

POLLUTION CONTROL HEARINGS BOARD

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

AIRPORT COMMUNITIES COALITION,)	
)	
Appellant,)	
)	
vs.)	PCHB NO. 01-160
)	
DEPARTMENT OF ECOLOGY and THE)	
PORT OF SEATTLE,)	
)	
Respondents.)	

DEPOSITION UPON ORAL EXAMINATION
OF
THOMAS LUSTER

8:57 A.M.

FEBRUARY 1, 2002

1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON

MARY L. GREEN, CCR, RPR
CSR NO. GREENML497RZ

25

1 APPEARANCES
 2 FOR THE APPELLANT:
 3 PETER J. EGLICK
 4 Attorney at Law
 5 Helsell Fetterman
 6 1325 Fourth Avenue, Suite 1500
 7 Seattle, Washington 98111
 8 FOR THE RESPONDENT PORT OF SEATTLE:
 9 GILLIS E. REAVIS
 10 Attorney at Law
 11 Marten Brown
 12 1191 Second Avenue, Suite 2200
 13 Seattle, Washington 98101
 14 FOR THE RESPONDENT DEPARTMENT OF ECOLOGY:
 15 Thomas J. Young
 16 Assistant Attorney General
 17 State of Washington
 18 PO Box 40117
 19 Olympia, Washington 98504
 20 FOR MR. LUSTER:
 21 RICHARD A. SMITH
 22 Attorney at Law
 23 Smith & Lowney
 24 2317 East John Street
 25 Seattle, Washington 98112
 ALSO PRESENT:
 ELIZABETH LEAVITT

1 212. Letter to Julia Patterson from Tom Luster, 114
 2 January 21, 2001
 3 213. SeaTac Issues Short List Oct99.doc 117
 4 214. Memo to Ecology's SeaTac reviewers from Tom 118
 5 Luster, October 9, 2000
 6 215. Sea-Tac Airport Third Runway 401 Permit 119
 7 Negotiations Final Draft Meeting Notes,
 8 October 13, 2000
 9 216. E-mail to Raymond Hellwig from Tom Luster 121
 10 October 18, 2000
 11 217. Declaration of Kevin Fitzpatrick 128
 12 218. Sea-Tac Airport Third Runway 401 Permit 136
 13 Negotiations Draft Meeting Notes,
 14 October 27, 2000
 15 219. Sea-Tac Airport Third Runway 401 Permit 136
 16 Negotiations Meeting Notes Summary,
 17 October 2 through December 8, 2000
 18 220. E-mail to Tom Luster from Raymond Hellwig 139
 19 January 3, 2000
 20 221. E-mail to Kevin Fitzpatrick from Raymond 143
 21 Hellwig, November 7, 2000
 22 222. E-mail to Tom Luster from Kevin Fitzpatrick 147
 23 May 14, 1999
 24 223. E-mail to Tom Luster from Raymond Hellwig 153
 25 May 12, 1999
 224. E-mail to Tom Luster from Paula Ehlers 162
 June 13, 1999

1 INDEX
 2 EXAMINATION BY: PAGE
 3 Mr. Reavis 6, 211
 4 Mr. Young 168
 5 Mr. Eglick 187, 213
 6
 7 EXHIBITS FOR IDENTIFICATION PAGE
 8 200. Curriculum vitae 9
 9 201. Memorandum to the Files from Tom 10
 10 Fitzsimmons, February 11, 1997
 11 202. Memo to Al Jacobs from Paula Ehlers, 11
 12 November 25, 1998
 13 203. Bibliography for the Port of Seattle 404 12
 14 permit
 15 204. E-mail to Tom Luster from Tom Luster, 15
 16 June 7, 2001
 17 205. E-mail to Tom Luster from Tom Luster, 15
 18 June 5, 2001
 19 206. Issues Related to Ecology's Section 401 Water 17
 20 Quality Certification Review of the Proposed
 21 SeaTac Airport Expansion
 22 207. Desk Manual for Ecology's Federal Permit Team 47
 23 401/CZM Review
 24 208. Letter to Jack Kennedy from Barbara Hinkle, 60
 25 JARPA Application Form
 209. Declaration of Thomas R. Luster 66
 210. Reply Declaration of Tom Luster in Support 66
 of Stay
 211. Letter to Barbara Hinkle from Gordon White 69
 July 20, 1998

1 SEATTLE, WASHINGTON; FRIDAY, FEBRUARY 1, 2002
 2 8:57 A.M.
 3 --oOo--
 4
 5 THOMAS LUSTER
 6 sworn as a witness by the Notary Public,
 7 testified as follows:
 8
 9 MR. REAVIS: Do you want to go ahead and make
 10 your objections?
 11 MR. SMITH: Sure. My name is Richard Smith.
 12 I am here representing Tom Luster, the deponent today,
 13 and as we get started, I have some objections I'd like
 14 to make a record of with respect to the document
 15 request that was attached to the notice of deposition.
 16 I'd like to object to the form of the
 17 document requests. There is no provision in the rules
 18 for a document request to a nonparty witness made by or
 19 with a notice of deposition. Second, I'd like to
 20 object that these document requests are overbroad and
 21 unduly burdensome, and, finally, I'd like to object
 22 that the fifth document request here is beyond the
 23 scope of the parties' agreement as I've understood it
 24 with respect to document disclosures. My understanding
 25 is that communications between counsel and experts are

1 not being disclosed by anyone in this case.
 2 That being said, without waiving those
 3 objections, we have brought some documents here and
 4 made an attempt to meet those requests.

5 MR. EGLICK: I'll add I think that the
 6 requirements for discovery in this case are being met,
 7 and anything that was requested of Mr. Luster beyond
 8 those requirements is subject to objection from ACC as
 9 well.

10
 11 EXAMINATION

12 BY MR. REAVIS:

13 Q. Will you please state your name for the
 14 record.

15 A. My name is Thomas R. Luster, L-u-s-t-e-r.

16 Q. Mr. Luster, my name is Gil Reavis, and I
 17 think we just met for the first time this morning. You
 18 understand I'm representing the Port of Seattle in
 19 connection with an appeal of a 401 certification issued
 20 to the Port for a project at Sea-Tac International
 21 Airport, do you not?

22 A. I do understand that.

23 Q. And you understand that you've been given an
 24 oath to tell the truth just as if you were in court
 25 testifying before a judge or jury?

1 you could tell me about which cases you gave
 2 depositions in in connection with 401 certifications.

3 A. The first deposition, I believe, was O'Hagen
 4 versus Ecology, and that was a 401 that Ecology had
 5 issued several years ago. I don't remember the exact
 6 date. And there may have been one or two different
 7 depositions in that case.

8 Q. Do you remember the time frame that those
 9 were given?

10 A. Probably mid '90s. I don't know more
 11 specifically than that. I also provided a deposition
 12 in the Battle Mountain 401 case, which was Okanogan and
 13 Highlands Alliance versus Ecology and Battle Mountain,
 14 I believe.

15 I gave a deposition on a matter between the
 16 LRI Landfill Company and Ecology. Actually, now that I
 17 think about it, that may not have been a 401-related
 18 one. Ecology was involved with the review, but I think
 19 eventually a 401 was not required for that instance,
 20 but regardless, I provided a deposition on that case.

21 Last January 2001, I was deposed on an appeal
 22 of the general NPDES permits for industrial and
 23 construction stormwater, I believe, and today's
 24 deposition. I believe that's the complete list as far
 25 as I can remember.

1 A. I do.

2 Q. If during the course of the deposition today
 3 any of my questions is unclear to you, I would
 4 appreciate it if you would stop and ask me to rephrase
 5 it. Will you do that?

6 A. Okay.

7 Q. That way before you answer a question,
 8 everyone will know that you understood it. Is that
 9 fair enough?

10 A. Right.

11 Q. For the court reporter's benefit, if you
 12 could please answer audibly instead of shaking your
 13 head or nodding.

14 A. Yes. I understand that.

15 Q. You've given depositions before, I
 16 understand.

17 A. Correct.

18 Q. On how many occasions?

19 A. I think five or six.

20 Q. Can you tell me what matters those were in
 21 connection with?

22 A. All but one were in regards to other 401
 23 certification issues. The one that wasn't had to do
 24 with a general NPDES permit.

25 Q. Why don't we go through briefly, then, and if

1 Q. In connection with that appeal of the general
 2 NPDES permit, you were actually deposed by Mr. Smith,
 3 who is here representing you today; is that correct?

4 A. Correct.

5 Q. The O'Hagen case, did that involve a 401
 6 certification that you authored?

7 A. Yes, it did.

8 Q. Did you testify or have you testified at any
 9 hearings before the PCHB or other court proceedings in
 10 connection with 401 certifications?

11 A. I testified before the board in that
 12 proceeding, the O'Hagen proceeding.

13 Q. By the board, that's the Pollution Control
 14 Hearings Board?

15 A. Yes.

16 Q. I take it you did not testify at the hearing
 17 or any of the hearings before the Pollution Control
 18 Hearings Board with regard to the Battle Mountain Gold
 19 case?

20 A. Correct.

21 Q. Let me go over with you if I could some of
 22 the documents that you brought with you today and get
 23 you to identify them for the record.

24 (Deposition Exhibit No. 200 was marked for
 25 identification.)

1 Q. (BY MR. REAVIS) Exhibit No. 200 to these
2 depositions appears to be a copy of your resume; is
3 that correct?

4 A. Yes, it is.

5 Q. Is that current to the best of your
6 knowledge?

7 A. Yes. It's also -- the first two pages are my
8 resume, and the last three are letters from the past
9 two directors of Ecology that delegated signature
10 authority for 401 to me.

11 Q. Let's do this, then. Why don't I pull those
12 letters off the back of that and mark those as another
13 exhibit.

14 (Deposition Exhibit No. 201 was marked for
15 identification.)

16 Q. (BY MR. REAVIS) Just so the record is clear,
17 Exhibit 200 is now your resume, and Exhibit No. 201 is
18 a copy of two letters or actually a memorandum and a
19 letter to you -- let me strike that. Why don't you
20 tell me what the first page of 201 is.

21 A. 201 is a memo from Tom Fitzsimmons, director
22 of Ecology, regarding delegation of signature
23 authority. It essentially continues the delegation of
24 authority that was provided by the previous director,
25 Mary Riveland.

1 environmental specialist 5 at Department of Ecology.
2 It includes a cover memo from my supervisor, the job
3 description known as a classification questionnaire,
4 and some personnel forms related to that and signature
5 blocks from various people, so that's the full --

6 Q. So Exhibit 202, the first page is a
7 memorandum dated November 25, 1998, from Paula Ehlers
8 to Al Jacobs?

9 A. Correct.

10 Q. And as I understand what you just told me,
11 the succeeding pages after the first two were
12 attachments to the memorandum?

13 A. Yes.

14 Q. So this is the document as it was intended to
15 be with all attachments?

16 A. Correct. That's the complete document.

17 (Deposition Exhibit No. 203 was marked for
18 identification.)

19 Q. (BY MR. REAVIS) Can you describe for me what
20 Exhibit 203 is?

21 A. This is a bibliography that I believe was
22 prepared by the Corps of Engineers staff. It's a list
23 of documents related to the proposed Sea-Tac master
24 plan expansion and goes back from the early '90s until
25 the last document noted was October of 2001.

1 Q. So this is dated February 11, 1997?

2 A. Yes. And attached to it is from December 14
3 of 1995 a letter to me from Director Riveland
4 delegating signature authority for 401 certifications
5 and CZM consistency determinations.

6 Q. So the second letter is dated December 14,
7 1995, to you from Mary Riveland?

8 A. Right.

9 Q. And that one specifically is delegating
10 signature authority to you personally?

11 A. Correct.

12 Q. The first page, the memorandum from
13 Mr. Fitzsimmons, does not mention you personally,
14 correct?

15 A. Correct.

16 (Deposition Exhibit No. 202 was marked for
17 identification.)

18 Q. (BY MR. REAVIS) Can you describe for the
19 record what Exhibit 202 is?

20 A. Actually, this isn't complete. Those last --
21 keep going.

22 Q. Why don't you make it a complete document.

23 A. Actually, there are -- I think there are nine
24 sheets here that comprise the recommendation for my
25 upgrade from an environmental specialist 4 to

1 I haven't done a count. There's probably a
2 little over a hundred documents listed, and I've check
3 marked a number of those documents that I either
4 reviewed or am familiar with or I know were part of my
5 earlier involvement with the project. There may have
6 been some I missed, but these are the ones that I
7 remember.

8 Q. So the purpose for putting the check marks on
9 the documents was what?

10 A. It's in response to the request for documents
11 as part of this deposition. I believe all these are in
12 the public record, and I think the request said
13 something about I didn't have to bring documents that
14 were part of the public record. I'm assuming that all
15 the parties have copies of these or have had
16 opportunities to get copies.

17 Q. So is it your testimony, then, that all of
18 these items with check marks on were either reviewed or
19 relied upon by you in the formulation of the opinions
20 that you're expressing in this case?

21 A. I either reviewed them, discussed them with
22 other people involved in the review, or am somehow
23 familiar in those ways.

24 Q. Let me just see if I can make sure I
25 understand, then. You're not necessarily testifying

1 that you reviewed all the documents that are marked
 2 with checks on Exhibit No. 203?
 3 A. Correct. Well, it varies by document. Some
 4 of them I did do a pretty thorough review of. Some of
 5 them I reviewed portions of the documents. For
 6 instance, with some documents that had a number of
 7 appendices with perhaps raw modeling data or something
 8 like that, I didn't personally review every page of an
 9 appendix like that. So my level of review or
 10 familiarity varies with each document.
 11 Q. To the best of your knowledge, are there
 12 documents that are marked with a check on Exhibit
 13 No. 203 that you never reviewed at all?
 14 A. I believe that the ones I checked are ones
 15 that I'm at least familiar with and have some personal
 16 knowledge of. I have done some level of review of
 17 those. As I said, I may have missed some or I may have
 18 inadvertently marked the wrong version perhaps of one.
 19 In some instances, we had four or five or six
 20 different drafts of a document, and I didn't have them
 21 all in front of me when I made this list or check
 22 marked this list, so I may have mismarked one draft and
 23 mistaken it for an earlier or later draft.
 24 Q. I take it, then, that the time frame in which
 25 you reviewed these documents may have been while you

1 were working for the Department of Ecology in addition
 2 to after you left the Department of Ecology?
 3 A. Correct.
 4 MR. EGLICK: Objection to the form of the
 5 question.
 6 Q. (BY MR. REAVIS) Do you understand the
 7 question?
 8 A. That this list includes documents I reviewed
 9 several years ago as well as during the last year?
 10 Q. Yes.
 11 A. Yes, it does.
 12 (Deposition Exhibit Nos. 204 and 205 were
 13 marked for identification.)
 14 Q. (BY MR. REAVIS) Will you please describe for
 15 the record what Exhibit 204 is?
 16 A. Exhibit 204 is a note to myself essentially
 17 from June 7, 2001, after I talked with Ann Kenny from
 18 Department of Ecology about -- I had just received a
 19 request from Senator Julia Patterson to review the
 20 NPDES permit that had been issued sometime right near
 21 this date, and I had called Ann letting her know that
 22 Senator Patterson had made the request, left a message
 23 for Ann, and then Ann called back and we talked some
 24 about that request.
 25 Q. So you describe this as a note that you wrote

1 to yourself?
 2 A. Correct.
 3 Q. Was this created in an e-mail program?
 4 A. Yes.
 5 Q. Did you create this document, this note to
 6 yourself, at the time that you were working for
 7 Ecology?
 8 A. No. This was after I had left Ecology.
 9 Q. I take it, then, that Exhibit No. 204 wasn't
 10 sent to anyone. You just kept it in your files?
 11 A. Correct.
 12 Q. Could you describe for us, then, what Exhibit
 13 205 is?
 14 A. 205 is again a note to myself, Tuesday, June
 15 5, 2001. Ann had called me with a question about how
 16 the 401 review was connected with the agreed order that
 17 was being negotiated with Sea-Tac and with the
 18 certification letter that the governor's office had
 19 issued some years earlier, and so this just is my notes
 20 on that conversation with Ann.
 21 Q. Dated June 5, 2001?
 22 A. Yes.
 23 Q. So that would have been the date it was
 24 created?
 25 A. Yes.

1 Q. But I take it again with Exhibit No. 205 that
 2 was kept in your files and not sent to anyone?
 3 A. Correct.
 4 (Deposition Exhibit No. 206 was marked for
 5 identification.)
 6 Q. (BY MR. REAVIS) Can you describe for the
 7 record what Exhibit No. 206 is?
 8 A. This is a document I wrote dated January 21,
 9 2001. I wrote this in response to a request from
 10 Senator Patterson that before I left Ecology I would
 11 memorialize my understanding of where the agency was
 12 with its review of the proposed Sea-Tac 401 review, and
 13 this is a several page summary of my understanding at
 14 the time, the status of various issues we were dealing
 15 with.
 16 Actually, I believe the original had a cover
 17 letter on it, but I imagine that was provided as part
 18 of public disclosure, because this was during my time
 19 at Ecology.
 20 Q. Maybe I'll find that one later, but it's your
 21 belief, then, that Exhibit No. 206 was in fact attached
 22 to the letter that was sent to Julia Patterson?
 23 MR. EGLICK: Objection as to the form of the
 24 question; no foundation.
 25 Q. (BY MR. REAVIS) Did you send a letter to

1 Julia Patterson at or about the time you left the
 2 Department of Ecology?
 3 A. Yes.
 4 Q. And do you believe that Exhibit No. 206 was
 5 attached to that letter?
 6 A. Yes, I do.
 7 Q. Have you brought any other documents with you
 8 to the deposition today pursuant to the document
 9 request that was provided along with a notice of
 10 deposition?
 11 A. No. I think this is the complete set.
 12 Q. Have you been retained by any party to this
 13 case as an expert witness?
 14 MR. EGLICK: Objection as to the form of the
 15 question; calls for a legal conclusion.
 16 Q. (BY MR. REAVIS) Can you answer the question?
 17 A. I don't know what the definition of an expert
 18 witness is.
 19 Q. You have been asked to express opinions in
 20 this case, have you not?
 21 A. Correct.
 22 Q. Has any party contacted you and engaged you
 23 as a witness to express opinions on their behalf?
 24 MR. SMITH: Objection. Engaged is vague.
 25 A. Yeah. I don't know what engaged means.

1 Q. (BY MR. REAVIS) Do you have any contractual
 2 relationship with any party to this case in which
 3 you've agreed to serve as an expert witness?
 4 A. I don't think so. I don't know. I haven't
 5 signed anything. I'm not being paid. There's no
 6 arrangement like that.
 7 Q. So there's no letter in which any party to
 8 this case has asked you to agree to serve as an expert
 9 witness on behalf of that party?
 10 A. Correct.
 11 Q. What did you do to prepare for this
 12 deposition today?
 13 A. I read and reread a number of documents that
 14 had been generated during this review and over the last
 15 year mostly to familiarize or refamiliarize myself with
 16 the documents and to get a better idea of the timing
 17 and the process that we went through to get to this
 18 point. That was the main focus of my preparation.
 19 Q. Did you review any documents in preparation
 20 for your deposition other than the ones that are
 21 identified in Exhibit No. 203 or that you have brought
 22 with you to the deposition today?
 23 A. I read a number of declarations that were
 24 written by various parties back in, I believe,
 25 September and October 2001. I read some of the more

1 recent depositions. I read some of the documents that
 2 had gone to the board, the PCHB; for instance, the
 3 requests for stays and replies to those requests. I
 4 read the board's decision from, I believe, December of
 5 last year regarding the stay. There may have been some
 6 others. Those are the ones I remember right now,
 7 though.
 8 Q. Have you met with anyone in preparation for
 9 your deposition today?
 10 A. My attorney.
 11 Q. Anybody else?
 12 A. No.
 13 Q. Was there anybody else in the meeting with
 14 you and your attorney besides the two of you?
 15 A. No. Just the two of us.
 16 Q. And your attorney would be Mr. Smith?
 17 A. Correct.
 18 Q. You've given us your resume, so I don't want
 19 to spend a lot of time going over some of the issues or
 20 some of the background that you have, but as I
 21 understand it, you have a BS in geography?
 22 A. Correct.
 23 Q. And an MS in resource geography?
 24 A. Correct.
 25 Q. Can you tell us what resource geography is?

1 A. Well, geography in general is the study of
 2 places and how various elements interact in the
 3 landscape, and those can be anything from biological
 4 components of the landscape, human components, economic
 5 components, so it's a very broad discipline. Resource
 6 geography is primarily focused on elements of the
 7 environment and how they interact in the landscape.
 8 At Oregon State where I got my MS degree, the
 9 focus was on ecological relationships in the landscape,
 10 specifically geomorphology, riparian studies, stream
 11 dynamics, wetland biology, that sort of thing.
 12 Q. So did you in the course of getting your MS
 13 take courses in wetlands biology?
 14 A. Yes, I did.
 15 Q. Do you recall how many?
 16 A. There were several courses that covered
 17 various aspects of either wetlands or biology or the
 18 combination, probably in total three or four different
 19 courses.
 20 Q. In your declaration you say that your course
 21 work focused on watershed analysis.
 22 A. Correct.
 23 Q. What type of course work was that?
 24 A. That included the ones I just mentioned. I
 25 also took some courses on stream hydrology, stream

1 dynamics, landscape ecology, the wetlands ecology.
2 Those are the ones that come to mind right now. There
3 may have been some more. Excuse me. Geomorphology was
4 an important part of that.

5 Q. Now, other than the work that you did in
6 connection with getting your BS or your MS, have you
7 had other formal training with regard to wetlands
8 biology, stream hydrology, or some of those other
9 matters you just talked about?

10 A. I took a number of workshops or training
11 courses during my career at Ecology. Specifically I
12 remember taking the Corps of Engineers' wetland
13 delineation course, which is a four- or five-day
14 workshop that covers wetland hydrology, wetland plants,
15 and wetland soils.

16 I remember a course through the University of
17 Washington extension on -- I don't remember the exact
18 title, something about stream dynamics and fish habitat
19 that was taught by a hydrologist and a fish biologist.

20 I have taken at least one course on aquatic
21 toxicology, a number of other courses on various
22 aspects of wetlands. I also attended several of the
23 annual conferences of the Society of Wetland Scientists
24 northwest chapter where there were different workshops
25 or training opportunities provided and presentations

1 some issues. Expertise is a matter of degree, and I'd
2 say part of the definition of an expert is what other
3 people think of someone's work or level of knowledge.

4 Q. (BY MR. REAVIS) Have you ever actually
5 yourself performed a study to delineate a wetland?

6 A. At the Corps of Engineers delineation
7 training, we did at least a couple of delineations as
8 part of that course, and I participated in some number
9 of delineations primarily with other Ecology staff at
10 various sites or with Ecology staff and staff from
11 various local governments as part of Ecology's
12 technical assistance work in various areas.

13 Q. So as a participant or student in the Corps
14 of Engineers course, you assisted in a delineation of a
15 wetland?

16 A. I believe we went to two or three different
17 sites and did a delineation using the knowledge we had
18 just learned in the course.

19 Q. Did you take any samples?

20 A. I believe part of the training was taking
21 soil samples and showing us how that's done properly,
22 yes.

23 Q. So you observed somebody else doing that?

24 A. I think I actually put the shovel in the
25 ground a few times and looked at the soil and did the

1 and papers delivered on particular aspects of wetland
2 science.

3 Over the course of the years, I probably had
4 20 or 30 different training opportunities at Ecology on
5 those and other similar subjects. I just can't
6 remember all of them right now.

7 Q. The course at UW on stream dynamics and fish
8 habitat, how long did that course take?

9 A. It was -- I don't remember exactly. It was
10 over the course of several days, I believe.

11 Q. What about the course on aquatic toxicology?
12 First off, where did you take that course?

13 A. I don't remember the details of that other
14 than -- well, I don't even remember when I took that.
15 I'm sorry. I don't recall exactly.

16 Q. Do you recall how long a course it was?

17 A. I don't recall that.

18 Q. More than one day?

19 A. I don't remember.

20 Q. Do you consider yourself a technical expert
21 in wetlands issues?

22 MR. SMITH: Objection to the form.

23 A. I don't know that it's my role to call myself
24 an expert. I think that's something that other people
25 may consider someone. I would say I'm knowledgeable on

1 feel test and that sort of thing.

2 Q. Did you write a report then reflecting that
3 delineation?

4 A. No, I didn't.

5 Q. In these other instances where you
6 participated with other Ecology staff or staff from
7 other agencies, did you yourself perform any analyses
8 or writing reports reflecting those delineations?

9 A. I don't think I've ever written a wetland
10 delineation report, no.

11 Q. So in those instances, were you there as an
12 observer watching someone else perform a wetlands
13 delineation?

14 A. Observer or assistant.

15 Q. Have you ever designed or built a mitigation
16 project for the wetland impact?

17 A. On my own?

18 Q. Yes.

19 A. No.

20 Q. Have you ever participated in such a project
21 apart from your duties in reviewing reports generated
22 for mitigation projects?

23 A. Well, as part of our review of 401 proposals,
24 I would often be on-site on a proposed project site
25 with an applicant and with Ecology's wetland staff or

1 wetland staff from other agencies discussing the design
2 of a proposed mitigation site, why it would or wouldn't
3 work in a particular location or what the likelihood of
4 success might be for one type of vegetation or another,
5 where we thought the wetland hydrology would be
6 supported and where it wouldn't be supported. So I was
7 involved to that degree on probably several dozen
8 different projects around the state.

9 Q. Ecology does have people who are specifically
10 tasked with the responsibility of evaluating wetlands,
11 correct, and impacts on wetlands?

12 MR. EGLICK: Objection as to the form of the
13 question.

14 A. Yes, I guess. I guess so.

15 Q. (BY MR. REAVIS) During your time at Ecology,
16 were there people who worked for the agency who were
17 more knowledgeable about wetlands issues than you were?

18 A. There were a number of people at Ecology who
19 had very good, very high level of expertise on
20 different aspects of wetland ecology and delineations
21 and that sort of thing, yes.

22 Q. What program would those people have been
23 working in?

24 A. Over the course of my career there, it
25 changed. Most recently, I believe the wetland staff

1 Q. And if there was a difference of opinion
2 between yourself and one of those experts on a
3 technical issue, would you generally defer to the
4 opinion of the expert?

5 MR. SMITH: Objection; lack of foundation.

6 A. Well, it would depend on the person involved
7 and the area of difference on a particular technical
8 issue.

9 Q. (BY MR. REAVIS) But on occasion you did that,
10 defer to the technical expertise of someone else?

11 A. Oh, yes.

12 Q. I take it you're not a geologist?

13 A. No.

14 Q. You're not a hydrogeologist?

15 A. No.

16 Q. Not a seismic expert?

17 A. No.

18 Q. Do you consider yourself to be a wildlife
19 biologist?

20 A. No.

21 Q. Fisheries biologist?

22 A. No.

23 Q. Toxicologist?

24 A. No.

25 Q. A minute ago you mentioned the Society of

1 are all in the shorelands and environmental assistance
2 program.

3 Q. Can you identify for me some of the people
4 that you believe worked in Ecology on wetlands issues
5 during the time that you were there who have particular
6 expertise with regard to wetlands issues?

7 A. Well, as I said, the staff there had
8 expertise in different areas of wetland technical
9 areas. Andy McMillan is considered Ecology's expert on
10 the wetland policy arena. Dr. Tom Hruby, H-r-u-b-y, is
11 our -- is Ecology's expert on the HGM method, which is
12 the way Ecology is working to determine wetland
13 functions.

