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September 10, 1998

J. Tayloe Washburn
FOSTER PEPPER & SHEFELMAN
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RE: Request for Clarification; Ecology's Order No. 96-4-02325

Dear Tayloe:

Over the last few weeks, the Department of Ecology has reviewed your memorandum dated August 11, 1998, in which you requested clarification and minor revisions to Ecology's certification for the airport improvements. Our responses to your statements on each of the conditions are set forth below. We have attempted to be as specific as possible, however, there are instances where we ask that you clarify your statements or suggested revisions.

Your August 11 memorandum raises two primary issues. First, the State and the Port simply have different perspectives as to the requirements of the Federal Water Pollution Control Act (Clean Water Act) for stormwater discharges. It appears by your comments that the Port believes it is subject to implementing Best Management Practices (BMPs) to comply with federal and state law. It is the State's position, however, that § 401 requires that a project not violate water quality standards, and that BMPs are recognized as merely the mechanism to meet those standards. If the BMPs are not sufficient to meet the water quality standards, then the project simply cannot go forward without being in violation of § 401. Ecology is interested in continuing to work with the Port in developing the treatment necessary for the airport to meet water quality standards.

The second primary issue is whether the 401 certification can place conditions on the entire Sea-Tac Airport operation and not just simply on the operation of the third runway. There are several reasons why Ecology believes it should and must condition the 401 to ensure that the stormwater discharges from the entire airport meet the water quality standards. The bottom line is that Sea-Tac Airport should not and cannot be operated in violation of the water quality laws. With the redevelopment of the airport under the Master Plan update, which includes construction of the third runway, Ecology believes that there is not only a factual but a legal basis for

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considering the entire operation of the airport. As mentioned below, Ecology is interested in discussing with the Port a comprehensive solution, which was intended by the 401 Certification, to have Sea-Tac Airport in compliance with federal and state water quality laws.

Finally, I hope we can come to agreement on the status of the 401 certification based on the new information on wetland impacts. The current 401 certification is inadequate based on the information we have today. Ecology is currently debating what action it should take. Our responses to your request for clarification may also change based on the final analysis of wetland impacts and the Corps' future action.

Ecology's response to your specific clarification requests are as follows.

A1.

Bullet 1 -- The Port's suggested revision is inconsistent with 401 requirement that the State certify that the project will not violate water quality standards. Therefore, the condition merely states what we believe to be the law. In some cases, Best Management Practices may satisfy this condition. However, based on data provided to Ecology by the Port and on the "reasonable potential analysis" conducted by the Port and Ecology, the Port's proposed BMPs clearly do not satisfy this condition. Pursuant to Condition C of the Order, the Port must provide a stormwater plan for Ecology's review and approval that prevents exceedances of state water quality standards, including both the criteria contained in 173-201A-030(1) and the numeric criteria contained in 173-201A-040. See WAC 173-201A-160. In this case, additional BMPs or other means will be necessary to reach compliance.

Bullet 2 -- The referenced sentence is meant to clarify that the Order does not authorize any further discharge of the listed contaminant. When a waterbody is listed under Section 303(d) of the Clean Water Act, Ecology cannot allow discharges of the listed contaminants without first completing a TMDL. Ecology is not expecting zero fecal coliform in the creek. If the BMPs requested in the certification are implemented, Ecology believes there will not be a fecal coliform problem caused by the Port. In reference to your suggested revision to the language, Ecology may agree to the following:

"Ecology will determine whether there are further exceedances based upon evidence that there has been an exceedance of fecal coliform that is attributable to the Port."

B1.

- Bullet 1 -- The Port is not required to implement all recommended actions in the Des Moines Creek Basin Plan, only those as described in the Certification Order.
- Bullet 2 -- Per Conditions B5, B5a, and B5b of this Order, the Port is required to ensure that either the RDF is constructed as described in this Order, or that equivalent regional peak flow controls are provided.

B3.

