed concern about Chinook salmon that are
5 found downstream in Miller Creek; is that correct?
- 6 A. Yes.
- 7 Q. Are there any Chinook salmon located in the vicinity
8 of lot 92?
- 9 A. No, there are not.
- 10 Q. And have any -- have any salmonids of any kind been
11 identified in this area?
- 12 A. No.
- 13 Q. And would the first salmonids be found downstream of
14 160th Street?
- 15 A. Yes, that's correct --
- 16 Q. Okay. And that's --
- 17 A. -- as far as we are aware.
- 18 Q. Okay. And that's pretty much off of our Exhibit 19
19 that we have here?
- 20 A. That's correct.
- 21 Q. And is the conclusion of your work that the entire
22 development of the third runway and all of the
23 filling and work that's necessary there is not going
24 to have an adverse impact on Chinook salmon?
- 25 A. That's the conclusion of our work. And that

1 conclusion is also based on very extensive water
2 quality mitigation that occurs during construction,
3 very extensive water quality and storm water controls
4 during operation. And it also includes retrofitting
5 portions of the airport right now that do not have
6 standard or acceptable storm water management
7 facilities up to current standards. So there was an
8 extensive amount of mitigation that was required for
9 us to come to that conclusion and to get concurrence
10 from the Federal agencies on that determination.

11 Q. So the excavation that's shown on Exhibit 53-A at
12 figure 3.2-1, excavation of almost 10,000 cubic yards
13 of material, isn't going to hurt the fish?

14 A. That's correct; if it's done with identified
15 mitigation to control sedimentation and storm water
16 runoff during construction.

17 Q. One last question: Are you familiar with the King
18 County Sensitive Areas mapping?

19 A. Yes, I am.

20 Q. Does any of what's shown on Exhibit 19 show up on
21 that map?

22 A. I have not looked.

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23 MR. ARAMBURU: No further questions.

24 THE COURT: Anything else, Counsel?

25 MS. JONES: Just one, your Honor.

REDIRECT EXAMINATION

1
2 BY MS. JONES:

3 Q. You just testified that you understand that there are
4 no salmonids having been identified in Miller Creek
5 north of 160th Street; is that right?

6 A. Yes.

7 Q. Do you know how far 160th Street is from Parcel 92?

8 A. I think it's about half a mile.

9 MS. JONES: No further questions.

10 THE COURT: All right. You may step down,
11 sir.

12 MR. KELLEY: Thank you.

13 THE COURT: I think you pulled one of the
14 maps out of there.

15 MR. KELLEY: I'm afraid to figure which one
16 it came out of.

17 MS. JONES: It's 39.

18 THE COURT: 39, all right. Go ahead and
19 put it back in the notebook by 39 if you could.

20 All right. Thank you, Counsel. We're going to
21 take our afternoon recess at this time. We'll see
22 you in 15 minutes. Thank you.

23 MS. JONES: Thank you, your Honor.

24 (Court at recess.)

25 THE COURT: Counsel, I should tell you just