14 I would say the various staff in Ecology's
15 regions are all very knowledgeable on information
16 needed for wetland fieldwork such as making
17 delineations, helping review proposed project impacts
18 and mitigation proposals, that sort of thing. So there
19 is a lot of expertise at Ecology in my opinion on
20 wetland issues, and it's embodied in different people
21 for different issues.

22 Q. And in the course of performing your work,
23 did you at times rely on the opinions expressed by
24 those technical experts on wetlands issues?

25 A. Yes, I did.

1 Wetland Scientists. You are a member, correct?

2 A. I am.

3 Q. As I understand it, there's two types of
4 memberships. One is a general membership where you pay
5 your fee and become a member, and the other is some
6 sort of certification program?

7 A. I understand there's probably four or five
8 different categories of membership -- active members,
9 student member, corporate, emeritus -- and separate
10 from that is the professional wetland certification
11 component that the society offers.

12 Q. Have you been certified by the association?

13 A. No.

14 Q. What type of membership do you hold?

15 A. An active membership, I believe.

16 Q. And is that one that's open to anyone who
17 wants to join?

18 A. I believe so, yes.

19 Q. So you pay a fee and you can become a member
20 of the Society of Wetland Scientists, correct?

21 A. That's correct.

22 Q. I think the fee is \$50. Is that correct?

23 A. Yes.

24 Q. So if I were to pay \$50, I could become a
25 member, correct?

1 A. That's correct.
 2 Q. So the fact you're a member of that society
 3 doesn't necessarily in and of itself mean that you have
 4 particular expertise in wetland science?
 5 A. That's correct. It provides me an
 6 opportunity to keep up with the state of the science.
 7 Along with the membership comes a quarterly journal and
 8 a bulletin that have peer-reviewed papers and articles
 9 on various aspects of wetland scientists, so I'm a
 10 member in order to just keep up on those sorts of
 11 things.
 12 Q. Let me go over your work experience briefly
 13 starting with where you first went to work after
 14 receiving your BS. Can you tell me what you did after
 15 receiving your BS in geography in 1981?
 16 A. Let's see. I had a number of different jobs.
 17 I worked in a salmon cannery, several different salmon
 18 canneries in Alaska, waited tables, had a number of
 19 temporary positions, worked in a law firm for a while
 20 as an administrative assistant, just a number of jobs.
 21 Q. Well, let me ask a different question. In
 22 between the time that you received your BS and the time
 23 that you went back to school for your MS, is there
 24 anything about your work experience in that time period
 25 that helps you better understand the issues in

1 county to each of these sites and do an environmental
 2 assessment to determine the risks and hazards
 3 associated with -- or the potential risks and hazards
 4 of that transformer at that setting, so I came up with
 5 a template that listed various types of risk to the
 6 environment and to human health such as proximity to a
 7 stream or wetland, proximity to a schoolyard, proximity
 8 to a hospital, that sort of thing, and went to each of
 9 these sites. A lot of them were on power poles. They
 10 were on a road somewhere in Snohomish County. Some of
 11 them were in substations throughout the county.
 12 Based on the proximity of these transformers
 13 to critical areas, the pathways leaking oil could take
 14 to reach these areas, that sort of thing, I prioritized
 15 these transformers. I think in total there were
 16 several hundred, and the county or the PUD used that to
 17 prioritize the order of removal or replacement of those
 18 transformers over the next couple of years.
 19 Q. Now, did the work that you were doing involve
 20 any sampling of soil or groundwater for the presence of
 21 PCBs?
 22 A. No. I didn't do any sampling.
 23 Q. Did you ever work with the Model Toxics
 24 Control Act in connection with your work regarding
 25 those transformers?

1 connection with 401 certifications or any experience
 2 that you're relying on to allow you to express opinions
 3 in this case?
 4 MR. SMITH: Objection; form, compound
 5 question.
 6 A. During that period, I didn't really have any
 7 professional experience in the area of 401
 8 certification, but it's hard for me to separate general
 9 life experience during that time. For instance,
 10 working in a law office, I had a better sense of
 11 learning procedures and learning to read complex
 12 documents and things like that. Working in various
 13 settings perhaps helped me prepare for my life now.
 14 Other than that general sense, that's what comes to
 15 mind.
 16 Q. (BY MR. REAVIS) Now, after getting your MS,
 17 what did you do first in terms of employment?
 18 A. I took a position with the Snohomish County
 19 public utility district, and that's listed on my
 20 resume. I was hired to do an environmental assessment
 21 of -- let me start over.
 22 The PUD had identified a number of electrical
 23 transformers around the county at various locations
 24 that they suspected may have been contaminated with
 25 PCB-containing oil, and my job was to go around the

1 A. No. I'm not certain of the timing, but that
 2 may have before Model Toxics Act had been passed.
 3 Q. What about any federal statutes that may have
 4 been in existence at that time? Did you work with any
 5 clean-up regulations promulgated by the EPA?
 6 A. No, not me directly.
 7 Q. During the course of your career, have you
 8 ever had occasion to work with clean-up regulations and
 9 particularly the Model Toxics Control Act?
 10 A. My first position at Ecology was to help
 11 develop the sediment management standards for the
 12 state, which included a clean-up component, and during
 13 that time, we in my work group had some interaction
 14 with staff of -- the toxics staff at Ecology.
 15 Since then I've had occasion on a few
 16 particular projects where projects proposed -- projects
 17 requiring a 401 were being proposed at a clean-up site
 18 or a site with existing or suspected contamination, and
 19 in those cases, I would interact with the clean-up
 20 staff at Ecology.
 21 Q. I'm kind of jumping ahead here, but why don't
 22 you describe for me the sites that you recall that were
 23 401 projects where there was a contaminated site.
 24 A. The primary one that comes to mind is on Lake
 25 Washington. I'm trying to remember the full name. The

1 Baxter site.

2 Q. Was it a former wood treating facility?

3 A. Yes. That's the one. There were two
4 properties adjoining there, and there was a proposal to
5 or there was -- it hadn't reached the 401 stage, I
6 believe, but there was an initial proposal to develop
7 those sites and a lot of concern about the
8 contamination issue and how that would eventually fit
9 into the requirements for a 401, so I was involved with
10 that one.

11 Q. And was there a 401 ever issued for that?

12 A. I don't believe so. Not that I recall.

13 There were some other sites. I believe I had one on
14 Lake Union that had some contaminant issues. I know
15 there were some others. I just can't think of them
16 right now.

17 Q. Do you recall whether or not a 401 was issued
18 for the site on Lake Union?

19 A. I don't recall right now.

20 Q. After leaving Snohomish County, then you went
21 to work for the Department of Ecology?

22 A. Correct.

23 Q. Why don't you describe for me what your work
24 at the sediment management unit consisted of.

25 A. I had several different roles in that

1 specialist 1; is that correct?

2 A. Yes. I believe so. Well, I was an
3 environmental specialist 1 when I was doing the
4 sediment work and just did a lateral transfer to the
5 401 group.

6 Q. At that time, who was the person in charge of
7 the 401 group? I guess by in charge, I mean who was
8 the 401 coordinator or the lead person in connection
9 with evaluating 401 applications?

10 A. There have been a number of changes since
11 then, so it's hard to remember the exact order. I
12 believe at the time my supervisor was Keith Phillips,
13 and there were two or three other staff that did 401
14 certification review. Rick Vining, Russ McMillan, and
15 Maria Peeler, I believe, were all there when I joined
16 that group.

17 Q. What were your duties when you first started
18 in the 401 group?

19 A. My primary duties were to review proposals
20 needing a 401 certification to determine whether or not
21 they met the requirements of the Clean Water Act and
22 the state water quality standards and also to ensure
23 that they conformed with the state's coastal zone
24 management program if that was applicable.

25 Q. Now, in your declaration, I believe that you

1 position. I was there for about three years. My
2 initial work was to guide the public involvement
3 portion of rule development. I also facilitated the
4 technical work group that was instituted to help guide
5 the technical development of the rule. That involved a
6 group of perhaps 20 to 30 different representatives
7 from different groups and organizations, industry,
8 environmental groups, scientists with expertise in
9 different areas of sediment and sediment contamination.

10 I believe I completed most of those two roles
11 and then moved into helping develop freshwater sediment
12 criteria as part of the agency's rule, and my primary
13 work there was to manage one or two different
14 laboratory contracts that Ecology set up to look into
15 particular aspects of freshwater sediment criteria
16 development determining what appropriate bioassays
17 should be used, doing a compilation of the existing
18 literature and state of knowledge on the effects of
19 freshwater sediment contamination on various organisms,
20 that sort of thing.

21 Q. So were you doing that literature review
22 yourself?

23 A. No. We had contracted with a laboratory to
24 do that. I was managing that contract.

25 Q. And then in 1993 you became an environmental

1 say that you have either made decisions with regard to
2 or recommendations with regard to over 700 401
3 certifications.

4 A. Correct.

5 Q. And I take it when you first started, were
6 you making recommendations at that time instead of
7 decisions?

8 A. Well, I guess I'd have to understand the
9 difference in those terms. I would say my role
10 throughout was to determine whether or not Ecology had
11 a reasonable assurance to issue a 401. Sometimes that
12 determination took the form of a recommendation to my
13 supervisor, who would ask me questions about it and
14 then decide whether or not to approve and sign a
15 decision. At other times, after I got the signature
16 authority from Ecology, I made the determination and
17 the decision, so it was a mix during that whole time
18 period.

19 Q. Let me ask it this way. Did the shift or did
20 the time frame at which you began to make decisions on
21 401s coincide with the time that you were delegated
22 signature authority for 401s?

23 MR. SMITH: Objection to the form of the
24 question.

25 A. Well, I guess throughout my time doing 401s

1 it was up to me to determine compliance and present the
2 findings and my perspective initially, to present that
3 to my supervisor, and depending on the project, he
4 would have some very detailed questions or not too many
5 questions at all. I think in part that may have
6 depended on his level of comfort with my conclusions.
7 I'm trying to differentiate between decision and
8 recommendation. I'm not really clear on what you're --

9 Q. (BY MR. REAVIS) That's what I was doing. I'm
10 just taking the language that was in your declaration
11 and trying to figure out whether in your mind there's a
12 clear distinction between when you were making
13 recommendations and when you were making decisions.

14 A. I'd say an umbrella term would be
15 determination. That would apply to both a decision or
16 a recommendation.

17 Q. After you were given signature authority for
18 401 certifications, did you always sign those
19 certifications or were there instances where someone
20 else signed them?

21 A. Again, I don't remember the exact timing, but
22 sometime in the mid '90s our unit -- the 401 review
23 unit started doing 401 reviews so that one person would
24 review a project, make the determination, write up the
25 draft decision, and then that would be reviewed by

1 Q. Is there any way to your knowledge to review
2 the certification itself and determine who is the
3 author?

4 A. I don't think there is an extra signature
5 block or review notation on who the original reviewer
6 was. I suppose if you went back through the records
7 and determined -- well, let me back up just a minute.

8 For most of the time I was -- for most of the
9 time that the 401 review process was centralized at
10 Ecology's headquarters office, different staff had been
11 assigned different regions of the state, and so if you
12 could somehow tie in a project in Snohomish County in a
13 certain year and determine which staff did that county
14 at that time, you might be able to determine who the
15 likely reviewer was.

16 However, that varied some based on workload
17 and different areas of expertise. For instance, one of
18 our reviewers really focused in on dredging projects,
19 and he tended to do those regardless of where they were
20 in the state, although I did an occasional dredging
21 project as well, so there's no absolute way of
22 determining that.

23 Q. So when you first started working for the 401
24 group, that function was at headquarters, correct?

25 A. Yes.

1 another person in our unit. It was essentially a peer
2 review process, and at that time there were probably
3 four or five of us. We each had signature authority
4 and could review and sign each other's certification.

5 Our practice was to never sign our own
6 certification. We always ran it by someone else. So
7 if it was a project I was reviewing, I'd make the
8 determination, write up the conditions, that sort of
9 thing, and then have that reviewed by someone else, and
10 they would do the same with me. In some instances, on
11 more complex or projects that had other issues, we
12 would have that signed by our supervisor rather than do
13 this peer review process.

14 Q. Did you ever sign certifications that you
15 yourself authored and made the recommendation to issue?

16 A. I don't believe so. I think this type of
17 review process I described was always in place.

18 Q. So if I were to find a certification that you
19 actually signed, would that be an indication that that
20 was one that you probably didn't author?

21 A. As far as I can remember, that's correct. It
22 would have been a certification that someone else
23 reviewed and I signed. I'm trying to remember if there
24 are any instances where that didn't happen, but I can't
25 think of any right offhand.

1 Q. And when did that particular 401 function be
2 reorganized in a manner to where it was distributed to
3 different regions?

4 A. I don't remember the exact date. It was
5 probably around '97, '98, something in there.

6 Q. What to your knowledge was the reason for
7 making that change to regionalize the 401 function?

8 A. My understanding was that Ecology wanted to
9 have more functions in general occur in the regional
10 offices than at the headquarters in order to be closer
11 to local concerns and to be more responsive to local
12 jurisdictions, that sort of thing, and so this
13 regionalization of 401 fit within that more general
14 approach Ecology was taking to regionalize a lot of
15 different functions.

16 Q. And did you agree with that proposal to
17 regionalize the 401 function?

18 A. I thought it was best to keep that as a
19 centralized function, because we had built up a lot of
20 knowledge, and the group that was doing 401 at
21 headquarters all worked together and sat together, and
22 as issues came up, we could interact very easily and
23 quickly, so I saw it as a good thing to stay
24 centralized, but once it became -- once the decision
25 was made to regionalize, part of my job was to help

1 carry that out, so I got behind it and did.

2 Q. Now, at the time that the decision was made
3 to regionalize the function, can you tell me who was in
4 headquarters office working on 401s?

5 A. Let's see. Besides myself, Sandy Manning,
6 Bonnie Shorin.

7 Q. I'm sorry?

8 A. Bonnie Shorin, S-h-o-r-i-n, Rick Vining, and
9 there's someone I'm forgetting, one or two people I'm
10 forgetting unfortunately.

11 Q. Can you tell me how the 401 group was
12 structured in terms of reporting requirements? Was
13 there a clear lead or was it your group of peers as
14 you've discussed earlier?

15 MR. SMITH: Objection. What period of time
16 are you talking about?

17 MR. EGLICK: Objection as to form of the
18 question.

19 MR. REAVIS: Let me start over again.

20 Q. (BY MR. REAVIS) At the time that the decision
21 was made to regionalize the function, can you describe
22 for me the reporting requirements and structure or
23 hierarchy of the 401 group?

24 A. I believe at that time we were using this
25 peer review structure. I'm trying to recall whether --

1 person who authored the 401?

2 A. Correct.

3 Q. So you would substantively review those
4 documents as opposed to just signing something that
5 someone put in front of you?

6 A. Generally, yes. We'd ask questions or review
7 certain aspects of it in more detail, but for the most
8 part, yes.

9 Q. Now, when the 401 function was regionalized,
10 did any of the people who were working at headquarters
11 at the time take positions with the various regions and
12 essentially move from headquarters to the region?

13 A. I believe -- and, again, I'm trying to
14 remember the timing of things. I believe the
15 headquarters person moved to the southwest region, and
16 that may have been Joe Sahnerone at the time, although
17 I can't recall the exact details. Other than that, I
18 don't think anyone from headquarters moved to a region.

19 Q. So was it necessary, then, to hire new people
20 in the regions to perform the 401 function?

21 A. Yes.

22 Q. Do you recall who was hired in the regions as
23 the first 401 reviewer?

24 A. I believe Ann Kenny was the first one.

25 Q. For northwest region?

1 I'm just trying to recall the supervisor at that time.
2 During that period, we had, I think, three different
3 supervisors in a relatively short period of time, so
4 I'm a bit confused on what happened first and what
5 happened next.

6 Q. Maybe it would be helpful, then, to go
7 through during the course of your work for Ecology's
8 401 group who your supervisors were over time. I think
9 you told me a minute ago that Keith Phillips was the
10 initial supervisor when you started.

11 A. Right. The ones that come to mind are Keith
12 Phillips, Jim Pendowski, Dave Bradley, Carrie Berry,
13 B-e-r-r-y, Maria Peeler, and most recently Paula
14 Ehlers. I hope I didn't leave anyone out.

15 Q. Now, during that time frame or with regard to
16 these people that you've mentioned, was the supervisor
17 for the 401 group always at headquarters?

18 A. Yes.

19 Q. Let me back up a minute to this signature
20 issue and ask if for 401 certifications that you
21 actually signed, is that an indication that you were
22 the person who peer reviewed someone else's work?

23 A. Yes. That's generally correct.

24 Q. And so would that indicate, then, that you
25 agreed with the determinations that were made by the

1 A. Correct.

2 Q. How about any other regions? Do you remember
3 who was hired in other regions?

4 A. Mark Schuppe and Cathy Reed were -- actually,
5 there may have been people before them in the central
6 region.

7 Q. So they were both in central region?

8 A. Yes. I'm embarrassed to say I can't remember
9 all the 401 reviewers from that period right now.

10 Q. Whose responsibility was it to train those
11 new 401 reviewers?

12 A. Largely mine.

13 Q. And how did you go about doing that? Would
14 you travel to the regions or did they come to
15 headquarters to receive training?

16 A. It was a combination. I went there and they
17 came to headquarters at various times over some period
18 of time.

19 Q. Was there a formalized training program that
20 you used in order to educate those people about how to
21 evaluate 401s?

22 A. We had put together a 401 training manual
23 that consisted of the applicable regulations, a lot of
24 the early guidance documents that we had, examples of
25 different types of 401s and the other permits we dealt

1 with. I'm using 401 throughout this, I guess, as a
2 shorthand for 401, CZM, nationwide permit, section 10,
3 that sort of thing. So we had a manual that compiled a
4 lot of information that we used to do this training and
5 updated that as necessary and also put together a
6 recommended training list for the new staff to help
7 them further their education in 401-related issues.

8 Q. So this was a document apart from the desk
9 manual?

10 MR. EGLICK: Objection as to form of the
11 question and foundation.

12 Q. (BY MR. REAVIS) Why don't you tell me what
13 document you were referring to when you said there was
14 a list of material to be reviewed.

15 A. Well, I know the manual consisted of the
16 regulations and guidance and examples of
17 certifications, and we also had a list that we
18 developed -- I'm not sure if this list was part of the
19 manual or something separate, but it was the suggested
20 training for 401 staff to make sure that they each took
21 the corps delineation, wetland delineation training,
22 that they developed some expertise in some particular
23 aspect of 401-related issues.

24 That was meant as a document to support
25 training requests by staff so that as opportunities

1 A. I don't believe we had a desk manual during
2 the first phase of regionalization.

3 Q. Let me just stop you there. Maybe my
4 question was unclear. I was asking about the training
5 manual. Was this a document that was delivered or a
6 copy given to the new 401 reviewers in the regions?

7 A. I believe everyone got the training manual
8 when they were hired, yes.

9 Q. And was the training manual updated as time
10 went on?

11 A. I believe there were occasional updates as
12 necessary, yes.

13 Q. Let me ask you, then, about Exhibit 207. Can
14 you tell me how or what the process was for creating
15 the desk manual that's referenced or represented in
16 Exhibit 207?

17 A. I believe one of the main drivers behind
18 creating this desk manual was the move from a
19 centralized 401 function to a regional approach. When
20 we were all centralized, it was easy to discuss things
21 in person and get immediate feedback and have questions
22 answered on procedure or technical elements of a
23 proposed project, that sort of thing.

24 When we moved the function to the various
25 regional offices, it was much more difficult to

1 came up, they could point to this document and say it
2 would help my professional development if I took this
3 course because it's part of the 401 recommendation.

4 (Deposition Exhibit No. 207 was marked for
5 identification.)

6 Q. (BY MR. REAVIS) Let me ask you about what's
7 been marked Exhibit 207. Does that appear to be a copy
8 of the 401 CZM review desk manual?

9 A. It does.

10 Q. And is that the document that you were
11 referring to just a minute ago?

12 A. Actually, no. This is a more recent
13 document. The training manual was a looseleaf binder
14 that consisted of things like the water quality
15 standards for the state, the applicable sections of the
16 Clean Water Act, the Federal Rivers and Harbors Act,
17 and things like that. The manual here in front of us
18 is somewhat an outgrowth of some of the documents in
19 that training manual.

20 Q. Did you prepare the training manual yourself?

21 A. I was the lead author, but I prepared it in
22 conjunction with the other 401 staff and other staff at
23 Ecology.

24 Q. And was that a document that was given to
25 these new regional 401 reviewers?

1 maintain the kind of consistency we strove for at
2 headquarters. It wasn't as easy for people to get
3 immediate feedback to their questions, and so we did
4 the -- put together the desk manual in order to help
5 maintain some consistency and help answer some of the
6 basic questions people might have during project
7 review.

8 Q. Now, a minute ago I asked you who the people
9 were at headquarters in the 401 group or the federal
10 permits group, I guess, is another name for the same
11 group; is that correct?

12 A. It's had a number of names. The federal
13 permits unit I think was the last name, yes.

14 Q. So at that time that the function was
15 regionalized, there were a number of people at
16 headquarters who previously had been performing the 401
17 function. My question is, did any of those people
18 continue to work at headquarters doing 401 type work
19 after the regionalization apart from yourself?

20 A. Yes. I believe Sandy Manning remained,
21 although her job was statewide review of projects
22 related to Department of Transportation. Rick Vining
23 remained at headquarters, and his focus was on dredging
24 projects throughout the state. Myself. Bonnie Shorin,
25 I believe, remained, and she did some 401-related work

1 as well as her focus was more on CZM issues as they
2 related to 401.

3 So the people at headquarters generally had
4 positions that required some level of statewide review
5 or knowledge about things throughout the state. I
6 believe that's the complete list. There may have been
7 a couple other folks.

8 Q. Do you recall who your supervisor was at the
9 time that the function was regionalized?

10 A. I believe it was Dave Bradley at the time.
11 I'm not exactly certain, though.

12 Q. Do you recall what Mr. Bradley's position
13 was?

14 A. He was the supervisor for our unit, the
15 federal permits unit, as well as, I believe, the SEPA
16 unit and one other work group. There have been a
17 number of reorganizations over the years, so it's hard
18 to remember exactly what came when.

19 Q. But you reported to Mr. Bradley at some point
20 in time?

21 A. Yes.

22 Q. Did any of these other 401 reviewers either
23 in headquarters or in the regions report directly to
24 you at any time?

25 A. As far as personnel matters and things like

1 Q. While you were serving as the policy lead or
2 the technical guidance lead, did you have the authority
3 to overrule decisions on 401 certifications made by
4 other 401 reviewers in the federal permits unit?

5 A. I don't know what you mean by overrule
6 exactly.

7 Q. Well, were the other 401 reviewers required
8 to submit their determinations to you before making any
9 decision on a particular 401?

10 A. No. In the regions, most of the 401s to my
11 knowledge were done by the reviewer and signed by their
12 supervisor in the region. For those that they had
13 questions about or wanted me to weigh in on, then I
14 would hear about those and provide my guidance.
15 Depending again on the project and the issue, I would
16 be involved to a greater or lesser degree and make my
17 recommendation or advise the staff or the supervisor
18 what I thought, but I didn't have any sort of official
19 override or veto power, no.

20 Q. So is it fair to say, then, that you served
21 as a resource for other 401 reviewers when they had
22 questions or concerns?

23 A. Yes. I'd agree with that.

24 Q. But you didn't have any sort of veto or
25 overriding decision-making authority for the decisions

1 that, no. My role was the policy lead and technical
2 guidance lead, and so matters directly related to 401
3 review I was, I suppose, the primary consultant for
4 people on that, but I did not serve as their official
5 supervisor, no.

6 Q. I'm trying to figure out what is intended by
7 the term "lead," the technical guidance lead or the
8 policy lead. Can you tell me how that worked in
9 practice?

10 A. Well, there are a number of people at Ecology
11 who are the technical or policy lead for a particular
12 issue, and I believe most of those people don't
13 directly supervise staff, and during my last position
14 at Ecology, that's the kind of role I had, so when
15 questions arose as to an issue that needed a decision
16 on guidance or policy, that sort of thing, related to
17 401, CZM, it generally was up to me to help develop
18 that position.

19 My position was meant to be analagous to Andy
20 McMillan's, who was Ecology's wetland technical lead.
21 I don't believe Andy directly supervised anyone, but he
22 was considered by the staff in headquarters and the
23 region to be the lead for any policy or guidance
24 questions that came up, and I modeled my role on Andy
25 largely.

1 made by those other reviewers?

2 A. Correct.

3 Q. Let me just mention this, because I didn't
4 earlier. If you want to take a break at any time, let
5 me know and we'll be happy to do that.

6 A. Okay. I'm fine right now.

7 Q. To your knowledge, is there a copy of the
8 training manual for 401 reviewers at headquarters for
9 Ecology?

10 A. There were several when I left Ecology, and I
11 don't know right now.

12 Q. Where were those kept?

13 A. Well, each reviewer should have one. I think
14 all the 401 staff were given one, so I would assume
15 they still each have one.

16 Q. Did you have a copy yourself?

17 A. Yes.

18 Q. Where did you keep your copy?

19 A. In my cubicle with me.

20 Q. What happened to the materials, then, that
21 were in your cubicle at the time that you left Ecology?

22 A. I believe most of them remained there. I
23 distributed some to the other staff depending on if
24 they were taking on part of my workload. At the time I
25 left, there hadn't been a decision made as to who to

1 hire in my absence, so I think a lot of the material
2 just remained there until someone else came in. As far
3 as I know, the training manual that I had was in the
4 cubicle when I left.

5 Q. Do you know if someone is currently filling
6 the same role that you did as technical and policy
7 guidance lead?

8 A. I believe when I left there was a decision to
9 move Marie Randall into my position but to also move
10 her in as a lateral as an environmental specialist 4
11 rather than make her an environmental specialist 5, so
12 there's someone there, but they don't have my exact
13 classification, I guess. That's the last I know
14 anyway.

15 Q. Do you know whether or not Marie Randall is
16 serving as the lead for the technical and policy
17 guidance issues?

18 A. I'm not sure what her exact role is right
19 now.

20 Q. Is there any correlation between an
21 environmental specialist 5 and the lead function or can
22 a person who is an environmental specialist 4 also be
23 the lead?

24 A. I don't know, actually.

25 Q. Were you serving as the lead prior to the

1 aspects of Ecology's work such as the 401, SEPA, things
2 like watershed planning sorts of things, elements of
3 Ecology's work that would draw on expertise or staff in
4 toxics or shorelands or water quality, that sort of
5 thing.

6 During one major reorganization, central
7 programs, I guess, was dissolved, and in its place was
8 the combination of a lot of those same functions with
9 many of the functions that had been in Ecology's
10 shorelands program, and that became the shorelands and
11 environmental assistance program. During both central
12 programs and the SEA program was the acronym, the 401
13 function had different names at times, the 401 team,
14 the federal permits unit, federal permits team.

15 Until it was regionalized in the time period
16 I mentioned earlier, '97 or '98, I believe, it was, I
17 believe, pretty much a stand-alone unit where 401 and
18 CZM was done, and then there was also a SEPA unit and a
19 wetlands unit, but the 401 group was a unit in and of
20 itself.