- Bullet 1 -- Many of the activities identified by the Port are incompatible with the functions and values associated with a wetland or stream buffer. If some of these activities were to take place in the buffer, the wetland and stream functions and values could be adversely affected, and at the very least, additional mitigation would be required. Ecology will review the Port's proposed easement language when it is received to further clarify this condition.
- Bullet 2 -- This timeline was based on an agreement between the Port and Ecology on time necessary to reach compliance with this condition. Ecology appreciates the Port submitting restrictive covenant language within the requested 30 days.
- Bullet 3 -- The buffer requirements apply to all lands owned by the Port, or which the Port has a property interest or control, in the mitigation areas, and lands which the Port may purchase in the future in the mitigation sites. In order for Ecology to specify the property, we need to review a map of the property owned by the Port, or which it has an interest or control, in the mitigation areas. This information will be necessary for Ecology to verify that this condition is met.

B3b.

- Bullet 1 -- The buffer requirements will apply to the length of Miller Creek under Port ownership or control. Condition B3b includes language that allows existing road configurations to remain, but requires Ecology review and approval for any alteration that could affect the functions and values of the buffers. Ecology recognizes that new wetland impacts being identified by the Port will likely result in a change to the draft Miller Creek Enhancement Program document (August 19, 1998).

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B4a.

- Bullet 1 --** The temperature threshold is established in WAC 173-201A-030(1)(c)(iv). Without such a threshold, this project could not be certified to meet state water quality standards. Since Ecology has not yet received an adequate stormwater management plan from the Port, we are unable to determine the nexus between the impacts of the Port's activities and the stream temperature. The Port may propose, as part of the operations plan described in Condition B4a, an alternative means of establishing a temperature threshold that will allow water quality standards to be met. This proposed operations plan should be coordinated with the Port's proposed stormwater management plan.
- Bullet 2 --** Ecology has received the Port's proposed Des Moines Creek Flow Augmentation operation plan. We appreciate the Port working within this timeline. Ecology set this timeline based on an agreement between the Port and Ecology on time necessary to reach compliance with this condition.
- Bullet 3 --** The requirement is meant to ensure that the necessary funds are available in perpetuity. The Port may propose any appropriate mechanism to achieve that requirement. Ecology will not accept a budget line item, as that is generally limited to funding for a one or two year period.

B4b.

- Bullet 1 --** Ecology has received the Port's proposed final wetland mitigation plan. We appreciate the Port's efforts. Ecology set this timeline based on an agreement between the Port and Ecology on time necessary to reach compliance with this condition. Based on recent information provided by the Port, Ecology believes that the design requirements of the Miller Creek mitigation site may change.
- Bullet 2 --** The buffer is necessary because the site is both a floodplain and a wetland. Because the adjacent uses along Des Moines Memorial Drive conflict with the functions and values meant to be preserved and enhanced at the mitigation site, a buffer is necessary.

B4c.

- Bullet 1 --** Ecology has determined that this wetland area is a water of the state and therefore subject to regulation under WAC 173-201A and this Order.

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Bullet 2 -- Ecology has received the Port's proposed updated mitigation plan for the Auburn site. Ecology set this timeline based on an agreement between the Port and Ecology on time necessary to reach compliance with this condition. Based on recent information provided by the Port, Ecology understands that the design of the Auburn mitigation site may change. The Port should provide the most recent version of the Auburn mitigation plan and may propose a different timeline for Ecology's concurrence.

B5a.

Bullet 1 -- Without the RDF or other equivalent means of mitigating the exceedances of state water quality standards in Des Moines Creek caused in part by discharges from the airport, the STIA Master Plan Improvement Project could not be certified. Therefore, this condition is a necessary part of this Order.

Bullet 2 -- The Order requires the Port to either ensure that the RDF is built or to provide equivalent detention through other means. Based on the Port's proposals, Ecology understands that the Port plans to work with other local jurisdictions to provide the necessary detention.

B5b.

Bullet 1 -- The "240 acre feet" was identified in the Des Moines Creek Basin Plan, and is based on the best information currently available. Ecology will consider further clarification or changes to this condition when the feasibility study is completed.

C, C1-3. -- These timelines are based on an agreement between the Port and Ecology regarding the time necessary to reach compliance with each condition. Ecology would like to keep the current timeline, but is willing to discuss the level of information necessary for filing on the 60th day under the C1 and 90th day under the C2 requirements. Ecology is willing to consider a timeline that allows for the filing of interim or preliminary plans so long as the final stormwater plan under C1 and the construction schedule under C2 is filed and ready for approval by December 1. This would give the Port approximately 145 days from the issuance of the order. The Port will have to make substantial progress at the respective 60 and 90 day deadlines set forth in the new timeline. Until alternative timelines are accepted by Ecology, the current timeline remains in effect.