21 Then with regionalization, the 401 unit
22 remained at headquarters, and then the agency added the
23 regional staff, and they became part of the regional
24 shorelands and environmental assistance program staff.
25 So that in a nutshell is what I remember of a number of

1 time that you became an environmental specialist 5?

2 A. Actually, I guess I was, yes. When I was an
3 environmental specialist 4, Maria Peeler left the
4 agency, and she had been the previous lead, and I moved
5 into her role, and based on that, about a year later, I
6 think, or two years later I was given the upgrade to
7 level 5.

8 Q. Let me ask you if you could to trace for me
9 the organizational changes in Ecology with regard to
10 the 401 unit. For example, if it moved from one
11 department to another over time, can you tell me how
12 that happened?

13 MR. EGLICK: Objection as to the form of the
14 question. It's vague.

15 Q. (BY MR. REAVIS) Do you understand that?

16 MR. EGLICK: And no foundation.

17 Q. (BY MR. REAVIS) Do you understand the
18 question?

19 A. I believe so.

20 Q. Why don't you try answer it, and if you need
21 clarification, I'll be happy to provide it.

22 A. When I arrived at Ecology, the 401 function,
23 I believe, was in what's called central programs, and
24 that was a program largely at headquarters that
25 included many of the cross-program or cross-media

1 changes throughout the years.

2 Q. Now, during the course of your work on 401
3 issues, did you have occasion to rely on the technical
4 expertise in other divisions of the Department of
5 Ecology?

6 A. Yes. Fairly often.

7 Q. And what divisions were those for the most
8 part?

9 A. Again, it depended on the specific proposed
10 project we were reviewing. I think most often it was
11 the wetlands staff. It was also the stormwater staff,
12 clean-up program staff, sediment staff. Occasionally
13 water resources or water rights would become an issue,
14 and we'd consult with staff from that group. More
15 recently Ecology has some watershed staff that were
16 involved in some of our review. Shoreline permitting
17 staff were often involved. So it was quite a mix and
18 depended heavily on the specifics of a proposal and
19 which regulations applied in a particular case.

20 Q. When you refer to stormwater staff, can you
21 tell me what group that is?

22 A. It's largely in the water quality program.

23 Q. And would you rely on the expertise of water
24 quality people in headquarters as well as the region,
25 regions?

1 A. Yes. I believe we called on help from both
2 headquarters and regions.

3 Q. Was Kevin Fitzpatrick the head of the
4 northwest region water quality program during at least
5 a portion of the time that you were at Ecology?

6 A. I believe Kevin was -- I don't believe he was
7 the head of the region's program when I was there.
8 That was John Glynn, and I think John has retired. I
9 think that happened after I left, though, and I've
10 heard that Kevin moved into that position.

11 MR. YOUNG: Excuse me. Can you spell
12 Mr. Glynn's name, please?

13 THE WITNESS: Glynn is G-l-y-n-n.

14 MR. YOUNG: Thank you.

15 Q. (BY MR. REAVIS) During the course of your
16 work on 401 issues, did you have occasion to rely on
17 the technical expertise of Mr. Glynn?

18 A. I don't know that Mr. Glynn ever weighed in
19 on a specific 401 proposal. He and I talked on several
20 policy or general broader guidance issues, and that was
21 more his role.

22 Q. What about Mr. Fitzpatrick? Did you rely on
23 his technical expertise?

24 A. Kevin and I worked on the Sea-Tac proposal,
25 and there may have been some other projects in the past

1 International Airport? By proposal, I mean in
2 connection with 401 issues.

3 A. I believe that was '95 or '96, perhaps as
4 late as '97. I think my first involvement was around
5 the time that the supplemental draft EIS was issued,
6 and I don't remember the exact date of that. I think I
7 either reviewed that or reviewed and made comments on
8 that document. There may have been a meeting before
9 then or concurrent with that review. I think that was
10 the first time I was involved.

11 (Deposition Exhibit No. 208 was marked for
12 identification.)

13 Q. (BY MR. REAVIS) Let me ask you if you
14 recognize Exhibit 208.

15 A. It's been awhile, but this looks like the
16 original application for a 401 and 404 from the Port.

17 Q. This is dated December 18, 1996, the cover
18 letter?

19 A. Yes.

20 Q. Do you believe that you first started working
21 on the 401 for Sea-Tac airport sometime after this
22 application was filed?

23 A. I would have definitely started after this
24 and perhaps started before depending on when that
25 supplemental draft EIS came out. I do remember

1 that don't come to mind right now, but I would have
2 drawn on his knowledge as well as a couple other people
3 at the northwest region, yes.

4 Q. Do you believe that Mr. Fitzpatrick knows
5 more about water quality impacts from stormwater than
6 you do?

7 A. Certain aspects of it, yes.

8 Q. What aspects would those be?

9 A. I think Kevin's primary focus is NPDES
10 requirements and how those are part of a facility's
11 operations, that sort of thing.

12 Q. Have you reviewed Mr. Fitzpatrick's
13 declaration in this case?

14 A. Oh, yes. That's the one from September or
15 something. Yes, I have.

16 Q. In connection with the stay motion. Is that
17 the one that you recall?

18 A. Yes. Yes.

19 Q. Have you reviewed his deposition in this
20 case?

21 A. I only got a copy yesterday, and I took a
22 brief glance at it, but I haven't really read it, no.

23 Q. Let me come back to that in just a minute.

24 Can you tell me when you first started working on the
25 Port's proposal to construct a new runway at Sea-Tac

1 reviewing that, but I don't know which of the documents
2 came first.

3 Q. Do you recall whether there was someone in
4 the 401 team or program who worked on the 401 for
5 Sea-Tac prior to your involvement?

6 A. I believe it was assigned to me initially,
7 and I don't think -- I don't recall anyone else having
8 it before me, no.

9 Q. In the course of your work on that 401
10 proposal, 401 application that's represented by Exhibit
11 208, did you become familiar with the project that was
12 being proposed by the Port of Seattle for which this
13 401 was necessary?

14 A. Yes.

15 Q. Were you familiar with the various components
16 of the project; for example, the third runway and other
17 improvements?

18 A. Yes, I was.

19 Q. Now, I believe there's a statement in one of
20 your declarations -- and I have it here if you'd like
21 to look at it, and I'm trying to find this particular
22 reference -- a statement that you made with regard to
23 your belief that over the course of the 401 process
24 with regard to the Sea-Tac project that the scope of
25 projects being considered under that 401 application

1 got smaller and smaller. Do you remember a statement
2 to that effect?

3 A. I do.

4 Q. Can you tell me what you recall about
5 elements that may have been removed from the scope of
6 that project over time?

7 A. Well, the proposal for a 404 and 401 was
8 related to the Sea-Tac master plan expansion, which
9 included a number of different elements. The shorthand
10 has been the third runway. That's been used a lot, but
11 there's actually a number of elements besides that.
12 The south aviation support area, I believe, was a part
13 of the proposal, various upgrades to other parts of the
14 airport, runway safety areas, that sort of thing.

15 During the course of our review, as we were
16 trying to determine the full extent of the proposed
17 project and its elements, we discussed changes to the
18 Port's stormwater system, its industrial wastewater
19 system, changes related to navigation equipment needed,
20 as well as wetland or other mitigation requirements
21 near the airport. I think there were probably a few
22 other elements, but those are the ones that come to
23 mind right now.

24 Q. I want to get into some of those in a little
25 bit. I think my question was more directed to the size

1 Third Runway Project as a whole?

2 MR. EGLICK: Objection as to the form of the
3 question.

4 A. I would say that if they are being
5 considered, it depends on elements of review that have
6 not yet occurred, and some of those elements should
7 have occurred as part of the 401 determination.

8 Q. (BY MR. REAVIS) So as I understand that
9 answer, then, you're saying that while they might
10 possibly be still on the radar screen for Ecology, they
11 have dealt with that by requiring future submittals to
12 address those issues?

13 MR. EGLICK: Objection as to the form of the
14 question.

15 Q. (BY MR. REAVIS) Is that a fair
16 characterization of your answer?

17 A. Could you repeat the question, please?

18 MR. REAVIS: Would you read that back,
19 please?

20 (The reporter read back as requested.)

21 MR. REAVIS: Let me rephrase that. Maybe a
22 better objection would be vague.

23 MR. EGLICK: That's part of the form, isn't
24 it?

25 MR. REAVIS: Yeah, true.

1 or scope of the the project itself and whether or not
2 it's your testimony that you believe that the matters
3 under consideration, the projects under consideration
4 with regard to that 401 application got smaller as time
5 went on apart from the issues that you mentioned, the
6 scope or size of the project.

7 A. The scope of the review of the project was --
8 got smaller as time went on; for instance, the need to
9 do a cumulative impact evaluation. At one point, I
10 think originally the Port hadn't anticipated, for
11 instance, that the change to the IWS system would be
12 included in Ecology's review. For some period of time,
13 I did review that change as part of this proposal, but
14 I believe that's since largely dropped out of the
15 review.

16 Q. And what do you base that on?

17 A. The 401 that was issued back in September and
18 also some of the discussions in the various
19 declarations and depositions and also some of the
20 information in the stormwater plan that's been
21 presented by the Port, also some of the modeling
22 discussions.

23 Q. So is it your belief, then, that certain
24 issues related to the IWS are no longer being
25 considered as a part of the cumulative impacts for the

1 Q. (BY MR. REAVIS) Let me see if I can
2 paraphrase your answer, and tell me if this is correct.
3 As I understood your last answer, what you were saying
4 was Ecology has decided to deal with certain issues
5 concerning the IWS by requiring future submittals to
6 address some of those issues, correct?

7 A. Yes.

8 Q. So you're not necessarily saying that Ecology
9 has decided that those IWS issues are irrelevant or
10 beyond the scope of their review, but they have decided
11 to deal with them in a manner that requires future
12 submittals?

13 A. Well, I wouldn't characterize it that way. I
14 guess until those future submittals come in and Ecology
15 weighs in on them, we won't know whether or not, for
16 instance, the IWS issue is resolved adequately, and
17 that would apply to pretty much any of the future
18 submittals that the 401 requires.

19 Q. Well, whether or not it's resolved adequately
20 in your words, what I'm trying to figure out is whether
21 you're saying that Ecology has taken certain parts of
22 the project or certain issues and simply said those are
23 beyond the scope of our review here, we're not even
24 going to consider issues that were previously included
25 within the first JARPA applications that's Exhibit 208.

1 MR. EGLICK: Objection as to the form of the
2 question. Just to give you some feedback if you want
3 it, Gil, it's because you're talking about what scope
4 of review, but you're not saying scope of review of
5 what. 401? IWS? Some other permit?

6 Q. (BY MR. REAVIS) Let me be a little bit more
7 specific, because this all comes from a statement in
8 your declaration, so I want to go ahead and have those
9 marked, both declarations.

10 MR. SMITH: Counsel, we've been going for
11 about two hours. If you could find an appropriate time
12 to take a break any time soon, that would be good.

13 MR. REAVIS: Why don't we do that.
14 (Recess taken.)

15 (Deposition Exhibit Nos. 209 and 210 were
16 marked for identification.)

17 Q. (BY MR. REAVIS) Let me show you a couple of
18 exhibits that were marked during the break. Can you
19 confirm for me that Exhibit 209 is a copy of the first
20 declaration that you submitted in this case in
21 connection with the stay order?

22 A. It looks like the one.

23 Q. And is Exhibit No. 210 the second or reply
24 declaration you submitted in connection with that same
25 motion?

1 development of various mitigation scenarios and both
2 the impacts of those mitigation elements and subsequent
3 causes of other areas of concern that may come out of
4 the mitigation elements, also changes in the cumulative
5 impacts associated with this proposal.

6 Q. But you're not saying in that statement that
7 the scope of the project as reflected in the JARPA has
8 been reduced by Ecology or by the Port over time?

9 A. Well, I would have to look at the description
10 of the project in this JARPA and also in the subsequent
11 applications to look at what elements were and weren't
12 included in each one.

13 Q. And those would be the sources for
14 determining what the scope of the project was that was
15 under review for Ecology, correct, the JARPA that
16 supports the application for a 404 permit?

17 A. Those would describe the proposed project.
18 Ecology's review would include determining the direct
19 and indirect impacts associated with the proposed
20 project, and the scope of those impacts as they relate
21 to the project have changed quite a bit over time.

22 Q. So you believe that there may be certain
23 impacts from the project that are no longer under
24 consideration by Ecology in connection with the 401
25 application?

1 A. Correct.

2 Q. Now, the question that I was trying to get to
3 a minute ago comes from a statement on page 8 of your
4 reply declaration, which is Exhibit 210. If you look
5 at line 15, the sentence reads, "In actuality, however,
6 as time went on, the scope of Ecology's review and
7 eventual issuance of the 401 certification was
8 continually reduced, generally after discussions with
9 the Port about their difficulties in complying with
10 various requirements of the project review, and
11 generally despite recognition of the regulations and
12 legal decisions cited above."

13 And maybe my question was asking you
14 something different, but can you tell me what was it
15 about the scope of Ecology's review that was being
16 continually reduced?

17 A. Originally you'd asked about the scope as
18 reflected in the Exhibit 208, the JARPA from December
19 of '96, and I would have to go through this and look at
20 each specific element to compare that statement with
21 what was in the JARPA.

22 The statement in my declaration reflected
23 primarily later determinations by Ecology of how large
24 the project was and what aspects of the facility under
25 review should or shouldn't be included and the

1 MR. EGLICK: Objection as to the form of the
2 question; vague. I mean, the 401 application has been
3 approved.

4 A. They're either not under consideration by
5 Ecology or their consideration has been put off until
6 the future, but right now it's kind of hard to tell
7 which that is, because we're depending on some future
8 application by the Port and determination by Ecology.

9 Q. (BY MR. REAVIS) Now, the first application,
10 the one we discussed a minute ago, Exhibit 208 from
11 December 18, 1996, did Ecology issue a 401
12 certification based upon or in response to that
13 application?

14 A. Yes.

15 Q. And is that a 401 certification that you
16 worked on?

17 A. Yes, it is.

18 Q. Who actually wrote that certification?

19 A. I believe it was largely my work in
20 conjunction with the other staff involved with the
21 project.

22 (Deposition Exhibit No. 211 was marked for
23 identification.)

24 Q. (BY MR. REAVIS) Can you tell me whether or
25 not Exhibit 211 is a copy of the 401 certification that

1 was -- that you just referred to?

2 A. It is.

3 Q. Now, this certification is signed by Gordon
4 White, correct?

5 A. Actually, the cover letter is signed by Paula
6 Ehlers for Gordon White. The certification itself is
7 signed by Gordon White.

8 Q. Now, this certification was issued at a time
9 when you had signature authority for 401
10 certifications, correct?

11 A. I believe so, yes.

12 Q. Is there any particular reason that you can
13 recall why Mr. White signed this one as opposed to you?

14 A. During that time, even though a number of us
15 had signature authority, on projects of particular high
16 profile or complexity or controversy, we would often
17 move the signature up the chain of command to someone
18 higher up in management, and that's what happened in
19 this case.

20 Q. Now, did you make a recommendation to
21 Mr. White that he approve this 401 certification and
22 sign it?

23 A. As I recall, this 401 came about after
24 Ecology had reviewed quite a few documents from the
25 Port and had continued a number of meetings and

1 should hold out for more information, but I was
2 convinced by Mr. White and others that this approach
3 was appropriate, and as a result, I was the primary
4 author for this 401.

5 Q. At the time that you wrote it and submitted
6 it to Mr. White, did you believe that Ecology had
7 reasonable assurance that water quality standards would
8 be met as a result of the 401 certification?

9 A. Well, I believe at the time that was still an
10 open question, because we were going into waters that
11 hadn't been tested very well yet. We didn't have --
12 let me back up. This was a very complex project.
13 There was a sense at Ecology that denying the project
14 wouldn't allow things to move forward and that
15 approving it would be a better course of action, and so
16 we ended up with this certification.

17 Q. Well, did you yourself, though, believe that
18 Ecology had reasonable assurance that water quality
19 standards would be met by issuance of this 401
20 certification?

21 A. At the time, I believed that if we got all
22 the documents that we required of the Port and if they
23 implemented them as Ecology directed them to, then we
24 could have reasonable assurance, yes.

25 Q. So at that time, you were relying on these

1 technical discussions with the Port and their
2 consultants and had reached agreement on some areas of
3 what the project entailed, and I think Ecology had
4 determined that certain parts of it that we believed
5 needed to be covered under a 401 were appropriate, but
6 there were some areas where the Port had essentially
7 disagreed with Ecology's conclusions and had not wanted
8 to go any further, and after discussions with Mr. White
9 and a number of other folks at Ecology, we decided that
10 we could issue a 401 essentially forcing the issue that
11 even though the Port hadn't submitted a final
12 stormwater mitigation plan, we could compel them to
13 submit that through issuance of this 401 in
14 anticipation of getting the Port to comply that way.

15 At the time, there were a lot of questions
16 about this approach. I believe a number of people at
17 Ecology were arguing that in this instance the 401
18 should be denied. Other people were arguing that it
19 could be approved if it was conditioned the way it was.
20 I believe it was Mr. White's decision to go ahead with
21 this approach. So that's how this 401 came about.

22 Q. Now, as the author of this 401, though, did
23 you make a recommendation that Mr. White sign it?

24 A. I believe on this one I was more on the side
25 of we weren't there yet with reasonable assurance and

1 future submittals to give you reasonable assurance at
2 some point on down the road after the 401 was issued?

3 A. That's correct.

4 Q. And, in fact, there are a number of items
5 that are in the current 401 that were not in existence
6 at the time that this 1998 401 was issued, correct?

7 MR. SMITH: Objection to form.

8 Q. (BY MR. REAVIS) Well, you mentioned a
9 stormwater management plan, correct?

10 A. Yes.

11 Q. And that did not exist at the time Exhibit
12 211 was issued, did it?

13 A. I believe at the time there was a stormwater
14 management plan that the Port had submitted. I'd have
15 to look through this to --

16 Q. Why don't you look at condition C1. It's on
17 page 10.

18 A. Condition C1 requires submittal of a
19 stormwater plan, although I believe the airport had a
20 stormwater plan for at least the existing facility at
21 that time.

22 Q. Do you recall why it was necessary at that
23 time to require the submittal of a final comprehensive
24 stormwater management plan as referenced in condition
25 C1?

1 A. Why it was required?

2 Q. Why it was necessary for reasonable
3 assurance.

4 A. To ensure that the discharges from the Port
5 would meet water quality standards for both the
6 existing and the proposed new parts of the airport.

7 Q. Do you recall what kind of stormwater
8 management plan the Port had submitted prior to
9 issuance of this 401 in July of '98?

10 A. I don't recall right offhand, no.

11 Q. Would you agree with me that it is less
12 comprehensive and detailed than the stormwater
13 management plan that was developed by King County prior
14 to issuance of the current 401?

15 MR. SMITH: Objection; form.

16 A. Well, since I can't recall what was submitted
17 under this or before this certification, I can't
18 compare the two, no.

19 Q. (BY MR. REAVIS) Obviously at the time that
20 this certification was issued you believed that
21 additional work needed to be done and a new stormwater
22 management plan needed to be submitted, and that's the
23 -- by this certification, I'm referring to the July '98
24 certification. Is that correct?

25 A. Yes. That's correct.

1 comprehensive stormwater management plan beyond what
2 was in this July '98 plan?

3 A. Well, I think we're talking about two
4 entirely different approaches, and it's hard to compare
5 them. From reading the July '98 401, I can see that we
6 required the Port to, for instance, do multiple BMPs or
7 submit the plan that included multiple BMPs for some of
8 their discharges, and the review for compliance with
9 the King County manual resulted in a different set of
10 BMPs being proposed, so it's kind of hard to compare.
11 I don't believe, for instance, there's a requirement in
12 the current King County manual that under C4b in this
13 401 it says --

14 MR. EGLICK: Excuse me. When you say "this
15 401," which one are you referring to?

16 THE WITNESS: Excuse me. That's the July '98
17 401.

18 A. At the bottom of page 11, there's a series of
19 bullets describing the types of BMPs that are to be put
20 at each stormwater treatment facility. I don't think
21 there's an equivalent requirement in the current 401 or
22 that came out of the county's review of the stormwater
23 plan.

24 Q. (BY MR. REAVIS) But these requirements that
25 you referenced on the bottom of page 11 were

1 Q. And you can't as you sit here today testify
2 regarding whether the plan that existed in July of '98
3 was more or less comprehensive than the one that
4 currently exists?

5 A. Right. I can't recall the details of that
6 plan from 1998.

7 Q. Ecology while you were the 401 technical and
8 policy lead engaged the services of King County to
9 develop -- assist the Port in developing a stormwater
10 management plan, correct?

11 A. We engaged King County as Ecology's
12 consultant, so their primary role was to assist Ecology
13 rather than the Port.

14 Q. But in any event, King County was involved in
15 reviewing the proposals and the draft stormwater
16 management plan prepared by the Port in connection with
17 the 401 that was finally issued in 2001?

18 A. Yes. Correct.

19 Q. And there was a lot of work that went into
20 that process, wasn't there?

21 A. Yes.

22 Q. Did you have any serious doubt that that work
23 that was done by King County and the Port in connection
24 with later efforts failed to add additional
25 requirements and other measures necessary to create a

1 requirements that Ecology was requiring the Port to
2 include in the new comprehensive stormwater management
3 plan that was to be submitted after this 401 was
4 issued, correct?

5 A. That's right.

6 Q. So wouldn't that indicate to you that those
7 particular elements were not in the stormwater
8 management plan that you had in front of you when this
9 July '98 401 was issued?

10 A. That's correct. They were either not in it
11 or not in it in enough places or in sufficient quantity
12 around the airport.

13 Q. So my question is not what stormwater plan
14 was either in existence or to be developed by this July
15 '98 401. My question is the stormwater management plan
16 that you had in front of you when this 401
17 certification in July '98 was issued, is it your
18 testimony as you sit here today that you don't know and
19 can't determine whether that stormwater management plan
20 was more or less complete and comprehensive than the
21 one that the August 2001 401 was based upon?

22 A. I guess my testimony is that I can't make a
23 fair comparison between the two. In both cases,
24 there's a dependence on future submittals, and until
25 those are submitted, it's hard to tell what's going to

1 result. The requirements here under C4b in the 1998
2 401 I believe are somewhat different than what is
3 described in the most current 401 from last September.

4 Q. Who made the decision to request the
5 assistance of King County in development of a
6 stormwater management plan for Sea-Tac airport?

7 MR. EGLICK: Objection as to the form of the
8 question; no foundation.

9 Q. (BY MR. REAVIS) Do you know how the decision
10 was made to retain King County to assist in the
11 stormwater management plan?

12 MR. EGLICK: Objection as to the form of the
13 question; no foundation.

14 Q. (BY MR. REAVIS) Can you answer that question?

15 A. Yes. Yes, I do.

16 Q. Why don't you tell me what you recall about
17 that.

18 A. We had been meeting with the Port for some
19 time, we being myself, Kevin Fitzpatrick, Ray Hellwig,
20 Erik Stockdale -- I believe those were the main Ecology
21 staff involved in management -- in order to resolve the
22 whole issue of coming up with a stormwater plan that
23 met the requirements, and we'd had some difficulty,
24 either miscommunication or misunderstanding, between
25 the Port and Ecology on what was required and the

1 lead in that area, David Masters, and he recommended
2 Kelly Whiting as the county's lead reviewer for us.

3 Q. As a result of that process, there was, in
4 fact, a comprehensive stormwater management plan
5 submitted. I think that's the title. I'm not asking
6 you to agree that it's comprehensive, but I believe
7 that's the title of the document.

8 A. Yes. There were several submittals during
9 that review.

10 Q. Was the final of that document submitted
11 before or after you left Ecology?

12 A. I don't believe a final has been submitted
13 yet.

14 Q. What's the latest -- strike that.

15 Since you left Ecology, have you reviewed any
16 stormwater management plans that were developed or
17 submitted after you left?

18 A. Yes. I believe there was -- I'm trying to
19 remember the dates. There was a December 2000
20 submittal. I believe parts of that were updated in
21 July 2001, and I believe there may have been a
22 subsequent update in November or December 2000, and I
23 reviewed some portion of each of those. I'm trying to
24 remember if that's the full list or not.

25 Q. Have you formulated any opinions about what

1 submittals and the type of information that was
2 presented.

3 During that process, the Port had been saying
4 that they intended not only to meet Ecology's
5 stormwater manual requirements but to meet the King
6 County manual requirements. Because we were having
7 difficulty figuring out the Port's proposal, I believe
8 Kevin and I actually after one of the meetings, we
9 decided that if we were to review the Port's proposal
10 and try to see if it actually did meet the King County
11 manual requirements, that would take quite a bit of
12 time on our part to get up to speed with the manual and
13 review the Port's proposal against that, and so we went
14 to Ray Hellwig and proposed that we hire King County as
15 our technical experts, and Ray presented that to the
16 Port, and the Port agreed to pay for that review, and
17 that's how we ended up with the county doing the
18 review.

19 During that time, I believe we made it clear
20 to the Port that compliance with either the Ecology
21 manual or the county's manual didn't ensure compliance
22 with state water quality standards but that finding
23 compliance with the county's manual would be a good
24 step towards that, and so the Port agreed to pay for
25 that review, and we worked with the county's watershed

1 you believe might be deficiencies in that stormwater
2 management plan as necessary for a 401 reviewer?

3 A. Yes, I have.

4 Q. Can you tell me what those are?

5 A. The primary deficiency is the speculative
6 nature of the plan. It leaves a lot of the development
7 of designs and eventual BMPs to some future decision
8 point. Apparently some of those future submittals may
9 not even require review or approval by Ecology.

10 There's no certainty provided in the current
11 plan or the potential future submittals that water
12 quality standards will be met from the various
13 discharges. It lays out an iterative process that may
14 or may not lead to eventual compliance with the
15 standards, but at this point it's pretty speculative as
16 to when or whether the Port will get there. So that's
17 the primary difficulty I have with the plan as it
18 stands today.

19 I also have questions about its interaction
20 with other elements of the project such as the wetland
21 mitigation sites, water quality and general beneficial
22 uses in the nearby streams, its interaction with the
23 low flow proposal as it currently stands. So I guess
24 the common thread is the speculative nature of the
25 proposal.

1 Q. At the time that the July 1998 401 was
2 issued, did you believe that reliance on a future
3 submittal of a stormwater management plan rendered that
4 401 certification speculative?

5 A. Yes. I would say that's a speculative 401.

6 Q. But wasn't it your belief that through
7 development and approval of those future submittals
8 that could lead Ecology to reasonable assurance at the
9 time that the July '98 401 was issued?

10 MR. SMITH: Objection to the form of the
11 question.

12 A. I would say it was more my hope than my
13 belief. Because we had no assurance that the -- given
14 the history of the Port's submittals and our history of
15 misunderstanding or miscommunication or inadequacy of
16 Port submittals, I would say there was a great deal of
17 doubt at Ecology as to what we would see in the future,
18 but the decision was made to issue that 401 anyway.

19 Q. (BY MR. REAVIS) Do you believe that Ecology
20 lacked reasonable assurance that water quality
21 standards would be met at the time of issuance of the
22 July 1998 certification?

23 A. I would say -- well, at the time it's hard
24 for me to recall. I would say with subsequent events
25 that a certification like that would not be issued or

1 discussions whether there was or wasn't reasonable
2 assurance, you don't recall ever going to Mr. White and
3 saying, no, there is no reasonable assurance and I
4 believe this should not be issued?

5 A. Yeah. I don't recall one way or the other on
6 that if I used those words. I imagine what happened in
7 the discussions was weighing the pros and cons and what
8 we knew or didn't know about the proposal at that
9 point, so I would -- I don't remember specifically, but
10 I imagine there was some discussion of reasonable
11 assurance, yes.

12 Q. So did you just give the document to
13 Mr. White and say sign it if you believe there's
14 reasonable assurance, don't sign it if you don't
15 believe there's reasonable assurance?

16 A. No. It was much more complex than that.

17 Q. But you don't recall making a recommendation
18 that he specifically sign it?

19 A. I don't think this was solely my
20 recommendation or I don't recall what part of my view
21 was reflected in this overall recommendation. There
22 were a number of people involved at the time.

23 Q. Well, I don't want to beat a dead horse, but
24 do you recall Mr. White ever saying, Tom, you wrote
25 this 401 certification, is it okay for me to sign, do

1 should not be issued today.

2 Q. Did you ever express opinions to Mr. White or
3 anyone else at Ecology at or around the time that the
4 July '98 certification was issued that you believed
5 that Ecology lacked reasonable assurance and therefore
6 that that certification should not be issued?

7 A. I believe I had several conversations with
8 Mr. White and with others basically asking can we do
9 this? Is this something that we want to do? This is
10 far more speculative than the approach we have taken
11 with the majority of 401s in the past. And the result
12 of those discussions was still the issuance of this
13 July '98 401.

14 Q. Did you ever express to Mr. White the view
15 that you believed this certification lacked reasonable
16 assurance and therefore should not be issued?

17 A. I don't recall specifically those words. I
18 think that may have come up in these discussions. I
19 mean, the whole basis of whether or not to issue this
20 was reasonable assurance, precedents established by
21 previous work in 401, that sort of thing.

22 Q. But you actually wrote this July '98 401,
23 correct?

24 A. Correct.

25 Q. And so whether or not it came up in

1 we have reasonable assurance?

2 A. I don't recall that specific discussion. It
3 very well could have occurred, maybe not in those exact
4 words, but I doubt Mr. White would have signed
5 something where he didn't have some questions for me on
6 a project of this scope, and I believe during the
7 discussions, as I mentioned, he had conferred with a
8 number of us. The technical experts I had mentioned
9 before, other people in management and at the staff
10 level came to that conclusion.

11 Q. Do you ever recall an instance where you went
12 to Mr. White and said, I don't believe you have
13 reasonable assurance to issue this 401, and he did it
14 anyway?

15 MR. EGLICK: Objection; asked and answered.

16 A. Do I recall an instance where that happened?

17 Q. (BY MR. REAVIS) Yes. With regard to this 401
18 or any other 401, did you ever go to Gordon White and
19 say, I don't think we have reasonable assurance, don't
20 issue this 401, and he did it anyway?

21 A. That occurred on the Battle Mountain
22 proposal, yes.

23 Q. Any others?

24 A. That's the main one that comes to mind. I
25 believe -- well, the other one that comes to mind is a

1 slightly different situation is the lower Columbia
2 deepening project where Ecology denied a 401. I was
3 less directly involved in that proposed project, but in
4 that case the recommendation was to deny certification,
5 and Mr. White concurred with that recommendation.

6 Q. Does the July 1998 certification contain any
7 criteria for constituents in the fill that will be used
8 to build the third runway?

9 A. May I take a moment to look through it?

10 Q. Sure. Look at page 14.

11 A. Thank you. It has several conditions that
12 address requirements for fill material.

13 Q. Now, let me just refer you then to the
14 beginning paragraph of that section E7. It says, "The
15 Port shall adhere to the Final Third Runway Soil Fill
16 Quality Criteria provided by memo to Ecology on July
17 17, 1998." Do you recall what document that reference
18 is with regard to?

19 A. I don't recall the specifics. I know the
20 Port had submitted a proposal that they be able to use
21 certain sources of fill and not use certain sources and
22 that they would do certain sampling and monitoring,
23 that sort of thing, but I don't recall the specifics of
24 it.

25 Q. At the time that this July '98 certification

1 believe it was my question raised to a number of the
2 technical staff at Ecology on how to interpret that
3 Corps of Engineers guidance specifically for this
4 proposal. What did we need as far as fill criteria or
5 the 401 condition to meet that no toxic materials in
6 toxic amounts requirement?

7 Q. Do you recall if in July of '98 when this
8 certification was issued you had before you numeric
9 criteria for various constituents in fill?

10 A. I believe the Model Toxics Clean-up Act, the
11 criteria contained in documents related to the act, I
12 think those were available. I think as part of our
13 review we may have looked for other sources of clean
14 fill criteria used elsewhere in the state or around the
15 country. That's all I recall at the moment. There may
16 have been some other things we looked into.

17 Q. Have you yourself ever written or approved a
18 401 certification that had numeric criteria for fill?

19 A. I don't recall right offhand, no.

20 Q. Do you recall ever in the course of your work
21 for Ecology learning that numeric criteria had been
22 applied in other 401 certifications whether in
23 Washington or someplace else for acceptable fill?

24 A. Actually, let me back up to my previous
25 answer. During my review of the 401 for the Navy

1 was issued, did you believe that Ecology had reasonable
2 assurance that fill in compliance with condition E7
3 would not cause any adverse effects on water quality?

4 A. I believe that based on our understanding at
5 the time that this condition would be adequate to
6 protect water quality, yes.

7 Q. Were you involved in the development of the
8 criteria that are described in that beginning paragraph
9 in condition E7?

10 MR. SMITH: Objection to the form of the
11 question. It's vague.

12 Q. (BY MR. REAVIS) Let me ask it a different
13 way. Do you recall being involved in the development
14 of any criteria for acceptable fill prior to the time
15 that this July '98 certification was issued?

16 MR. SMITH: Same objection.

17 A. I don't understand. For this project or --

18 Q. (BY MR. REAVIS) For this project.

19 A. Okay. During our review of this proposal,
20 the issue of clean fill came up, and at the time,
21 Ecology's only guidance was from the Corps of
22 Engineers, and they had a requirement that fill not
23 contain toxic materials in toxic amounts, and part of
24 what the Port was proposing was to use fill from
25 sources that Ecology had concerns about, and so I

1 shipyard in Bremerton, that was an underwater fill in
2 part and dredging of an area near a pier that had
3 contaminated sediments, and so in that sense, there
4 were numeric criteria in place. That was a little
5 different situation. I believe on some other dredging
6 projects the issue of contaminated fill has come up,
7 but mostly as a sediment-related issue.

8 Q. Do you recall where those criteria came from
9 to deal with contaminated sediments that were used in
10 401s?

11 A. Those were developed through the process I
12 mentioned earlier during the sediment management rule
13 development, through technical work group, through
14 various contracts with scientists and Ecology's rule
15 development. Those were -- at the time, those were
16 only applicable to marine sediments, and I'm not
17 certain whether or not Ecology's adopted freshwater
18 criteria yet for sediments.

19 Q. Now, with regard to upland soils, at the time
20 that this July '98 certification was issued, were you
21 aware of any sources to which you could refer for the
22 development of acceptable fill criteria to be used in a
23 401 certification?

24 A. No. That was the large part of the
25 difficulty was that we had the guidance from the corps

1 saying no toxic materials in toxic amounts but weren't
2 aware of information beyond that that we could use as a
3 401 condition.

4 Q. In the course of that work leading up to the
5 July '98 401 certification, did you do any research
6 yourself to determine whether or not there were any
7 standards for use of upland fill in a project that
8 requires a 401 certification?

9 A. I believe I may have made some phone calls to
10 various staff at the Corps of Engineers, perhaps some
11 other agencies, just to make general inquiries about
12 that. At the same time, other staff at Ecology were
13 looking to other sources.

14 Q. Did you ever have anyone tell you, yes, we
15 have done this in another 401 certification -- by this
16 I mean propose numeric fill criteria -- and here are
17 the numbers that we used?

18 A. I don't think we ever found that, no.

19 Q. So is it true, then, that you were
20 essentially trying to create numeric fill criteria for
21 use in this 401 certification without any real
22 precedent for what number should be used?

23 A. Well, what we were trying to do was get
24 reasonable assurance that the water quality criteria
25 would be met, and if placing contaminated fill on a

1 A. Some of those are described in the
2 documentation related to the Model Toxics Control Act.
3 I believe there's guidance in RCRA, R-C-R-A, the
4 federal clean-up, and CERCLA, C-E-R-C-L-A, guidance
5 from EPA. I don't know how closely those are related
6 to compliance with particular water quality criteria.
7 I think those are more focused on human health risk and
8 that sort of thing.

9 But there are methods to determine how a
10 contaminant either moves through the soil or is bound
11 to soil, and there is some ability to use that
12 information to determine eventual impact on surface
13 waters.

14 Q. Have you reviewed the biological opinion that
15 was issued by the US Department of Fish and Wildlife?
16 A. I know I've reviewed at least part of that,
17 yes.

18 Q. Have you reviewed that in connection with --
19 or have you reviewed the portion of that document that
20 relates to fill criteria?

21 A. I don't recall either way right now.

22 Q. So you don't know whether that document in
23 fact did incorporate an approach to fill criteria that
24 does calculate the amount of constituent that can exist
25 in soil without injuring or impairing or violating

1 site requiring a 401 would result in an exceedence of
2 the criteria, we couldn't allow that, and so I would
3 say the basis of our concern was the water quality
4 criteria, those numbers, rather than trying to come up
5 with clean fill numbers.

6 Had the Port proposed, for instance, using
7 fill that was only -- that only contained contaminants
8 in levels that wouldn't cause concern about possible
9 violations of the water quality criteria, I don't think
10 this would have been an issue.

11 Q. Well, how do you determine, then, or do you
12 know how you determine what levels of contaminants can
13 exist in soil without causing violations of water
14 quality standards?

15 A. Well, I think at the time of this July '98
16 401 we didn't know as much about that as we do today.
17 I think a lot of the work that has been carried out
18 since then has helped us address that to some degree.
19 I don't know that we're entirely there yet.

20 Q. Are there methodologies to your knowledge
21 that attempt to calculate how much of a particular
22 constituent can exist in soil without it causing water
23 quality violations?

24 A. Yes, there are.

25 Q. What are those to your knowledge?

1 water quality standards?

2 A. I'd have to look at the document to be sure.
3 Right now I'm not certain one way or the other.

4 Q. Have you formulated any opinions about
5 whether or not the numeric criteria in the September
6 2001 401 certification are adequate to prevent
7 violations of water quality standards?

8 A. My opinion is based on that document and
9 other documents that I've read that there is still
10 considerable doubt as to whether or not those criteria
11 will result in the standards being met. If I were
12 reviewing this 401, I would work to have those
13 questions answered beforehand, before I issued the 401.

14 Q. Well, it sounds like what you're saying is
15 that you believe that there is doubt about whether or
16 not those are protective.

17 A. Correct.

18 Q. But do you have any opinions based upon your
19 own research or evaluation that those criteria are in
20 fact not protective of water quality?

21 A. As of right now, I don't think I can tell one
22 way or the other.

23 MR. REAVIS: This is probably a good place
24 to break for lunch.

25 (Lunch recess taken 12:02 to 1:05 p.m.)

AFTERNOON SESSION

1:05 P.M.

-oOo-

CONTINUING EXAMINATION

BY MR. REAVIS:

1 Q. I just had a couple of questions about the
2 July '98 401 certification, which is Exhibit 211. One
3 thing I noticed about this document is in several
4 places it requires that submittals be given to Ecology,
5 and in the course of doing that, it says specifically
6 Ecology's Tom Luster, and my question for you is was
7 that a normal way to draft a 410 certification or is
8 that different for this particular project?

9 A. That was fairly standard at the time. We
10 either specified which of the 401 staff should receive
11 documents or would say in general provide it to the
12 federal permits team or something like that. It varied
13 by project, but it wasn't unusual to have a particular
14 person's name there.

15 Q. What I'd like to do now is have you describe
16 for me what all you have done since you left the
17 Department of Ecology as it relates to the Port's 401
18 application or the 401 certification. Maybe if you
19 could start with the list of documents that you brought

1 reviewed relating to the Port's 401 application since
2 you left the Department of Ecology?

3 A. Okay. So those that I included in the
4 declarations as well as -- it may be easier to start
5 from the back of this list. I've looked at the low
6 flow analysis from either November or December of 2001.
7 I looked at some part of the stormwater monitoring
8 plan, I believe. I believe I've looked at the sand and
9 gravel pollution prevention plan, that one or another
10 document with a similar title.

11 Q. Let me stop you there just to be clear we're
12 on the same page here. You're looking at the last page
13 of Exhibit 203, and there's one document on there that
14 you did not mention having reviewed since you left
15 Ecology being the spill prevention control and
16 countermeasures plan, which apparently was finished in
17 August of 2001, so is that a document you believe you
18 reviewed since you left Ecology?

19 A. That one I believe I may have reviewed. I'm
20 not certain sitting here right now.

21 Q. I guess there's a check mark by it, and
22 that's why I'm confused.

23 A. Right. If I had it to look at, I could
24 probably be more certain about all of these.

25 Q. Well, let me ask you how you prepared this

1 with you today, which I believe is Exhibit 203, and
2 tell me if you can which of those documents that you
3 put check marks by you have reviewed since leaving the
4 Department of Ecology.

5 A. Okay. I think I reference some specifically
6 in my declarations and deposition. I don't recall
7 right at the moment which ones those were, but those
8 along with --

9 Q. So just to clarify, that would be in one of
10 the two declarations you submitted in this case that
11 you had a list of certain documents you --

12 A. I believe I referenced the fact that I had
13 reviewed documents as part of my declaration or
14 preparing my deposition. I could go through those and
15 point them out if need be.

16 Q. Well, maybe I'm confused by documents that
17 you reviewed in preparing your deposition. Are you
18 talking about -- did you mean to say declaration?

19 A. Excuse me. What's the question again? Just
20 preparing for --

21 Q. No, no. This is a broader question than the
22 one I asked you earlier. The one earlier related to
23 documents you reviewed in preparation for this
24 deposition. The question I'm asking you now is can you
25 tell me which documents or what documents you have

1 list in Exhibit 203 and how you went about checking off
2 the items that you have in fact reviewed and
3 specifically with regard to things you reviewed since
4 you left Ecology. Did you make these check marks based
5 upon documents you had in your file; therefore, you
6 knew that you had them in your possession and reviewed
7 them?

8 A. No. I got this list and made the check marks
9 in response to the -- I don't know the name -- the
10 request for this deposition today, but I didn't have
11 all the documents in front of me when I made the check
12 marks. I did this -- I put together this check marked
13 list yesterday.

14 Q. So some of this was done based upon memory?

15 A. Correct.

16 Q. And that particular document, the spill
17 prevention control and countermeasures plan, you may or
18 may not have reviewed?

19 A. Correct. Going to the previous page, page 9,
20 the cumulative impacts to wetlands and stream, I
21 believe that's the version I reviewed. Low flow
22 analysis flow impact, I believe that's the version I
23 reviewed. I'm looking quickly to see if these other
24 documents I didn't check I might have reviewed. As I
25 said earlier, the biological opinion, I reviewed at

1 least a portion of that.

2 Near the top of that page, the natural
3 resource mitigation plan and appendices, the wetland
4 functional assessment, possibly some others on this
5 page based on not that I remember the title exactly,
6 but I know I reviewed some reports done by Hart
7 Crowser, and they're listed as the author on some of
8 these. I'm trying to remember if some of these may
9 have been appendices to documents that I reviewed.

10 Q. Do you remember what the subject matter was
11 of the Hart Crowser documents you reviewed?

12 A. I believe there was at least one document on
13 a geotechnical report on the MSE wall. There may have
14 been another one to do with a flow analysis. Again,
15 it's kind of hard to tell without the stack in front of
16 me.

17 Going to page 8, I believe I've seen a
18 document that had to do with the abandoned wells. I'm
19 not certain that this is the same document, but it
20 might have been.

21 Q. Let me stop you there and ask you: Page 8
22 seems to run in terms of document finish dates from
23 September of 2000 to December of 2000, so I wanted to
24 make sure that your answer now is confined to documents
25 that you have reviewed since you left Ecology.

1 or certification?

2 A. Probably several dozen hours overall. That
3 seems to be about right.

4 Q. Did you keep any record of the amount of time
5 you've spent doing that?

6 A. No.

7 Q. Several dozen could be a pretty broad range.
8 Can you tell me whether or not you believe it's more or
9 less than 50 hours?

10 A. I would say over the course of the year, over
11 50, yeah. It's hard to estimate exactly, because I
12 would do it for two or three hours in an evening or a
13 chunk of time on a weekend or things like that. I
14 didn't dedicate like a solid week to reviewing
15 documents, for instance.

16 Q. Do you believe that the amount of time you
17 spent was less than a hundred hours?

18 A. Probably, yeah. I'd say between 50 and a
19 hundred.

20 Q. Where did you obtain the documents that you
21 reviewed that you've just testified about?

22 A. I think most of them were sent to me by ACC.

23 Q. By ACC directly or by ACC's attorneys?

24 A. That I'm not sure of. It may have been both
25 in different instances. One may have sent them or the

1 A. Right. Yes. I believe -- well, for some of
2 these that were issued before I left Ecology, I
3 probably reviewed them at the time, and for some of
4 them I've also looked at them over the past year.
5 Other ones on this page, the low flow stream flow
6 analysis, the stormwater -- the comprehensive
7 stormwater management plan. I don't recall if I
8 mentioned earlier the final wetland delineation report.
9 Those are the ones that are apparent right now to me.

10 On page 7, I think we're getting into --
11 well, at the top of that page, those may be documents
12 that were before I left Ecology primarily, but let me
13 just make sure. Right at this moment, I can't recall
14 which of them on this page I reviewed in the last year
15 versus before then, and the same for the ones on page
16 6.

17 I think as we go back in this document, we're
18 getting into documents that were made out of date by
19 subsequent submittals by the Port, and so I think in
20 the last year I focused on most recent versions of
21 various plans and analyses, that sort of thing. I may
22 have missed some, but --

23 Q. Do you have any estimate about the amount of
24 time that you have spent in the last year reviewing
25 documents related to the third runway 401 application

1 other. I'm not sure of the difference, I guess.

2 Q. In addition to the documents themselves that
3 you've testified about, were there other materials that
4 came along with the communications from ACC or its
5 counsel relating to the 401 certification?

6 MR. EGLICK: Objection as to the form of the
7 question; no foundation.

8 A. I also received from ACC or its counsel the
9 notes from the meetings that occurred last -- in the
10 fall of 2000. This was the series of meetings with
11 Kate Snider facilitating. Those meetings included a
12 number of notes, so I got a copy of those.

13 MR. EGLICK: Can I just clarify? We're
14 talking about last fall?

15 THE WITNESS: Of 2000.

16 MR. EGLICK: Thank you.

17 A. I may have -- I think I received some e-mails
18 that ACC had obtained from Ecology. That's all that
19 comes to mind right now.

20 Q. (BY MR. REAVIS) Do you remember what the
21 subject of those e-mails was?

22 A. In general, just having to do with the review
23 for 401 of various aspects. I can't bring to mind
24 specifically right now.

25 Q. Any particular e-mail stand out?

1 A. At the moment, no. I'm trying to -- I doubt
2 very much that I got a complete set. From reading the
3 various declarations and depositions, it appears there
4 were a lot of e-mails that I haven't seen during the
5 last year, but I was provided some subset of those.

6 Q. Were there any transmittal letters or
7 memoranda forwarded to you by anyone in connection with
8 the 401 issues at the Port since you left Ecology?

9 A. I think with each packet I think there was a
10 cover memo saying here are and then a list of the
11 documents, but nothing other than that.

12 Q. So no memoranda, for example, explaining the
13 theory of the case or outlining the issues?

14 A. No. Nothing like that.

15 Q. To the best of your recollection, then, it
16 was documents with a transmittal letter saying here are
17 documents?

18 A. Correct.

19 Q. Who all have you talked to since you left
20 Ecology that was either with ACC or representing ACC?

21 A. I've talked with Mr. Eglick a few times. I
22 believe I talked with Mr. Stock once or twice. Let's
23 see. Ms. Grad at Mr. Eglick's and Mr. Stock's office.
24 That's all that comes to mind right now.

25 Q. How many times do you think you've talked to

1 don't we do this. Let's go ahead. You can ask subject
2 to my motion to strike on the understanding that there
3 will be absolutely no question that when similar
4 questions are asked of Port witnesses that there will
5 be no instruction not to answer similar questions of
6 any Port witness.

7 MR. REAVIS: Let me do this. I'm going to
8 move on for now.

9 MR. EGLICK: Well, no. I'm urging you to ask
10 the question subject to that agreement.

11 MR. REAVIS: No. What I'm going to do is
12 call co-counsel and ask them whether they have an
13 understanding of a different agreement, and at a break
14 I'll call them. If I get an answer, I'll go into this
15 area or not. I'm doing that based upon my own volition
16 and not as a result of your objection, but I do want to
17 clarify it before I agree to waive some sort of
18 privilege that co-counsel may have agreed to.

19 MR. EGLICK: I'm not waiving any, but what
20 I'm saying is I'm not going to ask or instruct or
21 request him not to answer. I'll leave it for a motion
22 to strike, but only on the understanding, of course,
23 that what's sauce for the goose is sauce for the
24 gander.

25 MR. YOUNG: I have one question, which is is

1 Mr. Eglick since you left Ecology?

2 A. Probably half a dozen or so.

3 Q. And what was the substance of those
4 conversations?

5 MR. EGLICK: Wait a minute. You're asking
6 him what the subject matter was or the substance?

7 MR. REAVIS: Either one. I asked substance.

8 MR. EGLICK: So because I want to understand
9 the Port's position on this, is it the Port's position
10 that in this case it is not asserting that there is a
11 work product protection or attorney/client privilege,
12 however it's characterized, that applies to
13 conversations between, for example, Port counsel and
14 witnesses that the Port is going to call or has listed?

15 MR. REAVIS: Well, my understanding of this
16 -- and let me say I wasn't involved in the details of
17 it -- was that with regard to the production of
18 documents that both parties were agreeing that those
19 materials would not be produced; in other words,
20 communication between counsel and experts. My
21 understanding, though, was that in depositions those
22 matters can be inquired about. I guess I would ask you
23 if you have a different understanding to let me know
24 now.

25 MR. EGLICK: Well, that wasn't mine, so why

1 it then your position, Peter, that Tom Luster is a
2 retained expert on behalf of ACC?

3 MR. EGLICK: Well, I guess if you want to
4 talk about that, we can go off the record and talk
5 about it, but I'm not being deposed here. The word
6 "retained" kind of implies some sort of commercial
7 transaction, and I don't think that's applicable here.

8 MR. YOUNG: But you're saying he is your
9 expert for purposes of asserting work product
10 privilege?

11 MR. EGLICK: Well, he is going to testify on
12 his opinions having been qualified as an expert by
13 Ecology before we ever appeared on the scene. I think
14 Exhibit 202, the third page, Ecology's description of
15 Tom is that he, quote, serves as senior expert to the
16 shorelands and environmental assistance program and the
17 Department of Ecology on technical and policy issues
18 related to section 401 of the Federal Clean Water Act,
19 Coastal Zone Management consistency determinations, and
20 coordinated state responses and so on. I guess --

21 MR. YOUNG: He's not working for Ecology now.

22 MR. EGLICK: Right. But you asked me --
23 there are two parts to the question. One, is he an
24 expert? As far as I know, Ecology described him as an
25 expert -- how many years ago is this now, five? -- on

1 401, so, yes, he's an expert, and, yes, we have asked
2 him to testify in the presentation that we will make to
3 the board.

4 MR. YOUNG: That's what I was looking for.
5 Thank you.

6 MR. REAVIS: And do you believe that
7 conversations between you and Mr. Luster are
8 privileged?

9 MR. EGLICK: Well, I think the question that
10 I raised was whether or not there had been an agreement
11 among counsel that conversations, communications with
12 witnesses such as Mr. Luster were not going to be
13 inquired into whether those communications were in
14 writing or in some other way. I don't know whether
15 that falls under attorney/client or work product. I
16 believe that Mr. Pearce's letter from December suggests
17 it falls under both, and that's the letter that I
18 thought was the load star here. Have you seen
19 Mr. Pearce's letter?

20 MR. REAVIS: I have.

21 MR. EGLICK: You know Mr. Pearce, right?
22 He's the other counsel for the Port. What I've also
23 said here again is please go ahead and ask your
24 questions subject to my objection and motion to strike
25 so long as it's understood that the Port will not

1 Q. Did you make changes after having sent it to
2 them in draft form? Let me refer to both declarations
3 for now.

4 A. Right. There were a few minor edits. The
5 primary changes were formatting. I don't think I've
6 written a declaration before these two, so I wasn't
7 sure on the structure and format, that sort of thing.
8 But the words are mine, and there were a couple minor
9 edits or grammatical corrections, but nothing of
10 substance.

11 Q. Have we covered, then, the list of people
12 that you have talked to from ACC or representing ACC
13 since you left Ecology? Are those three, Mr. Eglick,
14 Mr. Stock, and Ms. Grad, the entire list?

15 A. As far as I know, yes. I'm not certain who
16 all are members of ACC, but I don't recall
17 conversations with other people from that general area.

18 Q. Let me exclude Ecology people from this
19 question for now, but who else have you talked to since
20 you left Ecology about the Third Runway Project or the
21 401 certification in connection with that?

22 A. I've probably mentioned it to some of my
23 friends just -- they knew it was a big part of my life
24 for several years.

25 Q. You mean friends in California or friends up

1 interpose any instruction not to answer or anything
2 else when our turn comes, and that way we can just move
3 right ahead here.

4 MR. REAVIS: As I said a minute ago, I'm
5 going to defer that and come back to it later.

6 MR. EGLICK: It's your choice.

7 Q. (BY MR. REAVIS) Do you have any recollection
8 about the total amount of time you have spent in
9 conversations with Mr. Eglick?

10 A. I don't remember any calls being more than 10
11 to 20 minutes at most. Most were shorter, I think.

12 Q. How about Mr. Stock? And, again, the
13 question being how much time have you spent in
14 telephone calls or meetings with Mr. Stock?

15 MR. EGLICK: Object to the form of the
16 question; compound question, no foundation.

17 Q. (BY MR. REAVIS) Let me ask you how much time
18 have you spent in telephone calls with Mr. Stock?

19 A. Probably 15, 20 minutes total.

20 Q. Can you tell me who prepared the first draft
21 of the two declarations that you submitted?

22 A. Oh, I did.

23 Q. And did you send that to counsel for ACC in
24 draft form?

25 A. I did.

1 here in Washington?

2 A. Some of both, actually.

3 Q. Have you talked to Mr. Wingard about this
4 project since you left Ecology?

5 A. I don't think Mr. Wingard and I have talked.
6 I believe he and I exchanged an e-mail or two, but I
7 don't believe it was anything about this project. He
8 was working on something else having to do with the
9 Clean Water Act, and I know at one point I forwarded
10 him an article that I had read that I thought he might
11 find of interest, but I don't think we had any exchange
12 on the third runway in particular.

13 Q. Have you talked to Brett Fish since you left
14 Ecology?

15 A. No.

16 Q. Who have you talked to or what Ecology
17 employees have you talked to since you left Ecology
18 with regard to the Third Runway Project?

19 A. I've talked with Ann Kenny I think three
20 different times. I've talked with Erik Stockdale
21 several times, probably half a dozen or less. I've
22 talked with Gordon White once or twice. I talked with
23 Dave Peeler. Those are all that come to mind right
24 now.