Additionally, the compliance timelines refer only to preparation of reports, plans, etc. for Ecology review and approval, and not to the actual discharges into waters of the state. While a compliance schedule is allowed for existing discharges to

come into compliance with the water quality standards, new discharges are not allowed a compliance schedule.

- C4. -** Ecology is confused by the Port's analysis. As stated above, the project must meet water quality standards under WAC 173-201-160(3)(d), including compliance with the numeric criteria contained in 173-201A-040 WAC. The Clean Water Act requires that all discharges to waters of the United States apply Best Conventional Treatment Technology (BCT) and Best Available Treatment Technology (BAT), and meet the state's water quality standards. State law requires that all discharges apply AKART and meet the water quality standards.

Whether a TMDL has been completed is irrelevant. Currently, based on information provided by the Port, Des Moines and Miller Creeks are not meeting water quality standards for copper, zinc, temperature as well as fecal coliform.

The Port states correctly that BMPs are to be used to control stormwater discharges. 173-201A-160(3) specifically states that combinations of BMPs are to be used to prevent violations of water quality criteria. Data provided by the Port show that the BMPs proposed by the Port will not achieve the levels of treatment necessary to meet the criteria. In addition, data show that with the proposed treatment system, discharges of copper would not only be above the criteria but would also exceed levels identified as harmful to salmon, and would therefore also violate the characteristic uses of the waterbody as described in 173-201A-030(1) WAC. Given this, the BMPs proposed by the Port are not adequate to meet water quality standards.

C4a.

- Bullet 1 --** Ecology's position is that it has the authority to consider the applicability of the water quality standards to the entire airport. The operation of the third runway is tied directly to and will effect the use of the existing facility. The 401 application was for the Sea-Tac master plan, which includes operation of the entire facility. The Port of Seattle stated in their application for 401 Certification that the project would comply with the requirements of the Department's Stormwater Management Manual for the Puget Sound Basin (SWMM). The Master Plan Improvements are considered "redevelopment" by the SWMM. Redevelopment is defined as, on an already developed site, the creation or addition of impervious surfaces, structural development including construction, installation or expansion of a building or other structure, and/or replacement of impervious surface that is not part of a routine maintenance activity, and land disturbing activities associated structural or impervious redevelopment.

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The SWMM requires that redevelopment of a site of 5,000 square feet or greater must result in the entire site meeting the Minimum Requirements of the SWMM if the receiving water has a documented water quality problem. Water quality data for both Miller and Des Moines Creek documents water quality problems for copper, zinc, and fecal coliform.

There is no question that the existing facility as well as the expansion and redevelopment must meet water quality standards. If the existing facility is not retrofitted and the RDF is not constructed, Ecology's position is that the airport can simply not meet water quality standards, and the 401 could not be issued. The RDF may be used as part of the detention facilities for retrofitting the existing facility. This will have to be described in the stormwater plan to be proposed by the Port. Ecology does not believe it is duplicating requirements.

As stated above, Ecology recognizes that compliance with water quality standards for existing discharges may be accomplished pursuant to a compliance schedule. WAC 173-201A-160(4). Ecology is therefore willing to discuss how to coordinate a possible compliance schedule for the retrofitting for discharges from the existing facility. There is no compliance schedule given for new discharges from the operation of the expanded part of the facility. To the extent the stormwater from the expanded part of the facility and the stormwater from the existing facility are commingled through the treatment and detention facilities, the discharges must meet the 401 requirements; the discharges cannot violate water quality standards. This may not become an issue if the RDF or other necessary detention facility is constructed in a timely manner, and the compliance schedule in the NPDES is met prior to operation of the expansion when monitoring of the streams under the 401 certification will commence.

Bullet 2 -- Until the Port provides the necessary design and analysis, Ecology cannot determine whether a different pre-developed condition is appropriate. Ecology will consider any information from the Port that shows the pre-developed conditions were different.

Bullets 3&4 -- See our comments above in Bullet 2. Ecology has determined that this level of protection is necessary to ensure that water quality standards are met. Ecology was not consulted during the selection of the various Plan alternatives. The Port cannot rely simply on the Des Moines Creek Basin Plan, as it does not give adequate assurance that water quality standards will be met. While the plan is a good starting point, it did not consider the type of treatment levels for stormwater discharges.