25 Q. Some of the documents you brought with you

1 today, Exhibits 204 and 205, are notes that you made to
2 yourself relating to conversations that you had with
3 Ann Kenny?

4 A. Correct.

5 Q. One's on June 5, 2001, correct? That's
6 Exhibit 205.

7 A. Right.

8 Q. Now, do you recall whether you created this
9 Exhibit 205 on the same day that you talked to
10 Ms. Kenny?

11 MR. EGLICK: Objection; asked and answered.

12 A. This one shows or the first line starts "call
13 today from Ann Kenny," so in this case, yes, I made it
14 the same day.

15 Q. (BY MR. REAVIS) Would that be true of Exhibit
16 204 as well?

17 A. 204 may be a little different. I think we
18 had a little back and forth on voice mail for a day or
19 several day period perhaps until we spoke live in
20 person.

21 Q. So this represents two occasions that you
22 talked to Ann Kenny, this being 204 and 205. You
23 mentioned a third occasion.

24 A. I believe there was one other occasion, but I
25 did not make notes on that call.

1 of the matters that he was working on?

2 A. I don't recall any great details about the
3 substance. It was more of a conversation on how things
4 were going in general. I don't think we discussed the
5 particular details of a wetland issue, for instance.

6 Q. What did you discuss with Gordon White on
7 this one or two times that you talked to him?

8 A. Mr. White actually came to California as part
9 of a review team looking at the California coastal zone
10 management program, and that review was held at my
11 office in San Francisco, and so Gordon was there over
12 several days, and I saw him once or twice during that
13 review. He was pretty busy during that whole time, so
14 we just exchanged pleasantries primarily. I don't
15 think we discussed Sea-Tac at all, actually.

16 Q. Was there another time that you were
17 referring to a minute ago?

18 A. I think I saw him once or twice during that
19 several-day period is all.

20 Q. Now, in your work for the California Coastal
21 Commission, are you dealing with 401 issues?

22 A. Not directly. California Coastal Commission
23 doesn't have 401 authority. That's held in a different
24 agency, although a number of the projects that we work
25 with in the commission are required to obtain a 401,

1 Q. Do you recall what that other conversation
2 was about?

3 A. It may have been a continuation of one of
4 these two issues, but I don't recall specifically right
5 now.

6 Q. What was the purpose for your conversations
7 with Mr. Stockdale?

8 A. Early last year right after I left Ecology,
9 Erik and I talked several times just because we're
10 friends and colleagues, and he called me to find out
11 how I was doing in my new job, and I called him to find
12 out how he was doing, and we discussed how the Sea-Tac
13 review was going.

14 A little later, I believe, sometime this
15 summer he was planning a trip to California with his
16 family, and we talked to see if we could get together,
17 if he had any time to visit and that sort of thing. It
18 turns out he didn't, so we didn't get to see each
19 other. Those are the two main issues, I believe.

20 Q. Do you recall what Mr. Stockdale told you
21 about how the Sea-Tac project was doing?

22 A. Oh, I think generally he was saying it was
23 going like it always had, kind of in fits and starts
24 and they were trying to get through the review.

25 Q. Did he talk to you about the substance of any

1 and so part of my review for the commission is to make
2 sure the 401 is in place or find out the status of the
3 401 review on a particular project, and some of the
4 work I do involves the same sort of water quality
5 concerns that the 401 work I did here involved.

6 Q. What agency in California does handle 401
7 work?

8 A. There's a state water quality control board
9 and nine different regional water quality control
10 boards.

11 Q. Since leaving the Department of Ecology, have
12 you talked to any legislators about the Third Runway
13 Project?

14 A. No. I haven't talked with any of them about
15 that.

16 Q. You hesitated a minute. Is there something
17 that you're thinking of as a conversation?

18 A. At one point I got a letter -- I didn't talk
19 with but I got a letter from Senator Patterson asking
20 if I would care to comment on the NPDES permit that
21 Ecology had issued to the Port in spring or early
22 summer of 2001.

23 Q. And did you do that?

24 A. I believe one of the conversations I had with
25 Mr. Stock -- he called on the senator's behalf, I

1 believe, and we had a brief discussion. I believe the
2 gist of it was I referred to my earlier letter to the
3 senator that I wrote in January 2001 and the issues I
4 raised there.

5 Q. But you don't recall submitting any written
6 comments on the NPDES permit in 2001?

7 A. I don't think I wrote anything on that issue,
8 no. I don't remember that.

9 (Deposition Exhibit No. 212 was marked for
10 identification.)

11 Q. (BY MR. REAVIS) Is Exhibit 212 -- does that
12 appear to be a copy of the letter that you were
13 referring to a minute ago that was sent by you to Julia
14 Patterson in January of 2001?

15 MR. EGLICK: Object as to the form of the
16 question. I don't recall anyone referring to a letter
17 a minute ago.

18 MR. REAVIS: Maybe I misunderstood the
19 question.

20 Q. (BY MR. REAVIS) Did you send a letter to
21 Senator Patterson in January of 2001?

22 A. Yes.

23 Q. Does Exhibit 212 appear to be a copy of that
24 letter?

25 A. Yes, it does.

1 you brought with you today, correct?

2 A. Correct. I had provided -- Exhibit 206 is
3 the attachment without the cover letter, and so 212 is
4 the cover letter and the attachment together.

5 Q. In paragraph 2 of Exhibit 212, the cover
6 letter, it says, "I've included with this letter a
7 brief assessment of my view of the issues - due to
8 several time constraints, it is not complete, but it
9 does focus on what I believe are some of the primary
10 issues to be resolved in the project review."

11 Do you know if either during your tenure at
12 Ecology or shortly thereafter there was a list put
13 together of all of the outstanding issues related to
14 the Port's application for 401 certification?

15 A. Yes. I believe at different times there were
16 several different lists put together depending on the
17 status of the project.

18 Q. I have a few examples that I'm not sure I
19 want to get into a memo-by-memo review of those, but
20 let me ask you if during the course of your work on the
21 401 project you yourself kept a list of what you
22 believed to be outstanding issues.

23 A. I believe earlier in the process I was asked
24 to keep track of the different issues as they came up.
25 Very early in the process I believe there was a list

1 Q. Now, the first sentence in that letter says,
2 "Thank you for your letter of congratulations last
3 week." I assume that you got a letter from Senator
4 Patterson shortly before this Exhibit 212 was sent,
5 correct?

6 A. Correct.

7 Q. Do you recall what was in that letter?

8 A. She wrote a letter saying, I understand that
9 you've accepted a job in California, congratulations on
10 my new position, and asked that before I left if I
11 could provide her a summary of my understanding of the
12 current status of Ecology's 401 process on the Sea-Tac
13 application.

14 Q. Exhibit 212 is a two-page letter, and then
15 there's an attachment to that letter, correct?

16 A. Right.

17 Q. Is that attachment to the letter in response
18 to Senator Patterson's request for a -- for information
19 from you about the current status of the Sea-Tac
20 project?

21 A. Yes.

22 Q. And did you create that attachment to Exhibit
23 212?

24 A. I did.

25 Q. I think that was one of the documents that

1 that was generated through meetings between the Port
2 and Ecology. The regional director at the northwest
3 office before Ray Hellwig was Mike Rundlett, and we had
4 a series of meetings with the Port during that time
5 where I think we had a list of issues.

6 During different phases of the Port's
7 project, the project changed. For instance, at one
8 point there was a proposal to use irrigation water from
9 a well on the golf course south of the airport, and
10 that proposal had issues related to it that went away
11 after that proposal went away, so there might have been
12 a list at that time that was later supplanted by
13 another list.

14 Q. I guess I'm not asking you whether there were
15 items that came and went from the various lists. I was
16 just trying to determine whether or not you yourself
17 tried to keep a running list of what you thought were
18 the issues that were outstanding.

19 A. Yeah. I tried to keep tabs on where we were
20 with the review, and I probably had several different
21 lists over time.

22 (Deposition Exhibit No. 213 was marked for
23 identification.)

24 Q. (BY MR. REAVIS) Let me ask you about Exhibit
25 No. 213, which at the top left on the first page says

- 1 "Sea-Tac issues short list October '99.doc." Can you
2 tell me whether or not this exhibit is a document that
3 you created?
4 A. This looks like something I created, yes.
5 Q. And is that your handwriting on the first
6 page of that document?
7 A. It is.
8 Q. Now, do you know during the course of the 401
9 consideration by Ecology whether you updated this
10 Exhibit 213 or tried to keep sort of your own running
11 list of issues?
12 A. I don't recall right now whether this was one
13 of a series of -- or if I used this list and
14 continually updated it or created a new list, so I
15 guess my answer is I don't recall right now.
16 (Deposition Exhibit No. 214 was marked for
17 identification.)
18 Q. (BY MR. REAVIS) Exhibit No. 214 is entitled
19 Draft October 9, 2000. It appears to be a memo from
20 you to Ecology Sea-Tac reviewers; is that correct?
21 A. That's right.
22 Q. The re line says, "my most current list of
23 issues to be resolved for Sea-Tac 401 review"; is that
24 correct?
25 A. That's correct.

- 1 Q. Do you recall whether it was your intention
2 in preparing documents like No. 213 and No. 214 to try
3 to be as comprehensive as possible with regard to what
4 the outstanding issues were at any given time?
5 A. The main focus was to keep tabs on the
6 various issues as they arose. I'm not certain right
7 now whether any could be considered comprehensive.
8 They were fairly complete but often didn't go into, for
9 instance, the level of detail necessary. If I
10 mentioned that the natural resource mitigation plan
11 isn't complete, I may not have gone into each wetland
12 delineation and each mitigation site and what's
13 necessary for each one.
14 Q. At some point in the fall of 2000, there was
15 a process created which you referred to earlier in
16 connection with what Kate Snider was doing, correct?
17 A. Correct.
18 Q. Can you tell me what the purpose for that --
19 and I'll call it a facilitated meeting process -- was?
20 A. I think the main purpose was to have a
21 structured format for Ecology and the Port to sit down
22 and work out clear understandings on what issues needed
23 to be resolved and how to go about resolving them.
24 (Deposition Exhibit No. 215 was marked for
25 identification.)

- 1 Q. (BY MR. REAVIS) Let me ask you if you
2 recognize Exhibit No. 215.
3 A. Yes.
4 Q. What is it?
5 A. This is one set of notes from one of the
6 meetings held as part of that process on October 13,
7 2000.
8 Q. That shows you as an attendee, correct?
9 A. Right.
10 Q. Now, if you refer to page 2 of that document
11 and on to page 4, so the bottom half of 2, all of page
12 3, and the top of page 4. It appears to be a list of
13 what are called 401 technical issues requiring
14 resolution. Do you see that in the left column on the
15 table there?
16 A. Right.
17 Q. Was it your understanding that this
18 facilitated process was designed to make a
19 comprehensive list of the issues that remained to be
20 resolved in connection with consideration of the Port's
21 401 application?
22 A. I believe that was its intent, yes.
23 Q. And did you have an opportunity after this
24 October 13 meeting to comment on the list that was set
25 forth in Exhibit No. 215?

- 1 A. I believe so. This is noted as final draft
2 meeting notes, so I'm not certain on this particular
3 memo, but I know that the format for the series of
4 meetings was that Ms. Snider would send out draft
5 meeting notes for both Ecology and Port review and then
6 would create a set of final notes for each meeting.
7 Q. So do you recall receiving draft minutes of
8 the meeting before the final version came out?
9 A. That was the general approach, yes.
10 Q. Do you believe that you received them on one
11 or more occasions, the drafts?
12 A. I believe so. I'm not certain when this
13 process started, so this may have -- I don't know if
14 this was the first meeting or what, third or what.
15 (Deposition Exhibit No. 216 was marked for
16 identification.)
17 Q. (BY MR. REAVIS) Let me ask you to review
18 Exhibit No. 216, which appears to be an e-mail sent by
19 you to Ray Hellwig, Paula Ehlers, Kevin Fitzpatrick,
20 and Joan Marchioro on October 18, 2000.
21 A. Correct.
22 Q. Do you recall this particular e-mail or the
23 attachment to it?
24 A. Yes.
25 Q. The attachment that starts on page 2 of this

1 exhibit, does that appear to be the same attachment
2 that's referenced by this little icon on the first page
3 of the e-mail?

4 A. Yes. I believe it is.

5 Q. Do you recall -- well, let me just read the
6 first sentence of the attachment. "I have identified
7 several issues that need to be better resolved for
8 Ecology to issue a defensible 401 certification that
9 meets regulatory requirements." My question for you
10 is, do you know whether or not Exhibit No. 216 was an
11 attempt by you to supplement the list of issues that
12 were referenced in Exhibit No. 215, which was the
13 facilitated meeting minutes on October 13?

14 A. I believe my October 17 document was meant to
15 be -- meant to include some issues that I thought had
16 been left off of the October 13 issue list, yes.

17 Q. So at that time in October, were you
18 attempting to give your input to Kate Snider and the
19 facilitated process in order to develop a comprehensive
20 list of issues that needed to be resolved in the 401
21 process?

22 A. The memo I wrote didn't go to Kate Snider.
23 It was an internal Ecology memo. I believe at this or
24 perhaps other meetings before this October 13 meeting I
25 had raised some of these issues, but this draft didn't

1 decision?

2 A. Well, I don't know that there was an official
3 procedure in that case. I think that's a very general
4 question, and it would depend on the specifics of a
5 given project.

6 Q. Was there any general rule that if an issue
7 was a technical issue and you as the 401 lead disagreed
8 with a technical person on some other part of the team
9 that you were supposed to defer to the technical
10 expertise of that particular technical person?

11 A. I don't think that was an absolute. Again,
12 it would depend on the specifics. In most cases where
13 there was a difference of opinion, it didn't
14 necessarily have to do purely with a technical issue.
15 It was mostly the relationship between an area of
16 technical expertise and an area of regulatory
17 expertise.

18 Q. If it were a purely technical issue as to
19 which you disagreed with a technical expert, do you
20 believe it would have been your duty to defer to the
21 recommendations made by the technical expert?

22 A. Again, not necessarily. I'll provide a
23 specific example. If a proponent is proposing to put
24 in a stormwater BMP and the documentation Ecology has
25 shows that that BMP is able to treat a certain type of

1 go directly to Ms. Snider.

2 Q. So regardless of whether or not Exhibit
3 No. 216 was sent to Ms. Snider for the purpose of
4 expanding or modifying her list, do you recall in
5 October of 2000 yourself attempting to give your input
6 into the list that was being created by Kate Snider in
7 order to make this a comprehensive list of outstanding
8 issues?

9 A. Yes.

10 Q. Let me just ask you a question about the
11 e-mail itself, No. 216. The second bullet there says,
12 "While some of them may be, quote, internally resolved
13 through consensus (minus 1), close quote." Do you know
14 who the minus one was?

15 A. That would be me.

16 Q. Is that an indication that other people at
17 Ecology had agreed on the resolution of some of these
18 issues but you hadn't necessarily agreed?

19 A. I believe so, yes.

20 Q. Now, in an instance where that is the case,
21 where you have consensus among other 401 reviewers or
22 other technical people working on a 401 and you don't
23 agree with the consensus of the rest of the group, was
24 there a procedure at Ecology for resolving those types
25 of differences of opinion so you could reach a

1 run-off to a certain degree but the resulting discharge
2 doesn't meet the water quality standards, the technical
3 expert may say this is all that's required in the
4 stormwater manual and we've determined that this meets
5 the stormwater manual. The regulatory person may say,
6 that's fine from a technical perspective, but that
7 doesn't meet the requirement for reasonable assurance.

8 And so it's not so much a disagreement
9 between the two, but it's applying a certain area of
10 technical expertise to a regulatory situation in which
11 the technical finding doesn't allow the regulatory
12 standard to be met.

13 Q. Well, let me ask you a question, then, to
14 follow up on that. There may be instances where
15 there's a regulatory answer and a technical answer,
16 but, for example, if you have an issue that comes up
17 regarding whether or not a particular sampling result
18 represents a violation of water quality standard, would
19 you consider that to be a technical issue or is that
20 more a regulatory issue as you've described the
21 difference?

22 A. Well, in this particular case, I recall
23 several conversations with different people in the
24 water quality program about that very concern, and
25 Ecology's experts in stormwater had varying opinions on

1 something as simple as your question. Can you
2 determine compliance with water quality criteria if you
3 take a grab sample or do you need a series of samples?
4 How do you determine that?

5 I got different answers from different
6 experts on that, and so in that sense, until that
7 question was resolved, the whole idea of having
8 reasonable assurance that the water quality standards
9 would be met was in question, and I don't think Ecology
10 could base a decision on having reasonable assurance as
11 long as it didn't know whether or which sampling method
12 could ensure the standards were being met.

13 Q. With regard to that type of issue, first off,
14 is that an issue that would be addressed by the water
15 quality program?

16 A. That's where the primary expertise would be,
17 I believe, yes.

18 Q. Isn't there a chain of command in the water
19 quality program for resolving those differences of
20 opinion among people in the water quality program in
21 order to develop a decision on behalf of the waste
22 quality program about those types of technical issues?

23 A. I'm not certain. I imagine there is a
24 certain chain that would lead to a conclusion one way
25 or the other.

1 MR. REAVIS: Let me be a little more
2 specific.

3 (Deposition Exhibit No. 217 was marked for
4 identification.)

5 Q. (BY MR. REAVIS) Showing you what has been
6 marked Exhibit No. 217, which is a declaration from
7 Kevin Fitzpatrick signed by him on the 28th of
8 September, 2001. Have you seen this declaration
9 before?

10 A. Yes, I have.

11 Q. Let me ask you about some statements in
12 paragraph number 3. Well, let me back up just a
13 minute. In paragraph number 2, Mr. Fitzpatrick said he
14 is a section manager employed by the Department of
15 Ecology in the northwest regional office in the water
16 quality program. Now, in terms of the hierarchy of the
17 water quality program in the region, do you know where
18 Mr. Fitzpatrick would fall if he's the section manager?

19 A. As section manager, I believe he would report
20 both to Mr. Hellwig, the regional director, and to
21 someone at headquarters in the water quality program,
22 although I'm not sure who that is.

23 Q. Mr. Hellwig is the regional director,
24 correct?

25 A. Correct.

1 Q. So then getting back to your example, if you
2 have differences of opinion among technical people over
3 whether or not a sample indicates a violation of water
4 quality criteria and the head of the water quality
5 program or, say, the head of a region of the water
6 quality program concluded that, no, a particular sample
7 did not necessarily represent a violation of the water
8 quality criteria, would you believe it's your duty to
9 defer to that decision that has been reached by the
10 water quality program?

11 A. Oh, in that case, if that was the decision
12 that sampling could not determine whether or not water
13 quality standards were being met, then my response
14 would be that Ecology would not have a basis for
15 reasonable assurance for purposes of 401.

16 Q. So if Ecology is unable to determine whether
17 or not a particular sampling is a violation of water
18 quality standards, then that would prevent Ecology from
19 having reasonable assurance that water quality
20 standards would be met?

21 MR. EGLICK: Objection as to the form of the
22 question. It's vague, and in particular you're
23 referring to a particular sampling, and I don't know
24 whether, Gil, you're talking about a method, a result
25 of a sampling, or what.

1 Q. He's not necessarily the water quality --
2 he's not in the water quality program?

3 A. Right.

4 Q. So in terms of water quality chain of
5 command, is Mr. Fitzpatrick the top of that chain of
6 command in the northwest region as the section manager?

7 A. I believe so, yes.

8 Q. And then is there to the best of your
9 knowledge a reporting from Mr. Fitzpatrick to someone
10 else in the water quality program at headquarters?

11 A. I believe he reports to -- I don't know for
12 certain, but I believe it would be the program manager
13 at headquarters.

14 Q. Do you know who that is?

15 A. When I left, it was Megan White, but I'm not
16 sure who it is right now.

17 Q. Now, let me refer you to paragraph number 3,
18 the third sentence there. "The Port's stormwater
19 discharges from the STIA have exceeded state water
20 quality criteria for copper, lead, and zinc on an
21 instantaneous basis, but those exceedences do not
22 necessarily mean that the Port violated state water
23 quality criteria."

24 I think that is one example of the type of
25 issue I was asking you about earlier. To be specific

1 about the sampling that we're talking about, we're
2 talking about instantaneous samples showing an
3 exceedence, and it appears that Mr. Fitzpatrick's
4 opinion here is that those do not necessarily represent
5 violations of water quality criteria, correct?

6 A. Correct.

7 Q. Now, is that the type of issue that is a
8 technical issue as to which you would ordinarily defer
9 to a technical expert?

10 A. I would say it's a combination of a technical
11 issue and in this case a regulatory issue.

12 Q. In what sense is that a regulatory issue?

13 A. Well, as the statewide 401 policy and
14 guidance person, my job was to ensure consistent
15 application of reasonable assurance, and the
16 description here by Mr. Fitzpatrick stating that those
17 exceedences do not necessarily mean the Port violated
18 state water quality criteria does not equate to a
19 statement that the state of Washington has reasonable
20 assurance that standards will not be violated, and so
21 that's the interaction of the technical finding and the
22 regulatory requirement, and as long as that remained
23 unresolved, it was difficult to get to that standard of
24 reasonable assurance.

25 Q. So to the extent that Mr. Fitzpatrick is

1 instantaneous exceedence of a numeric water quality
2 standard in a stormwater discharge does not mean that
3 that same standard has been violated. A violation
4 exists only if the discharge exceeds the numeric
5 standards for the period of time set forth in the
6 regulations. Data from the Port's self-monitoring
7 reports of its stormwater discharges from its STIA
8 operations, required by the NPDES permit, do not show
9 that the numeric criteria standards were exceeded at a
10 constant level for the required duration of those
11 standards."

12 Now, isn't Mr. Fitzpatrick saying based upon
13 that statement that the standards were not violated?

14 MR. EGLICK: Objection. The declaration
15 speaks for itself.

16 Q. (BY MR. REAVIS) Have you discussed this issue
17 with Mr. Fitzpatrick on a number of occasions?

18 A. Yes. Quite a few.

19 Q. Do you know if he's saying that because you
20 don't have the required duration for these samples that
21 water quality standards are not being violated or is he
22 saying he doesn't know whether they're being violated?

23 MR. EGLICK: Objection as to the form of the
24 question; vague. Are you referring to what he's saying
25 in the declaration or what he said in the particular

1 saying he doesn't know whether or not that type of
2 instantaneous sample is or is not a water quality
3 violation, what you're saying is you can never have
4 reasonable assurance?

5 A. I'm saying not knowing is not the same as
6 reasonable assurance. If the reasonable assurance
7 standard is a more positive declaration by the state
8 saying we have a preponderance of the evidence showing
9 that the standards are being met and here we're saying
10 we have documentation of an instantaneous exceedence
11 but we don't know what to make of that, and so given
12 that, it certainly doesn't meet the preponderance of
13 the evidence requirement.

14 This -- I mean, this statement by
15 Mr. Fitzpatrick was evident in a number of other -- or
16 a number of monitoring reports from the Port, and that
17 same situation held true over quite a bit of time and
18 for different discharges from the Port, so overall, the
19 preponderance of the evidence available at the time was
20 that we had these ongoing instantaneous exceedences or
21 apparent exceedences and not enough documentation to
22 adequately counter those for reasonable assurance.

23 Q. Well, let me ask you about some additional
24 statements made in the same paragraph. Skipping down
25 to line 9, Mr. Fitzpatrick says, "A single

1 conversation?

2 Q. (BY MR. REAVIS) Let me ask you about the
3 conversations if you have any understanding of his
4 position on this issue apart from the declaration.

5 A. Well, I'd have to go back over meetings that
6 occurred over, I think, a two-year period at least,
7 actually longer, between myself, other people in the
8 water quality program, along with Mr. Fitzpatrick.

9 I think other programs may have been involved
10 to some degree trying to deal with this issue of
11 connecting stormwater discharges with the compliance
12 with the water quality standards and determination of
13 reasonable assurance, and so over the course of that
14 several year process, I think we all expressed a lot of
15 different opinions and weighed the pros and cons and
16 explored different avenues on how to resolve this
17 issue, so I don't know if this is Mr. Fitzpatrick's
18 final conclusion on the matter or if it was an opinion
19 he expressed previously.

20 Q. Well, is it your understanding of the
21 position of the water quality program that either, A,
22 they don't know whether or not water quality standards
23 are being violated by an instantaneous sample showing
24 an exceedence or, B, that they do know and there is no
25 violation?

1 A. Could you repeat the choices you offered?
2 MR. REAVIS: Could you read the question
3 back?

4 (The reporter read back as requested.)

5 MR. EGLICK: Objection as to the form of the
6 question.

7 A. I believe those are two possible choices
8 right now, but there may be some others. I've seen
9 other opinions expressed that an instantaneous grab
10 sample can be used to determine whether criteria are
11 being violated.

12 Q. (BY MR. REAVIS) I think my question was do
13 you know what the position of the water quality program
14 is on that issue?

15 MR. EGLICK: Objection to the form of the
16 question; argumentative.

17 Q. (BY MR. REAVIS) Do you know what their
18 position is?

19 A. I don't.

20 Q. Now, the water quality criteria, the numeric
21 water quality criteria that we're talking about here
22 are in WAC 173.201A040?

23 A. Most of them, yes.

24 Q. Now, if the water quality program determines
25 that a certain instantaneous sample does not represent

1 violated.

2 (Deposition Exhibit No. 218 was marked for
3 identification.)

4 Q. (BY MR. REAVIS) Showing you what has been
5 marked as Exhibit No. 218, which appears to be draft
6 meeting notes of one of these facilitated meetings held
7 on October the 27th, 2000; is that correct?

8 A. Right.

9 Q. And it shows you as being in attendance?

10 A. Correct.

11 Q. Do you recall the date that you were
12 reassigned such that you were no longer responsible for
13 the Third Runway Project's 401 certification?

14 A. I believe my change in assignment was the
15 week before this meeting. I notice that one of the
16 bullets is Ecology staffing 401, and I see that Ann
17 Kenny is in attendance, so this probably was the
18 following week.

19 Q. But, nevertheless, you were at the meeting on
20 the 27th?

21 A. Right.

22 MR. EGLICK: Off the record.

23 (Discussion off the record.)

24 (Deposition Exhibit No. 219 was marked for
25 identification.)

1 a violation of numeric water quality criteria, is that
2 the type of determination as to which you would defer
3 in deciding whether or not there's reasonable assurance
4 to issue a 401?

5 A. Probably. It would depend on the basis for
6 that determination. If it followed the requirements of
7 the water quality standards 173.201A and it was
8 supported by that regulation and perhaps case law in
9 the matter, yes.

10 Q. But that is within the province of the water
11 quality program to determine, correct?

12 MR. SMITH: Object to the form of the
13 question.

14 A. I don't know that it's solely in their
15 province.

16 Q. (BY MR. REAVIS) But certainly they deal with
17 those issues all the time?

18 A. Correct.

19 Q. And certainly they have the expertise to
20 determine whether or not water quality criteria are
21 being violated?

22 A. I'm not certain of the last part, no. In
23 some instances, it's clear that there appears to be
24 significant doubt as to whether or not they have the
25 expertise to determine whether criteria are being

1 Q. (BY MR. REAVIS) Let me ask you about Exhibit
2 No. 219, and the question is do you recall ever having
3 seen that document before?

4 A. I may have seen it as part of the overall
5 packet of notes on the series of meetings. I don't
6 remember it in detail, though.

7 Q. The first sentence of that exhibit says,
8 "This Meeting Notes Summary is a compilation of
9 discussions regarding issues related to a potential 401
10 Permit from the Department of Ecology for the Port of
11 Seattle's proposed Stormwater Master Plan Update and
12 third runway construction."

13 Do you know whether there was ever a list put
14 together as a part of this facilitated process that the
15 participants agreed was the final list at least as of
16 the date that the list was created of the outstanding
17 issues to be resolved in connection with the Port's 401
18 certification application?

19 A. I don't know that this -- I know that there
20 was a list created as part of this process. I don't
21 know that it was presented as the final list for all
22 purposes of 401. I think the list was used for
23 purposes of this series of meetings, but I believe
24 other issues arose either during or after these
25 meetings that required further resolution.

1 Q. And certainly issues will come up over time
2 -- for example, if the Port submits a new document --
3 that may raise issues that weren't previously on this
4 list, but I guess my question is at the end of 2000, do
5 you know whether there was acknowledgment by the
6 participants in this process that at that snapshot in
7 time that they had created what they believed to be the
8 final or complete list of all outstanding issues?

9 A. I don't know that for certain, because I
10 wasn't a part of the process at the end.

11 Q. Did you yourself at that time try to create a
12 list of what you believed to be all outstanding issues
13 after the facilitated process started?

14 A. I know I created -- oh, after the process.

15 Q. After the process started.

16 A. After the process started.

17 Q. In other words, we've seen some of your lists
18 that you talked about earlier, and my question was, did
19 you continue to keep your own lists after the process
20 started or did you attempt to incorporate your list
21 within the facilitated process?

22 MR. EGLICK: Object to the form of the
23 question, because it's not the question that was asked
24 earlier, so I think you should clarify for the witness
25 which question you're asking him to answer, the earlier

1 Q. Do you remember receiving this e-mail?

2 A. I don't remember specifically, but it must
3 have come to me, yes.

4 Q. Now, the subject matter of this e-mail
5 relates to issues that were being discussed regarding
6 how to coordinate 401 certification review with review
7 of NPDES permits. Is that a fair characterization?

8 A. I believe the third paragraph refers to that,
9 yes.

10 Q. Now, the next to the last sentence in that
11 paragraph says, "You will recall that the outcome of
12 the internal meetings resulted in a decision that the
13 regulation of stormwater discharges from facilities
14 covered under both 401 Certifications and NPDES permits
15 would be covered under the NPDES permit." Now, is that
16 your understanding of a decision that was reached by
17 the Department of Ecology with regard to that issue?

18 A. No, it isn't, actually.

19 Q. What about that is not consistent with your
20 understanding of the decision?

21 A. Well, there was a policy developed between
22 the water quality program and the shorelands and
23 environmental assistance program that spelled out the
24 relationship between 401 and 402, and I believe that
25 policy says something along the lines that discharges

1 question or the one you just articulated.

2 Q. (BY MR. REAVIS) Let me ask you to answer that
3 question, the one I just articulated.

4 A. Could you repeat it, please?

5 (The reporter read back as requested.)

6 A. The two lists I remember were the earlier
7 list -- and I believe it was dated October 17 -- excuse
8 me. It's Exhibit 216 -- that I created during the
9 process. The only list I can remember after that was
10 the summary that I created in response to Senator
11 Patterson's request, but I don't recall right now if I
12 had any lists between those two.

13 Q. (BY MR. REAVIS) But to the best of your
14 recollection, the last list you created was the one
15 that was attached to your letter to Senator Patterson?

16 A. I believe so, yes.

17 Q. Which I think the cover letter that we
18 discussed a minute ago says was not a complete list.

19 A. Right.

20 (Deposition Exhibit No. 220 was marked for
21 identification.)

22 Q. (BY MR. REAVIS) Let me ask you about Exhibit
23 No. 220, which appears to be an e-mail from Ray Hellwig
24 to you dated January 3, 2000; is that correct?

25 A. Correct.

1 covered by an NPDES permit may be used during 401
2 review to ensure compliance. However, the 401 may add
3 conditions if necessary to meet the standard of
4 reasonable assurance.

5 Q. Now, this Exhibit 220 shows a cc to a number
6 of people, correct?

7 A. Right.

8 Q. Let me just run down the list, and if you
9 can, tell me what position these various people
10 occupied with the Department of Ecology. First Ron
11 Langley.

12 A. He was the public information officer at the
13 northwest region.

14 Q. Dave Garland?

15 A. He was at the northwest region. I don't
16 recall which program, but he was involved in some
17 modeling efforts we had regarding the third runway
18 embankment.

19 Q. Erik Stockdale we've talked about, but what
20 was his position?

21 A. He was wetland staff at the northwest region.

22 Q. Gordon White?

23 A. The program manager for the SEA program.

24 Q. Jeannie Summerhays?

25 A. She was the section head for the SEA program

1 in the northwest region.
 2 Q. John Glynn?
 3 A. Was the head of the water quality section at
 4 northwest.
 5 Q. Kevin Fitzpatrick?
 6 A. Was in the northwest region water quality
 7 program.
 8 Q. Paula Ehlers?
 9 A. Was the headquarters supervisor of the
 10 environmental coordination section, which is where the
 11 federal permits unit was housed. She was my
 12 supervisor.
 13 Q. Megan White?
 14 A. Was the program manager for the water quality
 15 program.
 16 Q. And Dan Silver?
 17 A. Was then -- I believe his title was deputy
 18 director of the department.
 19 Q. So this appears to be an e-mail from
 20 Mr. Hellwig declaring a departmental policy that these
 21 issues would be resolved or covered under the NPDES
 22 permit, and the e-mail was sent up the chain of command
 23 all the way to the deputy director. Is that a fair
 24 statement?
 25 MR. EGLICK: Objection as to the form of the

1 final.
 2 Q. This one says effective March 31, 2000. Was
 3 there a final version actually adopted and signed?
 4 A. I'm not certain. At the time -- I believe
 5 the timing on this was the version here was considered
 6 final minus a couple of edits, minor edits that needed
 7 to be made. I'm not certain if or when it was signed,
 8 though.
 9 Q. If it was not final or at least you're not
 10 clear whether or not it was final on November the 7th
 11 of 2000 when you sent it to Ray Hellwig -- is that
 12 true? Maybe I shouldn't presume that. Do you know if
 13 it was final at the time that you forwarded this
 14 document to Ray Hellwig on November 7, 2000?
 15 A. I don't know if it was signed. I know that
 16 it was being used by staff at Ecology as an interim
 17 guidance sort of document.
 18 Q. Do you know for a fact that this was ever
 19 signed?
 20 A. I don't know if it was.
 21 Q. Let me ask you to refer to page 2 of the
 22 attachment and part B there. Is that the policy that
 23 you were talking about with regard to the relationship
 24 between 401 certifications and NPDES permits?
 25 A. Yes. Section B1 in particular. I don't

1 question; no foundation.
 2 A. Does it appear to be that? Yes.
 3 Q. (BY MR. REAVIS) Now, did you ever receive any
 4 calls from any of these people on the cc list to say,
 5 no, Mr. Luster, actually Mr. Hellwig was wrong and this
 6 is not an accurate statement of department policy?
 7 A. I don't believe I received any calls. I
 8 think this was done during the development of the
 9 policy between the SEA program and the water quality
 10 program and may not have reflected the final language
 11 in that policy.
 12 (Deposition Exhibit No. 221 was marked for
 13 identification.)
 14 Q. (BY MR. REAVIS) Exhibit 221, the first page
 15 of that is an e-mail from Ray Hellwig to Kevin
 16 Fitzpatrick and Ann Kenny. Further on down in the
 17 document it appears to be an e-mail sent from you to
 18 Ray Hellwig November 7 of 2000. Attached to it is the
 19 document that's entitled Water Quality and Shorelands
 20 and Environmental Assistance Programs Joint Policy,
 21 correct?
 22 A. Right.
 23 Q. Is that the policy that you were referring to
 24 just a minute ago in your answer?
 25 A. I believe so. I'm not certain this is the

1 remember if there were other sections.
 2 Q. Well, B1 relates to whether a project's
 3 discharges are covered by an individual 402 permit,
 4 correct? That's the introductory clause there?
 5 A. Right.
 6 Q. B2 is when discharges are covered by a
 7 general stormwater permit, correct?
 8 A. Right.
 9 Q. B3, projects covered by an individual or
 10 general permit that are determined to be out of
 11 compliance with that permit, correct?
 12 A. Right.
 13 Q. And B4 are projects that don't yet have a 402
 14 permit?
 15 A. Right. And I might add that those are all
 16 subsets of instances where both 401 and 402 apply.
 17 Q. Now, is it true, then, that this policy --
 18 well, during the time that you were working on the
 19 Port's 401 application -- strike that. Let me start
 20 over.
 21 During the time that you were working on the
 22 Port's 401 application, were you utilizing this policy
 23 that's reflected in Exhibit 221?
 24 A. Yes. Near the end of the review when this
 25 became -- when we got to, I believe, this version or a

1 similar version, we started -- this became our
2 guidance, yes.

3 Q. And were you evaluating the Port's project
4 under section B1 of this memo; in other words, covered
5 by an individual 402 permit and the project is in
6 compliance with that permit as determined by the water
7 quality program?

8 A. In part, yes.

9 Q. And what's the other part that would be no?

10 A. Well, elements of the Port's proposal that
11 fell outside of the particular discharges mentioned
12 here that were covered by the 402. The 401 included
13 discharges that weren't yet covered by 402 or weren't
14 under the regulatory purview of the 402, so 401 had a
15 different set of discharges as part of its review. I'd
16 have to reread this, but there may have been some other
17 instances in here. I can't recall right now, though.

18 Q. Do you recall what discharges were outside
19 the scope of the 402 for the airport?

20 A. Well, specifically the proposal to discharge
21 fill into water bodies were outside the scope of the
22 existing 402. Also at that time, I don't believe the
23 issue of whether or not a major or minor modification
24 to the existing 402 had been resolved, and so at the
25 very least, section B4 of this policy may have been

1 Q. And it attaches an updated 401 permit matrix,
2 and I guess I'm wondering what this document, the
3 matrix, was intended to do. Let me first ask you: Is
4 the matrix that you were referring to in your e-mail
5 actually attached to Exhibit No. 222?

6 MR. EGLICK: Are you asking about the --
7 you're saying there's a reference to this matrix in the
8 e-mail that's on the first page of Exhibit 222?

9 MR. REAVIS: Correct. On the re line, it
10 says "updated 401 permit matrix."

11 A. Right. I believe this matrix is what I'm
12 referring to on the first page.

13 Q. (BY MR. REAVIS) Can you tell me if you know
14 what the intent of that matrix was?

15 A. On page listed as page 51, there's a
16 statement from Michael Cheyne at the Port listed on
17 page 50 stating that the matrix is to act as an agenda
18 for the Monday, May 17, meeting between the Port and
19 Ecology.

20 Q. Maybe I'll have to try and find the document
21 I was thinking about a minute ago, but I thought there
22 was some sort of matrix or decision document that was
23 set forth in table form relating to consideration of
24 various projects and where they would fall within the
25 401, 402 regulatory schemes. Does that ring a bell at

1 under consideration at that time, which would have
2 required -- if Ecology determined that a modification
3 to the existing 402 was needed for the work in the
4 Walker Creek basin, then B4 would have applied.

5 I don't recall right offhand, but section C
6 may have been a piece of that. Part 2 or 3 may have
7 been under consideration. Part 4 may have been under
8 consideration. I think the project was still in flux
9 at that time, and so trying to determine the adequacy
10 of the existing 402 may have put any of those into
11 play.

12 Q. I've seen copies of a matrix that tries to
13 sort all this out. Do you recall that? In other
14 words, maybe that's a vague question, but I've seen
15 copies of a matrix that relate to this issue. Do you
16 recall having --

17 A. Not offhand.

18 (Deposition Exhibit No. 222 was marked for
19 identification.)

20 Q. (BY MR. REAVIS) Exhibit 222, the first page
21 of it appears to be an e-mail string. The second
22 e-mail in that string at least on this page was from
23 you to Ray Hellwig and some other folks on Friday, May
24 the 14th, 1999?

25 A. Right.

1 all?

2 A. I have a vague recollection from your
3 description, but I don't recall the details of it, no.

4 Q. Is that a document that you had any part in
5 creating?

6 A. I don't remember.

7 Q. Maybe here in a little bit I'll look through
8 the documents and see if I can find it.

9 As you mentioned a little while ago, your job
10 duties changed in about October of 2000, correct?

11 A. Right.

12 Q. And as a result of that change, you were no
13 longer responsible for working on the Port's Third
14 Runway Project, correct?

15 A. I was no longer the lead project reviewer,
16 correct.

17 Q. Did you continue to play a role after that
18 date with regard to the project?

19 A. I continued my role as the lead 401 policy
20 person for the state. I also had some interaction with
21 Ann Kenny in handing off the project to her and making
22 her familiar with the history and the documents, that
23 sort of thing. I probably talked a time or two with
24 the other people involved, Ray Hellwig and Kevin
25 Fitzpatrick and Erik Stockdale. There may have been

1 some other people as well.

2 Q. After the 401 function was regionalized as we
3 talked about this morning, did you maintain direct
4 responsibility for evaluating any 401 applications
5 besides that related to the Third Runway Project?

6 A. I believe during that period I had another
7 number of projects. I'm trying to remember
8 specifically what those might have been. I know at the
9 very least I provided support for the regional staff.
10 For instance, when they were gone on vacation, I would
11 take on review of some of their projects while they
12 were gone. I believe there were some others that came
13 directly to headquarters rather than going to regional
14 staff for one reason or another, and I would have
15 provided the review for those.

16 Q. Prior to the regionalization or at the time
17 of the regionalization, do you recall how many 401
18 projects you were working on as the person primarily
19 responsible for making recommendations or decisions?

20 A. Depending on workload and how many staff were
21 there, I would say at any given time we each could have
22 had 20 to 40 active projects, perhaps a few less or a
23 few more. That included projects requiring individual
24 401 certifications, some projects requiring nationwide
25 permits, some requiring just coastal zone management

1 determinations, but within that range, I think.

2 Q. After the beginning of this regionalization,
3 did you attempt to transition out of certain of those
4 projects and transfer those to the regions?

5 A. I think for the most part the ones I was
6 doing at the time of regionalization I kept. I saw
7 those through to the end. I think some of them may
8 have transitioned to the region. I think it largely
9 depended on when we hired somebody in the regional
10 office whether a project was in their region or not and
11 their degree of knowledge and taking on projects on
12 their own, so it was kind of a transitional period
13 where I kept some and some may have gone directly to
14 the regions.

15 Q. Do you recall when Ann Kenny first started
16 doing 401 work for the northwest region?

17 A. Not specifically, no.

18 Q. But did you train her in 401 issues or had
19 she previously been doing 401 proposals before the
20 regionalization?

21 A. I trained her, and I don't think she was
22 doing 401 before that. I believe she was doing
23 shoreline permit review before she took the 401
24 position.

25 Q. Now, in the fall of 1999, the Port reapplied

1 for the 404 permit, correct?

2 A. I believe that's the timing, yeah.

3 Q. And you worked on that 401 application that's
4 necessary for the 404, correct?

5 A. Correct.

6 Q. During your work on that particular
7 application -- strike that.

8 After the July 1998 401 was issued, it's my
9 understanding that the Port appealed that
10 certification, correct?

11 A. I believe so, yes.

12 Q. And then because of some issues related to
13 additional wetland impacts, the Port withdrew the
14 application?

15 A. Correct.

16 Q. And did the 401 evaluation continue after the
17 withdrawal of that application or did you stop and wait
18 for a new application to be filed in order to work on
19 these issues related to the third runway?

20 A. I believe we continued to work with the Port
21 during that period to clarify what their next
22 application should include. I think the Port made it
23 clear that they wanted to come back with a new revised
24 project, and I believe there were some meetings between
25 the withdrawal in '98 and the resubmittal in '99.

1 Q. Somewhere in the course of that work after
2 the withdrawal of the 1998 application or after the
3 withdrawal of the application in 1998, did you believe
4 that Ecology's position on the Port's application was
5 that Ecology was not going to say no to that
6 application and that somehow Ecology was going to have
7 to find a way to say yes?

8 A. Was that Ecology's position, are you asking?

9 Q. I'm asking was that your belief about what
10 Ecology's position was; that no was not an acceptable
11 option?

12 MR. EGLICK: Objection as to the form of the
13 question.

14 A. My belief was that it was the same as any
15 other proposed project for 401. If the applicant met
16 the regulatory requirements, they got their permit, and
17 if they didn't, we couldn't issue a permit. So if the
18 Port met the requirements, they would get a 401, and if
19 they didn't, we couldn't issue a 401.

20 (Deposition Exhibit No. 223 was marked for
21 identification.)

22 Q. (BY MR. REAVIS) Showing you what has been
23 marked as Exhibit 223. Down at the bottom half of the
24 page it appears to be an e-mail from you to Ray Hellwig
25 and Erik Stockdale and a copy to Paula Ehlers. Let me

1 ask you to refer to the last paragraph of your e-mail,
 2 which is on the top of the next page. The last two
 3 sentences say, "Based on the regs and the literature,
 4 it would be easier and more justifiable under 401 to
 5 deny the project because of the scope and extent of the
 6 project's impacts and the current conditions in the
 7 waterbodies. However, since 'no' is not seen as an
 8 acceptable option, we are looking for creative and
 9 regulatorily appropriate ways to get to 'yes' -- this
 10 approach may provide one of those ways."

11 I guess my question is, were you led to
 12 believe that no was not an acceptable option on the
 13 Port's proposal?

14 A. Yes.

15 Q. And how did you come to that belief?

16 A. During at least one of my discussions with
 17 Ray Hellwig, he at one point said no is not an option,
 18 and that's why I put the no in quotes there.

19 Q. Now, if you look then at the first page,
 20 which is Mr. Hellwig's response, in the third sentence
 21 there he says, "Therefore, the 'no' option is still
 22 alive -- always has been." Now, after this e-mail
 23 exchange, did you ever have any discussions with
 24 Mr. Hellwig as to whether or not no was in fact an
 25 acceptable option on the Port's proposal?

1 to say no or yes. My concerns were determining whether
 2 or not the proposal was going to meet the standards,
 3 and in my mind, both options were equally available.

4 Q. Let me ask you, then, about the change in
 5 your duties in October of 2000. First off, how did you
 6 find out about that change?

7 A. I think my supervisor, Paula Ehlers, told me.

8 Q. And do you recall what she told you about the
 9 reason for that change?

10 A. She said that she wanted me to be able to
 11 work on -- free up my time to work on some other
 12 important policy issues and that this seemed like a
 13 good opportunity to do that.

14 Q. And why was the timing of that change a good
 15 opportunity?

16 A. That I'm not sure of.

17 Q. Well, the change was made in October of 2000,
 18 correct?

19 A. Right.

20 Q. The Port's application was withdrawn in the
 21 previous month or so, correct?

22 A. Right.

23 Q. So there was going to be a new application
 24 submitted assuming the project was going to move
 25 forward, correct?

1 A. Yes. After this exchange, I know Ray and I
 2 talked about it, I believe with -- I'm trying to recall
 3 who else was there. The no is not an option was
 4 essentially changed to no is not an option if the Port
 5 does all that's required.

6 Q. Now, in fact, later on in 1999 the Port
 7 reapplied, correct?

8 A. Right.

9 Q. And a year or so later the application was
 10 withdrawn in the fall of 2000?

11 A. Right.

12 Q. Isn't it true that it was withdrawn because
 13 Ecology had indicated to the Port that the 401
 14 certification was going to be denied?

15 A. Correct.

16 Q. And does that indicate to you that in fact no
 17 was not only an option, it was the option that Ecology
 18 ultimately selected for that particular application?

19 A. Yes. At that time, Ecology chose to deny it,
 20 yes -- excuse me -- have the Port withdraw.

21 Q. So were your concerns about being able to say
 22 no to this project resolved in the course of these
 23 intervening months between the e-mail that's No. 223
 24 and the withdrawal of the Port's application?

25 A. I don't think I had concerns about being able

1 A. Right.

2 Q. So isn't that a natural time if there's a
 3 transition to be made to bring in a new person?

4 A. It very well could be. I know in other
 5 situations like that there was some benefit seen to
 6 having continuity of staff, but that may have been --
 7 the reason you mentioned may have been a good
 8 opportunity as well to do a transition.

9 Q. Now, did you resist this change or did you
 10 tell Paula Ehlers that you didn't want the change to
 11 occur?

12 A. I believe I expressed some regret about not
 13 seeing this review through until whatever conclusion
 14 came about, and at the same time, I recognized that
 15 there were other things that I could be spending my
 16 work time doing that I hadn't been doing, so it was
 17 kind of a mix of wishing I could continue and glad to
 18 work on some other things.

19 Q. Were there other parts of your duties such as
 20 statewide policy guidance that prior to the change you
 21 weren't able to devote as much attention to as you
 22 would like to have?

23 A. Yes.

24 Q. So was the change then beneficial in allowing
 25 you to devote more time to those types of duties?

1 A. Yeah. I started working on a number of other
2 things.

3 Q. Now, were you ever led to believe by anyone
4 at Ecology that the change in your duties was due to
5 your decisions or performance with regard to the Third
6 Runway Project?

7 A. What do you mean by led to believe?

8 Q. Did anyone ever say that to you?

9 A. A number of staff at Ecology said, What, did
10 the Port have you pulled off, or, Boy, who did you make
11 angry to have this happen, that sort of thing, so there
12 was some -- there were some comments along those lines,
13 yes.

14 Q. So those were questions about what the
15 reasons were?

16 A. Or assumptions on the part of different
17 staff.

18 Q. Did anyone at Ecology ever tell you that one
19 of the reasons for the change -- and by anyone at
20 Ecology, I mean people who were involved in the
21 decision to change your duties -- did anyone of that
22 nature ever suggest to you that the change was
23 motivated by your work on the Third Runway Project?

24 A. No, they did not.

25 MR. SMITH: Counsel, we've been going for

1 will result in some -- would likely result in a
2 difference between -- it's hard to tell right now what
3 the eventual stormwater discharges will do in regards
4 to other project elements such as wetland mitigation.
5 Also because the quality of stormwater in some portions
6 of the airport will drive the success or failure of the
7 proposed low flow plan, stormwater quality is likely to
8 be an issue there. Those are the ones that come to
9 mind right now.

10 Q. Let me ask you about the first one of those
11 regarding the existing levels of impairment. Is it
12 your opinion that the Port in connection with the Third
13 Runway Project has an obligation to restore all
14 beneficial uses to neighboring streams even though
15 those beneficial uses aren't currently being -- or
16 don't currently exist?

17 MR. EGLICK: Objection as to the form of the
18 question; foundation.

19 A. I don't think that's the Port's duty, no. I
20 think it's Ecology's obligation to ensure that the
21 water quality standards are met in both water bodies
22 and discharges to water bodies, and that applies in
23 this case as well.

24 Q. (BY MR. REAVIS) Well, let me make sure I
25 understand what you're saying. Is the Port's

1 more than two hours. Anytime you want to take a break,
2 it would be welcome.

3 MR. REAVIS: That's fine.

4 (Recess taken.)

5 Q. (BY MR. REAVIS) Do you have any opinions as
6 to whether or not the current 401 certification issued
7 in September of 2001 fails to meet regulatory standards
8 governing or relating to stormwater?

9 A. My concerns about the 401 are related to the
10 water quality standards in general and to some degree
11 the stormwater discharges associated with the Port's
12 proposal.

13 Q. What is it about the water quality standards
14 as applied to stormwater that causes you a concern?

15 A. Well, it's hard to separate out just
16 stormwater, but based on documentation from a number of
17 sources, it appears that Des Moines Creek itself is not
18 meeting or not supporting all the beneficial uses. It
19 appears Miller Creek may be in the same situation.
20 Given the existing levels of impairment, any discharges
21 to those water bodies need to deal with those elements,
22 and because the proposed discharges include stormwater,
23 that is part of my overall concern.

24 I also have concerns about the speculative
25 nature of the number of elements of the project that

1 obligation as you understand it in order to be issued a
2 401 certification to make sure that its discharges
3 don't further impair beneficial uses or is it the
4 Port's obligation to attempt to restore beneficial uses
5 that aren't currently being maximized?

6 MR. SMITH: Objection to form.

7 A. Again, it's -- the obligation is on Ecology.
8 Ecology has the obligation to ensure standards are met
9 in water bodies and discharges, and Ecology doesn't
10 have an obligation to issue a 401. However, if a
11 project proponent is willing to as part of its proposal
12 address the issues that exist in a water body, that
13 would help Ecology meet its obligations. The proponent
14 doesn't have to do that, in which case Ecology's
15 obligation is to determine other ways to ensure the
16 standards are met in a given water body.

17 Q. (BY MR. REAVIS) So if a project applicant
18 decided not to do that as you described and do
19 something which further enhances the beneficial uses,
20 are you saying that Ecology could in that instance
21 still issue a 401 despite that refusal to enhance the
22 beneficial uses as opposed to just deal with its
23 discharges not further degrading the water body?

24 MR. EGLICK: Could you read back that
25 question, please?

1 (The reporter read back as requested.)
 2 MR. REAVIS: Let me just stipulate that's a
 3 bad question.

4 (Deposition Exhibit No. 224 was marked for
 5 identification.)

6 Q. (BY MR. REAVIS) Let me ask you if you
 7 recognize Exhibit 224 as being an e-mail exchange
 8 between yourself and Paula Ehlers, at least the first
 9 three pages of it. Let me just ask you what Exhibit
 10 No. 224 appears to be.

11 A. It's a series of e-mails between myself,
 12 Paula Ehlers, Ray Hellwig, Tom McDonald, Joan
 13 Marchioro, Gordon White on several issues related to
 14 the Sea-Tac review. The last in the series is dated
 15 June 13, 1999.

16 Q. Now, these e-mails sort of relate to the
 17 question I was trying to formulate a minute ago. In
 18 order to receive a 401 certification, do you believe
 19 it's necessary for the project applicant to enhance the
 20 beneficial uses in an impaired water body or simply to
 21 make sure that the applicant's discharges don't further
 22 degrade the water body?

23 A. I don't think that's the choice necessarily.
 24 The requirement is to ensure that the water quality
 25 standards are met, and the water quality standards

1 if Ecology determines that by the project proponent
 2 improving upstream conditions or removing sources of
 3 impairment, that sort of thing, the water body itself
 4 is then meeting standards, then that would be an
 5 appropriate part of a project review.

6 Q. To use your words, if a project applicant
 7 decides not to help out to restore beneficial uses but
 8 instead limits itself to making sure that its
 9 contributions to the water body do not further degrade
 10 that water body, the applicant should still be entitled
 11 to get or should be able to get a 401 certification; is
 12 that correct?

13 A. Well, again, in a particular situation --
 14 let's say under a 303-D listing, which is the normal
 15 version of carrying this out, if a water body is on the
 16 303-D list for fecal coliform, further discharges of
 17 that particular contaminant should not be approved by
 18 Ecology.

19 Now, if an applicant comes in and has a
 20 proposal that initially includes a discharge that
 21 includes fecal coliforms, Ecology can work with the
 22 applicant to develop a series of BMPs or management
 23 measures or other mechanisms so that their discharge is
 24 not -- does not include fecal coliform, and I'd say
 25 that general approach applies to the water quality

1 include meeting the beneficial uses and characteristic
 2 uses of the different classifications of a water body
 3 as well as the numeric and narrative criteria and the
 4 anti-degradation provision, and that's the general
 5 response, I guess. On a specific proposal, we could
 6 talk about what's required.