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C4b.

Bullet 1 -- Ecology believes it has the authority to regulate stormwater discharges from Sea-Tac Airport under a 401 certification. Most if not all of the stormwater will be treated, put in detention facilities and discharged as point sources. The Clean Water Act also identifies such stormwater as being regulated as a point source. Finally, once a 401 certification is required for a facility, the authority to place necessary conditions on the operation of the facility is not limited to only point sources. The requirements to meet the water quality standards do not differentiate between point and non-point sources. The recent 9th Circuit case of Oregon Natural Desert Assoc. v. Bombeck does not limit this authority.

Bullet 2 -- As stated above, data provided by the Port show that the proposed stormwater treatment system is not adequate to meet water quality standards. The Port must go beyond minimum BMPs in order for the project to be certified.

Bullet 3 -- This condition requires that the Port implement the listed BMPs or other BMPs that will result in compliance with the water quality standards, including meeting the criteria contained in 173-201A(040).

C4d. -- As part of the reasonable potential analysis, the Port and Ecology determined that without this condition, the discharges from the proposed stormwater treatment system would have been far in excess of water quality criteria for some contaminants. Ecology will consider any additional data or analysis provided by the Port.

C4e.

Bullet 1 -- The NPDES permit (which is currently under appeal) requires monitoring of the outfall; this condition requires monitoring of the receiving water.

Bullet 2 -- The Port is not required to implement just the Ecology-selected BMPs; the Port may select other BMPs that will result in stormwater discharges that meet the water quality criteria.

D1. -- This timeline is based on an agreement between the Port and Ecology on time necessary to reach compliance with this condition. The Port may propose a different timeline for Ecology's concurrence. Until an alternative timeline is accepted by Ecology, the condition remains in effect.

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- E2. --** Ecology disagrees. In order to protect water quality and characteristic uses, and wetland functions and values, Ecology often includes buffer requirements around waters of the state. These buffers often include upland areas. In such cases, without this protection, water quality standards would not be met.
- E7. --** This condition requires compliance with MTCA Method A standards. The reference to "no toxic materials in toxic amounts" is a narrative standard used by the Corps of Engineers to regulate fill in wetlands. This condition is meant to define the Corps' narrative standard by using MTCA Method A. Ecology is willing to consider alternative language, but believes the Port's language is also too vague. Ecology needs more information as to the Port's understanding of how the review will occur "by environmental professionals."
- F1.**
- Bullet 1 --** Ecology recognizes the need for clarification and will be drafting alternative language.
- Bullet 2 --** Based on the potential for unauthorized discharges and on past performance by the Port, this Order requires a more extensive reporting requirement than is required under the NPDES permit (which is currently under appeal). Ecology may consider a change in this condition after the NPDES appeal is completed and after some amount of compliance with this condition by the Port.
- Bullet 3 --** The Port may provide more information to Ecology as to why the 24-hour reporting requirement is not adequate.
- Bullet 4 --** The report required within five days is meant to provide Ecology with an initial account of the event. The Port may then supplement the initial report at a later date with additional information, such as sample results received after the five-day period, other steps taken to prevent a re-occurrence, etc.
- G. --** Ecology generally considers the circumstances under which a violation occurs when formulating its response to the violation.
- G5.**
- Bullet 1 --** The key phrase in this condition is "readily available". The Port should insure that copies of this Order are available to the identified parties at various appropriate job sites throughout the airport.

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- Paragraph 2 -- The Order includes consistency with the federal Coastal Zone Management Act, which requires compliance with water quality regulations, the State Environmental Policy Act, and the federal Clean Air Act. It is appropriate and necessary for any project manager and construction superintendent whose work involves the above-referenced laws be familiar with this Order.
- 8a. -- Ecology reserves the right to determine significant and egregious impacts. The conditions listed are those that, if violated, would cause significant and egregious impacts by directly and immediately affecting water quality.
- 8c. -- This condition is necessary to provide Ecology with the level of "reasonable assurance" required to certify a project. If an applicant is out of compliance with an existing certification, it is difficult for Ecology to determine that future actions by the same applicant will be in compliance.

Very truly yours,



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