7 Q. Let's take an example of stormwater that may
 8 be flowing onto the Port's property from upstream on
 9 the Port's property into water bodies that are
 10 downstream of the Port's property. In your view, is
 11 the Port obligated to deal with that stormwater in a
 12 manner that improves its condition beyond the condition
 13 it was in when it entered the Port's property?

14 A. Again, the obligation is on Ecology. Your
 15 example describes to some degree the analagous
 16 situation with a 303-D listed water body. If Ecology
 17 determines that a water body has a certain type of
 18 exceedence or impairment, then further impairment is
 19 not allowed absent development of a TMDL or similar
 20 mechanism to bring that water body back into
 21 compliance, and Ecology's decisions are supposed to be
 22 based on meeting that obligation.

23 Now, if an applicant wants to help out with
 24 that process in order to get a permit, then that's
 25 something Ecology can include in its review, and then

1 standards in general.

2 Q. Well, putting aside the question of whether a
 3 water body is on the 303-D list, isn't it true that if
 4 a project applicant is proposing a discharge that does
 5 not further degrade the water body but on the other
 6 hand does not improve the water body, that that is
 7 permissible in the 401 context?

8 A. Again, it would depend on the condition of
 9 the water body. If the water body is already degraded,
 10 then it's not meeting water quality standards. If a
 11 discharge is going to accentuate that existing
 12 degradation, then I believe it's improper for Ecology
 13 to approve such a discharge.

14 Q. But I think my question was assuming that the
 15 discharge does not accentuate the degraded quality but
 16 on the other hand does not improve it.

17 A. Right. Well, I would say if a water body is
 18 listed for turbidity violations and a discharge -- a
 19 proposed discharge doesn't include any issues regarding
 20 turbidity, then that could be approved. If the
 21 existing discharge would result in additional turbidity
 22 in the stream, then that's something Ecology would have
 23 to either figure out a way to not have happen or not
 24 approve a discharge.

25 Q. Right. But, again, that answer assumes that

1 you have a listed water body for a particular --
 2 A. Listing is the formal way to carry that out.
 3 I don't think that's the only mechanism. For purposes
 4 of -- clearly the 303-D list provides that mechanism.

5 For purposes of 401 where you have the
 6 standard of reasonable assurance based on a
 7 preponderance of the evidence, if you have
 8 documentation showing ambient water quality in a stream
 9 exceeding various standards, even though that's not --
 10 even though the stream may not be on the 303-D list,
 11 unless there's contravening evidence showing that the
 12 ambient water quality is fine, I think that
 13 documentation showing exceedences can be used in the
 14 decision and needs to be addressed as part of Ecology's
 15 decision.

16 Q. We're talking around something here. What my
 17 question assumes is that you have a water body that's
 18 not on a 303-D list and that you have a discharge that
 19 does not cause any further degradation of that water
 20 body, and my question is, under that scenario, is there
 21 any reason why that discharge would not be allowable in
 22 the 401 context?

23 MR. EGLICK: Objection; asked and answered.

24 A. Can you give me a specific example, or I
 25 could provide one.

1 talking about earlier briefly regarding sampling. It
 2 sort of relates to your last answer. In terms of
 3 numeric water quality criteria, where are samples to be
 4 taken in order to determine if those criteria are being
 5 violated, in the receiving waters or some other place?

6 A. Well, it depends on the intent of the sample.
 7 In some instances you would sample the receiving water.
 8 In some instances you would sample the discharge itself
 9 before it entered the receiving water. Depending on
 10 the intent of the -- I'm assuming this is under some
 11 sort of permit condition -- you could determine whether
 12 or not standards were being met.

13 For instance, if you monitored the discharge
 14 itself, that might -- you may be able to model from
 15 those results whether or not criteria in the water body
 16 itself were being met. You may use those sampling
 17 results to change processing or processes somewhere up
 18 the pipe at the facility.

19 Q. But the water quality criteria themselves are
 20 applicable in the receiving waters?

21 A. Correct.

22 Q. I think that's all I have for now. Thanks.

23 A. Okay.

EXAMINATION

24 BY MR. YOUNG:
 25

1 Q. (BY MR. REAVIS) Why don't you tell me what
 2 you're thinking.

3 A. Well, let's take fish use and copper. If a
 4 water body is or isn't on the 303-D list but there is
 5 documentation showing that that water body doesn't
 6 support fish life or fish life is impaired in the water
 7 body and that's due to exceedences of copper, dissolved
 8 copper in the water body, I would say that further
 9 discharges of copper into that water body should be
 10 prohibited until or unless the ambient quality is below
 11 the criteria for copper, thus allowing fish use to be
 12 fully supported.

13 Q. So even if the discharge itself complies with
 14 water quality criteria, you believe that discharge
 15 should be disallowed?

16 A. Well, the discharge wouldn't comply if it
 17 included copper and the water body was exceeding copper
 18 criteria. The standards apply both to a water body and
 19 to a discharge, and you've got to meet both conditions
 20 to be in compliance with the standards. That's the
 21 whole basis of the structure of the Clean Water Act is
 22 to regulate discharges and regulate conditions of the
 23 water body. It's also the structure of the state water
 24 quality standards.

25 Q. Let me go back to an issue that we were

1 Q. I have some. In the documents that you've
 2 reviewed since your departure from Ecology -- and you
 3 enumerated a number of them while you were looking at
 4 your list. I think what you said is you said you
 5 reviewed part of the stormwater management plan. Did I
 6 hear that correctly?

7 A. Yes.

8 Q. So does that mean that you did not review the
 9 entire stormwater management plan since your departure
 10 from Ecology?

11 A. Right. I think there are several appendices
 12 to that that I didn't review in their entirety, so I
 13 don't recall right now which parts I reviewed and which
 14 parts I didn't.

15 Q. Did you receive the entire document?

16 A. I believe so. I believe I received -- it
 17 consisted of several volumes of I think loose bound
 18 volumes, so I think that's the document I'm remembering
 19 is the stormwater plan.

20 Q. And you can't remember now which parts you
 21 reviewed and which you didn't review?

22 A. Not at the moment, no.

23 Q. Did you review the majority of it or just
 24 little bits and pieces of it or can you recall just
 25 kind of generally?

1 A. I'm trying to remember. I think there were
 2 several appendices that had lots of raw data or tabular
 3 compilations of data, and I don't think I reviewed
 4 those in great detail. The overall description and
 5 layout and best management practices being included in
 6 the plan, I don't think I reviewed those sorts of
 7 things primarily.
 8 Q. Do you know how much time approximately you
 9 spent with the plan?
 10 A. Probably several hours in total. I can't
 11 recall specifically.
 12 Q. Would that be -- put a number on that if you
 13 can.
 14 A. More than four, less than 12.
 15 Q. What about the December low flow analysis?
 16 Did you review that after your departure from Ecology,
 17 the December 2001?
 18 A. Yes. I have reviewed that.
 19 Q. Did you review that in its entirety?
 20 A. Again, I reviewed parts of it. I believe
 21 there are a number of tables and graphs that I didn't
 22 look at in great detail, but I did look at the project
 23 description and the rationale and in general
 24 description of what those tables and graphs entailed.
 25 Q. And approximately how much time did you spend

1 Q. What were the future submittals?
 2 A. Again, I don't recall the details right now.
 3 Q. You're aware that Kelly Whiting from King
 4 County has reviewed on behalf of Ecology the stormwater
 5 management plan?
 6 A. Yes.
 7 Q. And you're aware that Mr. Whiting has
 8 certified that that manual or that the plan is in
 9 compliance with the King County Surface Water Design
 10 Manual?
 11 MR. EGLICK: Objection as to the form of the
 12 question.
 13 Q. (BY MR. YOUNG) Are you aware that he has
 14 certified that?
 15 MR. EGLICK: Objection as to the form of the
 16 question.
 17 A. I'm aware that he reviewed it and said that
 18 at least portions of it met the requirements of the
 19 manual. I am aware from his deposition, I believe,
 20 that he has some concerns about the current state of
 21 the plan, so I'm not sure if he's fully certified it or
 22 not.
 23 Q. (BY MR. YOUNG) In terms of determining
 24 whether it is in compliance with the King County manual
 25 or not, would you defer to Mr. Whiting to make that

1 with that?
 2 A. Probably two to four hours perhaps.
 3 Q. And going back just for a second to the
 4 stormwater management plan, do you remember when it was
 5 that you reviewed that?
 6 A. I believe I reviewed it in part -- let's see.
 7 Well, there was a December plan from 2000, I believe,
 8 and it was updated in part in July of 2001, and I
 9 reviewed some portion of it, I believe, for my
 10 declarations back in September and October, and I know
 11 I've looked at it at least once or twice since then.
 12 Q. For what purpose have you looked at it once
 13 or twice since then?
 14 A. In part for preparing for today. I think
 15 that's one of the documents I've listed on the earlier
 16 Exhibit No. 203.
 17 Q. And what were you looking for?
 18 A. I think just to refresh my memory on some of
 19 the key points.
 20 Q. The key points being what?
 21 A. I remember it having a lot of speculative
 22 elements in it and depended to some degree on future
 23 submittals.
 24 Q. What were those speculative elements?
 25 A. I don't recall right off the bat right now.

1 decision?
 2 A. Yes. He's far more aware of requirements of
 3 the plan than I am.
 4 Q. So if he were to say that it is in compliance
 5 with the substantive requirements of the King County
 6 Surface Water Design Manual, you wouldn't have any
 7 reason to disagree with him, would you?
 8 A. I may want to ask him questions about how he
 9 came to that conclusion about certain areas I may be
 10 aware of or the speculative elements, his level of
 11 comfort with those, that sort of thing.
 12 Q. But if he were comfortable with what you
 13 termed the speculative elements of it, would you defer
 14 to him?
 15 A. If he was able to answer my questions well
 16 enough to provide me with reasonable assurance, then I
 17 think that would be -- yes, I would -- I guess that
 18 would be considered deferring to him.
 19 Q. And what questions would you have for him?
 20 MR. EGLICK: Objection as to the form of the
 21 question.
 22 Q. (BY MR. YOUNG) You said you might ask him
 23 some questions, and I'm asking you what questions you
 24 might ask him.
 25 MR. EGLICK: I think the string started back

1 somewhere with saying whether or not there were going
2 to be concerns and whether or not Mr. Whiting could
3 address them. I think we're kind of way out on a
4 string of speculative questions. We've kind of lost
5 the thread. I'm just replying to your argumentative
6 response to my objection, but go ahead.

7 A. Well, a specific instance, I recall seeing
8 some discussions in a deposition or perhaps two -- and
9 I'm not certain it was Mr. Whiting's -- about King
10 County concern about increased pH levels in new
11 concrete stormwater vaults and that King County had not
12 yet resolved that issue, so I would -- that's one
13 specific example where I would find out the state of
14 knowledge about that issue and what options might be
15 available to ensure pH from those vaults didn't result
16 in water quality violations.

17 Q. (BY MR. YOUNG) When you said earlier that you
18 thought that Kelly Whiting had some concerns from your
19 review of his deposition, was that what you were
20 talking about?

21 A. I think that was one. I believe he had
22 several others, and I do recall he had some concerns
23 about the modeling done for the low flow plan.
24 However, because that's connected with the stormwater
25 management plan, I'd say that was a concern he had with

1 Q. I'm asking about your personal opinion. Your
2 personal opinion is as I understand it that compliance
3 with the King County manual does not necessarily
4 provide reasonable assurance that water quality
5 standards will be met?

6 A. Correct.

7 MR. SMITH: Asked and answered.

8 Q. (BY MR. YOUNG) And what do you base that
9 opinion on?

10 A. My discussions with Mr. Whiting and Ecology
11 -- various staff at Ecology's water quality program and
12 also statements in the -- I know it was a statement in
13 the previous -- well, let's see. Let me back up here
14 just a moment. I don't think either manual includes a
15 statement that compliance with this manual equals
16 compliance with water quality standards.

17 Q. I think you said you had discussions with
18 Mr. Whiting?

19 A. Right.

20 Q. Have you had discussions with Mr. Whiting?

21 A. Not in the last year, but during my review of
22 the 401, I had quite a few meetings with Mr. Whiting
23 and also Mr. Masters from King County, with other
24 Ecology staff, with Ecology staff and Port personnel,
25 and several meetings just between Mr. Whiting and

1 both plans.

2 Q. Well, I'm trying to ask questions only about
3 the stormwater management plan for the time being.

4 A. Okay.

5 Q. So is it your understanding that Mr. Whiting
6 had concerns about the stormwater management plan
7 modeling?

8 A. At least as it applies to the low flow, which
9 is integral to the stormwater plan.

10 Q. And the concern about the pH levels, was that
11 Mr. Whiting's concern or somebody else's at King
12 County?

13 A. That's what I'm not certain of right now. I
14 know it came up in at least one or two depositions, and
15 it may have been Mr. Whiting's.

16 Q. Now, it's your opinion as I understand it
17 that compliance with the King County manual is not
18 sufficient for there to be reasonable assurance; is
19 that correct?

20 A. I think it's Ecology's understanding that
21 compliance with both the Ecology stormwater manual and
22 the King County manual do not ensure compliance with
23 the water quality standards, and so in that regard, my
24 opinion is compliance with either manual doesn't
25 necessarily lead to reasonable assurance.

1 Mr. Masters and myself.

2 Q. And those meetings took place prior to your
3 departure; is that correct?

4 A. Right.

5 Q. And why is it that compliance with the King
6 County stormwater design manual does not provide
7 reasonable assurance that water quality standards will
8 be met?

9 A. Well, there are a number of reasons. I think
10 the primary one is the King County manual and the
11 Ecology manual are -- how shall I put it? -- more of a
12 cookbook approach or a menu-driven approach where you
13 take general characteristics of a project site and
14 general information about the anticipated run-off and
15 discharges and apply BMPs that are meant to meet a
16 certain level of pollutant removal. I think the goal
17 in both manuals is removal of 80 percent, for instance,
18 of total suspended solids.

19 Reasonable assurance on the other hand for
20 purposes of 401 is far more specific to a project site
21 and requires a more detailed look at what specific
22 contaminants are expected to be in the run-off and the
23 specific effectiveness of BMPs and the resulting
24 discharge to a water body. So in a number of cases,
25 compliance with either manual may result in standards

1 being met, but that's by no means a guarantee, nor does
2 it meet the level of reasonable assurance.

3 Q. Well, is it your opinion, then, that the BMPs
4 that are set forth in the King County manual are not
5 sufficient to ensure compliance with water quality
6 standards?

7 A. In some cases they may be, and in some cases
8 I would say definitely not.

9 Q. And what do you base that on?

10 A. Discussions with the same group of people I
11 mentioned earlier and my general familiarity with the
12 manuals and some of the stormwater training I've had in
13 the past.

14 Q. Now, you mentioned discussions with various
15 Ecology staff. Who were those staff?

16 A. Kevin Fitzpatrick, Ed O'Brien. Those are the
17 main two that come to mind right now. I know earlier
18 in this whole review process both Bill Moore and Steve
19 Saunders were involved, although I'm not certain
20 whether my discussions with them were about compliance
21 with the manual and compliance with the stormwater, but
22 it was at least that group of people that I discussed
23 stormwater-related issues with.

24 Q. I'm trying to find out what you base your
25 opinion that the BMPs and the manuals are not

1 run-off was largely turbid, say suspended soil, and the
2 BMPs that you put in place were sized to either
3 infiltrate the discharge or remove a lot of the
4 suspended soil as it ran through a bioswale perhaps, if
5 there is a wet vault in place that allows some of that
6 suspended soil to be removed, by the time the discharge
7 reached a receiving water, it could well meet the water
8 quality standards.

9 Again, it's a very site-specific application
10 of run-off characteristics and the efficiency of BMPs
11 that are put in place and also how the BMPs are
12 maintained once they're constructed.

13 Q. Could you give me an example of a type of
14 project where that would be the case where compliance
15 with the stormwater manual would be compliance with
16 water quality standards in your opinion?

17 A. Well, if you had a -- it's hard to say that
18 in general without the specifics of a site, but if you
19 had a run-off that had a very low load of contaminants
20 and BMPs that were sized to remove those contaminants
21 with a high degree of efficiency and there was enough
22 quote-unquote treatment distance within those BMPs
23 before the discharge met a receiving water, then I
24 think it would be relatively easy to meet the standards
25 in that situation.

1 sufficient to meet water quality standards on. Do you
2 base that on a scientific study, do you base that just
3 on discussions that you've had with people, or do you
4 base that on papers that you've seen or studies that
5 you yourself have conducted or what?

6 A. I haven't conducted any studies myself, but I
7 would say some mix of the other things you mentioned.
8 I'm aware of papers on the subject and presentations.
9 In fact, I took a training on the King County manual
10 when it first came out several years ago, discussions
11 with Kelly Whiting, discussions with Ed O'Brien.

12 I remember particularly discussing whether or
13 not a manual could ensure compliance, and both Kelly
14 and Ed made it clear that the intent of the manual was
15 not to ensure compliance with water quality standards
16 in all situations but served at least as a good first
17 step in that direction.

18 Q. So if I understand you correctly, in some
19 cases compliance with the manual does equate to
20 compliance with water quality standards?

21 A. I believe so, yes.

22 Q. What kinds of cases is that?

23 A. It depends on the type of project and the
24 run-off it generates and the BMPs that are put in
25 place. For instance, if you had a site where the

1 Q. Now, we've been talking about BMPs, and
2 there's different types of BMPs as I understand it; is
3 that correct?

4 A. Yes.

5 Q. There's source control BMPs and then there's
6 also water quality BMPs. Would that be fair to say?

7 A. Right.

8 Q. Which BMPs are you talking about when you use
9 that term, both or --

10 A. I realized in my answer that I was thinking
11 more of the water quality treatment BMPs, but source
12 control BMPs are equally important as part of the mix.

13 Q. So you think, then, that with the right mix
14 of source control and water-quality BMPs and the proper
15 sizing of the facilities that compliance with water
16 quality standards could be achieved?

17 A. Yes. Depends on the type of contaminants
18 you're dealing with and the efficiency of the BMPs,
19 yes.

20 Q. And who would be in the best position to make
21 that decision, you or, for example, Kevin Fitzpatrick?

22 MR. SMITH: Object to the form of the
23 question.

24 A. I don't know what decision you're referring
25 to.

1 Q. (BY MR. YOUNG) The decision as to whether or
2 not in a particular case with BMPs that were proposed,
3 their size and efficiency and the contaminants
4 involved, whether or not those were sufficient to meet
5 water quality standards, who would decide that, you, or
6 would Kevin Fitzpatrick or Kelly Whiting or Ed O'Brien
7 be better able to make that decision?

8 A. For what purpose?

9 Q. Well, for a given project.

10 A. For meeting -- to determine whether or not
11 those BMPs would result in the manual requirements
12 being met, I'd say Kelly is qualified to make that
13 determination for the King County manual. I believe
14 Kevin is qualified to do that for Ecology manual. To
15 meet the requirement for reasonable assurance for water
16 quality standards being met, I believe I've got a great
17 deal of knowledge about that if that was the decision.

18 Q. Would Kevin be able to make that decision for
19 purposes of an NPDES permit?

20 MR. SMITH: Objection to the form of the
21 question.

22 A. I don't know that compliance with either of
23 those manuals is the only part of a decision in
24 determining whether or not to issue an NPDES permit.

25 Q. (BY MR. YOUNG) Well, for purposes of issuing

1 Clean Water Act requires that either that same set of
2 standards be met or another set that may be established
3 to lead towards eventual compliance with Clean Water
4 Act requirements.

5 So 401D has a shall requirement. 402A has a
6 may requirement. That's illustrated best by the
7 ongoing nature of NPDES where you have a five-year
8 permit cycle and each cycle is supposed to be a
9 notching up of requirements towards eventual compliance
10 with the standards, whereas 401 is a one-time review by
11 the state to provide a statement to the federal agency
12 saying at this point in time, we have reasonable
13 assurance that this project -- the discharges of this
14 project will meet water quality standards. So in that
15 sense, 401 includes a more stringent review requirement
16 than the 402 or a more immediate requirement anyway.

17 Q. Is that a legal conclusion, do you think?

18 MR. EGLICK: Objection as to the form of the
19 question.

20 Q. (BY MR. YOUNG) Because you're saying now that
21 there's a different standard under the two parts of the
22 statute, and I'm just asking you is that in your view a
23 legal conclusion or is that --

24 MR. SMITH: Objection to the form.

25 A. I don't know what a legal conclusion is. I

1 an NPDES permit, would Kevin Fitzpatrick in your view
2 be in a position to decide whether a particular mix of
3 BMPs and a particular mix of contaminants, sizing of
4 the facilities and so forth and so on -- would he be in
5 a position to be able to decide whether that particular
6 mix was a sufficient basis upon which to issue an NPDES
7 permit?

8 A. I believe so, yes.

9 Q. And he would be in a better position to do
10 that than you, do you think?

11 A. For an NPDES permit, yes, I believe so.

12 Q. And isn't the issuance of an NPDES permit by
13 the state a determination that the discharges meet
14 water quality standards?

15 A. For purposes of section 402 of the Clean
16 Water Act, which is a different standard of review than
17 the 401, I would say yes.

18 Q. So is it your opinion, then, that there's a
19 different standard of review between 401 and 402?

20 A. Yes, it is.

21 Q. How would you describe that difference?

22 A. Section 401D of the Clean Water Act requires
23 that the certification -- any certification issued
24 include specific effluent limitations, monitoring
25 requirements, that sort of thing. Section 402A of the

1 might add to that --

2 Q. (BY MR. YOUNG) There's no question in front
3 of you. Your counsel can ask you.

4 MR. EGLICK: I think if there's not a
5 question on the floor and the previous question is
6 still on the floor and it hasn't been superceded, he's
7 entitled to complete his answer.

8 MR. YOUNG: You can ask him that when it's
9 your turn.

10 MR. EGLICK: You're not entitled to cut him
11 off.

12 MR. YOUNG: I'm not cutting him off.

13 MR. EGLICK: You just did.

14 MR. YOUNG: No. He answered the question,
15 and then he wanted to go on and add something else.

16 MR. EGLICK: He wanted to add to his answer
17 before you asked another question, and he is entitled
18 to do that. I'll note an objection for the record to
19 that and ask that counsel refrain from cutting off the
20 witness.

21 Q. (BY MR. YOUNG) When Mr. Reavis was asking you
22 about folks that you had talked to subsequent to your
23 departure from Ecology, he asked you if you talked to
24 anybody from Ecology and whether you talked to anybody
25 from the ACC. Did you talk to any of their

1 consultants; the ACC's consultants, that is?
 2 A. I don't think so. I don't know their full
 3 list of consultants, but I don't recall any
 4 conversations --
 5 Q. With, for example, Amanda Azous?
 6 A. No. I don't know that I've ever met or
 7 talked with Amanda.
 8 Q. How about Bill Rozeboom?
 9 A. No. Not since I left Ecology.
 10 Q. Mr. Leytham, Malcolm Leytham?
 11 A. No.
 12 Q. Peter Willing?
 13 A. No. I don't think so.
 14 Q. How about Greg Wingard? Did he ask you about
 15 Mr. Wingard?
 16 A. Right. He and I had, I believe, exchanged a
 17 couple of e-mails but not on third runway-related
 18 issues. It was something -- some other Clean Water Act
 19 issues he was working on and an article that I sent him
 20 that I thought he might be interested in.
 21 Q. I think you said you had talked to Dave
 22 Peeler at Ecology. What did you talk to Mr. Peeler
 23 about?
 24 A. He was in San Francisco for a conference at
 25 the EPA headquarters down there. He and Maria Peeler

1 is the PCHB's ruling on Battle Mountain at one point
 2 said that the 401 certification cannot be conditioned
 3 upon future issuance of an NPDES permit, and so in that
 4 sense, that may be analagous to this different
 5 structure and level of review for 401 and 402, the
 6 difference between something immediate and something
 7 that has future iterations.
 8 Q. Remind us again if you would when
 9 approximately you first started working on the third
 10 runway in one iteration or another.
 11 A. I don't know precisely. The mid '90s, '96
 12 plus or minus a year. It was about the time that the
 13 supplemental draft EIS came out and probably a little
 14 bit before the Port's initial application to the corps
 15 and Ecology.
 16 Q. Now, to your knowledge, up until the time
 17 that you left Ecology, was there anyone at Ecology who
 18 had worked as much on the third runway application as a
 19 whole as you had?
 20 A. No. I don't think so. I think I was the
 21 single longest participant.
 22 Q. And as part of your work, then, you're saying
 23 mid '90s, and you left Ecology -- or when were you as
 24 Mr. Reavis said reassigned from the Third Runway
 25 Project?

1 and my wife and I had dinner with them one evening.
 2 Q. And did you talk about the third runway?
 3 A. No, we didn't. I don't think that came up at
 4 all.
 5 Q. I think we were just asking about
 6 conversations about the third runway.
 7 A. Okay. I thought it was anybody at Ecology
 8 that I had talked with.
 9 MR. YOUNG: I think that's all the questions
 10 that I have.
 11 MR. EGLICK: Could we go back to the question
 12 that was asked of Mr. Luster and then the answer he
 13 gave and then that he got cut off by Mr. Young and
 14 could you read that back, please?
 15 (The reporter read back as requested.)
 16 EXAMINATION
 17 BY MR. EGLICK:
 18 Q. Mr. Luster, do you recall when you were
 19 trying to -- I think you said I might add to that when
 20 you were answering a question and you weren't able to
 21 complete your answer. Could you please now complete
 22 your answer that was to follow or that you had intended
 23 to follow the words "I might add to that"?
 24 A. Well, the thing that came to mind was -- I
 25 think this may have been applicable to the question --

1 A. That was, I believe, mid October 2000.
 2 Q. So we're talking about a space of at least
 3 four or five years that you worked on the third runway
 4 applications?
 5 A. Roughly four years, I think.
 6 Q. In that time, do you care to or could you
 7 estimate how many various documents, reports, memos,
 8 e-mails, any communication media you reviewed
 9 concerning the third runway application?
 10 A. Hundreds including everything, yeah.
 11 Q. So when you're asked, for example, how many
 12 hours did you spend reviewing the latest iteration of
 13 the stormwater management plan or when you were asked
 14 that, did your answer include all the hours that you
 15 spent reviewing, for example, earlier iterations of
 16 that same plan?
 17 A. No. That was -- my answer was -- I believe
 18 the question was how much time I had spent either
 19 during the past year or since the appeal occurred in
 20 September, so that's just over the past several months.
 21 Q. Well, let's -- would it be accurate, then, to
 22 say that in the four years plus that you worked on the
 23 third runway applications you spent hundreds of hours
 24 on it?
 25 A. I'm calculating in my head.

- 1 Q. Take your time.
 2 A. Well, in total, I would say over a thousand
 3 in that at times it was -- the majority of my work time
 4 was focused on the third runway review, and over the
 5 course of four years, I'm sure it added up to at least
 6 a thousand hours.
 7 Q. Would you say that from your experience
 8 review of an earlier iteration of a plan from one
 9 aspect of the Third Runway Project would or would not
 10 have any relation to review of a later iteration?
 11 A. I believe so.
 12 Q. Which way?
 13 A. Excuse me. I think it would help me. If I
 14 could remember key points from previous versions, I
 15 could focus in on those points in later versions, plus
 16 this is kind of what I've done for a living for years
 17 and years is review project plans of various sorts, and
 18 I'm still doing that today.
 19 Q. Could you look at Exhibit 202 for a moment,
 20 please? Just to make sure I've got the same version of
 21 202 as you, what I'm interested in is something called
 22 a personnel action form, which in my version of 202 is
 23 -- maybe this is a document -- is that part of 202 that
 24 you have?
 25 A. (Nodding head).

- 1 Q. What exactly -- for those of us who haven't
 2 been educated in Ecology forms, what exactly is a
 3 personnel action form if you know?
 4 A. I believe this is necessary to either
 5 reallocate someone's position at Ecology, to fill a
 6 vacancy, to establish a new or a different position for
 7 someone, and it has a chain of signature blocks by
 8 various people involved in that decision.
 9 Q. What's the document behind -- in your packet
 10 of Exhibit 202, what's the document behind that
 11 personnel action form? Can you tell me what that is?
 12 A. I believe this is a form generated by
 13 Ecology's personnel department that provides a place to
 14 describe the reasons why someone should be given a
 15 different position or an upgrade or whatever the action
 16 is being taken.
 17 Q. And is this the form that was used to justify
 18 I think you referred earlier in your testimony to your
 19 upgrade for environmental specialist 5?
 20 A. This is one of those forms, yes.
 21 Q. This form is handwritten, isn't it, how it's
 22 filled in?
 23 A. Right.
 24 Q. Looking down at the bottom of the form, who
 25 is it signed by?

- 1 A. Gordon White.
 2 Q. Have you seen his signature before?
 3 A. Yes.
 4 Q. Do you recognize this to be his signature?
 5 A. I believe so.
 6 Q. Now, could you read me under -- do you see
 7 the section that says "justification"?
 8 A. Right.
 9 Q. Could you read me the first sentence in that
 10 section?
 11 A. "The position is the statewide expert on
 12 401/CZM regulatory issues."
 13 Q. Now, from your understanding of how these
 14 Ecology forms -- how long did you work at Ecology?
 15 A. I started in January 1989 and left January
 16 2001.
 17 Q. So from your understanding of how these
 18 Ecology forms work, what's the significance of this
 19 description that you just read into the record in terms
 20 of your job position that you were assuming?
 21 A. This form includes a section on justifying in
 22 this case an upgrade from an environmental specialist 4
 23 to an environmental specialist 5. The environmental
 24 specialist series is or was numbered 1 through 5 with
 25 each step being increasing levels of independent work

- 1 and complexity, and the ES 5 position is generally
 2 provided to people that have statewide responsibilities
 3 and generally have a policy -- some sort of policy
 4 emphasis.
 5 Q. You have a next page in this same exhibit,
 6 Exhibit 202. Is yours headed at the top "comments and
 7 signatures"? Do you see that?
 8 A. Yes.
 9 Q. Now, again, do you see the signature from
 10 Gordon White?
 11 A. Yes.
 12 Q. And you recognize that as his signature?
 13 A. I believe so, yes.
 14 Q. Could you read his handwriting by the way?
 15 A. Most of the time, yes.
 16 Q. Well, since you probably have more practice
 17 at it than I do, can you read into the record what's on
 18 this form under his signature, the handwritten
 19 material? Is that his handwriting by the way?
 20 A. I believe so, yes.
 21 Q. And at the end of the three handwritten
 22 lines, do you see where I am? Are those his initials?
 23 A. I believe so.
 24 Q. Could you read into the record his
 25 handwritten comment, then, please?

1 A. It says, "Tom has helped me understand 401 -
2 no small accomplishment! and provides a good example to
3 other staff for his diligence and work ethic for the
4 citizens of the state. GW."

5 Q. Were you ever told that whether or not you
6 would stay on the 401 team for the third runway was a
7 matter of discussion with the Port of Seattle in the
8 fall of 2000 while you were working at Ecology?

9 A. I don't think so, no.

10 Q. When did you first learn, if you ever did,
11 that whether or not you would stay on the 401 team for
12 Ecology's review of the third runway was a matter of
13 discussion with the Port in the fall of 2000?

14 MR. REAVIS: Objection; lack of foundation.

15 A. There were comments about that at the time I
16 was reassigned, but I didn't have any certainty about
17 that until I read, I believe, some of the depositions
18 that I've seen over the last several weeks.

19 Q. (BY MR. EGLICK) So in other words, you only
20 saw whatever information you have on this topic of your
21 reassignment being discussed with the Port within the
22 last few weeks; is that correct?

23 A. That's the first, I guess, confirmation I had
24 of it. As I said, there were comments at the staff
25 level wondering if that was an issue.

1 A. Correct.

2 Q. Is there anything on the first page of
3 Exhibit 201 that refers to your signature authority
4 from your understanding of it?

5 A. It includes a general reaffirmation of
6 delegated authorities that were previously approved by
7 Director Riveland.

8 Q. Was that Mr. Fitzsimmons' predecessor?

9 A. I believe so, yes.

10 Q. And I think we've already established,
11 haven't we, through questioning from Mr. Reavis, I
12 believe, that pages 2 and 3 of Exhibit 201 is
13 delegation of authority -- of signature authority from
14 Director Riveland; is that correct?

15 A. Yes, it is.

16 Q. You were referring, I think, to something in
17 Mr. Fitzsimmons' letter on the first page of Exhibit
18 201. You called it a reaffirmation. Could you read
19 the sentence you're referring to?

20 A. It says, "Through this memorandum, I reaffirm
21 the delegated authorities approved by Ms. Riveland."

22 Q. Could you look at Exhibit 202 again for a
23 moment, please?

24 A. I've got it.

25 Q. Does the third page of Exhibit 202 represent

1 Q. Did anyone -- for example, Mr. Hellwig -- let
2 you know it had been a topic of discussion with the
3 Port?

4 A. Whether I should stay on the team or not?

5 Q. Yes.

6 A. No.

7 Q. Mr. Fitzsimmons, the director, did he let you
8 know?

9 A. No.

10 Q. Can you give some estimate of the number of
11 -- strike that. We'll save some time here.

12 Looking at Exhibit 201 if you would for a
13 moment. Do you recall this packet of documents? The
14 top one is from Tom Fitzsimmons about delegation of
15 signature authority.

16 A. Correct.

17 Q. You got it there?

18 A. Yes.

19 Q. Now, Mr. Reavis asked you a question, and I
20 think he asked you whether or not the first page of
21 Exhibit 201 mentioned you personally. Do you recall
22 that?

23 A. Right.

24 Q. And I think you agreed it did not mention you
25 personally?

1 a description of your job duties at the Department of
2 Ecology as the -- well, just leave it at that -- a
3 description of your job duties at the Department of
4 Ecology?

5 A. Yes.

6 Q. Did you have the duties described here in
7 this third page of Exhibit 202 when you were working on
8 the Port's third runway application up through when you
9 were, as Mr. Reavis said, reassigned, I believe, in the
10 fall of 2000?

11 A. Yes. I think this is my or was my most
12 current job description.

13 Q. If you'd look on the first page of Exhibit
14 202. Now, it's a memo, isn't it, from Paula Ehlers?

15 A. Correct.

16 Q. And who was she again?

17 A. She was my immediate supervisor at the time.

18 Q. And it's through, it says, Gordon White. Who
19 was he?

20 A. The program manager for the SEA program.

21 Q. And then too, who is Al Jacobs?

22 A. Al Jacobs is in Ecology's personnel office, I
23 believe.

24 Q. And could you look at the paragraph that
25 starts, "Tom has been assuming ES 5 level duties"? Do

1 you see that?
 2 A. Yes.
 3 Q. Could you look at the third sentence in that
 4 paragraph and the fourth sentence and read them for me,
 5 please?
 6 A. The third and fourth?
 7 Q. Yes, please.
 8 A. "Tom is the lead 401 project specialist for
 9 the state's most controversial and significant
 10 projects, and he serves as the coordinating and
 11 training lead for the 401 staff statewide. Tom now
 12 routinely performs these higher level duties with a
 13 high degree of skill and confidence."
 14 Q. Now, did there ever come a time when you were
 15 ever advised that you were not living up to that -- by
 16 anyone in Ecology that you were not living up to that
 17 description that you just read of how you were
 18 performing your higher level duties as they were
 19 called?
 20 A. Not really.
 21 Q. Was the manual that you referred to with
 22 Mr. Reavis in Exhibit 207 a final version?
 23 A. I believe this is the most current version.
 24 I don't know if it's been updated. I know there was at
 25 least one version before this, and the intent of this

1 desk manual was that it be updated as necessary. It
 2 was meant to serve as a living document essentially. I
 3 think it states that somewhere in the introductory
 4 comments.
 5 Q. Was the manual updated after the Battle
 6 Mountain Gold decisions came out to reflect what those
 7 decisions had to say?
 8 MR. REAVIS: Objection; vague.
 9 Q. (BY MR. EGLICK) When I say Battle Mountain
 10 Gold decisions, I'm referring to the PCHB decision,
 11 Mr. Luster. Are you familiar with those?
 12 A. I am.
 13 Q. I think you referred earlier to you had given
 14 a deposition in that case, the Okanogan Highlands
 15 Alliance case?
 16 A. Correct. I know that the Battle Mountain
 17 decision came out shortly before the date on this desk
 18 manual, and I'm not certain whether or not the desk
 19 manual was updated. It may have been. My question is
 20 about I believe the board's decision in that case was
 21 earlier that same month, so it may have just been a
 22 matter of a week or two apart, so I can't really
 23 remember right now whether this was updated in response
 24 immediately or not.
 25 Q. Well, you might take a quick look and see if

1 you -- can you find any reference to the decision in
 2 this Exhibit 207 version that Mr. Reavis gave you?
 3 A. I haven't yet. Would you like me to look
 4 through the whole --
 5 Q. I think we can do that later. Let me ask you
 6 another question that may be helpful. Were there
 7 appeals to your knowledge by Ecology of the PCHB's
 8 Battle Mountain Gold decision or by other parties?
 9 A. I believe the project proponent appealed that
 10 decision and that Ecology chose not to join in that
 11 appeal.
 12 Q. So at the time the manual was issued, then,
 13 as far as you know or this version of the manual was
 14 issued in Exhibit 207, there was apparently an appeal
 15 to your knowledge pending of Battle Mountain Gold?
 16 A. Well, there may have been if the decision
 17 came out earlier that month. I'm not sure that the
 18 appeal would have been filed by the date of this desk
 19 manual. I don't know if there's a 30-day or a 60-day
 20 period that the proponent would have had.
 21 Q. Thank you very much. That's a good point.
 22 You were talking with Mr. Reavis about the
 23 October -- was it October or July '98 401 decision that
 24 Ecology issued?
 25 A. Right.

1 Q. I believe you said that you were someone who
 2 had an opinion about whether or not the 401 approval
 3 should be issued in the course of Ecology discussions
 4 prior to issuance of the July '98 401; is that correct?
 5 A. Could you repeat that?
 6 Q. Sure. Did you have an opinion prior to the
 7 July '98 issuance of the 401 as to whether a 401 on the
 8 state of knowledge then should be granted to the Port
 9 for its third runway application?
 10 A. I believe I had some doubt about the decision
 11 and had been involved in discussions about the pros and
 12 cons of issuing a 401 versus denying it or having the
 13 Port withdraw. I think much of my concern was about
 14 how this fit into our previous 401 review requirements
 15 and what sort of precedence it might set and had some
 16 doubt that we should go this direction, but I think the
 17 overall decision of Ecology was to go ahead and issue.
 18 Q. That was ultimately a decision made by Gordon
 19 White, was it not?
 20 A. Correct.
 21 Q. Had he had a long time tenure in his position
 22 at Ecology when he made that decision?
 23 A. I'm trying to remember exact dates. I think
 24 Gordon had come to Ecology within a year of that
 25 decision, several months previous anyway.

1 Q. Was there -- you may have mentioned this, but
2 was there another decision that you drafted for Ecology
3 where Gordon White made a decision to issue it that you
4 didn't necessarily agree with that you can recall?

5 A. Oh, yes.

6 Q. And what other decision would that be?

7 A. That was the Battle Mountain Gold 401
8 certification.

9 Q. So, again, with Battle Mountain Gold, was it
10 then your job to draft the 401 after Mr. White had
11 decided that it should issued?

12 A. I believe the scenario was I was asked to
13 write the certification and explained that I didn't yet
14 have reasonable assurance, and I thought it would be
15 best if someone else were to write it at that point if
16 that was the decision, but I was asked if regardless of
17 my not having reasonable assurance could I write a
18 certification to the best of my ability given that
19 situation, and so I agreed to do that.

20 Q. Now, once the 401 was issued in July of 1998,
21 I believe you said the Port appealed it; isn't that
22 correct?

23 A. Yes.

24 Q. And then I believe you said the Port
25 submitted -- subsequently withdrew the appeal and

1 Q. Let's look at wetlands, for example, for a
2 moment. I think you said there was a ten-acre increase
3 in direct wetland impacts when the new application came
4 in?

5 A. Roughly. It may have been just under ten
6 acres, I think.

7 Q. What would that represent as a percentage
8 increase if you know over the direct wetland impact on
9 the application that had been withdrawn?

10 A. The original proposal was approximately ten
11 acres of direct impact or perhaps 11.87 comes to mind
12 for some reason, and that may have been direct and
13 indirect. The subsequent proposal was, I believe, 18
14 or 19, and then I think it's gone up a little bit since
15 then.

16 Q. So is the percentage then -- I'm no
17 mathematician, but is that about a hundred percent
18 increase give or take?

19 A. 75 to a hundred percent or so.

20 Q. I believe you were asked some questions about
21 whether or not you'd worked with criteria for fill in
22 other 401 applications. Do you recall that?

23 A. Yes.

24 Q. And you were asked a question, I think, also
25 or maybe in particular about whether you had worked

1 submitted a new application?

2 A. I think they withdrew their application to
3 the corps, which resulted in the 401 essentially
4 becoming moot, and then resubmitted an application.

5 Q. When the application was resubmitted, I take
6 it then you worked on review of the resubmitted
7 application; is that correct?

8 A. Yes.

9 Q. Were there aspects of the project that you
10 had not been fully aware of before that came to the
11 fore as you reviewed the new application?

12 A. Well, there were changes between the original
13 proposal and the resubmitted application. The two main
14 ones that come to mind are the wetland mitigation
15 impacts increased by something like ten acres or so
16 over the previous proposal, the direct impacts.

17 Also, the Port had realized that as part of
18 its initial mitigation proposal, the water they were
19 proposing to use for low flow augmentation, there was
20 some question as to the ownership or the legality of
21 the water right, and that water supply, I guess, wasn't
22 available or there was uncertainty about whether that
23 would be available for mitigation purposes, and so the
24 Port needed to come up with a different low flow
25 augmentation proposal.

1 with numeric criteria for fill in other applications.
2 Do you recall that as well?

3 A. Not specifically.

4 Q. And I could be wrong. Let me ask you this
5 question, then. Have you ever worked with in your
6 experience at Ecology an application for as much fill
7 as the Port proposed?

8 A. I don't believe so. The closest would be --
9 and I don't remember the numbers, and they're very
10 different situations. The Battle Mountain proposal
11 would have resulted in some fairly large amount of fill
12 due to tailings pile. Some of the dredging projects I
13 worked on had up to, well, I guess several hundred
14 thousand cubic yards of material, but I don't think any
15 of those were in the millions.

16 Q. And what's your understanding of the range
17 we're in here of fill from the Port's proposal?

18 A. I don't understand.

19 Q. In other words, in terms of million cubic
20 yards of fill.

21 A. I believe it's 17 million roughly.

22 Q. Cubic yards of fill?

23 A. Yes.

24 Q. Would it be accurate to say from your
25 experience, then, at Ecology that would be an

1 unprecedented amount of fill in terms of your
 2 experience?
 3 A. I believe so.
 4 Q. I believe at some point Mr. Reavis asked you
 5 with regard to Exhibit 216 -- do you want to take a
 6 look at that?
 7 A. I've got it.
 8 Q. -- whether you had given the input
 9 represented in exhibit -- the attachment to Exhibit
 10 216, whether you had given that to Ms. Snider. Do you
 11 recall that line of questioning?
 12 A. Yes.
 13 Q. Who was the attachment to Exhibit 216
 14 addressed to? It's a memorandum from you, isn't it?
 15 A. Yes.
 16 Q. Dated October 17?
 17 A. October 17, 2000.
 18 Q. And who is it to?
 19 A. Joan Marchioro.
 20 Q. And who is she?
 21 A. She's the Attorney General's office. She was
 22 helping with our review on this proposal.
 23 Q. So did you have clearance to send memoranda
 24 that you were sending to Ecology's lawyer to anyone
 25 outside of Ecology?

1 A. I believe this fell under attorney/client
 2 privilege, and so it went to Joan, and I think as a
 3 result it was -- well, I don't know if this was held
 4 back or not for some period of time.
 5 Q. Well, did you understand that it was your
 6 decision to make as to whether or not to send a memo to
 7 Ecology's attorney to anyone outside of Ecology?
 8 A. I'm not clear on the question.
 9 Q. Well, did you have authority to take a memo
 10 that you had sent to Ecology's attorney and send it to
 11 Kate Snider or the Port or anyone else?
 12 MR. YOUNG: Object; calls for a legal
 13 conclusion.
 14 A. My understanding was that that would have
 15 been privileged and it wouldn't be sent outside of
 16 Ecology. I believe I included it in the packet of
 17 material -- let me back up. We were getting regular
 18 requests from ACC at that time, I believe, and we had
 19 set up a system where all the documents went to one of
 20 two different public disclosure staff at Ecology, and
 21 we made -- each of the staff were to make an initial
 22 determination of what they thought was disclosable or
 23 not, and I think I had marked on this that it was -- I
 24 thought it was not disclosable.
 25 Q. (BY MR. EGLICK) Once again, I think

1 Mr. Reavis asked you questions about whether you had
 2 sent input on to Kate Snider. Do you recall that?
 3 A. Right.
 4 Q. What was the process with regard to Ecology's
 5 interaction with Ms. Snider in terms of who was
 6 supposed to send Ecology's responses on to her
 7 concerning meeting notes, for example?
 8 A. I don't recall precisely. I think they may
 9 have been compiled by -- I think they were compiled by
 10 someone other than myself -- but I don't remember who
 11 that was -- and then forwarded to Ms. Snider. I think
 12 in some instances I may have provided comments to her
 13 directly, but I think there was more of a structured
 14 process in place for at least part of these review
 15 meetings.
 16 Q. Mr. Reavis also asked you a question about
 17 the chain of command in the water quality program and
 18 whether or not if a decision was made up the chain of
 19 command in the water quality program that would resolve
 20 an issue under 401, for example. Do you recall that
 21 general discussion?
 22 A. Right.
 23 Q. Is there anyone that you know of in the water
 24 quality program who had responsibility equivalent to
 25 yours for 401 determinations under the Clean Water Act?

1 A. None that I can think of, no.
 2 MR. SMITH: Off the record for a second.
 3 (Discussion off the record.)
 4 (Recess taken.)
 5 Q. (BY MR. EGLICK) Could you look at Exhibit 220
 6 to your deposition? Do you see that, the e-mail
 7 January 3, 2000, from Ray Hellwig?
 8 A. Right.
 9 Q. I believe you previously testified that this
 10 doesn't represent your recollection of the outcome of
 11 the process of coming up with Ecology policies on the
 12 relationship between 401 and 402; is that correct?
 13 A. Right. The third paragraph of this doesn't
 14 in my mind mesh with condition, I believe it was, B1 of
 15 the policy.
 16 Q. Was Ron -- do you know who Ron Lavigne or
 17 Lavigne is?
 18 A. Ron Lavigne?
 19 Q. Yes.
 20 A. Is an attorney with Ecology's AG division.
 21 Q. L-a-v-i-g-n-e?
 22 A. I believe so, yes.
 23 Q. Wasn't he involved in one of the e-mail
 24 strings concerning this same question of relationship
 25 between 401 and 402?

- 1 A. I don't remember offhand. I think he may
2 have been at some point involved in those discussions.
- 3 Q. Well, does this one e-mail represent the
4 totality of all of the e-mail strings concerning this
5 discussion, concerning the relationship between 401 and
6 402?
- 7 A. No. There were e-mails on this issue for, I
8 think, about two years off and on.
- 9 Q. That may be it, but let me just look at my
10 notes here. You talked with Mr. Eglick about whether
11 or not Mr. Hellwig had advised you that no to the Port
12 was not an acceptable option, didn't you?
- 13 A. Right.
- 14 Q. And I believe your testimony was that
15 Mr. Hellwig said to you that no was not an acceptable
16 option in a discussion you had with him; is that
17 correct?
- 18 A. No was not an option, I think was the phrase.
- 19 Q. And then I think Mr. Eglick showed you an
20 e-mail in which Mr. Hellwig appeared to be saying
21 something different. Do you recall that?
- 22 A. Right.
- 23 Q. Then I think you said you had a later meeting
24 with Mr. Hellwig; is that correct?
- 25 A. Correct.

- 1 Q. In which he explained his earlier statement
2 to you; is that correct?
- 3 A. Yeah. I remember we discussed that among
4 other things.
- 5 Q. Is there any question in your mind that
6 Mr. Hellwig said to you the first time around that no
7 was not an option with regard to the Port's
8 application?
- 9 A. Is there any question?
- 10 Q. In your mind.
- 11 A. No.
- 12 Q. Thanks. I don't have any other questions.
- 13 FURTHER EXAMINATION
- 14 BY MR. REAVIS:
- 15 Q. Let me just follow up on that last point. I
16 thought earlier when I was asking you those questions
17 you indicated that Mr. Hellwig had explained to you
18 what no in his first instance meant.
- 19 A. Right. I think in the e-mail response he had
20 added some additional words there.
- 21 Q. But didn't he -- as I understand what you
22 said earlier, Mr. Hellwig made it clear that no in fact
23 was an option if the Port was unable to submit
24 materials that would allow Ecology to reach reasonable
25 assurance.

- 1 A. Right. That was the eventual resolution, I
2 guess, of that issue or that statement.
- 3 Q. And that was something that was explained to
4 you by Mr. Hellwig about what he meant when his initial
5 statement said no was not an option?
- 6 A. Yes. I believe it was Ray and myself and a
7 couple other people discussing that as part of one of
8 our regular meetings, yes.
- 9 Q. And it was agreed among that group that in
10 fact no was an option, correct?
- 11 A. Yes. I believe so.
- 12 Q. And, in fact, no was the option Ecology
13 ultimately selected on the Port's application in the
14 fall of 2000?
- 15 A. Actually, the Port withdrew that application.
- 16 Q. But I thought your testimony was the Port
17 withdrew it because Ecology had informed the Port that
18 the answer was going to be no.
- 19 A. Correct. However, that wasn't the final -- I
20 think you said the final Ecology decision. At that
21 time, yes.
- 22 Q. But in any event, before the Port withdrew
23 its application, Ecology had reached the decision that
24 the 401 would be denied?
- 25 A. Correct.

- 1 Q. So the statement that no was not an option
2 turned out to be untrue because no was what Ecology
3 decided ultimately with regard to that application in
4 the fall of 2000?
- 5 A. Right. No turned out to be an option.
- 6 Q. That's all I have. Thank you.
- 7 MR. EGLICK: I have one more.
- 8 FURTHER EXAMINATION
- 9 BY MR. EGLICK:
- 10 Q. Mr. Luster, were you privy to the discussions
11 among Mr. Hellwig, Mr. Fitzsimmons, and Port
12 representatives concerning the Port's withdrawal of its
13 application in the fall of 2000?
- 14 A. What do you mean by privy to?
- 15 Q. Well, for example, did you know there was a
16 meeting at Port headquarters down on the pier here in
17 Seattle?
- 18 A. I knew there had been a meeting scheduled. I
19 knew it had something to do with coming up on the
20 one-year deadline for 401, and I had been asked to
21 prepare the initial form of a denial letter, and I'm
22 not sure if that was before or after that meeting, but
23 I wasn't at the meeting.
- 24 Q. Were you invited and declined to go?
- 25 A. No. I think the message went out for people

1 to make themselves available, and I told folks I would
 2 be available, but I wasn't asked to attend.
 3 Q. So do you know then from personal knowledge
 4 what quid pro quos were discussed at that meeting, for
 5 example, concerning withdrawal of the Port application
 6 and what Ecology might do in response to that?
 7 MR. EGLICK: Objection; lack of foundation.
 8 MR. YOUNG: Object to the form of the
 9 question.
 10 Q. (BY MR. EGLICK) Let me ask you another
 11 question. You said I think in response to a question
 12 from Mr. Eglick that no turned out to be an option; is
 13 that correct?
 14 A. Correct.
 15 Q. Do you have any information based on
 16 attendance at the meeting down at the Port office that
 17 you said you weren't asked to go to as to what went
 18 along with the possibility of no?
 19 MR. YOUNG: Same objection.
 20 A. What I know of the outcome of that meeting
 21 was I believe that started the facilitated review
 22 process that Ms. Snider was involved with, and I
 23 believe that started a process in which Ray or someone
 24 from Ecology was to report progress of the review to
 25 the governor's office, but I think those are the only

1 two understandings or arrangements that I know of
 2 personally that occurred.
 3 Q. (BY MR. EGLICK) Let me ask you: How many
 4 weeks was it after the Port's withdrawal of its 401
 5 application before you were as Mr. Eglick puts it
 6 reassigned away from the Port of Seattle Third Runway
 7 Project?
 8 A. I think the meeting was late August or
 9 September sometime, and my reassignment was mid
 10 October, so anywhere from three to six weeks, I guess.
 11 Q. And there is a letter of withdrawal from the
 12 Port, isn't there, that would help us place that date
 13 to your knowledge?
 14 A. I believe so, yes.
 15 Q. Thank you very much. Nothing else.
 16 (Deposition concluded at 5:24 p.m.)
 17 (Signature was reserved.)
 18
 19
 20
 21
 22
 23
 24
 25

CORRECTION & SIGNATURE PAGE

1
 2
 3 RE: ACC v. DOE; PCHB; 01-160
 4 Thomas Luster; February 1, 2002
 5
 6 I, Thomas Luster, have read the within transcript
 7 taken February 1, 2002, and the same is true and
 8 accurate except for any changes and/or corrections, if
 9 any, as follows:
 10 PAGE LINE CORRECTION
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22 Signed at _____, Washington, on the
 23 day of _____, 2002.
 24
 25 Thomas Luster

CERTIFICATE

1
 2
 3 I, Mary L. Green, the undersigned Certified Court
 4 Reporter and Notary Public, do hereby certify:
 5 That the testimony and/or proceedings, a transcript
 6 of which is attached, was given before me at the time
 7 and place stated therein; that any and/or all
 8 witness(es) were by me duly sworn to tell the truth;
 9 that the sworn testimony and/or proceedings were by me
 10 stenographically recorded and transcribed under my
 11 supervision to the best of my ability; that the
 12 foregoing transcript contains a full, true, and
 13 accurate record of all the sworn testimony and/or
 14 proceedings given and occurring at the time and place
 15 stated in the transcript; that I am in no way related
 16 to any party to the matter, nor to any counsel, nor do
 17 I have any financial interest in the event of the
 18 cause.
 19 WITNESS MY HAND AND SEAL THIS 7TH DAY OF FEBRUARY
 20 2002.
 21
 22 MARY L. GREEN, CSR #GREENML497RZ
 23 Notary Public for the State of Washington,
 24 residing in King County.
 25 My appointment expires 4/4/05.